

MAR 13 2008

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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NOT FOR PUBLICATION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.	AZ-07-1358-KPaJu
		)		
7	RICHARD C. BRUMGARD; KAY	)	Bk. No.	02-04327
	BRUMGARD,	)		
8		)	Adv. No.	02-00117
	Debtors.	)		
9	_____	)		
		)		
10	JOHN R. YOUNG; MARGARET ANN	)		
	YOUNG; FREDERICK G. GAMBLE,	)		
11		)		
	Appellants,	)		
12		)		
	v.	)	<b>MEMORANDUM*</b>	
13		)		
	WATERFALL, ECONOMIDIS,	)		
14	CALDWELL, HANSHAW &	)		
	VILLAMANA, P.C.,	)		
15		)		
	Appellee.	)		
16	_____	)		

Argued and Submitted on February 21, 2008  
at Phoenix, Arizona

Filed - March 13, 2008

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

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS, and JURY, Bankruptcy Judges.

\*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.

1 This is the second appeal by the same appellants of an order  
2 awarding attorneys' fees as sanctions to appellee/debtors'  
3 bankruptcy counsel. In the first appeal, this Panel affirmed the  
4 finding of bad faith but vacated the amount of the prior  
5 \$34,116.50 sanctions award as overbroad and remanded the issue  
6 for recalculation. Based on the revised fee application  
7 submitted by debtors' bankruptcy counsel, the court awarded  
8 \$13,255.00 to debtors' bankruptcy counsel. We AFFIRM.

9  
10 FACTS

11 On June 7, 2007, this Panel entered a memorandum decision on  
12 the first sanctions appeal (BAP Nos. AZ-06-1238 & 1243) ("First  
13 Appeal"), in which the bankruptcy court imposed sanctions against  
14 appellants (creditor John Young and his attorney, Frederick  
15 Gamble) for years of misrepresenting to the bankruptcy court the  
16 time of ownership of an unavoidable judgment (the Pearce  
17 Judgment) against the debtors. On review, the Panel determined,  
18 in part, that the attorneys' fees awarded as a sanction were too  
19 broad. Thus, it vacated the sanctions order concerning the award  
20 of attorneys' fees and remanded the issue for further findings as  
21 to what amount of the fees represented litigation costs and  
22 expenses incurred in connection with the Pearce Judgment.

23 After appellee/debtors' bankruptcy counsel (Waterfall,  
24 Economidis, Caldwell, Hanshaw & Villamana) and debtors' state  
25 court counsel (Thomas Cole) resubmitted fee applications for  
26 sanctions based on the Panel's decision and appellants responded,  
27 the bankruptcy court issued its new sanctions order on September  
28

1 11, 2007, awarding \$13,255 to appellee in attorneys' fees and \$0  
2 to Cole.

3 Appellants timely appealed, requesting review of the award  
4 in favor of appellee.<sup>1</sup>

5 The following recaps the relevant facts relating to the  
6 sanctions issue in the underlying bankruptcy case and the Pearce  
7 Judgment, taken from the Panel's June 7, 2007, memorandum  
8 decision which presents the facts in further detail.

9 In September 2002, debtors Richard and Kay Brumgard filed  
10 for chapter 13 bankruptcy relief as a result of state court  
11 litigation between debtors, appellants/creditors John and  
12 Margaret Ann Young, and the Young Entities.<sup>2</sup> The Youngs filed a  
13 proof of claim in the case partially based on their asserted  
14 ownership interest in the Pearce Judgment.<sup>3</sup>

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15  
16 <sup>1</sup>The bankruptcy court's ruling with regard to the fees of  
debtors' state counsel was not appealed.

17  
18 <sup>2</sup>The "Young Entities" collectively refer to John Young and  
Margaret Ann Young, the Young Builders, Inc. Pension and Profit  
19 Sharing Trust, and Young Builders, Inc. ("YBI").

20  
21 <sup>3</sup>See BAP Mem. Decision at 1-11 (June 7, 2007) for a detailed  
account of the facts relating to the Pearce Judgment and its  
relation to the Youngs and the Young Entities' bankruptcy cases.

22 The Pearce Judgment arises from a vacant parcel of land that  
Debtors purchased in November 1985 for \$75,000 from John Pearce  
and Barbara Pearce, financed by a down payment of \$20,000 and a  
23 carry back note to the Pearces for the balance ("Pearce Note").  
After a senior lienholder foreclosed against the property,  
24 rendering the Pearce Note unsecured, the Pearces initiated a  
lawsuit against debtors. The state court granted the Pearce  
25 Judgment of \$48,052.82, which was recorded on April 3, 1990.

26 YBI and another company subsequently purchased the Pearce  
Judgment from the Pearces in September 1990. At the time of  
27 purchase, YBI was a shell company which borrowed funds from the  
Youngs in order to make the purchase.

28 (continued...)

1 The Pearce Judgment is important to the parties because it  
2 is secured by a deed of trust and cannot be avoided under state  
3 or federal law as impairing the debtors' homestead exemption. If  
4 the Pearce Judgment is enforceable, any exemption right that the  
5 debtors might have to the mini-storage warehouse that the debtors  
6 built on the property or the proceeds from its sale would be  
7 eliminated. The Youngs and Gamble had previously asserted that  
8 the Youngs had owned the Pearce Judgment since at least 1995 when  
9 they filed for chapter 13 bankruptcy relief, although they later  
10 admitted that the Pearce Judgment had not been transferred to the  
11 Youngs until 2002.

12 Summary judgment motions were filed by both sides regarding  
13 the enforceability of the Pearce Judgment. In addition to ruling  
14 on the motions after consideration of all the evidence presented  
15 at an evidentiary hearing and post-hearing briefs, the court  
16 entered its memorandum decision on September 1, 2005.

17 After obtaining information about the assignment of  
18 judgments including the Pearce Judgment from the Youngs to their  
19

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20 <sup>3</sup>(...continued)

21 In September 1994 and again in October 1999, Young filed  
22 renewal affidavits for the Pearce Judgment, under the "mistaken  
23 belief" that he had obtained ownership of the Pearce Judgment  
24 through YBI's 1988 partial liquidation. However, it was not  
25 until 2002, when YBI distributed all of its assets to the Youngs,  
26 that the Pearce Judgment actually was transferred to the Youngs.

27 From the period of 1990 to 1995, the Youngs and the Young  
28 Entities filed chapter 11 and 13 bankruptcy cases, in which the  
Youngs were untruthful about the ownership of the Pearce  
Judgment. After the Youngs' chapter 13 plan was confirmed in  
January 1996, the Youngs "irrevocably" assigned three judgments,  
including the Pearce Judgment, to their attorney Gamble as  
payment for his legal services.

1 attorney Gamble, the court entered sanctions against the Youngs  
2 and Gamble for engaging in wrongful conduct by "intentionally and  
3 in bad faith failing to disclose the existence of [the judgments  
4 including the Pearce Judgment] and, therefore, concealing assets  
5 of the Youngs' Chapter 13 estate and probably committing fraud on  
6 the court." Mem. Decision, App. 1 at 12 (Sept. 1, 2005).

7 The memorandum decision determined that a further hearing  
8 was warranted to consider the imposition of sanctions against  
9 appellants. Specifically, the court expressed concern about  
10 certain inconsistencies in Young's testimony regarding the  
11 ownership of the Pearce Judgment, including assertions made in  
12 previous bankruptcy cases filed by the Young Entities, in  
13 judgment renewal affidavits, and in pleadings filed in the  
14 pending bankruptcy case.

15 On September 1, 2005, the bankruptcy court issued an order  
16 to show cause why sanctions should not be entered against  
17 appellants for misrepresenting the ownership of the Pearce  
18 Judgment and deed of trust in debtors' case.

19 After an evidentiary hearing on January 31, 2006, the  
20 bankruptcy court determined in its memorandum decision entered on  
21 June 2, 2006, that the misrepresentation of ownership constituted  
22 the type of bad faith conduct which warranted the imposition of  
23 sanctions. The bankruptcy court then imposed sanctions pursuant  
24 to its inherent authority.<sup>4</sup> It ordered the Youngs to pay one-  
25 third and Gamble to pay two-thirds of debtors' reasonable

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26  
27 <sup>4</sup>See Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991);  
28 Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir.  
2003); Caldwell v. Unified Capital Corp. (In re Rainbow Magazine,  
Inc.), 77 F.3d 278, 283-84 (9th Cir. 1996).

1 attorneys' fees and costs incurred after July 8, 2004 in  
2 litigating issues before the court.

3 Affidavits and fee applications were submitted by the  
4 appellee and debtors' state court attorney, requesting \$43,496.50  
5 in attorneys' fees and costs. Appellants objected, claiming the  
6 amounts were excessive and did not comply with the laws governing  
7 an award of attorneys' fees and costs as a sanction.

8 On June 26, 2006, the bankruptcy court assessed sanctions  
9 against appellants, awarding \$34,116.50 in attorneys' fees and  
10 costs, without regard to whether the fees and costs were incurred  
11 in connection with the issue of ownership of the Pearce Judgment.  
12 The court's stated justification was that "[t]he fee award [was]  
13 intended to be a sanction for bad-faith litigation conduct and  
14 is, therefore, not limited to the time spent responding solely to  
15 claims about the ownership of the Pearce Judgment." Mem.  
16 Decision Regarding Att'ys Fees Award at 2 (June 26, 2006).

17 Appellants timely appealed to this Panel ("First Appeal").  
18 On review, the Panel sustained the bankruptcy court's findings of  
19 bad faith and imposition of sanctions, but determined that the  
20 nature of the sanctions in the amount of attorneys' fees awarded  
21 was too broad. In its memorandum decision dated June 7, 2007, the  
22 Panel stated:

23 While it is true that the sanction need not be limited  
24 to the time spent responding to claims concerning the  
25 ownership of the Pearce Judgment, the sanction cannot  
26 be so broad as to provide for payment of all of  
27 Debtors' attorneys' fees, whether related to issues  
28 surrounding the Pearce Judgment or not. To fully  
compensate Debtors for the sanctionable conduct, they  
need only be provided an award of attorneys' fees that  
reflects litigation costs associated with the Pearce  
Judgment.

1 BAP Mem. Decision at 18:21-28 (June 7, 2007) (emphasis in  
2 original).

3 Thus, in part, the Panel's memorandum decision "VACATE[D]  
4 the sanctions orders concerning the award of attorneys' fees and  
5 REMAND[ED] the issue for further findings as to what amount of  
6 the fees represented litigation costs and expenses incurred in  
7 connection with the Pearce Judgment."<sup>5</sup> BAP Mem. Decision at  
8 19:12-16 (June 7, 2007).

9 Upon remand to the bankruptcy court and a status hearing in  
10 which the court directed appellee and debtors' state court  
11 counsel to resubmit fee applications for sanctions based on the  
12 Panel's decision, the appellee and debtors' state court counsel  
13 filed a revised application for attorneys' fees. Appellee sought  
14 \$25,483 in fees and debtors' state counsel sought \$4,620 in fees.  
15 In his declaration, appellee stated that, because "it was not  
16 indicated that there was a date on which fees on the Pearce  
17 issues were cut off," he included "more such fees incurred beyond  
18 the first statement submitted," for the court's consideration.<sup>6</sup>  
19 Revised Decl. of Debtors' Legal Fees and Costs at 2 ¶ 3.

20 Appellants responded, arguing that the appellee's allocation  
21 of fees to the ownership of the Pearce Judgment issue did not

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22  
23 <sup>5</sup>We note that the Panel's June 7, 2007, memorandum decision  
24 at 19:12-16 does not include the words "ownership of" the Pearce  
25 Judgment, as the appellants stated in their briefs and at oral  
26 argument. Thus, the argument that the bankruptcy court offended  
27 this Panel's prior mandate lacks merit.

28 <sup>6</sup>Appellee's revised fee application was composed of \$15,458  
sought in the original fee application, which covered the period  
from July 8, 2004, through June 12, 2006, plus an additional  
\$10,025, which covered the period from June 13, 2006, through  
January 18, 2007, for a combined total of \$25,483.

1 reflect the actual time spent on that issue; the allocations in  
2 the fee applications did not comply with the Panel's memorandum  
3 decision; and no fees should be awarded for appellee's  
4 participation in the sanction hearing that occurred on January  
5 31, 2006.

6 After reviewing the revised fee applications and appellants'  
7 response without an evidentiary hearing, on September 11, 2007,  
8 the bankruptcy court ruled:

9 that the [appellants'] argument that the fees be  
10 allocated solely as a percentage of time spent at  
11 hearings or in pleadings on the issue of the Pearce  
12 Deed of Trust ownership does not properly reflect the  
13 actual amount of time devoted by counsel on the issue  
14 which was necessarily intertwined with the presentation  
15 of evidence and argument on the many other issues in  
16 dispute . . . .

17 Mem. Decision Regarding Att'ys Fees Sanctions at 1:20.5-27.5  
18 (Sept. 11, 2007).

19 The bankruptcy court then issued its new sanctions order,  
20 determining that no fees can be awarded prior to July 7, 2004, or  
21 after June 12, 2006. Thus, the court awarded the reduced amount  
22 of \$13,255 to appellee in attorneys' fees and \$0 to debtors'  
23 state court counsel.

24 Appellants' timely appeal of the \$13,255 attorneys' fee  
25 award to appellee ensued.

#### 26 JURISDICTION

27 The bankruptcy court had jurisdiction via 28 U.S.C.  
28 §§ 157(b)(2) and 1334. We have jurisdiction under 28 U.S.C.  
§ 158(a)(1).



1   ISSUE

2           Whether the bankruptcy court complied with this Panel’s June  
3 7, 2007, memorandum decision when the court ordered appellants to  
4 pay \$13,255 in attorneys’ fees to appellee as sanctions.

5  
6   STANDARD OF REVIEW

7           A bankruptcy court’s award of sanctions is reviewed for an  
8 abuse of discretion. Miller v. Cardinale (In re DeVille), 361  
9 F.3d 539, 547 (9th Cir. 2004). We also review a bankruptcy  
10 court’s decision regarding the proper amount of legal fees to be  
11 awarded for an abuse of discretion. Law Offices of David A.  
12 Boone v. Derham-Burk (In re Eliapo), 468 F.3d 592, 596 (9th Cir.  
13 2006).

14           An abuse of discretion is found if the bankruptcy court  
15 bases its decision on an erroneous view of the law or clearly  
16 erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496  
17 U.S. 384, 405 (1990). Otherwise, we will reverse only if we have  
18 a definite and firm conviction that there was a clear error of  
19 judgment in the conclusion reached. Bartee v. Ainsworth (In re  
20 Bartee), 317 B.R. 362, 364 (9th Cir. BAP 2004).

21           With respect to sanctions, a bankruptcy court’s factual  
22 findings are given great deference. F.J. Hanshaw Enters., Inc.  
23 v. Emerald River Dev., Inc., 244 F.3d 1128, 1135 (9th Cir. 2001).

24  
25   DISCUSSION

26           In the First Appeal, we ruled that the record adequately  
27 supported the bankruptcy court’s finding of bad faith sufficient  
28 to warrant imposition of sanctions. However, as to the nature of

1 the sanctions, we vacated the bankruptcy court's sanctions orders  
2 concerning the award of attorneys' fees and remanded the issue  
3 for further findings to determine the amount of fees representing  
4 litigation costs and expenses incurred in connection with the  
5 Pearce Judgment.

6 Appellee filed a revised application for attorneys' fees  
7 that adjusted its fees to the extent attributable to the Pearce  
8 Judgment issues and proceedings. The appellee also included fee  
9 amounts beyond the original statement submitted for the court's  
10 consideration. Appellee averred:

11 6. This was not an easy task, but I did the best I  
12 could after reviewing the proceedings and concluding  
13 that, while there were other issues involved, which I  
14 excluded, the Pearce Judgment issues were substantial  
15 in comparison to the other issues, and the Pearce  
16 Judgment remained at the center of the proceedings  
before this court.

7. On this basis, roughly half of the proceedings  
prior to the appeals can be attributed to the Pearce  
Judgment issues, which were what really drove the  
proceedings along.

17 Revised Decl. of Debtors' Legal Fees and Costs at 2 ¶¶ 6 & 7  
18 (Aug. 6, 2007).

19 Making similar arguments in their response to the revised  
20 application and in their opening brief, appellants contend that  
21 the appellee's calculation of fees is incorrect and arbitrary  
22 because calculating the percentage of actual time devoted to the  
23 ownership of the Pearce Judgment in the hearings or in the  
24 pleadings reveals that minimal time was spent on the issue.  
25 Appellants argue that this does not comply with the Panel's  
26 memorandum decision in the First Appeal or the bankruptcy court's  
27 subsequent instruction to calculate the portion of fees incurred  
28 in connection with the Pearce Judgment. Furthermore, the

1 appellants contend that the trial court's interpretation of the  
2 Panel's decision in the First Appeal was incorrect because it  
3 based the attorneys' fees award on arbitrary allocations.

4 On the other hand, appellee contends that the sanctions  
5 award calculation is correct because the Pearce Judgment is at  
6 the heart of the disputes and litigation between the parties and  
7 it has spawned additional side issues associated with the  
8 debtors. Thus, the Pearce Judgment issue was intertwined with  
9 the many other issues in the case. Appellee admits that the  
10 process of calculating the fees incurred in connection with the  
11 Pearce Judgment is not an exact science, but that he made a  
12 sincere effort to figure out the appropriate fee award under the  
13 Panel's memorandum decision in the First Appeal.

14 Appellee further argues that, even though the sanctions  
15 award of \$13,255 is arguably too low (given that the original  
16 sanction of \$34,116.50 was already reduced to \$13,255 pursuant to  
17 the First Appeal by the bankruptcy court), the appellants are now  
18 asking that the sanctions award be reduced even further, despite  
19 their bad faith conduct in two separate cases with the same  
20 litigants.

21 The bankruptcy court reviewed appellee's revised fee  
22 application of \$25,483 and reduced this amount to \$13,255,  
23 determining that no fees incurred prior to July 7, 2004, or after  
24 June 12, 2006, could be awarded. The court held that,

25 the [appellant's] argument that the fees be allocated  
26 solely as a percentage of time spent at hearings or in  
27 pleadings on the issue of the Pearce Deed of Trust  
28 ownership does not properly reflect the actual amount  
of time devoted by counsel on the issue which was  
necessarily intertwined with the presentation of  
evidence and argument on the many other issues in  
dispute. . . .

1 Mem. Decision Regarding Att'ys Fees Sanctions at 1:21-27.5 (Sept.  
2 11, 2007).

3 We agree with the bankruptcy court's holding and determine  
4 that it did not abuse its discretion in imposing \$13,255 as  
5 sanctions on appellants. See DeVille, 361 F.3d at 547; F.J.  
6 Hanshaw Enters., Inc., 244 F.3d at 1135.

7 The Pearce Judgment is involved with many other issues in  
8 this dispute. The court determined that the appellee's  
9 calculation of its attorneys' fees as sanctions was appropriate  
10 because the issue of ownership of the Pearce Judgment was  
11 entangled with the many other issues in the dispute. We do not  
12 perceive this as clear error. See Cooter & Gell, 496 U.S. at  
13 405. In addition, with respect to sanctions, a trial court's  
14 factual findings are given great deference. F.J. Hanshaw  
15 Enters., Inc., 244 F.3d at 1135.

16 The bankruptcy court utilized its inherent authority to  
17 award as sanctions \$13,255 (and not the total \$25,483 requested)  
18 for fees incurred between July 8, 2004 and June 12, 2006, because  
19 it was within the court's discretion to determine that this  
20 amount reflected compensation to the debtors for the sanctionable  
21 conduct without being punitive. See Dyer, 322 F.3d at 1197;  
22 Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 412 (9th Cir.  
23 BAP 2005).

24 Thus, the bankruptcy court complied with our remand of the  
25 sanctions order in the First Appeal by narrowing the sanctions  
26 award to the attorneys' fees related to litigation costs and  
27 expenses incurred in association with the Pearce Judgment.

1 CONCLUSION

2 The bankruptcy court did not abuse its discretion in  
3 determining that appellee was entitled to an award of  
4 \$13,255 for fees incurred between July 8, 2004 and June 12,  
5 2006, as sanctions imposed against appellants for their bad  
6 faith conduct in connection with the Pearce Judgment issue.  
7 We AFFIRM.