

Appeal
Evidence

Koennecke v. Hartvig, et al., BAP No. 97-1556-DMeJ
In re Koennecke, Case No. 396-32060-dds7

5/13/98

BAP aff'g DDS

Unpublished

Debtor filed a chapter 7 petition while incarcerated serving a 20 year sentence for first degree manslaughter and assault. Anticipating the imminent entry of nondischargeability judgments in favor of his victims under 11 U.S.C. § 523(a)(6), debtor moved to convert his case to chapter 13. The bankruptcy court denied the motion to convert, finding that the motion was in bad faith and that the debtor had unfairly manipulated the bankruptcy system. In support of its oral findings, the bankruptcy court incorporated earlier findings in an adversary proceeding wherein the trustee had recovered fraudulent transfers made to debtor's domestic partner in contemplation of bankruptcy. Debtor appealed the bankruptcy court's denial of the motion on the basis that the record before the bankruptcy court contained insufficient evidence to support a finding of bad faith . The BAP affirmed, concluding it had not rational basis to conclude that the bankruptcy court's findings were not based on the evidence where the Debtor failed to provide the entire record to the Panel.

BK CT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

CLERK U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

MAY 13 1998

LODGED _____
PAID _____
DOCKETED _____

In re)
DUANE L. KOENNECKE,)
Debtor.)
_____)
DUANE L. KOENNECKE,)
Appellant,)
v.)
DONALD H. HARTVIG, Ch. 7)
Trustee; DIANA PACE; WENDY)
ADAMS,)
Appellees.)
_____)

BAP No. OR-97-1556

Bk No. 396-32060-dds7

FILED

MEMORANDUM¹

MAY 13 1998

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on March 19, 1998
at Portland, Oregon

Filed - May 13, 1998

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: DONOVAN², MEYERS, and JONES, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36.3.

² Hon. Thomas B. Donovan, Bankruptcy Judge for the Central District of California, sitting by designation.

1 I. BACKGROUND

2 Duane Koennecke (Debtor) filed a chapter 7 petition on
3 March 26, 1996. At the time, the Debtor was incarcerated
4 serving a 20 year sentence for first degree manslaughter for
5 killing Robert Rodman (Rodman) and assault for shooting Wendy
6 Adams (Adams). Prior to the Debtor's bankruptcy, Adams and
7 Rodman's estate, through its representative Diana Pace (Pace),
8 had been awarded state court judgments against the Debtor
9 totaling \$2.5 million in compensatory and punitive damages.
10 These damage awards constituted the bulk of the Debtor's
11 liabilities. Adams and Pace later prevailed in timely
12 bankruptcy court §523(a)(6)³ nondischargeability suits against
13 the Debtor.

14 Lori Rains (Rains) is the Debtor's common law wife and
15 the mother of his child. One week prior to filing his
16 bankruptcy petition, the Debtor conveyed his interest in his
17 home to Rains as part of a child support agreement. Rains
18 resided in the house after the Debtor's incarceration and
19 during the course of the bankruptcy. Prior to filing his
20 petition, the Debtor also transferred his interest in timber
21 property to his father for \$15,000, though the Debtor stated
22 in his schedules that he had received \$43,000 for this
23 transfer.

24 The chapter 7 trustee (Trustee) sued and obtained

25 _____
26 ³ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§101-1330.

1 judgments from the trial court avoiding the pre-petition
2 transfers made by the Debtor to Rains and the Debtor's father.
3 The Trustee initiated procedures to evict Rains from the home
4 to facilitate the trustee's sale of the home. The Trustee
5 received a \$120,000 offer for the timber property, nearly
6 three times the value asserted by the Debtor in his statement
7 of affairs.

8 When the Trustee prepared to evict Rains from the home,
9 the Debtor moved to convert his bankruptcy case to chapter 13,
10 claiming that doing so would allow him to discharge more debt
11 than he could under chapter 7. The Debtor has a monthly
12 income of \$130, \$50 of which he earns in his prison job and
13 \$80 of which is a gift from an undisclosed source. The
14 bankruptcy court denied the Debtor's motion to convert based
15 on the court's finding that the Debtor had acted in bad faith
16 in seeking to convert his chapter 7 case to chapter 13. The
17 Debtor filed a timely appeal from that decision.

18 II. ISSUE

19 Did the bankruptcy court err when it found that the
20 Debtor's motion to convert had been filed in bad faith?⁴

21
22 ⁴ The Debtor urges that he wanted to convert his chapter 7
23 case to chapter 13 in order to receive a discharge of debts that
24 would not be discharged under chapter 7 and that evidence of such
25 desire is not sufficient to support a finding of bad faith. This
26 Panel agrees that the mere fact that a debtor would like the
benefit of a more extensive discharge does not warrant a finding of
bad faith on a motion to convert. The bankruptcy court, however,
did not base its finding of bad faith solely on the fact that the

1 bankruptcy court made the following preliminary findings:

2 In October of 1996 the Debtor was convicted of First
3 Degree Manslaughter, Second Degree Assault and being a
4 Felon in Possession of a Firearm, all the consequences of
5 a shooting which took place in September of 1995. After
6 the shooting, the Debtor transferred substantially all of
7 his real property assets to insider third parties and
8 thereafter filed a voluntary chapter 7 proceeding. The
9 trustee successfully challenged these transfers and
10 recovered the property for the benefit of the Debtor's
11 creditors. (TR 103:4-14)

12 The Debtor transferred his home to Rains with actual
13 intent to hinder, delay or defraud the victims of his
14 criminal actions. (TR 105:21-24)

15 The Debtor made misleading statements in his statement of
16 affairs and misled the Trustee concerning timber property
17 that the Debtor transferred to his father for
18 significantly less than market value. (TR 106:7-22)

19 The Debtor's motion to convert was timed so that it would
20 interfere with the Trustee's attempts to evict Rains from
21 the home. (TR 106:23-25)

22 The Debtor did not have the ability to fund a plan which
23 suggested manipulation and an attempt by the Debtor to
24 use the Bankruptcy Code in an inequitable manner. (TR
25 107:1-5)

26 The Debtor's purpose for converting to chapter 13 was to
manipulate the bankruptcy process in order to gain an
opportunity to share in a substantial inheritance from
his father. (TR 107:6-17)

27 The Debtor claims that these findings were not supported
28 by the record and, therefore, that the bankruptcy court's
29 conclusion that the Debtor was acting in bad faith was clearly
30 erroneous. The transcript as provided by the Debtor reflects
31 the trial court's careful explanation of its factual basis for
32 finding that the Debtor was acting in bad faith when he moved
33 to convert his case to chapter 13. (TR 103:4-14, 105:7-

1 107:17). What the transcript shows, as furnished to this
2 Panel by the Debtor, is that in arriving at its decision, the
3 bankruptcy court incorporated its previous findings in the
4 fraudulent transfer suits previously litigated by the Debtor's
5 chapter 7 trustee. In arriving at its bad faith finding, the
6 bankruptcy judge said, "I listened very carefully to the
7 testimony. . . . I have studied the exhibits which have been
8 admitted," though this Panel has not been furnished with a
9 transcript of that testimony or copies of all exhibits that
10 were admitted by the bankruptcy court.

11 This Panel must assume that the bankruptcy court's
12 findings of fact are correct because there is nothing in the
13 record before this Panel that establishes that the bankruptcy
14 court could not reasonably have arrived at its findings in
15 light of the testimony and exhibits in the chapter 7 trustee's
16 fraudulent transfer suits. The Debtor, as the appellant,
17 bears the burden of providing this Panel with evidence
18 demonstrating clear error by the bankruptcy court. "The
19 appellant has the burden of showing a trial court's findings
20 of fact are clearly erroneous. The responsibility to file an
21 adequate record also rests with the Appellants." In re
22 Burkhart, 84 B.R. 658, 660 (9th Cir. BAP 1988) (citations
23 omitted).

24 The Debtor provided the Panel with excerpts of the record
25 that do not contain evidentiary support for the bankruptcy
26 court's findings. However, the record provided by appellant

1 to the Panel is clearly incomplete. The bankruptcy court
2 referred to documents not included in the record as provided
3 to the Panel. Since the Debtor has failed to provide the
4 entire record, this Panel has no rational basis to conclude
5 that the bankruptcy court's findings were not based on the
6 evidence. Put another way, the bankruptcy court's findings
7 address in a logical and orderly way the factors that the
8 bankruptcy court should have considered in determining the
9 Debtor's lack of good faith. The record furnished by the
10 Debtor does not establish an evidentiary basis for this Panel
11 to conclude that the bankruptcy court acted without a proper
12 evidentiary record. Rather, the factors enumerated in the
13 bankruptcy court's findings adequately support a finding of
14 the Debtor's bad faith.

15 V. CONCLUSION

16 The Debtor had the burden of proving to this Panel that
17 the trial court's ruling was clearly erroneous but presented
18 to this Panel no convincing evidence that the bankruptcy court
19 made any error. The judgment is **AFFIRMED**.

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