NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. EC-08-1031-JuTaD EC-08-1032-JuTaD
BETSEY WARREN LEBBOS,	
Debtor,	Bk. No. 06-22225
BETSEY WARREN LEBBOS,	
Appellant,	
v.	
LINDA SCHUETTE, Chapter 7 Trustee; UNITED STATES TRUSTEE,	**M E M O R A N D U M**[1]
Appellees.	

Submitted Without Oral Argument on September 17, 2008
at San Francisco, California

Filed - October 6, 2008

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

Hon. Robert S. Bardwil, Bankruptcy Judge, Presiding

Before: JURY, TAYLOR,[2] and DUNN, Bankruptcy Judges.

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[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] Laura S. Taylor, Bankruptcy Judge for the Southern District of California, sitting by designation.

Appellant-debtor Betsey Warren Lebbos appeals the bankruptcy court's orders denying her motions to (1) terminate[3] the appointment of the chapter 7[4] trustee Linda Schuette (BAP No. EC-08-1031) and (2) dismiss her bankruptcy case (BAP No. EC-08-1032).

We AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

Debtor's chapter 7 petition was filed on June 26, 2006. Linda Schuette was appointed the chapter 7 trustee.

Debtor was involved in a civil lawsuit at the time her petition was filed. She also was a defendant in a criminal proceeding in the Santa Clara County Superior Court, being prosecuted for the unauthorized practice of law.[5] Debtor was convicted and sentenced to electronic monitoring (house arrest) for nine months, which commenced on August 28, 2006.

Debtor and Schuette have been at odds since the beginning

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[3] Debtor titled her motion as one to "terminate" the trustee. Technically, § 1105 authorizes the court, after notice and a hearing, to terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and the debtor's business. Section 1105 is inapplicable, however, to chapter 7 cases or situations caused by a trustee's misconduct. Because debtor alleged various types of misconduct by the trustee, § 324 for removal of the trustee for cause is applicable to debtor's motion. We thus refer to debtor's motion as one for removal of the trustee.

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

[5] Debtor is a former attorney who practiced law in California from 1975 until 1991 when she was disbarred.

of her case. This is the second appeal before this panel arising from an order denying debtor's motion to remove Schuette as trustee. The first such motion commenced on October 30, 2006, when debtor sent an ex parte letter complaining about Schuette to the judges of the bankruptcy court for the Eastern District of California.[6]

Debtor alleged the trustee engaged in numerous acts of misconduct, including perjury. The bankruptcy judge assigned to her case construed her letter as a motion to remove the trustee and sua sponte issued an order setting a briefing schedule and a hearing. After the hearing on January 3, 2007, the bankruptcy court issued an Order and Findings of Fact and Conclusions of Law, denying debtor's motion. Debtor moved for reconsideration, which the bankruptcy court denied on March 14, 2007.

Debtor timely appealed the order denying her motion to remove the trustee to this panel. We affirmed the bankruptcy court's ruling in Lebbos v. Schuette, BAP Nos. EC-07-1068 and EC-07-1119, filed November 14, 2007. Debtor appealed our ruling to the Ninth Circuit; that appeal, Lebbos v. Schuette, 9th Cir. Case No. 08-15031, is currently pending.

Debtor filed her second motion to remove the trustee, the subject of this appeal, on December 13, 2007. She contends good cause for the trustee's removal exists because Schuette (1) has committed new crimes, destroyed assets, and harmed creditors; (2) is incompetent; and (3) has adverse interests. Debtor sets

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[6] We take judicial notice of debtor's previous motion to remove the trustee pursuant to Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

forth in detail the trustee's alleged crimes of perjury, fraud, and unauthorized practice of law. Debtor also lists numerous acts purportedly demonstrating the trustee's incompetence and provides examples of Schuette's alleged conflicts of interest.

This is also the second appeal before this panel involving an order denying debtor's motion to voluntarily dismiss her bankruptcy case. Debtor filed her first motion on April 25, 2007, shortly after the bankruptcy court denied her first request to remove the trustee.[7] She asserted that she was never presented with, never saw, and never signed her bankruptcy petition. She claimed she gave no one authority to sign her name on the petition and that her former attorney, Darryll Alvey, or one of his staff members, forged her signature. She set forth forty errors on her petition and contended that she never would have signed such an outrageously inaccurate petition.

The bankruptcy court denied debtor's first motion to dismiss her case, without prejudice, on procedural grounds. Debtor timely appealed that order and we affirmed the court's ruling in Lebbos v. Schuette, BAP No. EC-07-1203, filed November 14, 2007.

Debtor filed her second motion to dismiss her bankruptcy

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[7] We take judicial notice of debtor's previous motion to dismiss her case pursuant to Atwood, 293 B.R. at 233 n.9. At the time she filed her motion to dismiss, debtor also filed a motion to transfer venue of her case and disqualify the bankruptcy judge. The bankruptcy court denied both motions. This panel affirmed those rulings in Lebbos v. Schuette, BAP Nos. EC-07-1163 and EC-07-1174, filed November 14, 2007.

case, the subject of this appeal, on December 10, 2007. Her second motion essentially duplicated her first, but she cured the procedural defects.

The bankruptcy court heard debtor's motions to remove the trustee and dismiss her bankruptcy case on January 16, 2008. The court ruled orally and denied the motions in orders entered on January 18, 2008. Debtor timely appealed both orders.

II. JURISDICTION

The bankruptcy court had jurisdiction over both matters pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A).

Because the order denying debtor's motion to dismiss her bankruptcy case was interlocutory, we granted debtor leave to appeal it and declined to issue a stay pending appeal. See Hickman v. Hana (In re Hickman), 384 B.R. 832, 836 (9th Cir. BAP 2008).

Our jurisdiction is based on 28 U.S.C. § 158.

III. ISSUES[8]

1. Whether the court erred in denying debtor's motion to remove the trustee for cause pursuant to § 324.

2. Whether the court erred in denying debtor's motion to dismiss her case pursuant to § 707(a) when debtor contends that her petition was forged and she did not authorize the filing.

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[8] Debtor argues in her reply brief that this panel should disqualify itself from hearing her appeals because it engaged in misconduct and discrimination against the disabled. These issues are not properly before the panel on the appeal of two bankruptcy court orders and, therefore, we do not address them. Debtor previously filed a Motion for Remedial Action which also sought, among other things, to disqualify the panel. An Order Denying Motion for Remedial Action was entered on July 15, 2008.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's disposition of a motion to remove a trustee for cause under § 324 for an abuse of discretion. Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 844 (9th Cir. 2008)(affirming and adopting in full the BAP opinion published at 355 B.R. 139 (9th Cir. BAP 2006)). We also review a determination of whether or not to dismiss a chapter 7 case for cause for an abuse of discretion. Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

We review findings of fact for clear error. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007).

V. DISCUSSION

A. The Order Denying Debtor's Motion to Remove the Trustee

Debtor, as the party seeking the trustee's removal, had the burden of proving specific facts that constitute cause. See § 324(a)[9]; AFI Holding, Inc., 530 F.3d at 845. Conclusory allegations will not suffice. AFI Holding, Inc., 530 F.3d at 845.

The Bankruptcy Code does not define what constitutes cause, but case law provides examples which may include "trustee incompetence, violation of the trustee's fiduciary duties, misconduct or failure to perform the trustee's duties, or lack of disinterestedness or holding an interest adverse to the estate." Id. Generally, "a court should apply a totality-of-circumstances analysis in determining other 'causes' for removal

[9] Section 324(a) provides: "The court, after notice and a hearing, may remove a trustee . . . for cause."

under § 324." Id. at 848-49.

Debtor's arguments on appeal are no more than a restatement of her arguments that the bankruptcy court did not accept. Her assignment of error is that she presented sufficient facts which constituted the necessary cause, warranting removal of the trustee.

Whether the trustee acted incompetently, committed fraud or perjury, destroyed assets, harmed creditors, or had an adverse interest were questions of fact that the court determined based upon a totality of circumstances analysis and the evidence presented. Id. We accord substantial deference to the bankruptcy court's factual findings, which we review for clear error. Hoopai, 369 B.R. at 509. A factual determination is clearly erroneous if, after reviewing the record, we have a definite and firm conviction that a mistake has been committed. Id.; see also Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

First, the bankruptcy court addressed debtor's allegations that the trustee and her attorney were acting incompetently because they attempted to settle a lawsuit "for no money" when it was worth $5 to $10 million.[10] Debtor maintained that the

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[10] The lawsuit, Lebbos v. Sanger, Los Angeles Superior Court Case No. NC050003, involved a malpractice claim against debtor's attorneys who represented her when she was being prosecuted for the unauthorized practice of law. Debtor contended in her underlying motion that the malpractice claim was not a cause of action in existence at the time of her petition. Debtor filed the lawsuit against her former attorneys in July 2007. The bankruptcy court found that the malpractice cause of action arose at the time the alleged malpractice was committed, which would

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trustee had no authority to be involved in the lawsuit, which she did not list in her schedules. She also contended that the trustee was not a lawyer and, therefore, was not competent to evaluate a fraud and legal malpractice claim.

The bankruptcy court correctly found that debtor's arguments were based on her misunderstanding of bankruptcy law. Debtor's failure to list her malpractice cause of action against her criminal defense attorneys did not exclude it from her estate. Rather, all of debtor's property as of the petition date, including the malpractice cause of action, was property of her estate whether it was listed or not. See § 541(a)(1); Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707 (9th Cir. 1986)("The scope of § 541 is broad, and includes causes of action."). The court also correctly noted that the trustee was the real party in interest and had the right to prosecute and settle lawsuits, subject to court approval, which had not yet been obtained. See AFI Holdings, 530 F.3d at 844 ("A trustee is the 'legal representative' and 'fiduciary' of the estate.").

Debtor presented her declarations and those of her attorney, Mr. Giovinnini, in support of her incompetence claim. The trial court gave the declarations, which were self-serving and conclusory, little, if any, weight. We do not reweigh the evidence and make our own inferences from the testimony and

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[10](...continued)
have been prior to the time debtor's bankruptcy case was filed. See generally In re Marriage of Klug, 130 Cal. App. 4th 1389, 1399-1400, 31 Cal. Rptr. 3d 327 (2005)(discussing when a malpractice cause of action arises and when it accrues).

evidence anew, as we are not a fact finding court. Anderson, 470 U.S. at 573-75. Accordingly, we find the record supports the bankruptcy court's conclusion that debtor failed to establish malfeasance on the part of the trustee under the circumstances she described.

The court next addressed debtor's allegation that the trustee and her counsel committed perjury and fraud by taking a defendant's default in an adversary proceeding, knowing that the defendant was not properly served. The evidence in the record, though, supports the bankruptcy court's factual finding that no fraud or perjury occurred. Rather, the entry of default occurred in part due to the trustee's attorney being "somewhat aggressive", but was also the result of uncooperative defendants.[11] Hence, the court's finding was not clearly erroneous.

The court also found no evidence to support the remainder of debtor's arguments, including that the trustee had a conflict of interest, sent fraudulent letters to the debtor's doctors, preferred certain creditors over others, and had created discord in the case. We agree with the court's conclusion: the record

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[11] Schuette commenced the adversary proceeding against debtor, Jason P. Gold, as trustee of Aida Madeleine Lebbos No. 2 Trust, and others on January 3, 2007. Schuette sought to set aside fraudulent transfers and recover property of the estate or monetary damages. Rather than file an answer, debtor filed a motion to dismiss the adversary and a motion to transfer venue. Raymond H. Aver was retained on January 29, 2007 to represent Gold. Aver and the trustee's attorney exchanged communications, over the course of several days, regarding Aver's request for an extension of time to file a responsive pleading. In the interim, trustee's counsel filed a request for entry of default.

confirms that debtor's allegations were unsupported and conclusory.

Furthermore, contrary to debtor's assertions, the court found that it was the debtor who has created the discord in the case by her failure to cooperate with the trustee. The record supports this conclusion. We take judicial notice of debtor's previous motion to remove the trustee pursuant to Atwood, 293 B.R. at 233 n.9. Debtor filed her second motion to remove the trustee approximately one month after this panel filed its decision affirming the bankruptcy court's ruling that denied her first motion. Her second motion, which asserts numerous complaints about the trustee's administration of assets that she failed to list in her schedules, underscores her lack of cooperation.

Lastly, the court considered debtor's argument that the trustee should be pursuing certain assets, including a timeshare, a claim against the American Association of Retired Persons (AARP) over hospital bills and her claim against 21st Century Insurance over a car accident. Debtor failed to list these assets in her Schedules A or B and presented no evidence of their value. Under these circumstances, the bankruptcy court reasonably concluded that it would not second guess the trustee's decisions whether to pursue those assets.

In sum, the court discussed each of debtor's contentions, and, in each instance, found the trustee's conduct did not warrant her removal. We have reviewed debtor's arguments, which essentially duplicate those she made to the bankruptcy court, the transcript of the hearing and the evidence presented. The record

shows that the bankruptcy court applied a correct legal standard and did not operate under a clearly erroneous view of the facts. Each finding of fact had support in the record. Accordingly, after reviewing all the evidence, this panel is not left with a definite and firm conviction that a mistake has been made. The bankruptcy court's denial of debtor's request to remove the trustee was not an abuse of discretion.

B. The Order Denying Debtor's Motion to Dismiss her Case.

Debtor is required to make a showing of cause to support a motion to dismiss her case. See § 707(a)[12]; Hickman, 384 B.R. at 840. Three examples of what may constitute cause are listed in § 707(a): "unreasonable delay prejudicial to creditors, nonpayment of filing fees, and not filing schedules — that is plainly incomplete." Hickman, 384 B.R. at 840; see § 707(a)(1)-(3). If a debtor's asserted cause for dismissal does not fall within the scope of § 707(a), and is not dealt with by a specific Code provision, the bankruptcy court applies a totality of circumstances analysis to determine whether cause exists. Hickman, 384 B.R. at 840.

Debtor's asserted cause for dismissal of her case — the alleged forgery of her signature on the petition — is not one of the three items listed in § 707(a) nor is it contemplated by a specific Code provision. Accordingly, whether cause existed to dismiss debtor's case was a matter left to the discretion of the bankruptcy court based upon its consideration of the totality of

[12] Section 707(a) provides in relevant part: "The court may dismiss a case under this chapter only after notice and a hearing and only for cause, ..."

the circumstances.

Debtor contends the bankruptcy court abused its discretion because it based its decision on an erroneous view of the law. She maintains that because her petition was forged, it is a nullity and void ab initio; therefore, the bankruptcy court had no choice but to dismiss her case. Debtor cited a number of cases in support of her position.[13]

We conclude that debtor's contention of error lacks merit. None of the cases debtor cited were binding on the bankruptcy court, as they are all from lower courts outside the Ninth Circuit. Moreover, we agree with the bankruptcy court that they are distinguishable.

The bankruptcy court correctly viewed the law in this circuit by analyzing debtor's motion under the standards set forth in Mendez, 367 B.R. at 109. Mendez, a 2007 decision, rejects the notion that a forged signature on a petition in and of itself requires dismissal of a case when other evidence indicates that the debtor consented to the filing. Id. at 119-20. The Mendez court recognized that a chapter 7 debtor does not have an absolute right to dismiss his or her case. Id. at 120. Therefore, contrary to debtor's assertion, even if her

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[13] For example, see In re Brown, 163 B.R. 596 (Bankr. N. D. Fla. 1993)(case dismissed as a legal nullity as petition was signed by someone other than the debtor without any showing that the signature was made in a representative capacity); In re Curtis, 262 B.R. 619 (Bankr. D. Vt. 2001)(court held that more than general power of attorney was needed to permit debtor's daughter, acting pursuant to such a power, to file Chapter 7 petition upon debtor's behalf); In re Harrison, 158 B.R. 246 (Bankr. M.D. Fla. 1993)(Chapter 13 petition, which was signed by nondebtor, was nullity).

petition was forged, the bankruptcy court could exercise its discretion and decide whether dismissal of her case was appropriate.

The question of fact — whether debtor intended to file her petition — was relevant to the court's totality of the circumstances analysis. The court considered a number of factors to determine debtor's intent, including (1) the timing of debtor's motion to dismiss; (2) the degree to which debtor participated in her case prior to filing her motion; and (3) debtor's former statements in pleadings filed with the court that contradicted her statements in her motion.

The record reveals that debtor did not file her first motion to dismiss her case until April 27, 2007, approximately ten months after her petition was filed and shortly after the bankruptcy court denied her first motion to remove the trustee. The record also shows that debtor never once indicated, prior to her first motion to dismiss, that her petition was forged or improper.

Additionally, the bankruptcy court found that debtor actively participated in her case from its inception. Debtor filed an exhibit two months after her case was filed, requesting her then attorney to write a letter to the presiding judge of Santa Clara County Superior Court to advise him that the judges of the court "are violating the stay order and should comply with it." From this filing the bankruptcy court could reasonably infer that debtor knew the petition was filed and wanted the protection of the automatic stay.

Debtor also drafted a document entitled Draft of Brief sent

August 24, 2006 to her attorney to use in her bankruptcy case "for continuance and in opposition to the trustee's request to appoint attorney." The document drafted by debtor begins, "The debtor, Betsey Warren Lebbos, filed a Chapter 7 bankruptcy on June 26, 2006." This statement contradicted her later statement in her second motion to dismiss that she did not file the petition. Debtor also explained in the Draft of Brief why her case should be stayed for nine months and argued that Schuette should not be allowed to hire counsel. Debtor was thus well aware her petition had been filed.

The record contains ample evidence from which the court could conclude debtor intended to file bankruptcy and authorized the filing so that she could take advantage of the automatic stay.[14] Accordingly, we hold that the court did not base its decision on a clearly erroneous view of the facts.[15]

Finally, a debtor may be entitled to dismissal of her case "so long as such dismissal will cause no 'legal prejudice' to interested parties." Bartee v. Ainsworth (In re Bartee), 317 B.R. 362, 366 (9th Cir. BAP 2004). The debtor bears the burden of proving that dismissal will not prejudice creditors. Id.

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[14] We observe that the factual similarities between Mendez and the present case are striking.

[15] The bankruptcy court also did not abuse its discretion when it judicially estopped debtor from asserting that she did not intend to file the bankruptcy petition in light of her earlier comments, declarations and statements. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

The record reveals that debtor did not meet her burden of proof on this issue. Debtor stated in her motion that she would "make her creditors whole as they are entitled to be paid if she is permitted to manage her own affairs." Debtor further contended that she would use the "millions of dollars" she would receive from the two lawsuits she had pending to pay her creditors. However, debtor previously filed pleadings in which she disputed each of her debts, and asserted she had no money, job, or insurance to pay her creditors. Given debtor's contradictory statements, we hold the bankruptcy court reasonably concluded that debtor had neither the ability nor the intent to pay her creditors.

In sum, debtor did not have an absolute right to dismiss her petition even if she could prove her petition was forged. Rather, the bankruptcy court had discretion to determine whether cause existed under the totality of circumstances. The bankruptcy court applied a correct legal standard and did not operate under a clearly erroneous view of the facts based on the evidence presented and this case's record as a whole. Accordingly, the bankruptcy court's decision was a reasonable exercise of its discretion.

VII. CONCLUSION

For the reasons stated above, we AFFIRM.