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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-06-1409-McMoD
)		
7	BONIFACE ONUBAH,)	Bk. No.	SV 06-10910-KT
)		
8)		
	Debtor.)		
9)		
)		
10	_____)		
)		
11	BONIFACE ONUBAH,)		
)		
12	Appellant,)		
)		
13	v.)	OPINION	
)		
14	NANCY ZAMORA, Chapter 7)		
	Trustee,)		
15)		
	Appellee.)		
16	_____)		

Argued and Submitted on July 26, 2007
at Pasadena, California

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

Honorable Kathleen T. Thompson, Bankruptcy Judge, Presiding

Before: MCMANUS,¹ MONTALI, and DUNN, Bankruptcy Judges.

¹ Hon. Michael S. McManus, Chief Bankruptcy Judge for the
Eastern District of California, sitting by designation.

1 MCMANUS, Bankruptcy Judge:

2
3 The debtor, Boniface Onubah, appeals from an order entered
4 on November 14, 2006,² granting the motion of the chapter 7
5 trustee, Nancy H. Zamora, to surcharge his homestead and
6 household goods exemptions. We conclude that the bankruptcy
7 court did not abuse its discretion when surcharging the debtor's
8 exemptions under Latman v. Burdette, 366 F.3d 774, 785-86 (9th
9 Cir. 2004). We AFFIRM.

10
11 FACTS

12 Onubah filed a chapter 7 petition on June 15. Among his
13 scheduled assets was a residence located in Calabasas,
14 California, as well as household goods located in that residence.
15 Onubah claimed as exempt \$75,000 of the equity in the residence
16 and the entire \$25,000 value of the household goods.

17 Onubah's residence had a scheduled value of \$2 million and
18 was encumbered by two deeds of trust securing claims totaling
19 \$1,680,000, as well as a \$2,000 lien for delinquent homeowners'
20 association assessments and four judicial liens. The most senior
21 judicial lien, securing a \$5,400 judgment, was held by Geoffrey
22 Ojo. The remaining three judicial liens secured judgments
23 exceeding \$2.4 million in favor of the California Department of
24 Health Services (CDHS).

25 Despite the apparent lack of equity, Zamora was able to
26 procure a buyer for the residence that produced a return for the
27 estate. This was due in part to the \$2.3 million sale price,
28

² All relevant dates are in 2006.

1 slightly higher than the scheduled value, and in part to Zamora's
2 agreement with CDHS permitting the estate to retain \$96,000 of
3 the sale proceeds otherwise due CDHS. The sale price permitted
4 payment in full of the two deeds of trust, the delinquent real
5 property taxes and homeowners' association assessments, the
6 judicial lien held by Ojo, Onubah's homestead exemption, and all
7 transactional costs. After paying the \$96,000 "carve-out" to the
8 bankruptcy estate, the balance was payable to CDHS.

9 Zamora filed her motion to approve the sale on August 15.
10 Onubah did not oppose the motion, and on September 5 the
11 bankruptcy court entered an order authorizing the sale. With the
12 sale approved and scheduled to close escrow on September 26,
13 Zamora sent a letter to Onubah, requesting that he vacate and
14 turn over the residence to her by September 15. Onubah refused.

15 Onubah's refusal to cooperate with the trustee threatened to
16 derail the sale because the buyer's deposit of the sale price
17 into escrow was conditioned upon Onubah relinquishing possession.
18 Further, the holder of the first deed of trust had scheduled a
19 September 28 hearing on its motion to terminate the automatic
20 stay. If granted, the holder of the first deed of trust would be
21 able to foreclose on the residence.

22 Faced with Onubah's refusal to relinquish possession, on
23 September 20 Zamora filed an emergency motion to compel Onubah to
24 turn over the residence.³ The motion was scheduled for hearing
25

26
27 ³ The turnover motion requested the bankruptcy court to
28 direct the U.S. Marshal to enforce the turnover order and to
surcharge Onubah's homestead exemption by \$47,500, \$10,000 in
favor of the estate and \$37,500 in favor of CDHS. The bankruptcy
court eventually surcharged the debtor as requested by Zamora.
That surcharge, however, is not the subject of this appeal.

1 on September 25.

2 On September 25, but prior to the hearing on the turnover
3 motion, Onubah filed, and the bankruptcy court granted without a
4 hearing, a motion to convert his case from chapter 7 to chapter
5 11.

6 In a bid to salvage the sale, Zamora immediately moved to
7 reconvert the case to one under chapter 7. On September 25, with
8 Onubah present in the courtroom, the bankruptcy court took up
9 Zamora's reconversion and turnover motions.

10 Under questioning by the bankruptcy court, Onubah was unable
11 to explain coherently why his creditors would be better off under
12 chapter 11. With no indication that he had the ability to
13 reorganize his financial affairs under chapter 11, the bankruptcy
14 court ordered the case reconverted to chapter 7 and then granted
15 the turnover motion. Its turnover order required Onubah to
16 remove his household goods and turn over the residence to Zamora
17 by 5:00 p.m. on September 26.

18 When representatives of the estate arrived at the residence
19 to take possession of it, Onubah informed them that an
20 involuntary bankruptcy petition had been filed against him on
21 September 26. Welford and Gilfert Jackson had filed the
22 involuntary petition in the Los Angeles Division of the Central
23 District.

24 Zamora responded on September 29⁴ by filing a motion
25

26 ⁴ Although the sale did not close by September 26, the sale
27 ultimately was consummated on a date not specified in the record.
28 While the record does not indicate that the buyer agreed to
extend the September 26 closing date, or that the holder of the

(continued...)

1 seeking, among other things, the reassignment of the involuntary
2 petition to Judge Kathleen T. Thompson, the bankruptcy judge
3 presiding in the chapter 7 case, the dismissal of the involuntary
4 petition, and the termination and annulment of the automatic stay
5 created by the filing of the involuntary petition, in order to
6 permit Zamora to proceed with the sale.

7 On September 29, the bankruptcy court, Judge Geraldine Mund
8 presiding, entered an order reassigning the involuntary petition
9 to Judge Thompson as well as terminating and annulling the
10 automatic stay to allow Zamora to move ahead with the sale. In
11 so ordering, Judge Mund concluded that the involuntary petition
12 had been filed solely to circumvent Judge Thompson's turnover
13 order. Judge Mund also found that the parties filing the
14 involuntary petition, Welford and Gilfert Jackson, were known to
15 "act in tandem to prevent foreclosures and eviction[s]."

16 Later, when dismissing the involuntary petition, Judge
17 Thompson similarly concluded that, by filing the involuntary
18 petition, Onubah and the Jacksons were "working together to
19 obstruct the judicial process and prevent the [t]rustee from
20 administering the [residence]."

21 Despite the bankruptcy court's order permitting Zamora to
22 move ahead with the sale, Onubah still refused to cooperate and
23 turn over the residence. So, on September 30, Zamora had the
24

25 ⁴(...continued)

26 first deed of trust agreed to continue the September 28 hearing
27 on its motion for relief from the automatic stay, we can infer
28 from the fact that the sale was consummated sometime after
September 30, that the buyer and the holder of the first deed of
trust agreed to, or acquiesced in, a later closing.

1 U.S. Marshal evict Onubah. Zamora then removed and stored
2 Onubah's household goods.

3 Onubah's efforts to obstruct the sale, while unsuccessful,
4 caused the bankruptcy estate to incur significant expenses.
5 Zamora paid \$20,000 in legal fees, \$5,000 for the services of the
6 U.S. Marshal, \$1,873.40 to change the locks, and \$23,544.78 for
7 the removal and storage of Onubah's household goods. These costs
8 totaled \$59,418.18.

9 In order to recover these costs, Zamora filed a motion to
10 surcharge Onubah's homestead and household goods exemptions by
11 \$27,500 and \$25,000, respectively. The bankruptcy court entered
12 an order granting the surcharge on November 14. In support of
13 the surcharge, the bankruptcy court cited Onubah's "numerous
14 actions to delay and frustrate" Zamora's administration of the
15 chapter 7 estate.

16 Onubah timely appealed the surcharge order.

18 JURISDICTION

19 The bankruptcy court had jurisdiction under 28 U.S.C.
20 §§ 157(b)(2)(A), (N), (O) and 1334. We have jurisdiction under
21 28 U.S.C. §§ 158(a)(1) and (c)(1).

23 STANDARD OF REVIEW

24 We review the bankruptcy court's surcharge of the debtor's
25 exemptions for an abuse of discretion. Latman v. Burdette, 366
26 F.3d at 786. A bankruptcy court abuses its discretion if it
27 bases its ruling upon an erroneous view of the law or a clearly
28 erroneous assessment of the evidence. Cannery Row Co. v. Leisure

1 Corp. (In re Leisure Corp.), 234 B.R. 916, 920 (9th Cir. BAP
2 1999). Findings of fact upon which a surcharge is based are
3 reviewed for clear error, while the bankruptcy court's
4 conclusions of law are reviewed de novo. Kelley v. Locke (In re
5 Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003); see also Earth
6 Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir.
7 2006).

8
9 DISCUSSION

10 Onubah argues that the bankruptcy court improperly
11 surcharged his homestead and household goods exemptions because:
12 (A) his misconduct did not involve the concealment of assets; (B)
13 the surcharge was in reality a sanction because the costs
14 incurred by the estate "had nothing to do with [his] exemptions;"
15 (C) legal fees are not recoverable in the surcharge of an
16 exemption, "when a defendant (or debtor) is asserting his rights
17 (even if mistakenly);" and (D) "judgment creditors usually do not
18 get to execute on exemptions to recover costs of gaining
19 possession to collateral."

20 Each of these arguments lacks merit.

21
22 **A**

23 A surcharge of a debtor's exemptions is appropriate only in
24 "exceptional circumstances." Latman, 366 F.3d at 786.
25 Exceptional circumstances are present when a debtor engages in
26 inequitable conduct that, when left unchallenged, denies
27 "creditors access to property in excess of that which is properly
28 exempted under the Bankruptcy Code." Latman, 366 F.3d at 786.

1 In Latman the debtors concealed \$7,000 in proceeds from the
2 sale of a vehicle and a boat. When the trustee became aware of
3 these assets and their sale, he requested an accounting of the
4 sale proceeds. The trustee moved to surcharge the debtors'
5 exemptions when they refused to provide him with an accounting
6 and then turn over the sale proceeds. Latman, 366 F.3d at 778-
7 79.

8 In this case, Onubah did not conceal his residence.
9 However, when Zamora asked Onubah to vacate the residence by
10 September 15, he refused.

11 When Zamora filed a motion to compel Onubah to vacate the
12 residence, Onubah responded by converting his chapter 7 petition
13 to one under chapter 11 in an attempt to end Zamora's
14 administration of the bankruptcy estate. This was done even
15 though Onubah did not have the financial ability to reorganize
16 his affairs.

17 When the petition was reconverted to chapter 7, and after
18 Zamora obtained the turnover order, Onubah colluded with others
19 to file an involuntary petition against himself to prevent the
20 enforcement of the order and the sale.

21 When Zamora eliminated the involuntary petition as an
22 impediment to the sale, she again demanded that Onubah vacate the
23 residence. He refused, requiring Zamora to use the U.S. Marshal
24 to evict him. Onubah also failed to remove his household goods
25 from the residence, forcing Zamora to remove and store them.

26 This is not a case where a debtor took a good faith but
27 erroneous position in an exemption dispute with a trustee or a
28 creditor. Cf. In re Gordon, 322 B.R. 886, 888 (Bankr. C.D. Cal.

1 2005). Onubah's efforts at obstruction were not litigation
2 tactics undertaken in good faith.

3 What should have been a \$96,000 return to the bankruptcy
4 estate from the sale was reduced by almost \$60,000 in costs that
5 were incurred because of Onubah's misconduct.

6 Nonetheless, Onubah argues that his misconduct is
7 qualitatively different from the debtors' misconduct in Latman.
8 They concealed assets; he did not.

9 Onubah's interpretation of Latman is too narrow.

10 The misconduct that led to the surcharge in Latman was not
11 just the initial concealment of the \$7,000. It was the debtors'
12 failure to account for and turn over the money. Latman, 366 F.3d
13 at 785.

14 Although Onubah did not attempt to keep assets by concealing
15 them from the trustee, his misconduct was to the same end. Even
16 though he disclosed his residence, Onubah refused to turn it over
17 so the trustee could sell it and realize the nonexempt equity for
18 the benefit of creditors. He sought to keep that nonexempt
19 equity for himself.

20 Not only did Onubah refuse to obey the turnover order, he
21 abused the processes of the bankruptcy court, first by converting
22 his petition to one under chapter 11 for an improper purpose and
23 then by colluding in the filing of an improper involuntary
24 petition.

25 In this regard, it must be noted that Onubah has not
26 challenged the bankruptcy court's interpretation of his actions
27 as efforts to obstruct a sale of his home.

28 A surcharge of exemptions does not hinge on a concealment of

1 assets. It requires misconduct that would cause "fraud on the
2 bankruptcy court and the [debtor's] creditors." Latman, 366 F.3d
3 at 785. This may include concealment of assets, but is not
4 limited to such cases. An unjustified refusal to turn over
5 property of the estate to the trustee may be the basis for a
6 surcharge of the debtor's exemptions. Latman, 366 F.3d at 785
7 (citing In re Ward, 210 B.R. 531, 532 (Bankr. E.D. Va. 1997)).

8 Other courts have held likewise. For instance, in In re
9 Karl, 313 B.R. 827, 829-30 (Bankr. W.D. Mo. 2004), a bankruptcy
10 court surcharged an exemption because of the debtors' refusal to
11 turn over to the estate a nonexempt truck. See also Scrivner v.
12 Mashburn (In re Scrivner), 370 B.R. 346, 2007 WL 1783863 (10th
13 Cir. BAP 2007) (surcharge based on the failure to turn over non-
14 exempt royalties that were property of the estate).

15 Accordingly, we reject Onubah's interpretation of Latman and
16 his argument that because he did not conceal his home, his
17 exemptions cannot be surcharged.

18 **B**

19
20 This case differs from Latman, as well as Ward, Karl, and
21 Scrivner, in one significant respect. The debtors in those cases
22 successfully resisted efforts of the trustees to compel the
23 turnover of nonexempt property. Thus, it was necessary to reduce
24 their exemptions by the value of the nonexempt property they had
25 failed to turn over. If this had not been done, these debtors
26 would have sheltered more assets than they could have
27 legitimately exempted.

28 Onubah, on the other hand, was unsuccessful in his attempt

1 to keep his home from the trustee. Zamora was able to obtain
2 possession of, and sell, Onubah's home for the benefit of
3 creditors.

4 Onubah therefore argues that because he did not succeed in
5 profiting from his misconduct, the surcharge "had nothing to do
6 with [his] exemptions" and so was an impermissible sanction. In
7 the words of the Latman court, the surcharge was unnecessary to
8 ensure that Onubah "exempt[ed] an amount no greater than what is
9 permitted by the exemption scheme of the Bankruptcy Code." See
10 Latman, 366 F.3d at 786; see also Karl, 313 B.R. at 831.

11 Latman, however, does not limit the availability of a
12 surcharge only to cases where the debtor successfully keeps
13 nonexempt property out of the hands of the trustee. Its holding
14 is broader: "Under exceptional circumstances, such as those
15 presented here, surcharge may be the only means fairly to ensure
16 that debtors retain their statutory 'fresh start,' while also
17 permitting creditors access to property in excess of that which
18 is properly exempted under the Bankruptcy Code." Latman, 366
19 F.3d at 786.

20 Even though Onubah was unsuccessful in his attempt to keep
21 his home, his misconduct nonetheless deprived the estate and his
22 creditors of some of the nonexempt equity in it. The estate
23 incurred substantial costs, approximately \$60,000, obtaining
24 possession of and selling Onubah's residence. Absent a
25 surcharge, what should have been a \$96,000 recovery by the
26 estate, would have been a \$36,000 return. While the \$60,000
27 difference did not go into Onubah's pocket, it came out of the
28 pockets of his creditors. In every sense, Onubah's creditors

1 were denied "access to property in excess of that which" Onubah
2 could properly exempt. Latman, 366 F.3d at 786.

3 The Latman court noted that surcharge is similar to the
4 remedy fashioned by the panel in Arnold v. Gill (In re Arnold),
5 252 B.R. 778 (9th Cir. BAP 2000). Latman, 366 F.3d at 786 n.9.

6 In Arnold, the debtor had a personal injury claim which was
7 pending when he filed a chapter 7 petition. Because the debtor
8 had not exempted the personal injury suit, the trustee hired
9 special counsel on a contingency fee basis to prosecute it. When
10 the trustee settled the suit for \$200,000, the debtor amended his
11 exemption and claimed the entire settlement as exempt.

12 We recognized in Arnold that prejudice to the estate or to
13 creditors causing actual economic loss may be the basis for the
14 disallowance of an exemption, or conditioning its allowance on
15 the debtor purging the effect of his prejudicial conduct.
16 Arnold, 252 B.R. at 788-89.

17 The Arnold panel concluded that by waiting for the trustee
18 to recover the asset before claiming an amended exemption, the
19 debtor had caused unfair prejudice to the estate. Therefore,
20 allowance of the amended exemption was conditioned on the debtor
21 compensating the estate for the cost of obtaining the settlement.
22 "Such amounts ... should be paid out of the proceeds of the
23 [personal injury suit] in order to avoid any prejudice to [the
24 trustee] or other third parties." Arnold, 252 B.R. at 789.

25 Here, even though Onubah raised no objection to the sale
26 before the court authorized it, he refused to turn over his
27 residence to Zamora and actively attempted to obstruct a sale by
28 disobeying the turnover order and by twice invoking the chapter

1 11 reorganization process despite an inability to reorganize his
2 financial affairs. This conduct unfairly prejudiced and damaged
3 the estate.

4 While we agree that the purpose of a surcharge cannot be the
5 punishment of a debtor, the surcharge in this case was not meted
6 out to punish Onubah. Consistent with Latman, the surcharge was
7 calculated to compensate the estate for the actual damage
8 inflicted by Onubah' misconduct.

9
10 **C**

11 Onubah also asserts that legal fees are not recoverable in
12 connection with the surcharge of an exemption, "when a defendant
13 (or debtor) is asserting his rights (even if mistakenly)."

14 Without any discussion, Onubah cites Bertola v. N. Wisconsin
15 Produce Co. (In re Bertola), 317 B.R. 95 (9th Cir. BAP 2004), for
16 this proposition.

17 Bertola has no application here because the question in that
18 case was whether the prevailing party could recover attorney's
19 fees under applicable nonbankruptcy law. Bertola, 317 B.R. at
20 99-100. "[A] prevailing party in a bankruptcy proceeding may be
21 entitled to an award of attorney fees in accordance with
22 applicable state law if state law governs the substantive issues
23 raised in the proceedings." Bertola, 317 B.R. at 99 (quoting
24 Heritage Ford v. Baroff (In re Baroff), 105 F.3d 439, 441 (9th
25 Cir. 1997)).

26 Bertola is distinguishable because state law does not govern
27 the substantive issues raised in connection with the surcharge of
28 a bankruptcy debtor's exemptions. This remedy is exercised "to

1 protect the integrity of the bankruptcy process." Latman, 366
2 F.3d at 786.

3 We hasten to add, however, that the remedy of surcharge may
4 not be used to shift costs to a debtor who has unsuccessfully,
5 but in good faith, opposed a trustee's effort to liquidate a
6 partially exempt asset or who has otherwise challenged the
7 trustee's administration of the estate.

8 In this case, the bankruptcy court awarded approximately
9 \$20,000 of attorney's fees to the estate as part of the surcharge
10 of Onubah's exemptions. This award was not given just because
11 Onubah did not prevail. Rather, these fees were awarded because
12 he had disobeyed a court order and abused the bankruptcy process
13 in order to obstruct an approved sale of his home. His conduct
14 caused the estate to incur unnecessary expenses, including
15 attorney's fees, and without the award the estate would not have
16 been made whole.

17 As explained above, this award is consistent with the remedy
18 of surcharge and is also consistent with the "American Rule."
19 Under the American Rule, attorney's fees are not recoverable,
20 unless provided for by a contract or a statute. Alyeska Pipeline
21 Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Baroff,
22 105 F.3d at 441. But, the American Rule has three exceptions:
23 (1) when a litigant preserves or recovers a fund for the benefit
24 of others; (2) when a losing party acts in bad faith; and (3) in
25 a civil contempt action for disobedience of a court order. Perry
26 v. O'Donnell, 759 F.2d 702, 704 (9th Cir. 1985) (citing Alyeska,
27 421 U.S. at 257-59).

28 Even a charitable view of Onubah's conduct in this case

1 would characterize it as being undertaken in "bad faith" and as
2 an abuse of the bankruptcy process. This implicates the second
3 exception to the American Rule.

4 Therefore, we conclude that the bankruptcy court did not
5 abuse its discretion or misapply the law when it awarded
6 attorney's fees as part of the surcharge of Onubah's exemptions.
7 See Scriver, 370 B.R. at 349, 2007 WL 1783863 at *1 (permitting
8 award of attorney's fees to trustee as part of a surcharge of the
9 debtor's exemptions).

10
11 **D**

12 Onubah next contends that "judgment creditors usually do not
13 get to execute on exemptions to recover costs of gaining
14 possession to collateral." Citing 11 U.S.C. § 544(a) for the
15 proposition that a chapter 7 trustee "stands in the position of a
16 judgment creditor," Onubah argues that a bankruptcy trustee may
17 not surcharge a debtor's exemptions because a judgment creditor
18 cannot do so outside of bankruptcy court.

19 The bankruptcy trustee, however, is not limited to the
20 rights of a judicial lien creditor under applicable nonbankruptcy
21 law.

22 Section 544(a) gives the bankruptcy trustee the rights and
23 powers of certain creditors, including a creditor whose claim is
24 secured by a judicial lien, to avoid transfers of property of the
25 debtor under applicable nonbankruptcy law. However, section
26 544(a) does not limit the trustee's other rights and powers,
27 including the right to seek equitable remedies, like surcharge,
28 to prevent a debtor from violating the integrity of the

1 bankruptcy process.

2 The integrity of this process requires, among other things,
3 that a debtor fully disclose all assets and liabilities when the
4 petition is filed, provide the trustee with financial records,
5 surrender all property of the estate to the trustee, cooperate
6 with the trustee's administration of the estate, comply with the
7 Bankruptcy Code's exemption scheme, and obey the bankruptcy
8 court's lawful orders. 11 U.S.C. §§ 521(a)(1), (a)(2), (a)(3),
9 and (a)(4), 522, 727(a)(6)(A); Latman, 366 F.3d at 786.

10 When a chapter 7 debtor fails to turn over property of the
11 estate to the trustee, the trustee generally has two tools to
12 deal with the problem. First, the trustee may seek a denial of
13 the debtor's discharge pursuant to 11 U.S.C. § 727(a). However,
14 even when successful, the denial of a debtor's discharge will not
15 compensate the estate for the additional costs incurred to
16 recover property of the estate from an uncooperative debtor.
17 This is one reason trustees have been given resort to a second
18 remedy, the surcharge of the debtor's exemptions.

19 The trustee's ability to request a surcharge of a debtor's
20 exemptions "may be the only means fairly to ensure that debtors
21 retain their statutory 'fresh start,' while also permitting
22 creditors access to property in excess of that which is properly
23 exempted under the Bankruptcy Code." Latman, 366 F.3d at 786.⁵

24

25 ⁵ Denial of discharge and surcharge are not mutually
26 exclusive remedies. By seeking a denial of a chapter 7 debtor's
27 discharge, the trustee is not precluded by the election of
28 remedies or claim preclusion doctrines from also seeking a
surcharge. Latman, 366 F.3d at 781-784.

1 CONCLUSION

2 We conclude that the bankruptcy court did not abuse its
3 discretion when it surcharged Onubah's homestead and household
4 goods exemptions. Onubah's refusal to turn over the residence to
5 the estate, his obstruction of the sale, and his failure to
6 remove his household goods warranted the surcharge.

7 We AFFIRM.
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