

AUG 21 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-09-1099-RMoPa
)		
7	FISHER FINANCIAL AND)	BK. No.	LA 08-24688-BR
	INVESTMENT LLC,)		
8)	Adv. No.	LA 08-01869-BR
	Debtor.)		
9	_____)		
)		
10	ROBERT E. SCOTT,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	NATIONAL INSURANCE &)		
	ASSET PROTECTION, INC.;)		
14	SUE KRUSE,)		
)		
15	Appellees.)		
	_____)		

Argued and Submitted on July 31, 2009
at Pasadena, California

Filed - August 21, 2009

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Before: RIEGLE,² MONTALI and PAPPAS, Bankruptcy Judges.

¹This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

²Hon. Linda B. Riegler, U.S. Bankruptcy Judge for the District of Nevada, sitting by designation.

1 Attorney Robert Scott ("Scott") appeals sanctions
2 imposed by the bankruptcy court against him for removing a
3 state court action to bankruptcy court. We **AFFIRM**.

4 **FACTS**

5 On September 9, 2008, Fisher Financial and Investment
6 LLC ("FFI") filed a voluntary petition for relief under
7 chapter 7 of the Bankruptcy Code. On November 7, 2008, Scott
8 signed and filed a notice to remove a California state court
9 action brought by National Insurance & Asset Protection
10 ("NIAP") and Sue Kruse ("Kruse") against FFI, Michael Fisher
11 ("Fisher"), R.D. Financial Services ("RDFS") and others for
12 the alleged diversion of assets and trade secrets. Scott
13 filed the notice of removal on behalf of Fisher and RDFS,
14 who were not debtors in the bankruptcy case.

15 On the day Scott filed the notice of removal there were
16 a number of pending motions that were scheduled to be heard
17 in the California state court action. One was a motion to
18 compel discovery responses and a request for sanctions that
19 NIAP had filed against Fisher and RDFS. This motion was
20 scheduled to be heard in six days, yet neither Fisher nor
21 RDFS had filed any opposition to it. In addition, two
22 demurrers filed by NIAP and Kruse, and a motion to strike
23 filed by NIAP, were all scheduled to be heard in
24 approximately one month on December 4, 2008. The trial in
25 the state court lawsuit was set to begin in less than three
26 months on January 26, 2009. The discovery cut-off date for
27 the trial was seven weeks away on December 26, 2008. All of
28 these hearings, as well as the trial, were taken off

1 calendar as a result of Scott's filing the notice of
2 removal.

3 The bankruptcy court issued an order to show cause on
4 November 14, 2008 in response to the removal of the state
5 court action which directed Scott "to show cause why the
6 Court should not abstain and remand the case pursuant to 28
7 U.S.C. Section 1334(c) and 1452(b)."

8 NIAP filed a motion for remand on November 18, 2008.
9 NIAP argued that the removal was improper and that it had
10 been filed "to delay the proper and timely adjudication of
11 plaintiff [NIAP's] claims." Kruse filed a joinder in NIAP's
12 remand motion. Scott filed an opposition to the motion on
13 behalf of Fisher and RDFS, arguing that removal was
14 appropriate because the state court complaint alleged a
15 claim to assets of the estate.

16 The day after NIAP filed its motion to remand, on
17 November 19, 2008, NIAP sent a letter to Scott accusing him
18 of filing an "inappropriate notice of removal" and
19 explaining that it intended to seek sanctions under Fed. R.
20 Bankr. P. 9011³ for its fees and expenses for responding to
21 the notice. NIAP warned Scott that he had "temporarily
22 delayed" the state court action, and that unless he
23 stipulated to immediately remand the action back to state
24 court NIAP would "seek sanctions from both you and your
25 firm, and your clients" NIAP served its motion for
26

27 ³Unless specified otherwise, all references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal
Rules of Bankruptcy Procedure, Rules 1001-9037.

1 sanctions on Scott on November 20, 2008.

2 On November 25, 2008, Kruse also sent a letter to Scott
3 saying that the notice of removal was improper. She informed
4 him that unless Fisher and RDFS stipulated to remand the
5 action to state court she would file a joinder in NIAP's
6 motion for sanctions. Kruse warned Scott that she intended
7 to seek sanctions against Scott and his firm.

8 On December 12, 2008, NIAP filed a motion for sanctions
9 against Scott, Scott's firm, Fisher, and RDFS under Rule
10 9011. In the motion, NIAP accused Scott of filing the notice
11 of removal to delay the state court lawsuit, saying that
12 Scott's notice of removal was "purposefully calculated to
13 delay the timely adjudication of NIAP's claims in the State
14 Court Action." Later, in its reply brief to Scott's
15 opposition, NIAP specifically requested that the court
16 invoke its inherent authority to sanction Scott. NIAP argued
17 "the Court should grant NIAP's motion for sanctions under
18 Bankruptcy Rule 9011 or under its inherent power." NIAP
19 requested \$11,400 for attorney's fees as a sanction, and it
20 supplied a declaration of its counsel in support of the
21 fees.

22 Scott opposed the sanctions motion. He argued in his
23 opposition that NIAP and Kruse had not satisfied the 21-day
24 safe harbor provision found in Rule 9011.⁴ Scott contended

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26 ⁴Rule 9011 requires that notice be given to the
27 offending party 21 days before filing a motion for sanctions
28 with the court. The safe harbor provision of Rule
9011(c) (1) (A) provides in relevant part:

(continued...)

1 that NIAP shorted the 21-day period because it failed to add
2 the 3-day extension for service by mail in Rule 9006(f).

3 The remand hearing was held on December 16, 2008. The
4 bankruptcy court found that it lacked jurisdiction. It
5 remanded the action back to state court, stating that
6 "[t]his clearly should never have been here in bankruptcy
7 court"

8 Kruse served Scott with her joinder in NIAP's sanctions
9 motion on December 18, 2008. This was two days after the
10 remand hearing occurred. Kruse filed her joinder on January
11 9, 2009. Like NIAP, Kruse asked for her attorney's fees as a
12 sanction, and she supplied a declaration of her attorney in
13 support of them.

14 At the sanctions hearing on February 3, 2009, the
15 bankruptcy court determined that the notice of removal was
16 both frivolous under Rule 9011 and that it had been filed
17 for an improper purpose. It was frivolous, the court found,
18 because there was no objectively reasonable basis for
19 removal under 28 U.S.C. § 1452. Furthermore, the action had
20 no conceivable effect on the bankruptcy estate because the
21 debtor had represented that it had no assets to distribute,
22

23 ⁴(...continued)

24 The motion for sanctions may not be
25 filed with or presented to the court
26 unless, within 21 days after service of
27 the motion (or such other period as the
28 court may prescribe), the challenged
paper, claim, defense, contention,
allegation, or denial is not withdrawn
or appropriately corrected

1 possessed no chose in action, and had brought no cross-
2 complaint in the state court. The court found the notice of
3 removal was filed for an improper purpose because it had
4 been filed approximately two months after the debtor's
5 petition was filed, and only days before the hearing on a
6 sanctions motion against Fisher and RDFS for which they had
7 not yet filed oppositions. The removal was orchestrated not
8 by the debtor, but by non-debtors. Furthermore, Scott had
9 failed to attach enough state court papers to the notice of
10 removal to permit the bankruptcy court to properly evaluate
11 it.

12 The court also found that the 21-day safe harbor period
13 in Rule 9011 had been satisfied. It concluded that the 3-day
14 extension for mailing in Rule 9006(f) does not apply to Rule
15 9011, but that even it did, Scott had waived the benefit of
16 the safe harbor provision by failing to withdraw the notice
17 and by arguing against remand at the hearing on December 16,
18 2008.

19 The court invoked a second authority to sanction Scott.
20 As an alternative to its sanction under Rule 9011, the
21 bankruptcy court sanctioned Scott pursuant to its inherent
22 sanctioning powers for improperly removing the state court
23 action. In its order granting the sanctions motion entered
24 on March 13, 2009, the court stated that:

25 Based upon the facts and circumstances
26 as stated above, the Court finds
27 defendants and Mr. Scott improperly
28 removed the State Court Action. Thus,
under the Court's inherent power under
11 U.S.C. section 105(a), the Court
finds sanctions are warranted and
authorized.

1 The court imposed sanctions against Scott and his firm
2 in the amount of the attorney fees incurred by NIAP and
3 Kruse as a result of his filing the notice of removal. A
4 sanction of \$11,400 was imposed for NIAP's fees. Kruse was
5 awarded \$4,100 for her fees incurred as a result of the
6 removal.

7 Scott timely appealed the sanctions order.

8 JURISDICTION

9 The bankruptcy court had jurisdiction to award
10 sanctions under 28 U.S.C. §157(b)(1) and (b)(2)(A). This
11 panel has jurisdiction under 28 U.S.C. § 158(b). In re
12 Brooks-Hamilton, 400 B.R. 238, 245 (9th Cir. BAP 2009).

13 ISSUES

14 1. Whether the bankruptcy court abused its discretion
15 by imposing sanctions against Scott under its inherent
16 power.

17 2. Whether Scott's due process rights were violated.

18 STANDARDS OF REVIEW

19 The award of sanctions is reviewed for an abuse of
20 discretion. See Miller v. Cardinale (In re DeVille), 361
21 F.3d 539, 547 (9th Cir. 2004). A bankruptcy court abuses its
22 discretion if it bases its decision "on an erroneous view of
23 the law or on a clearly erroneous assessment of the
24 evidence." In re Brooks-Hamilton, 400 B.R. at 245 (citation
25 and quotation marks omitted). Due process challenges are
26 reviewed de novo. Price v. Lehtinen (In re Lehtinen), 564
27 F.3d 1052, 1058 (9th Cir. 2009), *petition for cert. filed*
28 (July 24, 2009). A trial court has "broad fact-finding

1 powers with respect to sanctions, and its findings warrant
2 great deference. . . ." Primus Auto. Fin. Serv., Inc. v.
3 Batarse, 115 F.3d 644, 649 (9th Cir. 1997) (citation and
4 quotation marks omitted).

5
6 ***The Court Did Not Abuse Its Discretion By Imposing
Sanctions Under Its Inherent Authority***

7 **A. Due Process**

8 The bankruptcy court awarded sanctions "under the
9 Court's inherent power under 11 U.S.C. § 105(a)."⁵ When a

10 _____
11 ⁵Section 105(a) provides:

12 The court may issue any order, process,
13 or judgment that is necessary or
14 appropriate to carry out the provisions
15 of this title. No provision of this
16 title providing for the raising of an
17 issue by a party in interest shall be
18 construed to preclude the court from,
sua sponte, taking any action or making
any determination necessary or
appropriate to enforce or implement
court orders or rules, or to prevent an
abuse of process.

19 Bankruptcy courts generally have the power to sanction
20 attorneys pursuant to (1) their civil contempt authority
21 under § 105(a); and (2) their inherent sanction authority.
22 In re Lehtinen, 564 F.3d at 1058, *petition for cert. filed*
23 *(July 24, 2009)*. The court's inherent authority to sanction
24 is recognized in § 105(a), Caldwell v. Unified Capital Corp.
25 (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir.
1996), but it differs from the court's civil contempt power
26 under § 105(a) and the two are not interchangeable. Knupfer
27 v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir.
2003). The powers differ in at least two ways. First, the
inherent power allows the court to sanction a broad range of
conduct, unlike the civil contempt authority, which permits
a court to remedy a violation of a specific order. *Id.*
Second, unlike the civil contempt authority, a court must

28 (continued...)

1 court invokes its inherent power to sanction, due process
2 requires that parties be given sufficient advance notice of
3 exactly what conduct is alleged to be sanctionable and that
4 they are accused of bad faith. Miller v. Cardinale (In re
5 DeVille), 361 F.3d 539 at 549. Scott was fully apprised of
6 both. He had sufficient notice that his conduct in causing
7 the removal of the state court action to the bankruptcy
8 court was claimed to be sanctionable and that he stood
9 accused of removing the action in order to delay it.

10 In its motion for sanctions NIAP specifically
11 identified the sanctionable act as Scott's "filing of an
12 improper notice of removal." NIAP fully described the facts
13 of the removal and Scott's conduct. Thus Scott was aware
14 that his conduct was alleged to be sanctionable.

15 Furthermore, in its motion NIAP accused Scott of
16 removing the state court action to bankruptcy court to delay
17 it. NIAP contended that Scott's removal was "purposefully
18 calculated to delay the timely adjudication of [NIAP's]
19 claims in the State Court Action." NIAP's counsel supplied
20 an affidavit describing the status of the proceedings in
21 state court when the notice of removal was filed and
22 pointing out that the removal "forced all existing hearings
23 in the state court action off calendar." Kruse echoed NIAP's

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26 ⁵(...continued)
27 make an explicit finding of bad faith or willful misconduct
28 before imposing sanctions under its inherent authority. In
re Lehtinen, 564 F.3d at 1058, *petition for cert. filed*
(July 24, 2009).

1 arguments in her joinder to NIAP's sanctions motion.⁶

2 Scott had other notice of NIAP's position. Before the
3 sanctions motion was even filed, on November 19, 2008, NIAP
4 sent a letter to Scott charging him with filing an
5 "inappropriate notice of removal." NIAP told Scott in the
6 letter that:

7 [W]e intend to file [a Rule 9011] motion
8 with the court and go forward with the
9 hearing to reimburse our client for the
10 fees and expenses incurred in responding
11 to the inappropriate notice of removal.
12 In so doing, the motion will seek
13 sanctions from both you and your firm,
14 and your clients on a joint and several
15 basis . . . While you and your clients
16 have temporarily delayed the prosecution
17 of the state court action, rest assured,
18 the prosecution will continue "

14 In addition, Scott was on notice that the propriety of
15 the removal was at issue in the bankruptcy court. The court
16 had issued a show cause order seven days after Scott filed
17 the notice of removal. The show cause order stated that
18 Scott was "to show cause why the Court should not abstain
19 and remand the case pursuant to 28 U.S.C. Section 1334(c)
20 and 1452(b)." Even more, at the remand hearing on December
21 16, 2008, which occurred 49 days prior to the sanctions
22 hearing, the bankruptcy court said this:

23 Because I must admit, the timing of
24 this is very difficult to ignore,
25 that there's about to be a sanctions
26 and suddenly - usually it's the debtor
27 that wants to remove an action.

27 ⁶Kruse, in her joinder, stated that she "joins in all
28 of the factual and legal arguments asserted by NIAP and
evidence submitted in support of its motion for sanctions."

1 It's pretty - red lights go on, all
2 the flashing in my head, when a non-debtor
3 removes the action. I get the impression
4 and pretty - it may be very well in
5 this case, there's something else
6 going on and it's not something that's
7 a good thing.

8 These comments by the court at least alluded to what Scott
9 had already been apprised of before the sanctions hearing by
10 (1) NIAP's motion for sanctions, (2) NIAP's letter of
11 November 19, 2008 warning of sanctions, and (3) Kruse's
12 joinder in NIAP's sanctions motion - namely, that Scott's
13 action in filing the notice of removal was alleged to be
14 sanctionable and that he stood accused of filing the notice
15 in order to delay the state court action.

16 Scott argues he was denied due process because the
17 bankruptcy court relied on its inherent power as the basis
18 for its sanctions without prior notice to him that it would
19 do so, and that he had no opportunity to respond. The record
20 shows otherwise.

21 NIAP specifically asked the court to invoke its
22 inherent powers to sanction Scott. In its reply to Scott's
23 opposition to the sanctions motion NIAP argued that "the
24 bankruptcy court may impose sanctions under 11 U.S.C.
25 section 105 and pursuant to its inherent authority," and
26 that "the Court should grant NIAP's motion for sanctions
27 under Bankruptcy Rule 9011 **or under its inherent power.**"
28 (Emphasis supplied.) In light of all of this prior notice,
29 Scott was not deprived of due process. See In re DeVille,
30 361 F.3d 539 (bankruptcy court's failure to specify, in
31 advance of a disciplinary proceeding, that its inherent

1 power was a basis for the proceeding did not violate due
2 process where court's prior orders to show cause fully
3 advised of the conduct charged and that bad faith was
4 alleged).

5 **B. Bad Faith**

6 Before imposing sanctions under its inherent authority,
7 a bankruptcy court must make a finding of "bad faith" or
8 "willful misconduct." In re Lehtinen, 564 F.3d at 1058,
9 *petition for cert. filed* (July 24, 2009) (citation and
10 quotation marks omitted). Explicit findings are unnecessary
11 where a court finds conduct tantamount to bad faith. Id. at
12 1061.

13 Although the court did not explicitly say that Scott's
14 removal was done in "bad faith" or that it was "willful," it
15 impliedly made these findings. The court found that Scott
16 filed the notice of removal in part to delay the California
17 state court action. At the sanctions hearing the court
18 labeled Scott's plan to remove the state court action to the
19 bankruptcy court as "outrageous," "without any basis
20 whatsoever," and done "for a totally improper motive." The
21 record supports these findings.

22 Scott filed his notice of removal only six days before
23 the state court was scheduled to hear a discovery sanctions
24 motion for which neither Fisher nor RDFS had yet filed
25 oppositions. NIAP and Kruse's demurrers were also scheduled
26 to be heard soon, and the trial in state court was less than
27 three months away. The result was that all of these
28 proceedings were taken off calendar because of the removal.

1 While the bankruptcy court made no express finding of bad
2 faith, the record contains ample evidence that Scott's
3 conduct in delaying the state court litigation was
4 tantamount to it. See Leon, M.D. v. IDX Sys. Corp., 464 F.3d
5 951, 961 (9th Cir. 2006) (a party demonstrates bad faith by
6 delaying or disrupting litigation) (citation and quotation
7 marks omitted).

8 **C. Appropriateness of the Sanction**

9 Scott appears to argue that the sanction was
10 unwarranted when he contends in his appeal brief that the
11 "removal was reasonable." He argues that the bankruptcy
12 court had "related to" jurisdiction because NIAP and Kruse's
13 complaint alleged a claim against the assets of the estate.

14 In the Ninth Circuit the test to determine whether a
15 civil proceeding is "related to" a bankruptcy case "is
16 whether the outcome of the proceeding could conceivably have
17 any effect on the estate being administered in bankruptcy."⁷
18 While the state court complaint alleged that Fisher was the
19 alter ego of FFI and RDFS, Scott's counsel admitted at the
20 sanctions hearing that the trustee had not filed a cross-
21 claim in the state court litigation. FFI had represented in
22 its bankruptcy schedules that it had no assets to
23 distribute. The California state court action dealt only

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25 ⁷Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455,
26 457 (9th Cir. 1988) (adopting the definition of "related to"
27 proceedings under Section 1334 from Pacor, Inc. v. Higgins,
28 743 F.2d 984 (3rd Cir.1984). 28 U.S.C. 1334(b) provides that
"the district courts shall have original but not exclusive
jurisdiction of all civil proceedings arising under title
11, or arising in or related to cases under title 11."

1 with state law claims, and the notice was filed not by the
2 debtor, but instead by two non-debtors. Furthermore, Scott
3 had failed to attach enough state court pleadings to the
4 notice of removal to permit the bankruptcy court to properly
5 evaluate it. Under these circumstances, we perceive no abuse
6 of discretion in the court's imposition of sanctions.

7 **CONCLUSION**

8 We affirm the bankruptcy court's decision to impose
9 sanctions under its inherent authority.⁸

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⁸Much of Scott's appeal brief addresses the court's sanction under Rule 9011 and whether or not NIAP and Kruse satisfied the 21-day safe harbor provision. But there is no need to reach these issues. The bankruptcy court imposed sanctions not only under Rule 9011, but pursuant to the court's inherent power as an alternative ground, and we may affirm the bankruptcy court's decision on any basis supported by the record. Vaught v. Scottsdale Healthcare Corp. Health Plan, 546 F.3d 620 (9th Cir. 2008).