§ 109(e)
chapter 13 eligibility
contingent debt
liquidated debt

In re Grayson, Case No. 301-30932-elp13

02/28/03 J.King adopt, J. Perris' Find & Concl unpub

District court opinion withdrawing reference and adopting bankruptcy court's proposed findings of fact and conclusions of law in connection with a motion to dismiss a chapter 13 case.

The district court opinion addresses the debtor's objections to the bankruptcy court's proposed findings and conclusions concerning whether a debt for receivership fees and expenses was noncontingent and unliquidated on the petition date. The debt arose from a provision in a stipulated order signed by debtor's attorney making him liable for receivership fees and expenses. The district court discussed contract law principles in concluding that debtor was jointly and severally liable for the debt. The court also found that debt was liquidated on the petition date, because the amount and debtor's liability were readily determinable.

The district court deferred ruling on the motion to dismiss pending an evidentiary hearing on the subject of whether the debtor's attorney was authorized to sign the stipulated order.

P03-4(11)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	
	)	
BARCLAY LLOYD GRAYSON,	)	
	)	
Debtor.	)	No. 301-30932-elp13
	)	
	)	OPINION

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KING, Judge:

The United States Department of Labor ("DOL") filed a Motion to Dismiss (#77) the Chapter 13 bankruptcy case of Barclay Grayson ("Debtor"). Subsequently, Debtor filed a Motion to Withdraw Reference (#102). The Honorable Elizabeth L. Perris, Bankruptcy Judge, filed a Recommendation to Withdraw Reference and Proposed Findings and Conclusion. Before me are Debtor's objections to the Findings and Conclusion. For the reasons below, I withdraw the reference and will hold an evidentiary hearing on a single issue, as recommended by the Bankruptcy Court. Although I cannot make a final ruling on the Motion to Dismiss until after that hearing, I adopt the Findings and Conclusion in all respects.

BACKGROUND

On September 21, 2000, the Department of Labor and the Securities and Exchange Commission ("SEC") filed separate suits against Barclay Grayson, Jeffrey Grayson and Capital Consultants, LLC ("CCL"). A Stipulated Order in the DOL case, signed by the defendants' attorneys, appointed a Receiver and stated:

> 12. Defendants Capital Consultants, Jeffrey Grayson, and Barclay Grayson shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his or her duties described in this order, including the costs and expenses of those persons who may be engaged or employed by the receiver to assist him or her in carrying out his or her duties and obligations . . . .

On January 9, 2001, the Receiver filed a Second Interim Report of the Receiver identifying estimated fees and costs through December 31, 2000, in the total amount of $1,563,000.

Debtor filed his Chapter 13 bankruptcy petition on February 8, 2001. According to his bankruptcy schedules, he owed a total of $185,825.90 in noncontingent, liquidated, unsecured debt as of the petition date. Debtor listed the Receiver as a precautionary creditor. The entry states that the debt was incurred on September 21, 2000, and describes it as unliquidated, disputed and of unknown amount.

At the time Debtor filed his Chapter 13 petition, the Bankruptcy Code stated that

> [o]nly an individual . . . that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less that $269,250 . . . may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e).

Post petition, Debtor entered into a settlement agreement with the Receiver and claimants in several separate pending actions. The DOL was not a party to the settlement agreement. In return for a $500,000 payment, the parties to the settlement agreement agreed to release Debtor from any and all claims. The Receiver also agreed to withdraw his pending motion to dismiss Debtor's Chapter 13 bankruptcy case and stipulated that the claim of the Receiver against Debtor was contingent and unliquidated as of the petition date.

BANKRUPTCY COURT'S FINDINGS AND CONCLUSION

After the settlement agreement, the DOL filed a motion to dismiss Debtor's bankruptcy case, contending that he is ineligible to be a Chapter 13 debtor because his noncontingent, liquidated, unsecured debt exceeds the § 109(e) eligibility limit, among other reasons. After conferring with the parties, Judge Perris decided to file a proposed Findings and Conclusion on this issue and the issue of whether the DOL has standing to request dismissal, leaving other issues raised in the motion for later, if necessary.

The Bankruptcy Court first found that the DOL had standing to seek dismissal of Debtor's Chapter 13 case because the DOL was not a party to the settlement agreement, the DOL was commonly thought to have reserved the right to pursue whatever remedies it thought appropriate, and case law holds that settlements between private parties do not bar the DOL from pursuing its own action to address ERISA violations. Debtor does not object to this finding.

The Bankruptcy Court then turned to an analysis of the § 109(e) eligibility requirements. It first concluded that the District Court should reject any of Debtor's arguments based on post-petition events, such as the settlement agreement, because eligibility is determined on the petition date. The Bankruptcy Court then determined that the District Court should look beyond Debtor's schedules in determining his eligibility

under § 109(e) because the debt was scheduled as unknown. Thus, it believes that the typical rule that the Bankruptcy Court only looks to the petition to determine the amount of debt and checks only to see if the schedules were made in good faith does not apply to this situation.

Debtor had argued that the debt for receivership fees and expenses was contingent on the petition date because he is only secondarily liable for the debt in the nature of a conditional guaranty of the primary liability of his father, Jeffrey Grayson, and CCL. The Bankruptcy Court interpreted the DOL Stipulated Order under the general principles of contract law. It found that the DOL Stipulated Order was not ambiguous and did not hold Debtor only secondarily liable for the receivership fees and expenses. It also found that any right of contribution did not make the debt contingent. Even though the language was not ambiguous, the Bankruptcy Court reviewed the extrinsic evidence relied upon by Debtor but was unconvinced. The Bankruptcy Court recommended that the District Court conclude that the debt owed by Debtor for receivership fees and expenses was not contingent on the petition date.

The Bankruptcy Court then analyzed whether the debt was liquidated on the petition date. It noted that under the case law, disputes as to a debtor's liability for a debt generally do not render the debt unliquidated. Debtor contended that the debt is unliquidated because he was unaware of the provision in the Stipulated Order making him personally liable for the receivership fees and expenses and he did not authorize his attorney to agree to such a provision. The Bankruptcy Court concluded that the hearing required to determine if Debtor's attorney acted within the scope of his authority was simple enough that the need for the hearing does not make the debt unliquidated. It recommended that the District Court should conduct the hearing and, if it determines that Debtor's attorney acted within the scope of his actual or apparent authority, the debt for receivership fees and expenses should be included in the § 109(e) calculation.

Finally, the Bankruptcy Court addressed the size of the debt for receivership fees and expenses. It was undisputed that Debtor had $185,825.80 of liquidated, unsecured

debt on the petition date. The Bankruptcy Court thus noted that if only $83,424.20 of the $1,563,000 in receivership fees and expenses was readily determinable on the petition date, 5% of the total, Debtor is ineligible for Chapter 13 relief. Debtor originally pointed to the voluminous objections filed against the fees and expenses sought by the Receiver. The Bankruptcy Court reviewed those objections and noted that they were made against the fees but not against the expenses, which totaled $174,000 alone. Moreover, specific objections were not filed against fees and costs incurred by Allen Matkins and Foster Pepper, which total $517,000. At the hearing, Debtor's attorney conceded that it is highly unlikely that such a small proportion needed to make Debtor ineligible for § 109(e) would not be capable of ready determination, as required to be a liquidated debt. The Bankruptcy Court recommended that the District Court conclude that at least $83,424.20 of the debt for the receivership fees and costs was liquidated on the petition date.

The Bankruptcy Court concluded as follows:

> For the foregoing reasons, I recommend that the District Court determine whether debtor's attorney in the DOL and SEC actions had actual or apparent authority to enter into the stipulated orders. If so, and if the court agrees with my recommended interpretation of the orders' provisions regarding debtor's liability for receivership fees and expenses, I recommend that the District Court grant the DOL's motion to dismiss on the basis that, on the date debtor filed his Chapter 13 petition, he had noncontingent, liquidated, unsecured debt exceeding the limit set forth in § 109(e). Such dismissal should be without prejudice to debtor refiling under chapter 13, if at the time of refiling, his debts do not exceed the applicable limits under § 109(e).

STANDARD OF REVIEW

The parties dispute the proper standard of review, depending on whether this is a core or non-core proceeding.

In a bankruptcy-related matter that is a non-core proceeding, a bankruptcy judge may hear the matter and submit proposed findings of fact and conclusions of law to the District Court. The District Court may enter any final order or judgment after considering the proposal and giving de novo review to all matters to which any party has timely and specifically objected. 28 U.S.C. § 157(c)(1).

In reviewing a bankruptcy court's decision in a core proceeding, findings of fact are

reviewed under the clearly erroneous standard. Conclusions of law and issues of statutory interpretation are reviewed de novo. In re Cohen, 300 F.3d 1097, 1101 (9th Cir. 2002).

Core proceedings are not strictly defined under the statute. They include, but are not limited to, determinations as to the dischargeability of particular debts and proceedings affecting the liquidation of the assets of the estate. 28 U.S.C. § 157(b)(2)(I), (O). Because this issue determines whether Debtor can proceed under Chapter 13, I conclude that it is a core proceeding. Thus, I will proceed as outlined in Cohen.

I also note that my analysis below would not differ, even under the higher de novo standard of review for factual findings.

DISCUSSION

I. Ambiguity of DOL Stipulated Order

Debtor objects to the Bankruptcy Court's finding that the DOL Stipulated Order was not ambiguous in paragraph 12. He agrees with the Bankruptcy Court's statement of the law regarding determination of ambiguity.

The paragraph states:

> 12. Defendants Capital Consultants, Jeffrey Grayson, and Barclay Grayson shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his or her duties described in this order, including the costs and expenses of those persons who may be engaged or employed by the receiver to assist him or her in carrying out his or her duties and obligations . . . .

Debtor compares the language in paragraph 12 accepting liability for the Receiver's fees and expenses with the statement in paragraph 3 that he does not admit any wrongdoing. I do not agree that the difference supports the argument that paragraph 12 is ambiguous. A statement denying wrongdoing is typical in preliminary stipulations, such as this, as well as in final agreements settling entire actions.

A contract or term is unambiguous if it has only one sensible and reasonable interpretation. D&D Co. v. Kaufman, 139 Or. App. 459, 462, 912 P.2d 411 (1996). For a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. Moon v. Moon,

140 Or. App. 402, 407, 914 P.2d 1133 (1996).

I see no way to interpret the language in paragraph 12 other than to find Capital Consultants, Jeffrey Grayson, and Debtor to be jointly and severally liable for the Receiver's fees and expenses. There are no words evidencing an intent that Debtor's liability would only be secondary in nature, such as in a guarantee. I conclude that Paragraph 12 is not ambiguous. Thus, as the Bankruptcy Court explained, "First, the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends." Yogman v. Parrott, 325 Or. 358, 361 (1997).

I will, however, look at one piece of extrinsic evidence relied upon by Debtor, the wording in paragraph XI of the SEC Stipulated Order. It states:

> IT IS FURTHER ORDERED that Defendants Capital Consultants, Jeffrey Grayson or Barclay Grayson and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, shall pay the costs, fees and expenses of the permanent receiver . . . .

Debtor points to the disjunctive "or" between the three parties in the SEC Stipulated Order while the DOL Stipulated Order used the conjunctive "and." Debtor argues that if these two orders are read together, reasonable minds could disagree on the scope of his liability for receivership fees and expenses. Thus, Debtor contends that the DOL Stipulated Order is ambiguous.

I disagree with Debtor's argument. Although the wording is different, I interpret both orders to provide for joint and several liability. Consequently, the one cannot be ambiguous in light of the other.

In summary, I adopt the Bankruptcy Court's finding that paragraph 12 of the DOL Stipulated Order is not ambiguous and that the debt is not contingent.

II. Liquidity of Receiver's Fees and Expenses

A debt is liquidated for purposes of calculating eligibility for relief under § 109(e) if the amount of the debt is readily determinable, that is whether the debt is subject "to ready determination and precision in computation of the amount due." In re Slack, 187 F.3d 1070, 1073 (9th Cir. 1999) (internal quotation omitted). "Whether the debt is subject

to ready determination will depend on whether the amount is easily calculable or whether an extensive hearing will be needed to determine the amount of the debt, or the liability of the debtor." Id. at 1074. "We hold that a debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided." Id. at 1075. The Bankruptcy Appellate Panel has concluded that Slack's holding concerning the effect of a liability dispute on whether the debt is liquidated should not be read to remove the issue from the analysis because liability was conceded in Slack. In re Ho, 274 B.R. 867, 874 (B.A.P. 9th Cir. 2002).

I first note that I adopt the Bankruptcy Court's conclusion that at least $83,424.20 of the debt for the receivership fees and costs was liquidated on the petition date, looking strictly at the amount of the debt. This is based on the small percentage of the full debt that needs to be attributable to Debtor to put him over the § 109(e) limit and the nature of the objections filed against the Receiver's claim for the amount.

Debtor argues that the Bankruptcy Court erred in finding that the claim for the Receiver's fees and expenses was liquidated when he filed his petition. He disputes that he is liable at all for the debt because his attorney did not have the authority to stipulate to the Orders. Debtor argues that more than a simple evidentiary hearing is required to determine his attorney's authority and thus his ultimate liability for the claim. Debtor contends that when analyzing his attorney's authority to enter into the stipulation, the Bankruptcy Court should have looked at ORS 9.340 rather than contract law.

ORS 9.340 provides:

> If it is alleged by a party for whom an attorney appears that the attorney does so without authority, and the allegation is verified by the affidavit of the party, the court may, if it finds the allegation true, at any stage of the proceedings relieve the party for whom the attorney has assumed to appear from the consequences of the attorney's acts.

Debtor is prepared to testify at a hearing that he gave his attorney authority regarding the injunction, the appointment of the Receiver, and a freeze of his assets but that he did not give the attorney any authority to bind him to a financial commitment to the SEC or DOL. He argues that this situation falls within ORS 9.340 which gives the court

the authority to reform the Stipulated Orders to remove his financial liability for the receivership's fees and expenses.

An attorney's appearance in a case raises a presumption of authority. ORS 9.340 explains the mechanism for a party to rebut the presumption with evidence that the attorney appeared without authority. Choi v. Hurley, 86 Or. App. 425, 428, 739 P.2d 1056 (1987).

The statute discusses the authority for an attorney to make an appearance on behalf of a party. I interpret this to mean making an appearance at all rather than having the authority to appear but going beyond the authority granted by the client. This interpretation is supported by the case law. In Choi, the party's affidavit stated that the attorney had no authority to represent him. Id. The parties in Financial Indemnity v. Howser, 38 Or. App. 369, 590 P.2d 276 (1979), who had appeared pro se before the court, filed affidavits stating that the attorney had not been authorized to represent them. Id. at 371.

That is not the case here. Debtor acknowledged that he retained his attorney to represent him in the mediation in many aspects but argues that he did not give him the authority to bind him to the SEC or DOL in financial aspects. I conclude that ORS 9.340 does not apply to this situation because the attorney had the authority to appear. Accordingly, I agree with the Bankruptcy Court that I must conduct an evidentiary hearing to determine if Debtor's attorney acted within the scope of his authority when he entered into the Stipulated Orders on Debtor's behalf. I also agree with the Bankruptcy Court that this is a simple evidentiary hearing whose nature does not require a finding that the debt is unliquidated.

III. Application of *In re Scovis*

Debtor contends that the Bankruptcy Court erred in failing to apply In re Scovis, 249 F.3d 975 (9th Cir. 2001), to find that the debt for the receivership fees and expenses is unliquidated because it is voidable as a fraudulent transfer. He seeks to present evidence at a hearing which will prove all elements of a fraudulent transfer.

The DOL argues that Scovis does not even discuss fraudulent transfers under 11 U.S.C. § 548. Furthermore, it argues a fraudulent transfer *may* be set aside by the trustee,

not must be set aside, and the trustee has taken no such action in Debtor's case. The DOL also contends that Debtor received equivalent value by avoiding costly litigation and by trading on his cooperation to enhance his position with this court, the Bankruptcy Court, and the United States Attorney.

Scovis analyzed the effect of the California $100,000 homestead exemption on a judgment lien secured by the debtor's house. The court noted that a claim secured only by a lien which is avoidable by a declared exemption is unsecured for § 109(e) eligibility purposes. Id. at 983. It drew an analogy to the definition of liquidated, as discussed above, and the fact that readily ascertainable amounts are included in the eligibility determination, even though liability on the debt had not been finally decided.

> This principle of certainty carries equal force in the present context, where the homestead exemption's effect on the status of Debtors' debt as secured or unsecured is readily ascertainable. Debtors declared the $100,000 California homestead exemption on their originally filed schedules, and at the same time listed Henrichsen's lien as secured by the exempted residence. Even though the lien was not judicially avoided until after the Chapter 13 petition was filed, the fact that Debtors listed both the homestead exemption and the lien on the schedules provides the bankruptcy court with a sufficient degree of certainty to regard the judgment lien as unsecured for eligibility purposes. Thus, the Henrichsen debt should be treated as wholly unsecured on the petition date.

Id. at 984.

Debtor argues that Scovis holds that any avoidable transfer must be considered in the debt ceiling calculation and if the Bankruptcy Court had applied the principle, it would have concluded that the fraudulent transfer rendered the claim for the receivership fees and expenses a nullity with a dollar value of $0.

Although the Bankruptcy Court was not sure if Debtor had abandoned its argument based on Scovis, it addressed the case and concluded that Scovis's facts are distinguishable from Debtor's situation and that his argument takes the Scovis case too far. I agree with the Bankruptcy Court. A statutory homestead exemption which is claimed on the debtor's schedules is more certain in nature than the fraudulent transfer argument Debtor now raises. I adopt the Bankruptcy Court's finding that Scovis is not dispositive here. Debtor will not be allowed to present evidence concerning a fraudulent transfer at the evidentiary

hearing.

IV. Reformation of Order

Debtor asks to remove any provision in the SEC Stipulated Order and the DOL Stipulated Order relating to his personal liability for receivership fees and expenses. This entails: (1) removing his name from paragraph XI in the SEC Stipulated Order; and (2) reforming the DOL Stipulated Order by removing primary liability for him with respect to paragraph 11 and removing his name from paragraph 12.

I will defer discussion of possible reformation pending the evidentiary hearing and my decision on the authority of Debtor's attorney.

CONCLUSION

The Motion to Withdraw Reference (#102) is granted. I defer ruling on the Motion to Dismiss (#77) pending the evidentiary hearing, as explained above. The parties will be contacted for a status conference to schedule a hearing to determine the authority of Debtor's attorney.

DATED this 27 day of February, 2003.

GARR M. KING
United States District Court Judge