UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-03-1232-BKMo
VAHE T. AZIZIAN,	Bk. No. SV 02-20199-AG
Debtor.	
VAHE T. AZIZIAN, M.D.,	
Appellant,	
v.	**M E M O R A N D U M**[1]
ELIZABETH F. ROJAS, Ch. 13 Trustee; CITY NATIONAL BANK,	
Appellees.	

Argued and Submitted on November 19, 2003
at Pasadena, California

Filed - December 24, 2003

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Arthur M. Greenwald, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN, and MONTALI, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law or the case, res judicata (claim preclusion) or collateral estoppel (issue preclusion). See 9th Cir. BAP Rule 8013-1.

Debtor filed his second chapter 13[2] petition eight months after receiving a chapter 7 discharge in a case in which creditor obtained a judgment of nondischargeability based on fraud. Among the unsecured nonpriority debt scheduled in debtor's chapter 13 was $46,900 owing to his family and friends. Debtor proposed a 3% payout to unsecured creditors. On creditor's motion, the bankruptcy court dismissed debtor's chapter 13 case with prejudice as a bad faith filing. We AFFIRM.

I. FACTS

Vahe Azizian, a physician, obtained a line of credit from appellee City National Bank ("CNB") in 1998. After CNB granted two extensions, the line of credit came due 4 June 2001. Azizian filed a chapter 13 petition on 21 May 2001 (SV-01-14980-AG) which he dismissed on 6 August 2001.

Shortly thereafter, on 19 September 2001, CNB filed a state court lawsuit against debtor for fraud and breach of contract. Debtor filed a chapter 7 petition on 8 November 2001, receiving a discharge on 26 March 2002 (SV-01-20484-AG).[3] CNB filed an adversary proceeding and obtained a judgment for $100,000 (plus interest) against the debtor which was found nondischargeable under sections 523(a)(2) (fraud) and (6)(willful and malicious injury).

While CNB's adversary proceeding was pending, but after closure of the chapter 7 case, debtor filed a second chapter 13 on the same

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[2] Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

[3] The case was closed 10 July 2002 but has since been reopened (and remains open) for reasons apparently not relevant to this appeal.

day CNB served its motion for summary judgment in the adversary proceeding.

Debtor's plan proposed monthly payments of $525 for 36 months, paying 3.07% of unsecured debt. The plan listed attorney's fees of $3000 and a secured claim of $7500 to be paid prior to unsecured creditors. In Schedule F, Debtor listed as unsecured CNB's claim for $120,000, a nonpriority tax debt of $19,000, and debts to two family members and a friend totaling $46,900.

Having previously objected to confirmation, CNB moved for dismissal of the chapter 13 case. It asserted that the petition and plan were not filed in good faith because of debtor's multiple filings, which it characterized as attempts to block its collection efforts; inconsistencies in debtor's income and expense figures; debtor's proposed de minimis payments on CNB's nondischargeable debt; and the inclusion in the plan of undocumented debts to family and friends. Debtor responded with some explanations, unsupported by evidence.

After a hearing at which the bankruptcy court heard testimony from the debtor and arguments of counsel for debtor, CNB, and the chapter 13 trustee, the court dismissed the case with prejudice for lack of good faith. The order provides that debtor is "forever barred from filing any bankruptcy proceeding [in] which Debtor seeks to discharge all or any portion of the debt owed to CNB." Order Dismissing Chapter 13 Case With Prejudice, 8 April 2003.

Debtor timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(A), and we do under 28 U.S.C. § 158(c).

III. ISSUE

Whether the bankruptcy court abused its discretion in dismissing debtor's chapter 13 case with prejudice.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's decision to dismiss a case for abuse of discretion. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999). A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Under the abuse of discretion standard, we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached to reverse. Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994).

We review a bankruptcy court's finding of bad faith for clear error. Leavitt, 171 F.3d at 1222-23. Under this standard, we may not reverse even if convinced that had we been the finder of fact, we would have weighed the evidence differently: where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, having considered the entire evidence, is left with the definite and firm conviction that a mistake has been committed.

Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985).

We may affirm on any basis supported by the record. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998); Leavitt, 171 F.3d at 1223.

V. DISCUSSION

A. Lack of Good Faith

The bankruptcy court may dismiss a chapter 13 case "for cause," § 1307(c), including bad faith. Leavitt, 171 F.3d at 1224. This is a case-by-case determination that takes into account the totality of the circumstances. Id.

The bankruptcy court should consider:

> (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the Chapter 13 petition or plan in an inequitable manner;
>
> (2) the debtor's history of filings and dismissals;
>
> (3) whether the debtor's only purpose in filing for Chapter 13 protection is to defeat state court litigation; and
>
> (4) whether egregious behavior is present.

Id.

Once the issue of debtor's good faith has been raised, it is debtor's burden to show the petition was filed in good faith. In re Powers, 135 B.R. 980 (Bankr. C.D. Cal. 1991). See also Fidelity & Cas. Co. of N.Y. v. Warren (In re Warren), 89 B.R. 87, 93 (9th Cir. BAP 1988) (in context of plan confirmation, debtor has especially heavy burden to establish good faith where chapter 13 superdischarge is sought).

The bankruptcy court referred to several factors supporting its finding of bad faith:

1. Debtor's listing of debts to family and friends for which there was no documentation, and failure to document IRS debt;

2. Timing of the filing - shortly after a chapter 7 in which there had been a determination of nondischargeability;

3. Debtor's proposal of a de minimis payment to CNB; and

4. Discrepancies in reporting of income between earlier and current filings. Transcript, 25 March 2003, pages 72-76.

The court also mentioned debtor's advertising and life insurance expenses, and noted that if the debtor's malpractice insurance was $82,000 per year, his plan would not be feasible, id. at 76, and noted debtor's failure to provide any evidence other than his testimony. Id. at 73.

The bankruptcy court concluded that, based on the totality of the circumstances and the record before it, the chapter 13 filing was "nothing more than a manipulation of the bankruptcy system in order to discharge a single debt for a de minimis payment under a 13 plan, which was ruled nondischargeable under an immediate[ly] previous chapter [7] filing." Id. at 75.

1. Contentions

Debtor asserts that the bankruptcy court erred because it based its decision not on the totality of the circumstances, but only on the first of the Leavitt factors, citing Ho v. Dowell (In re Ho), 274 B.R. 867 (9th Cir. BAP 2002) (reversing and remanding bankruptcy court's dismissal of a chapter 13 case for bad faith, in part because the court considered only one of the relevant factors).

Debtor also argues the bankruptcy court should not have relied on Pioneer Bank of Longmont v. Rasmussen (In re Rasmussen), 888 F.2d

703 (10th Cir. 1989), a case involving similar facts, contending that under that case any "chapter 20" (that is, the filing of a chapter 13 case to deal with debts not discharged in a preceding chapter 7) is bad faith per se. There the Tenth Circuit upheld the bankruptcy court's dismissal of a debtor's chapter 13 petition which was filed shortly after the conclusion of a chapter 7 case wherein debtor's debt to Pioneer Bank had been determined to be nondischargeable. That debt was the only one being paid in the plan, and the debtor proposed a payment of only approximately 1.5% of the amount due. Debtor points out (in his reply brief) that in this circuit a "chapter 20" case is not per se bad faith, citing Downey Sav. & Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987), and Steinacher v. Rojas (In re Steinacher), 283 B.R. 768, 774 n.14 (9th Cir. BAP 2002), and urges us to adopt the holding of Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000). In Keach the court rejected as overly broad the "all militating factors" and "totality of circumstances" approaches endorsed by other courts. According to the Keach court, the only inquiry relevant to good faith is "simple honesty of purpose;" the impact of debtor's pre-filing conduct on dischargeability of a debt, the filing of a chapter 13 on the heels of a chapter 7, and the percentage being paid to unsecured creditors (so long as the disposable income test is met) are not relevant to good faith. Keach, 243 B.R. at 868.

Debtor also cites Ed Schory & Sons, Inc. v. Francis (In re Francis), 273 B.R. 87 (6th Cir. BAP 2002), aff'd, 69 Fed. Appx. 766 (6th Cir. 2003) in which the panel, using a multi-factor approach, upheld the bankruptcy court's confirmation of a chapter 13 plan over creditor's bad faith objection, despite the fact that debtor was

attempting to discharge a nondischargeable debt with minimal payments, and his schedules were inaccurate. The Sixth Circuit affirmed.

CNB counters that the bankruptcy court's ruling was proper, relying on Leavitt, 171 F.3d 1219, Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994); In re Huerta, 137 B.R. 356 (Bankr. C.D. Cal. 1992); In re Jahnke, 146 B.R. 830 (Bankr. E.D. Cal. 1992); In re Pickering, 195 B.R. 759 (Bankr. D. Mont. 1996); Rasmussen, 888 F.2d 703; and Davis v. Mather (In re Davis), 239 B.R. 573 (10th Cir. BAP 1999). In these cases, bankruptcy courts dismissed petitions for bad faith under circumstances analogous to those present here; in the appellate cases, those dismissals were upheld.

CNB contends that Keach is contrary to Ninth Circuit authority, and that bankruptcy courts in the First Circuit have declined to follow it. See In re Quiles, 262 B.R. 191, 196 (Bankr. D.R.I. 2001); In re Virden, 279 B.R. 401, 408-09 (Bankr. D. Mass. 2002); In re Scotten, 281 B.R. 147, 149 (Bankr. D. Mass. 2002). CNB also argues that Francis is not analogous: there the debtor had spent three and a half years paying down the nondischargeable debt, and had devoted to the plan all of his disposable income over five years. Further, the bankruptcy court found that the inaccuracies in the schedules were not deliberate attempts to mislead. Francis, 273 B.R. at 92-95.

2. Analysis

While the bankruptcy court did not make explicit findings on each Leavitt factor, reversal or remand is not necessarily warranted. See Leavitt, 171 F.3d at 1223 ("[T]he standard for adequacy of factual findings in the Ninth Circuit is whether they are explicit enough on the ultimate issues to give the appellate court a clear understanding

of the basis of the decision and to enable it to determine the grounds on which the trial court reached its decision." (citation omitted)).

There is no requirement that the bankruptcy judge make an explicit finding on each factor to be considered – the requirement is consideration of, rather than a verdict on, each factor. Nor is there a precise formula assigning weights to each factor, with a threshold score establishing good faith. Rather, the factors are guides for the trial court's determination, which is to be based on the totality of circumstances.

Review of the hearing transcript reveals that the bankruptcy court considered all of the relevant factors before making its ruling. The court cited the Leavitt factors at the beginning of the hearing and requested CNB to address each. Transcript, 25 March 2003, pages 3-4. And in its ruling the bankruptcy court addressed each factor:

a. Whether the debtor misrepresented facts, unfairly manipulated the Code or proposed the plan in an inequitable manner

The bankruptcy court explicitly found that the case was a manipulation of the Code because of the timing of the filing, the attempt to discharge an otherwise nondischargeable debt with a de minimis payment, and the absence of other legitimate unsecured debt.

The court also found the debts to family and friends were unsubstantiated, and noted that there was no documentation of the tax debt, and found the debtor's representations "just not credible." Transcript, page 75. This factor supports dismissal.

b. History of filings and dismissals

The debtor filed three bankruptcy cases within eighteen months.

The bankruptcy court noted that the second chapter 13 was filed shortly after a prior chapter 7 in which there had been a judgment of nondischargeability. Transcript, at 72-73. This factor weighs against debtor. See Rasmussen, 888 F.2d at 706.

Debtor attempts to explain the multiple filings, stating that he dismissed his first chapter 13 when a $63 million judgment was entered against him which made him ineligible for chapter 13. However, he points to no evidence in the record supporting that assertion. Moreover, chapter 13 eligibility is determined as of the petition date. Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 982 (9th Cir. 2001). He argues that his latter two cases were filed "to effectuate a classic chapter 20 result."

Arguably, this factor supports dismissal; in any event, it does not militate against it.

c. Only purpose to defeat state court litigation

Bad faith exists where debtor's only purpose in filing is to defeat state court litigation. Eisen, 14 F.3d 469-70. The bankruptcy court found that the second chapter 13 case was filed to frustrate CNB's efforts to collect on its nondischargeable debt. Transcript, at 73. The timing of the filings supports this finding – the chapter 7 filed one day before debtor's response to the CNB state court action was due, and the second chapter 13 filed during the pendency of CNB's nondischargeability action.

d. Egregious behavior

The bankruptcy court did not make an explicit finding of egregious behavior, and debtor argues there was none. But egregious

behavior is implicit in the bankruptcy court's findings that debtor listed illegitimate debts in his plan and schedules and that the second chapter 13 was filed solely as a manipulation of the Code to discharge a nondischargeable judgment by making a de minimis payment.

The bankruptcy court considered the appropriate factors and evidence supporting its ultimate finding that debtor lacked good faith.

2. Totality of Circumstances

Review of the transcript and the bankruptcy judge's ruling belies debtor's characterization of this as a reflexive dismissal of a "chapter 20." Rather, the bankruptcy judge did consider the totality of circumstances, including, importantly, debtor's credibility, and found good faith lacking.

B. Dismissal With Prejudice

A bankruptcy court may dismiss a case with prejudice "for cause." § 349(a). A finding of bad faith based on egregious behavior will justify dismissal with prejudice. Leavitt, 171 F.3d at 1224. "With prejudice" includes forever barring the discharge of certain debts. See id. at 1223-24.

Debtor argues that a bar on discharge is a draconian prohibition not authorized merely for filing a "chapter 20" case, citing In re Penny, 243 B.R. 720 (Bankr. W.D. Ark. 2000), and Casse v. Key Bank Nat'l Ass'n (In re Casse), 198 F.3d 327, 335 (2d Cir. 1999). This argument is unconvincing. First, debtor mischaracterizes the bankruptcy court's ruling. The court did not dismiss the case with

prejudice for the mere filing of a "chapter 20," but took into account the relevant factors. Second, the cases are inapposite.

It is not clear that Penny helps debtor; there the bankruptcy court dismissed a serial filer's chapter 13 case with a 180-day bar to refiling, and prohibited him from filing any chapter 11, 12, or 13 petition for two years. Debtor's citation to Casse is nearly as puzzling, although the court there noted that a bankruptcy court must consider the cumulative effect of a multiplicity of factors in determining whether cause exists for dismissal with prejudice. Casse, 198 F.3d at 335 (citing In re Martin-Trigona, 35 B.R. 596, 601 (Bankr. S.D.N.Y. 1983)). The court did so here.

Debtor has not shown that dismissal with prejudice was outside the court's discretion. As in Leavitt, he made misrepresentations in his schedules and proposed a de minimis payment on a nondischargeable debt. His filings also suggest his petitions were timed to avoid the CNB obligation. See In re Covino, 245 B.R. 162, 169-70 (Bankr. D. Idaho 2000) (dismissing chapter 13 case with prejudice where debtors filed their petition solely to avoid paying nondischargeable debt). See also Huerta, 137 B.R. at 377 (dismissing chapter 13 case with prejudice where debtors failed to provide any evidence that their case was filed in good faith).

Debtor has shown no abuse of discretion.

C. Alternatives

We held in Ho, supra, that the bankruptcy court should not dismiss a chapter 13 without considering the alternative of conversion. To the extent the failure to do so here was error, debtor has waived it by failing to raise it in the bankruptcy court, United

States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990), or his opening brief, Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998). In any event, CNB properly notified all scheduled creditors of its motion, and none opposed dismissal.

VI. CONCLUSION

Debtor has not shown clear error in the bankruptcy court's finding that his chapter 13 was filed in bad faith. The "all militating factors" approach does not require mathematical precision; the court need only consider each factor. That was done here.

We find no abuse of discretion in the bankruptcy court's dismissal with prejudice, and AFFIRM.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP NO. CC-03-1232-BKMo

RE: VAHE T. AZIZIAN

A separate Judgment was entered in this case on 12/24/03.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Elaine Lewis

Deputy Clerk: December 24, 2003

Elaine Lewis

12/24/03