

APR 03 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NOT FOR PUBLICATION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

In re:	)	BAP No.	AZ-07-1084-KBMd
	)		
PAUL DOUGLAS COMBS,	)	Bk. No.	05-06498
	)		
Debtor.	)	Adv. No.	05-00570
	)		
PAUL DOUGLAS COMBS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
Renaissance Aircraft, LLC,	)		
	)		
Appellee.	)		

Argued and Submitted on March 19, 2008  
at Pasadena, California

Filed - April 3, 2008

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Before: KLEIN, BRANDT\*\* and MACDONALD,\*\*\* 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.

\*\*Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

\*\*\*Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the District of Alaska, sitting by designation.

1 The pro se debtor-defendant appeals an order dismissing all  
2 unresolved counts in an adversary proceeding at the request of  
3 the creditor-plaintiff who had previously obtained partial  
4 summary judgment as to one count. After the debtor stated on the  
5 record in open court that he did not object to dismissal, the  
6 court dismissed the remaining counts against the debtor with  
7 prejudice because there was consensus that they could be  
8 dismissed. Contending he misunderstood the situation, the debtor  
9 appeals. We AFFIRM.

10  
11 FACTS

12 Appellant debtor Paul Douglas Combs filed a chapter 11 case  
13 on April 18, 2005, which case was voluntarily converted to  
14 chapter 7 on July 25, 2005.<sup>1</sup>

15 On July 2, 2005, appellee Renaissance Aircraft, LLC filed an  
16 eight-count adversary proceeding complaint seeking denial of the  
17 debtor's discharge pursuant to various subsections of 11 U.S.C.  
18 § 727 in six counts and determination of nondischargeability of a  
19 \$2,192,969 judgment debt pursuant to 11 U.S.C. § 523(a)(6) in two  
20 counts.<sup>2</sup> The \$2,192,969 judgment that appellee holds against the

21  
22 <sup>1</sup>The bankruptcy court entered its order converting the  
debtor's case to chapter 7 on September 15, 2005.

23  
24 <sup>2</sup>The following is a summary of the background information  
regarding the relationship and disputes between the debtor and  
25 appellee, taken from the General Allegations of appellee's  
complaint filed in the present adversary proceeding.

26 The debtor was president of the Don Luscombe Aviation  
History Foundation ("Foundation"), an Arizona tax-exempt, non-  
27 profit corporation, that extended an exclusive worldwide  
manufacturing license to appellee to manufacture 8-Series

28 (continued...)

1 debtor has been affirmed on appeal by a state court.

2 The debtor answered the complaint as to all counts on August  
3 31, 2005.

4 Appellee filed a motion for summary judgment on Count 7 of  
5 the complaint, which sought to have the judgment debt excepted  
6 from discharge under § 523(a)(6). After numerous proceedings in  
7 the matter, the motion was granted on March 30, 2006. The court  
8 entered its judgment of nondischargeability against the debtor on  
9 Count 7, on April 20, 2006.

10 After a long period of inactivity in the adversary  
11 proceeding, a court-generated order requesting information on the  
12 adversary hearing was entered and the court set a status hearing  
13 for February 13, 2007.

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15 <sup>2</sup>(...continued)

16 Luscombe airplanes. In the complaint, appellee alleged various  
17 misconduct by the debtor, including breach of contract which led  
18 to an arbitration award confirmed by the Maricopa County Superior  
19 Court, attempts to transfer personal assets and assets of the  
20 Foundation to avoid sale of the assets, and filing chapter 11  
21 bankruptcy on behalf of the Foundation (Case No. 02-18352-PHX-  
22 SSC) in November 2002 to avoid enforcement of the arbitration  
23 award. In February 2003, appellee brought a civil action against  
24 the debtor in the Maricopa County Superior Court for intentional  
25 interference with the contract between appellee and the  
26 Foundation. After the Superior Court granted summary judgment in  
27 favor of appellee and entered a final judgment in favor of  
28 appellee in March 2004, appellee alleged that the debtor again  
sought to hinder, delay, and defraud appellee from collecting the  
judgment. Thus, in the instant adversary proceeding, the  
appellee sought to deny the debtor his discharge based on his  
actions injuring the appellee.

On September 22, 2005, it was ordered that the  
administration of the debtor's bankruptcy case (Case No. 05-  
06498-PHX-SSC) be jointly administered with The Don Luscombe  
Aviation History Foundation bankruptcy case (Case No. 02-18352-  
PHX-SSC).

1 At the February 13, 2007 hearing, the appellee requested  
2 that all remaining counts of the complaint against the debtor be  
3 dismissed. The appellee stated that, although the parties had  
4 been unable to reach any global settlement in the instant  
5 adversary proceeding and other adversary proceedings, the  
6 appellee was not interested in pursuing the remaining counts in  
7 the instant adversary proceeding, which sought to deny the debtor  
8 his bankruptcy discharge. The debtor assented on the record that  
9 he would not object to dismissal of the remaining counts in the  
10 adversary proceeding.

11 The court thereupon dismissed the remaining claims for  
12 relief with prejudice, acknowledging agreement by the parties  
13 that the remaining claims in the adversary be dismissed. The  
14 court directed the appellee to lodge a form of order with the  
15 court, memorializing the dismissal in writing.

16 Counsel for the appellee subsequently lodged a proposed form  
17 of order, to which the debtor did not object when submitted. On  
18 February 20, 2007, the court entered the order dismissing with  
19 prejudice Counts 1-6 of the complaint, which objected to the  
20 debtor's discharge. The form of order prepared by appellee's  
21 counsel mistakenly omitted reference to dismissal of Count 8, the  
22 second dischargeability count ("Original Dismissal Order").<sup>3</sup>

23 On March 2, 2007, the debtor filed a motion for  
24 reconsideration of the order, styled as an "Objection to  
25

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26 <sup>3</sup>Recall, the court already resolved Count 7 by granting  
27 appellee's motion for summary judgment and entering a  
28 nondischargeability judgment on Count 7 against the debtor under  
§ 523(a)(6), on April 20, 2006.

1 Plaintiff's Form of Order, and Content Dismissing Complaint  
2 Counts 1 through 6 with Prejudice and Motion for Stay." The  
3 debtor contended that it was his understanding in court that the  
4 agreement between the debtor and appellee was an agreement to  
5 resolve the remaining counts of the complaint and to resolve all  
6 issues between the parties in a global settlement. Instead, the  
7 Original Dismissal Order (proposed by appellee's counsel and  
8 signed by the court) contained language asserting an agreement  
9 had been concluded between the parties that the remaining counts  
10 of the present complaint be dismissed, even though no discussions  
11 had yet resumed regarding resolution of the other adversary  
12 proceedings filed against the debtor.<sup>4</sup> The debtor argued that  
13 "[b]oth the Plaintiff and the Court has [sic] long been aware  
14 that the defendant seeks vindication for the specious claims  
15 alleged against him by the plaintiff and plaintiff's counsel."  
16 Objection to Pl.'s Form of Order at 1:26-2:2.

17 The debtor also appealed the Original Dismissal Order on  
18 March 2, 2007.

19 On March 7, 2007, the court denied reconsideration of the  
20 Original Dismissal Order because the debtor and appellee had  
21 agreed on the record that the remaining counts of the appellee's  
22 complaint could be dismissed. The court noted that the debtor  
23 did not raise any new law, facts, or evidence as to why  
24 reconsideration would be appropriate, and that the debtor's main  
25 contention appeared to be that the dismissal order was drafted

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26  
27 <sup>4</sup>The debtor noted that the appellee has filed no less than  
28 four proceedings against the debtor and his family in both state  
and federal courts.

1 without his advice or agreement.

2 As a result of the dismissal of the counts objecting to  
3 discharge, the debtor was granted a discharge of his debts on  
4 March 8, 2007.

5 The omission to dismiss Count 8 came to light upon screening  
6 review by the BAP clerk's office. Because the Original Dismissal  
7 Order enumerated Counts 1 through 6 only as dismissed and did not  
8 explicitly state that Count 8 was dismissed, on August 30, 2007,  
9 the Panel granted limited remand to allow the bankruptcy court to  
10 clarify the February 20, 2007, Original Dismissal Order and  
11 determine whether all counts of the complaint, including Count 8,  
12 had been disposed.

13 The debtor did not file a motion for clarification until  
14 January 9, 2008. The debtor repeated his arguments that the  
15 Original Dismissal Order, "unilaterally developed" by appellee's  
16 counsel and signed by the court, did not address a "global  
17 resolution of litigation with defendant Combs." Mot. for  
18 Clarification at 2:22-23. The debtor requested that the  
19 bankruptcy court either vacate its previous order dismissing  
20 Counts 1-6 because it was defective on its face and did not  
21 reflect the conditions under which the debtor agreed to dismissal  
22 or revise its order to expressly include dismissal of all counts  
23 in the complaint, including Count 8, so that the debtor could  
24 proceed with his appeal.

25 Appellee lodged with the court a proposed form of "Amended  
26 and Restated Order Dismissing Remaining Counts of Complaint  
27 (Counts 1-6 and 8) With Prejudice," to which the debtor filed an  
28 "Objection and Motion for Stay" on February 14, 2008.

1 A hearing on the matters, including the debtor's motion for  
2 clarification and objection and motion for stay occurred on  
3 February 14, 2008. On February 22, 2008, the court entered its  
4 memorandum decision and signed the amended and restated order  
5 dismissing the remaining counts of the complaint, Counts 1-6 and  
6 8, with prejudice ("Amended Dismissal Order"). The court  
7 clarified that the Original Dismissal Order was intended to, and  
8 should have, encompassed all remaining counts of the complaint,  
9 namely Counts 1-6 and 8. It further overruled the debtor's  
10 objection to the proposed form of the Amended Dismissal Order and  
11 denied the debtor's motion for stay. The court ruled that the  
12 Amended Dismissal Order would replace and supersede the Original  
13 Dismissal Order nunc pro tunc to February 20, 2007.

#### 14 15 JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
17 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
18

#### 19 ISSUES

20 (1) Whether the Amended Dismissal Order constitutes a final  
21 appealable order, effectively replacing the Original Dismissal  
22 Order.

23 (2) Whether the bankruptcy court erred in dismissing the  
24 remaining counts (Counts 1-6 and 8) of the adversary proceeding  
25 with prejudice, based upon the agreement between the parties to  
26 dismissal that was stated on the record at the status hearing.  
27  
28

1 STANDARD OF REVIEW

2 We review the trial court's decision to approve voluntary  
3 dismissal of the adversary proceeding for abuse of discretion.  
4 See Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001). Under  
5 the abuse of discretion standard, we reverse only if the court  
6 applied an incorrect standard of law or made a clearly erroneous  
7 factual determination or if we have the definite and firm  
8 conviction that the court made a clear error of judgment. SEC v.  
9 Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001).

10  
11 DISCUSSION

12 Before disposition on the merits of the debtor's appeal, the  
13 confusion regarding the effect of the February 20, 2007, Original  
14 Dismissal Order, which only enumerated Counts 1-6 as dismissed  
15 and inadvertently excluded dismissal of Count 8 (thereby making  
16 the order interlocutory under Federal Rule of Civil Procedure  
17 54(b)) must be clarified.

18  
19 I

20 After the Panel entered an order granting limited remand to  
21 the bankruptcy court to clarify the Original Dismissal Order and  
22 the debtor requested clarification, the bankruptcy court then  
23 entered its memorandum decision and Amended Dismissal Order. It  
24 clarified that the Original Dismissal Order was intended to, and  
25 should have, encompassed all remaining counts of the complaint,  
26 namely Counts 1-6 and 8. The court further ruled that the  
27 Amended Dismissal Order would replace and supersede the Original  
28 Dismissal Order nunc pro tunc to February 20, 2007.



1 With leave of the appellate court, after an appeal has been  
2 docketed in the appellate court and while it is pending, the  
3 trial court may correct a clerical mistake or mistake arising  
4 from oversight or omission whenever one is found in an order.  
5 Fed. R. Civ. P. 60(a), incorporated by Fed. R. Bankr. P. 9024.

6 Although Count 8 was inadvertently excluded from the  
7 Original Dismissal Order, it is apparent on the docket and in the  
8 record of the hearing that the Original Dismissal Order was  
9 intended to be the final order in this adversary, encompassing  
10 Counts 1-6 and 8.

11 In any event, the Amended Dismissal Order finally disposed  
12 of all claims against all parties and forms an appropriate basis  
13 for finality. As the court's ruling was amended on February 22,  
14 2008, the notice of appeal filed on March 2, 2007 is treated as  
15 filed when the final order was actually entered. Fed. R. Bankr.  
16 P. 8002(a).

17 It is now clear that we have jurisdiction to hear this  
18 appeal from the final order pursuant to 28 U.S.C. § 158(a)(1).  
19

## 20 II

21 On appeal, the debtor argues that the order dismissing the  
22 remaining counts of the complaint with prejudice was  
23 "unilaterally" constructed by the appellee without participation  
24 or agreement by the debtor and that the dismissal order did not  
25 account for the debtor's condition that he would agree to  
26 dismissal of the instant adversary proceeding only if the parties  
27 entered into a global resolution of their disputes in the other  
28 adversary proceedings against him as well.

1 Federal Rule of Civil Procedure 41(a)(2) provides that an  
2 action may be dismissed at the plaintiff's request by court  
3 order. The dismissal is without prejudice, unless the order  
4 states otherwise. Fed. R. Civ. P. 41(a)(2), incorporated by Fed.  
5 R. Bankr. P. 7041.

6 In the present case, the bankruptcy court dismissed the  
7 remaining counts of the adversary proceeding with prejudice upon  
8 agreement by both the appellee and the debtor recorded in open  
9 court.<sup>5</sup> Although the debtor expressed his interest in a global  
10 negotiation, he explicitly stated on the record at the February  
11 13, 2007, status hearing that he did not object to dismissing the  
12 remaining counts of the instant adversary proceeding.<sup>6</sup> Both the  
13

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14 <sup>5</sup>At the February 13, 2007 hearing, the court indicated, "And  
15 as to the adversary proceeding with Renaissance, there is an  
16 agreement that the remaining claims in that adversary be  
dismissed." Hr'g Tr. at 7:22-24 (Feb. 13, 2007).

17 <sup>6</sup>The transcript states:

18 THE COURT: That's the request that the remaining  
19 claims or causes of action in the adversary be  
20 dismissed. Any problem with that?

21 [DEBTOR]: We've been working with Renaissance for  
22 some period of time trying to come to a global  
23 resolution regarding this in the state court action.

24 THE COURT: Right.

25 [DEBTOR]: And we were going to file a motion to  
26 that affect [sic] ourselves, Your Honor. I don't know  
27 if it offers any useful purpose to let it go forward  
for the global negotiation, if they're going to pass on  
it at this time. So, I guess, there wouldn't be an  
objection to that.

28 (continued...)

1 transcript and the minute entry document his agreement to  
2 dismissal.

3 A stipulation made in open court and recorded by the  
4 reporter constitutes an agreement between the parties and between  
5 them and the court, which the latter is bound to enforce for the  
6 benefit of those interested and for the protection of its own  
7 honor and dignity. Dwyer v. Haynes (In re Haynes), 97 B.R. 1007,  
8 1011 (9th Cir. BAP 1989).

9 After the appellee expressed to the court at the status  
10 hearing that it did not have any interest in pursuing the  
11 remaining counts of the adversary proceeding, the debtor then  
12 explicitly stated in open court that he did not have an objection  
13 to dismissal of the remaining counts of the adversary proceeding.

14 Contrary to the debtor's position, there was no condition  
15 expressed at the February 13, 2007, hearing to the effect that  
16 discussions occur before a proposed form of order was lodged or  
17 that a global resolution be reached on all the other adversary  
18 proceedings against the debtor before dismissal of the remaining  
19 counts in the instant adversary proceeding. After the court  
20 stated on the record that there was consensus for dismissal of  
21 the remaining counts of the adversary proceeding, the court then  
22 asked that appellee's counsel prepare a form of order with the  
23  
24

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25 <sup>6</sup>(...continued)

26 THE COURT: Okay. So we're going to go ahead and  
27 dismiss the remaining claims.

28 Hr'g Tr. at 6:2-15 (Feb. 13, 2007).

1 help of counsel for the debtor's chapter 7 trustee.<sup>7</sup> See Hr'g  
2 Tr. at 7:24-8:9 (Feb. 13, 2007).

3 Rule 41(a)(2) allows the court to grant a plaintiff's  
4 dismissal motion with appropriate terms and conditions to protect  
5 the defendant from prejudice. United States v. Baird-Neece  
6 Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998). In deciding  
7 whether to grant voluntary dismissal, a trial court must consider  
8 whether the defendant will suffer legal prejudice as a result of  
9 the court's dismissal. Resorts Int'l, Inc. v. Lowenschuss (In re  
10 Lowenschuss), 67 F.3d 1394, 1399 (9th Cir. 1995).

11 Here, it was within the court's discretion to grant  
12 dismissal of the remaining counts of the complaint because the  
13 debtor would not be prejudiced by dismissal of an adversary  
14 proceeding against him. In fact, dismissal of the instant  
15 adversary proceeding favored the debtor because appellee's  
16 objections to the debtor obtaining his discharge were eliminated.  
17 Moreover, the dismissal was entered with prejudice so that  
18 appellee could not subsequently re-file an adversary proceeding  
19 on the same causes of action.

20 Furthermore, the debtor's argument that the order was  
21 procured through fraud or misrepresentation in violation of  
22 Federal Rule of Civil Procedure 60 is unsubstantiated and misses  
23 the essential point. Again, the debtor expressed that he had no  
24 objection to the dismissal and the court noted that there was

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26 <sup>7</sup>Why the court needed help is a mystery. All that was  
27 required was a captioned document with a single declarative  
28 sentence: It is ordered and adjudged that Counts 1 through 6 and  
8 are dismissed with prejudice.

1 agreement that the remaining counts of the adversary proceeding  
2 be dismissed. This agreement was stated on the record and  
3 memorialized in the court's minute entry.

4 Once the debtor stated on the record in open court that he  
5 had no objection to dismissal of the remaining counts, the court  
6 was entitled to dismiss the remaining counts.

7 Thus, we perceive no error in the court's order dismissing  
8 the remaining counts (Counts 1-6 and 8) of the adversary  
9 proceeding with prejudice, based on agreement to dismissal  
10 expressed in open court by both parties. We certainly do not  
11 have a definite and firm conviction that the court made a clear  
12 error of judgment in this regard.

13 It is plain that the debtor was not harmed by dismissal with  
14 prejudice of the appellee's counts asserted against him. He has  
15 lost nothing of value and the appellee has surrendered some  
16 negotiating leverage.

17  
18 CONCLUSION

19 The bankruptcy court did not abuse its discretion in  
20 dismissing the remaining counts (Counts 1-6 and 8) of the  
21 adversary proceeding with prejudice, based upon agreement by both  
22 parties to dismissal stated on the record at the status hearing.  
23 We AFFIRM.