

In re CCC BES, Inc., Case No. 389-34026-elp7
National Management Services, Inc. v. Mitchell, Civil
No. 95-1276-HA

6/6/96

Judge Haggerty

unpublished

The District Court affirmed the bankruptcy court's order approving the trustee's final account and application for compensation. The bankruptcy court did not err in rejecting the contention that the trustee had acted negligently in failing to pursue five past-due rent payments as preferential transfers, and therefore should be denied compensation for which he applied. The court determined that the trustee's decisions were reasonable at the time they were made.

C-Bray Court

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DISTRICT OF OREGON

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re	)	
	)	Bankruptcy No. 389-34026-elp7
CCC BES, Inc., fka McLean	)	
Clinic, P.C.,	)	Civil No. 95-1276-HA
	)	
Debtor.	)	
_____	)	
	)	
NATIONAL MANAGEMENT	)	
SERVICES, Inc.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOHN MITCHELL, Trustee,	)	
	)	
Appellee,	)	

Certified to be a true and correct
copy of original filed in my office

Date: 6/7/96

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pg 6-14(14)

287

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HAGGERTY, Judge.

The appellant National Management Services, Inc. ("NMS"), a claimant in the above-listed bankruptcy proceeding, brings this appeal challenging an order by the United States Bankruptcy Court for the District of Oregon approving the bankruptcy trustee's Final Account and Application for Compensation. The Bankruptcy Court overruled appellant's objections and authorized the trustee to pay his fees and costs in the amount of \$31,325.79 and to pay attorneys' fees in the total amount of \$67,860.41. Appellant's request for oral argument is denied. For the reasons stated below, the order of the Bankruptcy Court is affirmed.

BACKGROUND

This bankruptcy action involves a debtor medical clinic and a partnership (made up of doctors from the clinic) that leased the business premises to the clinic. The individual defendants were doctors and have been officers, directors and/or shareholders in the clinic. The leasing partnership, defendant BECS Enterprises, was composed of four of the individual defendants: Doctors Billmeyer, Emerich, Chitty and Stevens.

The day before filing its chapter 7 bankruptcy petition, the debtor made payments to the individual defendants as follows: \$2,400 each to Doctors Billmeyer, Emerich, Chitty and Stevens, and \$1,500 to Dr. Connor. Previously, the debtor made two payments to BECS Enterprises each in the amount of \$12,987.00 for antecedent past due rent. The bankruptcy trustee, John Mitchell, brought adversary proceedings to avoid and recover these two preferential transfers.

Subsequently, the bankruptcy trustee agreed to a settlement, and moved the bankruptcy court for an order authorizing the settlement. NMS, which had an unsecured claim against the bankruptcy estate, filed a timely objection to the trustee's motion.

Following three hearings on the trustee's motion, the bankruptcy court entered an order on 21 February 1992 authorizing the settlement of the preference claims. The bankruptcy court found that the settlement amount was fair and equitable after taking into account the creditors' interests, the costs of litigating the claims, the relatively high recovery on the claims against the individual defendants and the risk of a ruling adverse to the estate based on a "new value" defense on the claim against BECS Enterprises. The bankruptcy court determined that the cost

of litigating the claim against BECS Enterprises would be exacerbated because that defendant could raise a "new value" defense. The "new value" defense is set forth in § 547(c)(4) of the Bankruptcy Code. 11 U.S.C. § 547(c)(4) (1992). Section 547(c)(4) provides that a trustee may not avoid a transfer to the extent that transfer was "to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor."

Three years after this settlement, the trustee filed an application for fees and costs. On 15 May 1995 oral argument was heard on appellant's objection to this application.

NMS asserted that the trustee was negligent in failing to pursue a series of preference claims, which allegedly resulted in damage to the estate. Counsel for NMS referred to five past-due rent payments the debtor made to the partnership more than 90 days, and less than one year, prior to the date of bankruptcy. Opposing counsel stipulated that these payments constituted past-due rent to "insiders" in the bankruptcy, but contended that the decision to not pursue the payments was based upon the conclusion, after an investigation, that the payments were non-recoverable preferential transfers.

In its Opinion denying the objection, the Bankruptcy Court noted that the debtor filed for bankruptcy on 1 September 1989, and that during the year preceding that filing, the debtor made five payments to the partnership (an entity the Court described as having close ties to the debtor). The Court also acknowledged that a bankruptcy trustee is required to exercise reasonable care and diligence, and is liable for negligent violations imposed by law. The Court recognized that its review of a trustee's administration is conducted in light of the circumstances at the time of that administration. The Court's ruling provided:

Considering all of the circumstances at the time, I find that the Trustee acted reasonably. I decline to punish the Trustee when he investigated the five payments and considered pursuing a preference action, but made a reasonable decision not to pursue them as preferential transfers. If anything, his actions indicate that he was balancing his conflicting duty to "collect and reduce to money the property of the estate . . . , and close such estate as expeditiously as is compatible with the best interest of the parties of interest." § 704(1). As one court explained, a trustee "should not be punished, after the fact, for judgment calls which, at the time were . . . reasonable." In re Melenzyer, 140 B.R. 143, 155 (Bankr. W. D. Tex. 1992).

Letter Opinion issued 17 May 1995, page 4.

On 31 May 1995, the Bankruptcy Court issued an Order denying NMS's objection and granting the trustee's application for compensation and payment of fees. On 28 August 1995, the case was

transferred from the United States Bankruptcy Court for the District of Oregon to this court for disposition of appellant NMS's appeal of the decision denying its objection to the trustee's application for compensation and fees.

STANDARDS

In reviewing a bankruptcy court decision, this court acts as an appellate tribunal, and is governed by traditional standards of appellate review. Factual findings are reviewed under the clearly erroneous standard, and conclusions of law are reviewed *de novo*. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986). The lower court's findings of fact must be accepted unless the appellate court is left with the definite and firm conviction that a mistake has been made. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Conclusions of law and mixed questions of law and fact are reviewed *de novo*. In re Hedgecock, 160 B.R. 380 (D. Or. 1993).

De novo review requires consideration of the matter anew, as if it had neither been heard before nor a decision been previously rendered. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

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ANALYSIS

Appellant asserts that the "bankruptcy judge's opinion is based upon non-existant [sic] facts and fraudulent findings" and "is clearly erroneous and should be completely reversed." Counsel also objects that the "long-suffering creditors of this estate" should not have to pay "the exorbitant fees" of the trustee and his attorneys, whom counsel for NMS refers to as "unconscionable clowns." Appellant's Reply Brief at 9. Accusations that the Bankruptcy Court practiced fraud and *ad hominem* assaults against the trustee and his attorney notwithstanding, counsel's brief presents unpersuasive arguments on behalf of this appeal.¹

The question presented is whether the Bankruptcy Court was correct in rejecting the contention that the trustee acted negligently in failing to pursue five past-due rent payments as preferential transfers, and should therefore be denied the compensation for which he has applied.

Counsel for appellant attempts an exhaustive showing in his briefing of why the trustee might have been successful had he

¹ A number of remarks made by appellant's counsel in his briefs strikes the court as unprofessional. Repeatedly asserting that the Bankruptcy Court committed "fraud," and engaging in name-calling, is inappropriate and will invite sanctions if engaged upon again before this court.

embarked upon such a pursuit, but as the Bankruptcy Court correctly noted, the question is whether the trustee's decision was proper in light of his duty to act reasonably under the circumstances. Accordingly, this court focuses on the reasonableness of the trustee's decisions at the time he made them, rather than upon whether appellant's counsel is convincing in his insistence that the trustee could have recovered the past-due rent payments had he chosen to pursue them.

Appellant contends that the trustee should be deprived of compensation because of (1) alleged conflicts between his testimony in 1992 (regarding his settlement of claims), and his testimony in May 1995 (in response to appellant's challenge of his decision to forego pursuit of the past-due rent payments); (2) an allegedly mistaken view held by the trustee of how complete the defenses would have been to the preferential transfers in question; and (3) the breaches of the trustee's fiduciary duties allegedly evidenced by his willingness to "abandon valuable property of the debtor. . . in an unrecorded, secret fashion." Appellant's Reply Brief at 7. This last argument appears to assert that the trustee breached fiduciary duties by failing to satisfactorily document his decision not to pursue the past-due rent payments. Id.

These three arguments fail to establish that the trustee acted unreasonably in his administration of the bankruptcy estate. The alleged "conflicts" between the trustee's testimony in 1992 and 1995 concern the perceived inconsistency the trustee demonstrated in recovering two rent checks that were paid close to the bankruptcy filing, while electing to forego recovery of five other payments that were made earlier. The trustee testified in 1995 that he considered the two later payments to be different (and recoverable) because "the last two payments were made relatively close to the date of the bankruptcy, and it would have been more difficult to have a new value defense. . . ." Tr. (15 May 1995) at 14.

Counsel for appellant contends that the trustee's "testimony and conduct is consistent with an act of negligent malpractice" because in 1992, the trustee testified that after he instructed his attorney to pursue recovery of the last two rent payments, he then reconsidered and thought that there were good defenses against the recovery. Tr. (6 February 1992) at 11. Appellant's counsel speculates that this reveals that the trustee neglected to investigate the other five payments. If he had, counsel reasons, he would have made the same "mistake" he had made with the last

two payments, and he would have sought their recovery regardless of any new value defenses, as well. Appellant's Reply, at 2-3.

There is nothing contradicting the evidence that supports the Bankruptcy Court's conclusion that the trustee "and his staff investigated the Debtor's transactions for potential preferential transfers and identified 81 potential transfers. The Trustee knew of the five payments to the Partnership and considered whether to pursue a preference action. However, based on the investigation and his approximately eight years as bankruptcy trustee, he concluded that the Partnership had a new value defense under § 547 (c)(4) that would have precluded recovery." Opinion Letter at 2-3. There is nothing save appellant's unsupported interpretation of the trustee's testimony in 1992 to contradict the Bankruptcy Court's findings and conclusions that the trustee was aware of the five payments, and chose to forego their recovery in light of a possible new value defense. This court concurs in such findings and conclusions.

Counsel for appellant next attacks the trustee's deference to the possible "new value" defenses in deciding not to pursue recovery of the past-due payments. Counsel notes that the Bankruptcy Court stated in its 1992 Opinion authorizing settlement that the law on the issue of whether past-due rent is exchanged

for the "new value" of being free from eviction proceedings was unsettled. Counsel then asserts that if this is true, the trustee was "grossly irresponsible and negligent" in not pursuing the five past-due payments, because the applicable law was so unclear. This argument lacks merit for several reasons.

First, as is clear from the transcript of the Bankruptcy Court's 21 February 1992 oral ruling, the Court was expressing concern about the potential for costly litigation and appeals when it referred to legal uncertainties pertaining to aspects of the case. Such concern is paramount to a trustee, who is obliged to "collect and reduce to money the property of an estate" and close an estate "as expeditiously as is compatible with the best interest of the parties in interest." Bankruptcy code § 704. Accordingly, the trustee's decision not to pursue the very kind of protracted litigation that the Bankruptcy Court expressed concern for can hardly be viewed as "grossly irresponsible."

Second, the Court explicitly stated that there was a "substantial risk that the defendant would prevail on its new value defense if that issue were litigated." Tr. (21 February 1992) at 4. Counsel for appellant unpersuasively asserts that the Bankruptcy Court's decision in 1992 addressing the "substantial risk" of losing claims to the new value defense actually supports

the notion that the trustee acted negligently in not asserting those claims against that very defense. Conceivably, the trustee could more likely be found negligent had he proceeded with pursuing claims that the Court explicitly viewed as incurring high costs of litigation and a substantial risk of loss.

Moreover, the 1992 ruling referred to the burden of establishing insolvency that rested with the trustee regarding some of the claims. Although a presumption of insolvency existed for those claims, the Court noted that even with such a presumption, the trustee would still lack "a shield against litigation costs" that would be incurred in meeting his burden of proof. Id. at 6. The claims appellant criticizes the trustee for not pursuing lacked this presumption of insolvency, Bankruptcy Code § 547 (f), and the litigation costs and risks would have been even greater than those anticipated by the Bankruptcy Court in its 1992 ruling. The possible merits to appellant's proposed arguments against the applicability of the new value defense in this case notwithstanding, the trustee acted reasonably and prudently in electing to forego the expensive endeavor of pursuing the five past-due rent payments to the partnership.

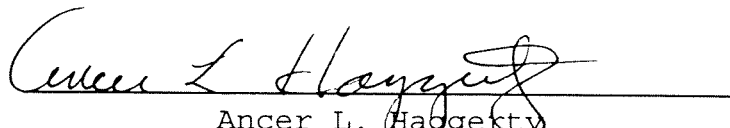
Finally, appellant's last major argument is that the trustee breached fiduciary duties by making his decision not to pursue the

payments "in an unrecorded, secret fashion." Appellant's Reply Brief at 7. This assertion is meritless. There is no authority offered in support of the notion that a trustee should be construed to have forfeited his or her right to compensation upon failure to document to the satisfaction of creditors the processes by which the trustee made decisions.

CONCLUSION

The other arguments offered by appellant's counsel have also been considered and found to lack merit. The trustee and his attorneys acted reasonably and well within the bounds of the fiduciary duties owed by the trustee. Based on the foregoing, the appeal is denied, and the order of the Bankruptcy Court authorizing the trustee to pay his fees and costs in the amount of \$31,325.79 and to pay attorneys' fees in the total amount of \$67,860.41 is AFFIRMED. The parties shall pay their own costs incurred in the prosecution of this appeal.

DATED this 6 day of June, 1996.


Ancer L. Haggerty
United States District Judge