

attorney fees

Mitchell v. Pedersen & Slominski BAP No. OR-91-2044-RJAs  
Adv. No. 90-3493

In re Hanna Case No. 390-33990-S11

12/14/92 BAP aff'g Judge Luckey unpublished

The bankruptcy court awarded judgment in favor of the trustee for money had and received based on the debtor's overpayment on a lease. The judgment resulted in a net award to the trustee after offset of the outstanding payments owed by the debtor. The court did not mention attorney fees.

The BAP affirmed the judgment. The trustee prevailed on a money had and received theory rather than for breach of contract. Since the lease was not clear about whether the trustee was entitled to fees on the money had and received action, the BAP could not say the bankruptcy court abused its discretion by implicitly declining to award fees. All other issues on appeal were dismissed by the parties.

P92-\_\_ (6)

# NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
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OF THE NINTH CIRCUIT

## UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re

DANIEL C. HANNA, et al,

Debtors.

JOHN MITCHELL, INC., Trustee,

Appellant,

v.

RICHARD A. PEDERSEN,  
PAUL J. SLOMINSKI,

Appellee(s).

) BAP No. OR-91-2044-RJAs

) BK. No. 390-33990-S11

) ADV. No. 90-3493

### MEMORANDUM

Argued and Submitted on  
July 24, 1992 at Portland, Oregon

Filed - DEC 14 1992

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

Honorable C. E. Luckey, Bankruptcy Judge, Presiding

Before: RUSSELL, JONES and ASHLAND, Bankruptcy Judges.

1       The lessors of real property and equipment appealed the  
2 recovery of rent overpayments made by the debtor. The Trustee  
3 cross-appealed and asserted that the bankruptcy court erred by  
4 not awarding attorney's fees. The lessors dismissed their  
5 appeal leaving only the cross-appeal. We affirm.

6                               I. FACTS

7       Charles M. Kaady ("Kaady") entered into one equipment lease  
8 and two real property leases with Richard A. Pedersen and Paul  
9 J. Slominski ("P&S") who were the lessors of car wash related  
10 equipment and properties. Although the debtor in this case,  
11 Daniel C. Hanna, ("Hanna") appears as guarantor on the subject  
12 leases, Hanna operated the car wash on the leased property,  
13 using the leased equipment. Hanna made all the required lease  
14 payments and exercised the options available under the lease.

15       Both the equipment and property leases were based upon an  
16 initial ten-year term, with an option to renew for an additional  
17 five years. On the equipment lease, the rent during the five-  
18 year option period was substantially less than that during the  
19 initial ten-year period. Hanna made all rental payments  
20 required under the initial ten-year term and chose to exercise  
21 the applicable options on the real property and equipment,  
22 paying a combined rent of \$3,567.33 per month to P&S through May  
23 1985, when the initial ten-year term expired. Thereafter,  
24 during the option period, Hanna continued to pay rent at the  
25 rate of \$3,567.33 per month even though the total monthly  
26 payment due under the leases had decreased to \$2,071.56,

1 resulting in an overpayment of \$86,735.52 (\$1,495.77 per month  
2 for the period between June 23, 1985 and March 23, 1990).

3 Hanna also expressed intent to exercise the purchase option for  
4 \$1,500, however, this sum was not paid to P&S.

5 Neither Hanna nor Kaady paid the real property taxes for  
6 the years 1986, 1987 and thereafter. Under the terms of the  
7 real property leases, the tenant was responsible for the payment  
8 of all real and personal property taxes. P&S paid \$10,775.23 to  
9 county tax authorities. An additional \$41,872.03 was owed for  
10 delinquent taxes for the years 1987-88 through 1990-91 as of May  
11 1991.

12 The Trustee brought an action to recover the \$86,735.52 in  
13 overpayments from P&S on theories of "money had and received"  
14 and breach of contract. The Trustee also sought declaratory  
15 relief stating that the debtor Hanna was the owner of the  
16 subject equipment. P&S disputed the Trustee's right to recovery  
17 by contending, inter alia, that Hanna was not a party to the  
18 leases, but merely a guarantor, and thus had no rights under  
19 them, and that various defaults existed including failure to pay  
20 rent from March 1990, unpaid property taxes and interest owing  
21 thereon.

22 P&S counter-claimed for breach of contract, attorney's fees  
23 and declaratory relief stating that Hanna had no interest in the  
24 property leases or the equipment.

25 The bankruptcy court awarded judgement to the Trustee based  
26 upon the action for money had and received in the amount of

1 \$86,735.52. This judgement was subject to a set-off of  
2 \$66,601.85 in favor of P&S<sup>1</sup>. The court ordered P&S to pay the  
3 Trustee in the amount of \$65,678.05 representing the claim less  
4 the \$10,775.23 paid by P&S to county tax authorities on the  
5 debtor's behalf, the \$1,500 purchase money and the \$8,782.24 for  
6 prepetition rent. The court also found in favor of the Trustee  
7 on the request for declaratory relief, finding that the trustee  
8 has all rights and duties under the real property and equipment  
9 leases. Additionally, the court dismissed P&S's counterclaims  
10 with prejudice.

11 However, the bankruptcy court did not rule on attorney's  
12 fees or on pre-judgment interest on either the Trustee's  
13 \$86,735.52 or the off-setting \$66,601.85.

14 P&S appealed the judgment, the grant of declaratory relief,  
15 and the failure of the court to award attorney's fees and pre-  
16 judgment interest. The Trustee filed a cross-appeal also  
17 challenging the court's failure to award attorney's fees and  
18 pre-judgment interest.

19 P&S subsequently filed a motion to dismiss their appeal  
20 (OR-91-2011), which was granted by an order entered October 5,  
21 1992, leaving only the Trustee's cross-appeal (OR-91-2044). The  
22 issue of pre-judgment interest was withdrawn by the Trustee at  
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24 <sup>1</sup> The set-off was comprised of: the delinquent real  
25 property taxes totaling \$53,555.30; delinquent personal property  
26 taxes of \$2,764.31; the purchase option money for the equipment of  
\$1,500; and prepetition equipment and real property rent from  
April 23, 1990 until May 23, 1990 of \$2,071.52 per month, and from  
June 23, 1990 until July 27, 1990 of \$2,319.60 per month, totaling  
\$8,782.24.

1 oral argument, leaving only the issue of the Trustee's  
2 attorney's fees. We AFFIRM.

3 II. ISSUE

4 Whether the bankruptcy court erred by not awarding the  
5 Trustee attorney's fees as the prevailing party.

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7 III. STANDARD OF REVIEW

8 Bankruptcy court determinations regarding attorneys' fees  
9 will not be disturbed on appeal absent an abuse of discretion or  
10 erroneous application of the law. In re Riverside-Linden Inv.  
11 Co., 945 F.2d 320, 322 (9th Cir. 1991); In re Nucorp Energy,  
12 Inc., 764 F.2d 655, 657 (9th Cir. 1985).

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14 IV. DISCUSSION

15 With P&S' dismissal of their appeal, issues surrounding the  
16 judgment, declaratory relief, their attorney's fees and pre-  
17 judgment interest are eliminated. All that remains is the  
18 question of the Trustee's attorney's fees.

19 In its order, the bankruptcy court makes no mention of  
20 attorney's fees. The Trustee's remaining cross-appeal asserts  
21 that the court erred because the lease provisions specifically  
22 provide that in the event of a dispute, the prevailing party  
23 shall be entitled to attorney's fees.

24 We note that the Trustee prevailed on the "money had and  
25 received count," not the breach of contract count. The  
26 provision granting attorney's fees is part of the lease

1 contract. The contract is unclear, however, about whether the  
2 trustee is entitled to fees based on the money had and received  
3 action alone. We cannot say that the bankruptcy court abused  
4 its discretion by implicitly declining to award fees. We  
5 therefore affirm.

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7 V. CONCLUSION

8 We AFFIRM the bankruptcy court's denial of attorney's fees.  
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