

OCT 06 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NOT FOR PUBLICATION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 Nos.	EC-08-1031-JuTaD
)		EC-08-1032-JuTaD
BETSEY WARREN LEBBOS,)		
)	Bk. No.	06-22225
Debtor,)		
_____)		
BETSEY WARREN LEBBOS,)		
)		
Appellant,)		
v.)		
)		
LINDA SCHUETTE, Chapter 7)		
Trustee; UNITED STATES)		
TRUSTEE,)		
)		
Appellees.)		
_____)		

MEMORANDUM¹

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.

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.

1 Appellant-debtor Betsey Warren Lebbos appeals the
2 bankruptcy court's orders denying her motions to (1) terminate³
3 the appointment of the chapter 7⁴ trustee Linda Schuette (BAP
4 No. EC-08-1031) and (2) dismiss her bankruptcy case (BAP No. EC-
5 08-1032).

6 We AFFIRM.

7 **I. FACTS AND PROCEDURAL HISTORY**

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

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

16 Debtor and Schuette have been at odds since the beginning
17

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

28 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.

1 of her case. This is the second appeal before this panel
2 arising from an order denying debtor's motion to remove Schuette
3 as trustee. The first such motion commenced on October 30,
4 2006, when debtor sent an ex parte letter complaining about
5 Schuette to the judges of the bankruptcy court for the Eastern
6 District of California.⁶

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

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

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

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27 ⁶ We take judicial notice of debtor's previous motion to
28 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).

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

5 This is also the second appeal before this panel involving
6 an order denying debtor's motion to voluntarily dismiss her
7 bankruptcy case. Debtor filed her first motion on April 25,
8 2007, shortly after the bankruptcy court denied her first
9 request to remove the trustee.⁷ She asserted that she was never
10 presented with, never saw, and never signed her bankruptcy
11 petition. She claimed she gave no one authority to sign her
12 name on the petition and that her former attorney, Darryll
13 Alvey, or one of his staff members, forged her signature. She
14 set forth forty errors on her petition and contended that she
15 never would have signed such an outrageously inaccurate
16 petition.

17 The bankruptcy court denied debtor's first motion to
18 dismiss her case, without prejudice, on procedural grounds.
19 Debtor timely appealed that order and we affirmed the court's
20 ruling in Lebbos v. Schuette, BAP No. EC-07-1203, filed November
21 14, 2007.

22 Debtor filed her second motion to dismiss her bankruptcy
23

24
25 ⁷ We take judicial notice of debtor's previous motion to
26 dismiss her case pursuant to Atwood, 293 B.R. at 233 n.9. At the
27 time she filed her motion to dismiss, debtor also filed a motion
28 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.

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

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

8 **II. JURISDICTION**

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

11 Because the order denying debtor's motion to dismiss her
12 bankruptcy case was interlocutory, we granted debtor leave to
13 appeal it and declined to issue a stay pending appeal. See
14 Hickman v. Hana (In re Hickman), 384 B.R. 832, 836 (9th Cir. BAP
15 2008).

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

17 **III. ISSUES⁸**

- 18 1. Whether the court erred in denying debtor's motion to
19 remove the trustee for cause pursuant to § 324.
- 20 2. Whether the court erred in denying debtor's motion to
21 dismiss her case pursuant to § 707(a) when debtor contends that
22 her petition was forged and she did not authorize the filing.

23
24 ⁸ Debtor argues in her reply brief that this panel should
25 disqualify itself from hearing her appeals because it engaged in
26 misconduct and discrimination against the disabled. These issues
27 are not properly before the panel on the appeal of two bankruptcy
28 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.

1 **IV. STANDARDS OF REVIEW**

2 We review the bankruptcy court's disposition of a motion to
3 remove a trustee for cause under § 324 for an abuse of
4 discretion. Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d
5 832, 844 (9th Cir. 2008) (affirming and adopting in full the BAP
6 opinion published at 355 B.R. 139 (9th Cir. BAP 2006)). We also
7 review a determination of whether or not to dismiss a chapter 7
8 case for cause for an abuse of discretion. Mendez v. Salven (In
9 re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

10 We review findings of fact for clear error. Hoopai v.
11 Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509
12 (9th Cir. BAP 2007).

13 **V. DISCUSSION**

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

15 Debtor, as the party seeking the trustee's removal, had the
16 burden of proving specific facts that constitute cause. See
17 § 324(a)⁹; AFI Holding, Inc., 530 F.3d at 845. Conclusory
18 allegations will not suffice. AFI Holding, Inc., 530 F.3d at
19 845.

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

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

1 under § 324.” Id. at 848-49.

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

7 Whether the trustee acted incompetently, committed fraud or
8 perjury, destroyed assets, harmed creditors, or had an adverse
9 interest were questions of fact that the court determined based
10 upon a totality of circumstances analysis and the evidence
11 presented. Id. We accord substantial deference to the
12 bankruptcy court’s factual findings, which we review for clear
13 error. Hoopai, 369 B.R. at 509. A factual determination is
14 clearly erroneous if, after reviewing the record, we have a
15 definite and firm conviction that a mistake has been committed.
16 Id.; see also Anderson v. City of Bessemer City, N.C., 470 U.S.
17 564, 573 (1985).

18 First, the bankruptcy court addressed debtor’s allegations
19 that the trustee and her attorney were acting incompetently
20 because they attempted to settle a lawsuit “for no money” when
21 it was worth \$5 to \$10 million.¹⁰ Debtor maintained that the

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23 ¹⁰ The lawsuit, Lebbos v. Sanger, Los Angeles Superior Court
24 Case No. NC050003, involved a malpractice claim against debtor’s
25 attorneys who represented her when she was being prosecuted for
26 the unauthorized practice of law. Debtor contended in her
27 underlying motion that the malpractice claim was not a cause of
28 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

(continued...)

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

5 The bankruptcy court correctly found that debtor's arguments
6 were based on her misunderstanding of bankruptcy law. Debtor's
7 failure to list her malpractice cause of action against her
8 criminal defense attorneys did not exclude it from her estate.
9 Rather, all of debtor's property as of the petition date,
10 including the malpractice cause of action, was property of her
11 estate whether it was listed or not. See § 541(a)(1); Sierra
12 Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707
13 (9th Cir. 1986) ("The scope of § 541 is broad, and includes causes
14 of action."). The court also correctly noted that the trustee
15 was the real party in interest and had the right to prosecute and
16 settle lawsuits, subject to court approval, which had not yet
17 been obtained. See AFI Holdings, 530 F.3d at 844 ("A trustee is
18 the 'legal representative' and 'fiduciary' of the estate.").

19 Debtor presented her declarations and those of her attorney,
20 Mr. Giovinnini, in support of her incompetence claim. The trial
21 court gave the declarations, which were self-serving and
22 conclusory, little, if any, weight. We do not reweigh the
23 evidence and make our own inferences from the testimony and
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25 ¹⁰(...continued)
26 have been prior to the time debtor's bankruptcy case was filed.
27 See generally In re Marriage of Klug, 130 Cal. App. 4th 1389,
28 1399-1400, 31 Cal. Rptr. 3d 327 (2005) (discussing when a
malpractice cause of action arises and when it accrues).

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

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

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

22 ¹¹ Schuette commenced the adversary proceeding against
23 debtor, Jason P. Gold, as trustee of Aida Madeleine Lebbos No. 2
24 Trust, and others on January 3, 2007. Schuette sought to set
25 aside fraudulent transfers and recover property of the estate or
26 monetary damages. Rather than file an answer, debtor filed a
27 motion to dismiss the adversary and a motion to transfer venue.
28 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.

1 confirms that debtor's allegations were unsupported and
2 conclusory.

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

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

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

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

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

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

20 Debtor's asserted cause for dismissal of her case – the
21 alleged forgery of her signature on the petition – is not one of
22 the three items listed in § 707(a) nor is it contemplated by a
23 specific Code provision. Accordingly, whether cause existed to
24 dismiss debtor's case was a matter left to the discretion of the
25 bankruptcy court based upon its consideration of the totality of
26

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

1 the circumstances.

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

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

13 The bankruptcy court correctly viewed the law in this
14 circuit by analyzing debtor's motion under the standards set
15 forth in Mendez, 367 B.R. at 109. Mendez, a 2007 decision,
16 rejects the notion that a forged signature on a petition in and
17 of itself requires dismissal of a case when other evidence
18 indicates that the debtor consented to the filing. Id. at
19 119-20. The Mendez court recognized that a chapter 7 debtor does
20 not have an absolute right to dismiss his or her case. Id. at
21 120. Therefore, contrary to debtor's assertion, even if her
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23 ¹³ For example, see In re Brown, 163 B.R. 596 (Bankr. N. D.
24 Fla. 1993) (case dismissed as a legal nullity as petition was
25 signed by someone other than the debtor without any showing that
26 the signature was made in a representative capacity); In re
27 Curtis, 262 B.R. 619 (Bankr. D. Vt. 2001) (court held that more
28 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).

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

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

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

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

28 Debtor also drafted a document entitled Draft of Brief sent

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

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

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

21 _____
22 ¹⁴ We observe that the factual similarities between Mendez
23 and the present case are striking.

24 ¹⁵ The bankruptcy court also did not abuse its discretion
25 when it judicially estopped debtor from asserting that she did
26 not intend to file the bankruptcy petition in light of her
27 earlier comments, declarations and statements. See Hamilton v.
28 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.").

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

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

22 **VII. CONCLUSION**

23 For the reasons stated above, we AFFIRM.
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