

MAY 11 2007

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

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	AZ-06-1397-BrMoPa
)		
SCOTT J. SOBCZAK,)	Bk. No.	06-00030-RJH
)		
Debtor.)		
_____)		
RUSSELL A. BROWN, Chapter 13)		
Trustee,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
SCOTT J. SOBCZAK,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 23, 2007
at Phoenix, Arizona

Filed - May 11, 2007

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

Hon. Randolph J. Haines, Bankruptcy Judge, Presiding

Before: BROWN¹, MONTALI and PAPPAS, Bankruptcy Judges.

¹ Hon. Trish M. Brown, Bankruptcy Judge for the District of Oregon, sitting by designation.

1 BROWN, Bankruptcy Judge:

2

3 This appeal arises from the bankruptcy court's order granting
4 Debtor-Appellee's motion to dismiss his chapter 13 case.² For the
5 reasons set forth below we REVERSE the bankruptcy court's order
6 granting Debtor-Appellee's motion to dismiss.

7

I. FACTS

8 Appellee filed a voluntary chapter 7 petition on March 12,
9 2006. He scheduled a single parcel of real property, his
10 residence, located in Kingman, Arizona (the "Property"). Appellee
11 valued the Property, which was subject to two liens totaling
12 \$113,724.00, at \$200,000.00. Appellee claimed a \$150,000
13 homestead exemption in the Property pursuant to Arizona Revised
14 Statute § 33-1101(A). In response to Question 15 on his Statement
15 of Financial Affairs ("SOFA"), which required Appellee to list all
16 previous addresses if he had moved in the three years preceding
17 the filing, Appellee checked "none."

18 On May 25, 2006, the chapter 7 trustee for Appellee's case
19 filed an Objection to Property Claimed Exempt in which he objected
20 to all of Appellee's claimed exemptions on the grounds that he had
21 not resided in the state of Arizona for 730 days as required by
22 § 522(b)(3)(A).³ As a result, the chapter 7 trustee contended
23 Appellee was required to use the exemptions provided under Ohio

24

25 ² Unless otherwise indicated, all Code, chapter and section
26 references are to the United States Bankruptcy Code, 11 U.S.C.
§§ 101-1532.

27 ³ Debtor disputes that assertion, but no determination of
28 that disputed fact was made by the bankruptcy court before
Debtor's case was dismissed.

1 law, the state in which Appellee had resided for more than 180
2 days prior to moving to Arizona. The homestead exemption in Ohio
3 is only \$5,000.00. Ohio Rev. Code Ann. § 2329.66(A)(1)(b). On
4 June 8, 2006, Appellee filed a Motion to Convert to Chapter 13
5 Case. The court entered an Order Converting Case to Chapter 13
6 that same day. On June 8, 2006, Appellee also filed a Response to
7 Former Trustee's Objection to Property Claimed Exempt. In his
8 response, Appellee contended that there was a factual question as
9 to his place of residency during the 730 days preceding the filing
10 of his bankruptcy petition. Specifically he contended that
11 because he intended to reside in Arizona as of March 2004 and
12 began seeking employment in Arizona at that time, his residence
13 should be determined to be in Arizona as of March 2004. In
14 addition, he argued that § 522(b)(3)(A), which provides that a
15 debtor's exemptions are governed by applicable law at the place in
16 which his domicile has been located for the 730 days immediately
17 preceding the date of the filing of the petition, applied only to
18 the equity brought by a debtor from a former state's exempt
19 homestead. Finally, he contended that while residing in Ohio he
20 held his homestead jointly with his wife as tenants by the
21 entirety and could have exempted the entire amount of the equity
22 in the home under Ohio law. Consequently, he contended, if his
23 exemptions were determined based on Ohio law, he was entitled to
24 exempt all of the equity in his Arizona property.

25 On June 8, 2006, Appellee also filed amended Schedules A, I,
26 and J and an amended SOFA. On his Amended Schedule A Appellee
27 valued the Property at \$180,000.00. Appellee did not file an
28 amended Schedule C Property Claimed as Exempt. In response to

1 Question 15 on his amended SOFA, Appellee indicated that he had
2 lived in Ohio "through March 2004."

3 On June 20, 2006, Appellant, the chapter 13 trustee for
4 Appellee's case, filed his Chapter 13 Trustee's Objection to
5 Claims of Property as Exempt, joining in the objection filed by
6 the Chapter 7 Trustee. On June 29, 2006, Appellee filed a
7 Response to Chapter 13 Trustee's Objection to Property Claimed
8 Exempt. In his response, Appellee raised the same arguments that
9 he had previously raised in his Response to Former Trustee's
10 Objection to Property Claimed Exempt.

11 On June 29, 2006, Appellee also filed a motion to dismiss his
12 chapter 13 case. In that motion, he stated that "[a]lthough
13 debtor believes that no non-exempt assets exist, both the Chapter
14 7 and Chapter 13 trustees have taken contrary positions. Debtor
15 asks this matter be dismissed to avoid a potential twisted
16 application of the new bankruptcy law which would unfairly deny
17 him his homestead under either Arizona or Ohio law." He indicated
18 that if his motion was denied that he wished to remain in chapter
19 13.

20 On July 7, 2006, Appellant filed Trustee's Objection to
21 Motion to Dismiss. In his Memorandum of Points and Authorities in
22 support of that objection Appellant stated:

23 Debtor filed a Motion to Dismiss his case on June
24 29, 2006, without stating any statutory authority for
25 his request. However, the Trustee notes that Debtor
26 does not possess the right to dismiss his case pursuant
27 to 11 U.S.C. § 1307(b). Debtor's absolute right to
28 dismiss is absent when the case was previously converted
from another chapter. Therefore the Court must not
dismiss the case.

Rather than Dismissal, the proper result should be
reconversion back to Chapter 7. Both the Chapter 7 and

1 Chapter 13 Trustees believe that Debtor may have non-
2 exempt assets which a Chapter 7 Trustee should
administer for the creditors of this estate.

3 Because Debtor has significant non-exempt assets,
4 and because he does not have an absolute right to
dismiss their [sic] case, the Chapter 13 Trustee objects
5 to the Dismissal of this case.

6 The bankruptcy court held a hearing on the Appellee's motion
7 to dismiss on October 25, 2006. During that hearing, the parties
8 discussed, at length, their respective positions with respect to
9 Appellee's right to claim exemptions under Arizona law as well as
10 the effect on the estate if the court determined that Appellee was
11 not eligible to claim exemptions under Arizona law. Appellant
12 contended that he believed that there was significant equity in
13 the Property and that the bulk of this equity, none of which could
14 be reached by creditors if Appellee were eligible to claim Arizona
15 exemptions, would be available to creditors if Appellee were
16 required to use Ohio exemptions. At one point during the oral
17 argument when addressing Mr. Lieske, Appellant's attorney, the
18 court stated:

19 THE COURT: On the other hand though, you know, if
20 assuming you're correct and in effect the -- well, I was
going to say that if he doesn't have an exemption in the
21 Arizona homestead then creditors could resort to it
outside of a Chapter 7, but that's not the case. If he
22 didn't have a Chapter 7, he would be entitled to the
full Arizona exemption in his Arizona Homestead, vis-à-
23 vis his creditors, outside of bankruptcy."

24 MR. LIESKE: Well, I -- what I --

25 THE COURT: So in effect, doesn't keeping him in a 7 or
26 a 13 create a windfall for his creditors that they would
not be entitled to outside of bankruptcy, because
27 outside of bankruptcy he's entitled to his Arizona
exemption?

28 MR. LIESKE: Right. And what I suspect might happen is
that the debtor may -- may re-file a new Chapter 13 case

1 after he's -- after this case is dismissed he can take
2 advantage of the Arizona exemptions now because he has
3 lived in Arizona for the 730 days and not have to pay
4 anything to his unsecured creditors, not have to pay
5 anything to those creditors that would in this case
6 receive a distribution.

7 THE COURT: I'm not sure that responded to my question.
8 Your argument was it would be unfair to creditors to
9 dismiss the case. And the question I raised is well,
10 why is it unfair? He's not hiding assets. He's got an
11 Arizona asset that any creditor could locate, but under
12 Arizona law he'd be entitled to exempt it.

13 So how can you say that it would be unfair to the
14 creditors to allow a dismissal? Isn't it really the
15 other way around? He may have made a mistake by filing
16 a case, and in effect, disqualifying himself from the
17 Arizona homestead exemption that he would've been
18 entitled to if he hadn't filed at all. So doesn't the
19 maintenance in the -- of the case in effect create a
20 windfall for creditors?

21 Ultimately the court granted Appellee's Motion to Dismiss
22 Case. In doing so it stated:

23 Well, I agree that -- that when it comes to a motion to
24 dismiss a 13 in a case that has been converted from
25 Chapter 7, it is the best interest [of] creditors test,
26 but I don't know that anything in the code or
27 particularly [BAPCPA] has suggested that that should be
28 measured by the basis of what I have to conclude, was an
unintended benefit to creditors by the [BAPCPA] changes
that they would not have had under state law

29 II. ISSUES

30 Did Appellee have standing to seek voluntary dismissal of his
31 chapter 13 petition under § 1307(c)?

32 Did the bankruptcy court err in granting Appellee's motion to
33 dismiss?

34 III. STANDARD OF REVIEW

35 We review the issue of standing de novo. Arakaki v. Lingle,
36 477 F.3d 1048, 1056 (9th Cir. 2007), citing Bruce v. United
37 States, 759 F.2d 755, 758 (9th Cir. 1985).

1 We review an order dismissing a chapter 13 bankruptcy case
2 for abuse of discretion. Armstrong v. Rushton (In re Armstrong),
3 303 B.R. 213, 218 (10th Cir. BAP 2004). "A bankruptcy court
4 necessarily abuses its discretion if it bases its ruling on an
5 erroneous view of the law. The Panel also finds an abuse of
6 discretion if it has a definite and firm conviction the court
7 below committed a clear error of judgment in the conclusion it
8 reached." Lopez v. Specialty Restaurants Corp. (In re Lopez), 283
9 B.R. 22, 26 (9th Cir. BAP 2002) quoting Palm v. Klapperman (In re
10 Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001), aff'd 315 F.3d 1121
11 (9th Cir. 2003) (citations and quotation marks omitted).

12 IV. DISCUSSION

13 1. Standing

14 Appellant contends that the bankruptcy court erred in
15 granting Appellee's motion to dismiss because Appellee lacked
16 standing to request such relief. Dismissal of a Chapter 13 case
17 is governed by § 1307 of the Code. This section provides, in
18 relevant part:

19 (a) The debtor may convert a case under this chapter to
20 a case under chapter 7 of this title at any time. Any
21 waiver of the right to convert under this subsection is
22 unenforceable.

22 (b) On request of the debtor at any time, if the case
23 has not been converted under section 706, 1112, or 1208
24 of this title, the court shall dismiss a case under this
25 chapter. Any waiver of the right to dismiss under this
26 subsection is unenforceable.

25 (c) Except as provided in subsection (e) of this
26 section, on request of a party in interest or the United
27 States trustee and after notice and a hearing, the court
28 may convert a case under this chapter to a case under
chapter 7 of this title, or may dismiss a case under
this chapter, whichever is in the best interests of
creditors and the estate, for cause. . . .

1 Appellee's Motion to Dismiss did not cite the statute under
2 which Appellee sought dismissal. However, because his case had
3 been converted from a chapter 7 case, Appellee concedes he was not
4 entitled to automatic dismissal under § 1307(b). Consequently, it
5 appears that Appellee sought dismissal under § 1307(c), which
6 allows the court to dismiss or convert a case, after notice and a
7 hearing, on request of the United States Trustee or "a party in
8 interest."

9 Appellant argues that Appellee is not a "party in interest"
10 and has no standing to seek dismissal of his case under § 1307(c).
11 As a preliminary matter, it does not appear that Appellant raised
12 this issue at the trial level. In his memorandum in support of
13 his objection to Appellee's Motion to Dismiss, Appellant noted
14 that Appellee had not cited any statutory authority in support of
15 his motion and that he did not have an absolute right to dismiss
16 under § 1307(b). This same issue was raised in oral argument
17 before the court. However, Appellant did not challenge Appellee's
18 right to seek dismissal under § 1307(c). Nonetheless, this matter
19 is properly before the Panel as standing is a "jurisdictional
20 issue[] that may be raised at any time, even for the first time on
21 appeal." DBSI/TRI IV Ltd. P'ship v. United States, 465 F.3d 1031,
22 1038 (9th Cir. 2006).

23 In support of his argument that the Appellee lacks standing
24 to bring a motion under § 1307(c) Appellant reasons that
25 "[a]lthough 11 U.S.C. § 101 fails to define a 'party in interest,'
26 the lack of specific inclusion in § 1307(c) eliminates the debtor
27 as an eligible party. The debtor is specifically included in
28 those other subsections of § 1307 that he has standing to invoke."

1 Appellant's Opening Br. at 8. Although not clearly stated, his
2 argument is, presumably, that because the debtor is specifically
3 listed as a party who may seek dismissal or conversion under
4 § 1307(a) or (b), the fact that the debtor is not specifically
5 listed in § 1307(c) is evidence of the fact that Congress did not
6 intend that a debtor have authority to seek dismissal under this
7 subsection.

8 Appellant's argument ignores the fact that the debtor is the
9 only party who may bring a motion under § 1307(a) or § 1307(b).
10 Therefore, the debtor would necessarily have to be specifically
11 listed as a party who could bring a motion under either of those
12 two sections. By contrast, a request to dismiss or convert under
13 § 1307(c) may be made by any party in interest or by the United
14 States Trustee.

15 Although the term "party in interest" appears many times
16 in the Bankruptcy Code, it is not defined in § 101. It
17 has been described as "an expandable concept depending
18 on the particular factual context in which it is
19 applied." In re River Bend-Oxford Associates, 114 B.R.
20 111, 113 (Bankr. D. Md. 1990). In various contexts, a
21 "party in interest" has been held to be one who has an
22 actual pecuniary interest in the case, Kapp v.
Naturelle, Inc., 611 F.2d 703, 706 (8th Cir. 1979);
23 anyone who has a practical stake in the outcome of a
24 case, In re Amatex Corporation, 755 F.2d 1034, 1041-44
25 (3rd Cir. 1985); and those who will be impacted in any
26 significant way in the case, In re Johns-Manville Corp.,
27 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984).

23 In re Cowan, 235 B.R. 912, 915 (Bankr. W.D. Mo. 1999). Clearly,
24 the debtor has a pecuniary interest and practical stake in whether
25 his own bankruptcy case should be dismissed and is, accordingly, a
26 party in interest in that proceeding.

27 Appellant contends that allowing a debtor in a case converted
28 from chapter 7 to bring a motion to dismiss under § 1307(c) would

1 contravene the Code. He argues that “[a] debtor should not be
2 permitted to do in two steps (conversion, then dismissal motion)
3 that which the debtor could not accomplish in one step (motion to
4 voluntarily dismiss a Chapter 7 case).” Appellant’s Opening Br.
5 at 9. Appellant is correct in his assertion that a chapter 13
6 debtor in a converted case should not be able to accomplish that
7 which he could not accomplish in a chapter 7, that is, automatic
8 dismissal of his case without court intervention or oversight.
9 However, allowing a debtor to bring a motion to dismiss under
10 § 1307(c) does not guarantee dismissal as such motion may only be
11 granted after notice and a hearing. See Collier on Bankruptcy,
12 15th Ed. ¶ 1307.03[2] page 1307-9 (“There is no absolute right on
13 the part of the debtor to obtain a dismissal of a case converted
14 to chapter 13 from chapter 7, chapter 11, or chapter 12. Instead,
15 the debtor, or any other party in interest, may request dismissal
16 or conversion of the chapter 13 case pursuant to section 1307(c)
17 or (d). The court, after notice and a hearing, may either
18 dismiss, convert the case to chapter 7 or convert the case to
19 chapter 11 or chapter 12 prior to confirmation of a chapter 13
20 plan.”)

21 Appellee is a “party in interest” within the meaning of
22 § 1307(c) and had standing to bring a motion to dismiss his case
23 under that section.

24 2. Did the Court Abuse its Discretion in Granting Appellee’s
25 Motion to Dismiss Case?

26 Section 1307(c) provides that upon request of the United
27 States Trustee or a party in interest, the court may, for cause,
28 dismiss or convert a chapter 13 case “whichever is in the best

1 interest of creditors and the estate." In this case the equity in
2 the Property might have been available to Appellee's creditors had
3 his Motion to Dismiss been denied. That equity would not be
4 available to the creditors outside bankruptcy. Further, if the
5 Appellee were to file another bankruptcy, the equity that may have
6 been available in this case would no longer be available, at least
7 up to the \$150,000 Arizona homestead exemption. The court
8 nonetheless granted Appellee's Motion to Dismiss because it found
9 that compelling Appellee to remain in bankruptcy would result in
10 "an unintended benefit to creditors by the [BAPCPA] changes that
11 they would not have had under state law." The issue before this
12 panel is whether the bankruptcy court should have considered this
13 factor in deciding whether to grant Appellee's Motion to Dismiss.

14 "When interpreting a statute, '[o]ur first step . . . is to
15 determine whether the language at issue has a plain and
16 unambiguous meaning with regard to the particular dispute in the
17 case.' Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). This
18 court's inquiry must end if the statutory language is unambiguous
19 and 'the statutory scheme is coherent and consistent.' United
20 States v. Ron Pair Enters. Inc. 489 U.S. 235, 240 (1989)."
21 Cellular 101, Inc. v. Channel Commnc'n Inc. (In re Cellular 101,
22 Inc.), 377 F.3d 1092, 1098 (9th Cir. 2004) (Brunetti, J.,
23 concurring). "If the statutory language is unambiguous, in the
24 absence of a clearly expressed legislative intent to the contrary,
25 that language must ordinarily be regarded as conclusive." United
26 States v. Buckland, 289 F.3d 558, 564-65 (9th Cir. 2002) (en banc)
27 quoting Reves v. Ernst & Young, 507 U.S. 170, 177 (1993).

28 Section 1307(c) provides that when making the determination

1 as to whether to grant a motion to dismiss or convert under this
2 subsection, the bankruptcy court must be guided by what is in the
3 best interest of the estate and creditors. This language is clear
4 and unambiguous. Moreover, the statute does not instruct the
5 bankruptcy court to consider the best interests of the debtor in
6 deciding whether to dismiss a chapter 13 case. The bankruptcy
7 court was not, therefore, free to look behind that language to
8 determine whether, in his opinion, the result reached by
9 application of the plain language was consistent with the intent
10 of the statute.

11 It is clear that Appellee's creditors may fare better if
12 Appellee's case remains open. It is equally clear that the timing
13 of Appellee's filing of his bankruptcy case was flawed. However,
14 Appellee voluntarily sought the protection of the bankruptcy
15 court. In doing so he pledged all of his non-exempt assets toward
16 payment of his unsecured pre-petition debts. While Appellee may
17 have made a tactical error in filing his petition before he had
18 resided in Arizona for the minimum time required to enable him to
19 claim exemptions available under Arizona law, there is nothing in
20 the language of § 1307(c) or the legislative history of BAPCPA
21 that indicates that the benefit afforded Appellee's creditors
22 under § 522(b)(3)(A) was unintended.

23 Under § 1307(c) it is not the province of the court to shield
24 a debtor from the consequences of his own actions, however
25 unfortunate, at the expense of his creditors. Section 1307(c)
26 unambiguously required that the trial court consider only the
27 interests of creditors and the estate in determining whether to
28 grant Appellee's motion to dismiss. It did not. The trial court

1 therefore erred in granting Appellee's Motion to Dismiss.

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V. CONCLUSION

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As the debtor, Appellee had a pecuniary interest in whether his bankruptcy case continued or was dismissed. Appellee was, therefore, a "party in interest" for purposes of § 1307(c) and had standing to request dismissal. However, the bankruptcy court erred when it granted Appellee's motion, since dismissal was not in the best interests of Appellee's creditors or the bankruptcy estate. As a result, we REVERSE.

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