NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1099-RMoPa
FISHER FINANCIAL AND INVESTMENT LLC,	BK. No. LA 08-24688-BR
Debtor.	Adv. No. LA 08-01869-BR
ROBERT E. SCOTT,	
Appellant,	
v.	**MEMORANDUM**[1]
NATIONAL INSURANCE & ASSET PROTECTION, INC.; SUE KRUSE,	
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.

[1]This 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.

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

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

FACTS

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

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

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

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

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

The day after NIAP filed its motion to remand, on November 19, 2008, NIAP sent a letter to Scott accusing him of filing an "inappropriate notice of removal" and explaining that it intended to seek sanctions under Fed. R. Bankr. P. 9011[3] for its fees and expenses for responding to the notice. NIAP warned Scott that he had "temporarily delayed" the state court action, and that unless he stipulated to immediately remand the action back to state court NIAP would "seek sanctions from both you and your firm, and your clients . . . ." NIAP served its motion for

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

sanctions on Scott on November 20, 2008.

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

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

Scott opposed the sanctions motion. He argued in his opposition that NIAP and Kruse had not satisfied the 21-day safe harbor provision found in Rule 9011.[4] Scott contended

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

(continued...)

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

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

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

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

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[4](...continued)

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

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

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

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

> Based upon the facts and circumstances as stated above, the Court finds defendants and Mr. Scott improperly 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.

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

Scott timely appealed the sanctions order.

JURISDICTION

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

ISSUES

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

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

STANDARDS OF REVIEW

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

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

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

A. Due Process

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

[5]Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be 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.

Bankruptcy courts generally have the power to sanction attorneys pursuant to (1) their civil contempt authority under § 105(a); and (2) their inherent sanction authority. In re Lehtinen, 564 F.3d at 1058, *petition for cert. filed* (July 24, 2009). The court's inherent authority to sanction is recognized in § 105(a), Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996), but it differs from the court's civil contempt power under § 105(a) and the two are not interchangeable. Knupfer 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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Bad Faith

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

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

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

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

C. Appropriateness of the Sanction

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

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

[7] Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988)(adopting the definition of "related to" proceedings under Section 1334 from Pacor, Inc. v. Higgins, 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."

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

CONCLUSION

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

[8]Much 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).