

MAR 13 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|-----------------------------|---|--------------------|------------------|
| In re: |) | BAP No. | AZ-07-1358-KPaJu |
| |) | | |
| RICHARD C. BRUMGARD; KAY |) | Bk. No. | 02-04327 |
| BRUMGARD, |) | | |
| |) | Adv. No. | 02-00117 |
| Debtors. |) | | |
| <hr/> | | | |
| JOHN R. YOUNG; MARGARET ANN |) | | |
| YOUNG; FREDERICK G. GAMBLE, |) | | |
| |) | | |
| Appellants, |) | | |
| |) | | |
| v. |) | MEMORANDUM* | |
| |) | | |
| WATERFALL, ECONOMIDIS, |) | | |
| CALDWELL, HANSHAW & |) | | |
| VILLAMANA, P.C., |) | | |
| |) | | |
| Appellee. |) | | |
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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 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.¹

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.² The Youngs filed a
13 proof of claim in the case partially based on their asserted
14 ownership interest in the Pearce Judgment.³

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

17
18 ²The "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 ³See 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

20 ³(...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.⁴ It ordered the Youngs to pay one-
25 third and Gamble to pay two-thirds of debtors' reasonable

26
27 ⁴See 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."⁵ 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.⁶
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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23 ⁵We 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 ⁶Appellee'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 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.