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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NOT FOR PUBLICATION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	NC-07-1159-MkKJu
7	MEDIA GROUP, INC.,)	Bk. No.	01-45924
8	Debtor.)		
9	<hr/>			
10	LINDA SHAO; LAW OFFICES)		
11	of LINDA SHAO, APLC,)		
12	Appellants,)		
13	v.)	MEMORANDUM¹	
14	LOIS I. BRADY, Trustee,)		
15	Appellee.)		

Argued and Submitted on January 24, 2008
at San Francisco, California

Filed - February 11, 2008

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

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: Markell, Klein and Jury, Bankruptcy Judges.

¹This 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 R. 8013-1.

1 Linda Shao and the Law offices of Linda Shao, APLC
2 (collectively "Shao") appeal the bankruptcy court's award of
3 compensatory sanctions in the amount of \$26,663 following remand
4 from a previous appeal to the BAP ("First Appeal")². The
5 bankruptcy court's order is AFFIRMED.

6 I. FACTS

7 Shao represented the debtor, Media Group, Inc. ("Debtor"),
8 in certain state court matters. In October 2000, without Shao's
9 endorsement, the Debtor deposited, and its bank credited to
10 Debtor's account, a settlement check payable jointly to Shao and
11 Debtor. On November 5, 2001, Debtor filed a chapter 11³
12 petition.⁴

13 The automatic stay provision then prevented Shao from suing
14 the Debtor to recover any of the funds deposited. Shao, however,
15 initiated action in state court against the depository bank and
16 certain of Debtor's officers seeking damages for fraud and breach

17
18 ²BAP No. NC-05-1432-SALMa.

19 ³Unless otherwise indicated, all chapter, section and rule
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as
21 enacted and promulgated prior to the effective date (October 17,
22 2005) of the relevant provisions of the Bankruptcy Abuse
23 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
119 Stat. 23 (2005), and to the Federal Rules of Bankruptcy
24 Procedure, Rules 1001-9037.

25 ⁴Shao's opening brief states that the check was received in
26 October 2000. The BAP's Memorandum on the First Appeal also
27 references October 2000. The bankruptcy court's Memorandum of
28 Decision re Motion of Sanctions ("Original Sanctions
Memorandum"), however, recounts the story of the settlement check
but indicates that the bankruptcy was filed "shortly thereafter."
It would seem likely that the year of the check as stated in
Shao's brief is in error and it was received in 2001, but we are
unable to clarify this.

1 of contract ("State Court Action").⁵ Without obtaining relief
2 from stay, the bank debited the Debtor's bank account in an
3 amount equal to the check deposited and then interpleaded the
4 funds with the state court. Id.

5 On October 25, 2002, Debtor's chapter 11 case was converted
6 to one under chapter 7, and Lois Brady was appointed trustee (the
7 "Trustee"). The Trustee hired Reidun Stromsheim ("Stromsheim")
8 as counsel. Stromsheim filed a complaint against Shao for, among
9 other things, a violation of the automatic stay. The complaint
10 was dismissed in large part, and Shao sought sanctions against
11 Stromsheim for a violation of Rule 9011, which the bankruptcy
12 court granted and the BAP upheld.

13 Shao then settled the claims against the bank, but the State
14 Court Action apparently remained pending against the Debtor's
15 officers. On April 26, 2004, while the appeal regarding
16 Stromsheim's sanctions was pending before the BAP, Shao issued a
17 subpoena, in the State Court Action, directing Stromsheim to
18 appear at deposition and produce documents. Shao contended that
19 the Trustee and Stromsheim were percipient witnesses in
20 connection with the State Court Action despite the fact that they
21 were not appointed until well over a year after the check was
22 improperly deposited. The Trustee contended that documents
23 listed in the subpoena indicated an improper intent, presumably
24 harassment or unfair settlement leverage, on Shao's part in
25 seeking the deposition.

26

27

28 ⁵Law Offices of Linda Shao, APLC v. Chan et al., Case No.
CV-803254 in Santa Clara County Superior Court.

1 The deposition was set for May 19, 2004. On May 10, 2004,
2 the Trustee filed an adversary proceeding seeking injunctive
3 relief and a temporary restraining order against appearing for
4 the deposition. The court issued the requested order on May 13,
5 2004 ("TRO"). Sometime after, Shao filed a "Motion for Leave to
6 Take the Deposition of Stromsheim" in bankruptcy court.⁶ After
7 numerous intervening filings and continuances, both the motion
8 for leave and the adversary proceeding were heard on November 18,
9 2004. The motion for leave was denied and the adversary matter
10 was ultimately dismissed.

11 On July 21, 2005, the Trustee filed a motion under section
12 105(a)⁷ seeking sanctions against Shao in the amount of the costs
13 incurred by the bankruptcy estate in defending against the
14 subpoena. The Trustee asserted that Shao's actions were improper
15 on two grounds: 1) that leave of the bankruptcy court was
16 required to depose the Trustee's counsel in a non-bankruptcy
17 forum under the Barton Doctrine;⁸ and 2) that Shao was improperly
18 using the subpoena as a means to investigate the administration
19 of the bankruptcy estate.

21 ⁶The motion was filed in response to a belief on the part of
22 Shao that the bankruptcy court ruled that leave of court was
23 required prior to deposing Stromsheim. The court did ultimately
24 so rule, but there is some confusion over when it made its
ruling. But this is not relevant to the facts of this appeal.

25 ⁷No one has raised the issue that the damages were not
26 sought by adversary proceeding.

27 ⁸The doctrine comes from the United States Supreme Court
28 cases establishing it: i.e., Barton v. Barbour, 104 U.S. 126
(1883) (improper to sue receiver without first obtaining
permission of appointing court).

1 The bankruptcy court, in its "Order Awarding Sanctions
2 against Linda Shao and the Law Offices of Linda Shao, APLC"
3 ("Order Awarding Sanctions") granted the Trustee's motion on
4 October 24, 2005, pursuant to its inherent authority under
5 section 105(a). The court also found that Beck v. Ft. James
6 Corp. (In re Crown Vantage, Inc.), 421 F.3d 963 (9th Cir. 2005)
7 held that the Barton Doctrine applied to trustees in bankruptcy
8 and required that Shao seek leave of the court prior to deposing
9 Stromsheim.

10 The bankruptcy court further found that Shao acted in bad
11 faith by engaging in improper litigation tactics by issuing and
12 refusing to withdraw the subpoena. The court based its finding
13 on two independent grounds: 1) Shao was advised by the Trustee
14 that, under the authority of Crown Vantage, a party may not take
15 discovery of a trustee and or her counsel without first obtaining
16 leave ("Barton Doctrine Grounds"); and 2) that there was no
17 rational ground for deposing Stromsheim in the State Court Action
18 with respect to actions that had occurred over one year prior to
19 the Trustee's appointment and Stromsheim's employment ("Abuse of
20 Process Grounds"). After considering the record, the bankruptcy
21 court accepted the Abuse of Process Grounds, finding Shao's
22 actions to be an abuse of state court process.

23 The bankruptcy court also concluded that Shao's bad faith in
24 engaging in improper litigation tactics was demonstrated in other
25 ways as well, including the use of delay tactics. In accordance
26 with its findings in its Original Sanctions Memorandum, the
27 bankruptcy court's Order Awarding Sanctions granted the Trustee's
28 motion and awarded "compensatory sanctions against Shao in the

1 amount of \$29,062.50 pursuant to its inherent authority under
2 section 105(a)".

3 On November 1, 2005, Shao filed the First Appeal. The BAP
4 reversed the bankruptcy court as to the Barton Doctrine Grounds
5 and as to certain of the court's findings of bad faith, but
6 affirmed on the Abuse of Process Grounds. Unable to allocate the
7 award to each area of misconduct, the BAP vacated the amount of
8 the sanction and remanded for determination of the appropriate
9 amount, if any, in light of its rulings.

10 On remand the bankruptcy court granted the Trustee's motion
11 for sanctions in the reduced amount of \$26,663 ("Order after
12 Remand"). In calculating the revised amount of sanctions, the
13 court deducted charges that implicated discovery and the Barton
14 Doctrine from the itemization of fees.

15 Shao now appeals ("Second Appeal").

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 157(b)(1) and (b)(2)(A). We have jurisdiction pursuant to 28
19 U.S.C. §§ 158(a)(1) and (c)(1).

20 **III. ISSUES**

21 1. Whether the bankruptcy court abused its discretion in
22 calculating the amount of sanctions assessed against Shao in
23 light of the BAP's ruling in the First Appeal.

24 2. Whether the bankruptcy court's award of compensatory
25 sanctions for civil contempt on remand is reversible error.

26 **IV. STANDARDS OF REVIEW**

27 "This court reviews the bankruptcy court's conclusions of
28 law and questions of statutory interpretation de novo, and

1 factual findings for clear error.” Village Nurseries v. Gould
2 (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999)
3 (citations omitted).

4 We review the bankruptcy court’s assessment of sanctions for
5 an abuse of discretion. Caldwell v. Unified Capital Corp. (In re
6 Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996). A
7 court abuses its discretion if it bases its ruling “on an
8 erroneous view of the law or on a clearly erroneous assessment of
9 the evidence.” In re Deville, 280 B.R. 483, 492 (9th Cir. BAP
10 2002) aff’d Miller v. Cardinale (In re Deville), 361 F.3d 539 (9th
11 Cir. 2004).

12 V. DISCUSSION

13 In this appeal Shao raises two questions that the BAP need
14 address: the proper basis for awarding sanctions on remand; and
15 the bankruptcy court’s purported award of sanctions for civil
16 contempt. Shao attempts to raise additional issues, but for the
17 most part these are simply rearguments of issues lost on the
18 First Appeal. Indeed, in many cases the arguments are presented
19 verbatim from the First Appeal. The BAP resolved these issues in
20 its ruling on the First Appeal and will not now revisit them.

21 Whether Any or Sufficient Bad Faith Existed

22 Shao does not take issue with the actual calculation of the
23 sanctions award on remand. Rather, Shao argues that (I) the
24 prior BAP decision reversed all findings of bad faith, and thus
25 deprived the court on remand of any basis to assess sanctions
26 under section 105 or the court’s inherent powers; and (ii) to the
27 extent that the BAP did not reverse all findings of bad faith,
28

1 any bad faith shown was not sufficient to support the amount of
2 the sanctions awarded.

3
4 Prior Bad Faith Findings

5 At oral argument in the Second Appeal, Shao argued that the
6 BAP had reversed all of the bankruptcy court's finding of bad
7 faith in the First Appeal. Shao contends that even under its
8 inherent authority, the court was required to make a new finding
9 of bad faith on remand.

10 Our review of the BAP's decision indicates this is an
11 overstatement. The BAP made clear that it found error "to the
12 extent that the bankruptcy court's finding of bad faith is based
13 on [the Barton Doctrine] premise." It specifically affirmed,
14 however, as to the use of improper litigation tactics. Had the
15 BAP intended to wholly reverse as to bad faith, it would simply
16 have reversed the Original Sanction Order in whole; a remand to
17 determine sanctions would have been as inconsistent as it would
18 have been unnecessary.

19 Thus, the BAP's remand instructions to the bankruptcy court
20 required it merely to revisit the amount of the appropriate
21 sanction. A new or additional finding of bad faith was
22 unnecessary to determine the amount of the sanction on remand.

23 Renewed Attacks on Prior Findings of Bad Faith

24 Shao continues to press the basis of the original findings
25 of bad faith. As indicated above, findings of bad faith
26 sufficient to sustain sanctions were left undisturbed by the
27 First Appeal. Shao cannot now reopen that issue.

1 Shao contends, however, that she acted in good faith by
2 seeking leave of court to depose Stromsheim after having already
3 issued the subpoena.⁹ As a result, because she sought leave of
4 the court to depose Stromsheim and then took no further action,
5 she asserts that any costs after seeking leave should not be
6 assessed in awarding sanctions. The problem with this argument
7 is that a subpoena had already been issued and the deposition
8 scheduled. The Trustee was not able to rely on Shao's now
9 claimed good faith in conducting her response. Shao must be
10 "prepared to shoulder the expense that [she] occasion[ed]" in
11 issuing the subpoena initially for an improper purpose. Corder
12 v. Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1995).

13 We give special deference to the findings of fact by a
14 bankruptcy court. Rule 8013. Evidence of an itemization of fees
15 the Trustee had incurred had been presented to the bankruptcy
16 court by declaration for determination of the original sanctions
17 award. The bankruptcy court considered this evidence as well as
18 Shao's opposition in determining the amount of compensatory
19 sanctions in issuing its Order Awarding Sanctions. The court
20 reviewed the evidence already available to it in light of the
21 BAP's instruction in the First Appeal in determining the revised
22 amount of the sanction. Further hearings were unnecessary.

23 On remand, the bankruptcy court's award took into
24 consideration the costs the Trustee had incurred with respect to
25

26 ⁹Shao further argues that the sanctions are excessive in
27 that they must be reported to the State Bar, and that there was
28 no evidence or discussion of Shao's ability to pay. Shao's
arguments were raised in the First Appeal, and were unavailing
then, as they are now.

1 research of the Barton Doctrine and deducted those costs from the
2 total. The court did not make a further deduction for reversal
3 of the bad faith finding as to delay tactics because the court
4 had issued that sanction sua sponte. The Trustee had incurred no
5 costs related to that finding, so the bankruptcy court made no
6 further deductions on remand.

7 The bankruptcy court's determination of sanctions was
8 reasonably based on evidence before it, took into consideration
9 the BAP's ruling and instructions on remand, and therefore it did
10 not clearly err in its calculation of the amount of sanctions on
11 remand.

12 **Civil Contempt**

13 In its Order on Remand, the bankruptcy court granted the
14 Trustee's motion and "awarded compensatory sanctions for civil
15 contempt in the amount of \$26,663." Shao seizes on the use of
16 the term "civil contempt," and argues that without a violation of
17 a general or specific order of the bankruptcy court, she cannot
18 be found in civil contempt, thus the award of sanctions is error.

19 Pursuant to section 105(a), a bankruptcy court may take any
20 necessary or appropriate action to enforce or implement court
21 orders or rules, or to prevent an abuse of process. Rainbow
22 Magazine, 77 F.3d at 284. Thus, a court may issue compensatory
23 sanctions under either its ordinary civil contempt authority or
24 its inherent sanction authority. Knupfer v. Lindblade (In re
25 Dyer), 322 F.3d 1178, 1195-96 (9th Cir. 2003).

26 Section 105(a) provides in full that:

27 (a) The court may issue any order, process,
28 or judgment that is necessary or appropriate
to carry out the provisions of this title. No

1 provision of this title providing for the
2 raising of an issue by a party in interest
3 shall be construed to preclude the court
4 from, sua sponte, taking any action or making
any determination necessary or appropriate to
enforce or implement court orders or rules,
or to prevent an abuse of process.

5 A court exercises its power under civil contempt to remedy
6 violation of a specific order. It exercises its inherent
7 sanction authority more broadly; "to deter and provide
8 compensation for a broad range of improper litigation tactics."
9 Dyer, 322 F.3d at 1196 (emphasis added).

10 Shao believes that the bankruptcy court's mindset was
11 fashioning punishment for a civil contemnor. Shao clearly
12 misconstrues the bankruptcy court's intent. The Trustee's
13 original motion was for civil contempt sanctions. The bankruptcy
14 court, however, citing to Dyer, distinguished between its power
15 to sanction under civil contempt and under its inherent
16 authority. In its Original Sanction Memorandum the court made
17 clear that the award was granted under its inherent sanction
18 authority pursuant to section 105(a) for an abuse of process. It
19 was on that basis that the BAP affirmed in the First Appeal and
20 that the bankruptcy court awarded sanctions pursuant to its
21 Memorandum of Decision on Remand re Motion for Sanctions ("Remand
22 Memorandum").

23 Before imposing sanctions under its inherent sanctioning
24 authority, a court must make an explicit finding of bad faith or
25 "willful misconduct". Id. at 1196. "[S]pecific intent or other
26 conduct in 'bad faith or conduct tantamount to bad faith,' is
27 necessary to impose sanctions under the bankruptcy court's
28 inherent power." Id. (internal citation omitted). Bad faith

1 includes, among other things, willful abuse of judicial process
2 and reckless conduct accompanied by an improper purpose. Fink v.
3 Gomez, 239 F.3d 989, 992-94 (9th Cir. 2001).

4 The bankruptcy court did make explicit findings of fact as
5 to bad faith or conduct tantamount to bad faith that survived the
6 remand required by the First Appeal. It found "[t]here was no
7 rational ground for deposing Stromsheim in connection with [the
8 State Court Action]." The bankruptcy court also found that Shao
9 planned to use the deposition of Stromsheim for an improper
10 purpose: as a means to investigate the administration of the
11 estate. Fink, 239 F.3d at 992 (citing Itel Secs. Litigation v.
12 Itel Corp. (In re Itel Secs. Litigation), 791 F.2d 672 (9th Cir.
13 2001) (finding improper purpose to attempt to gain tactical
14 advantage is sufficient to support a finding of bad faith)).

15 The bankruptcy court found that Shao demonstrated bad faith
16 in other ways as well: by failing to ask for guidance from the
17 bankruptcy court as to the application of the Barton Doctrine; by
18 engaging in delay tactics; and by filing opposition after the
19 briefing schedule was closed and citing new cases at oral
20 argument without justification.¹⁰

21 In conclusion, the bankruptcy court stated: "[t]he Court
22 will grant the Trustee's motion for an award of compensatory
23 sanctions against Shao in the amount of \$29,062.50 pursuant to
24 its inherent authority under 11 U.S.C. § 105(a)." (emphasis
25 added). In the First Appeal, the BAP affirmed the finding of use
26

27
28 ¹⁰In the First Appeal, the BAP explicitly rejected that this
other conduct rose to the level of bad faith.

1 of improper litigation tactics as an abuse of the state court
2 process.

3 The bankruptcy court in its initial award of sanctions, and
4 the BAP in the First Appeal, clearly contemplated that the
5 sanctions were authorized under the court's inherent authority
6 under section 105(a). The bankruptcy court, as well as the party
7 preparing the court's Order on Remand, erred in the use of the
8 term "civil contempt." But this is harmless error.

9 **Issue raised for the First Time on Appeal**

10 Shao oversteps her bounds in raising an issue for the first
11 time on appeal. Although phrased as a jurisdictional attack, it
12 really is an attempt to recharacterize the bankruptcy court's
13 actions. Claiming that the bankruptcy court sanctioned Shao for
14 her conduct in prosecuting the State Court Action, Shao asserts
15 that as a court of limited jurisdiction, the federal bankruptcy
16 court cannot police conduct occurring in state court. In support
17 of this proposition, she cites one district court case from
18 Massachusetts and one unreported decision from the Eastern
19 District of California.¹¹

21 ¹¹These decisions are strikingly inapposite. Robinson v.
22 Dean Witter Reynolds, Inc., 129 F.R.D. 15 (D. Mass. 1989) uses
23 the word "jurisdiction" only once, and then not in the context
24 sought by Shao; the case simply stands for the proposition that
25 Rule 11 may not be used to sanction the signing of documents
26 filed in a removed action to the extent that the signatures
27 occurred before removal. Stanley v. Wong, 2006 WL 1523128 (E.D.
28 Cal. May 31, 2006) is also inapplicable. That case dealt with
the ability of a district court, in a prisoner's habeas corpus
proceeding, to sanction the prosecutors in the state criminal
case for conduct that had occurred long before the filing of the
habeas action. As Stanley acknowledges, however, "[a]n exception
(continued...)

1 As an initial matter, there is nothing in the record,
2 including Shao's objection to the sanctions, the Original
3 Sanction Order and hearing transcript, and Shao's brief in the
4 First Appeal, challenging the bankruptcy court's order on these
5 grounds. Absent exceptional circumstances, the BAP will not
6 consider issues raised for the first time on appeal. Scovis v.
7 Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001).
8 Here no exceptional circumstance exists. Because Shao failed to
9 raise the issue of the bankruptcy court's jurisdiction below, it
10 is accordingly now waived. Cybernetic Svcs, Inc., v. Matsco,
11 Inc. (In re Cybernetic Svcs., Inc.), 252 F.3d 1039, 1045 n.3 (9th
12 Cir. 2001).

13 Even were we to address the merits, however, Shao admits
14 that binding Ninth Circuit authority recognizes the type of
15 action, and hence the jurisdiction to act, undertaken in this
16 case. See Western Systems Inc. v. Ulloa, 958 F.2d 864 (9th Cir.
17 1992). Although Ulloa may be "wrongly decided" as Shao
18 strenuously urges, a point upon which we express no opinion, it
19 is not for this court to make that call.

20 VI. CONCLUSION

21 The order of the bankruptcy court is AFFIRMED.
22
23

24
25 ¹¹(...continued)

26 to the rule of non-involvement occurs when the misconduct taking
27 place elsewhere is affirmatively continued in the federal court."
28 Id. at 4. Here, of course, there was ongoing activity in both
state and federal court, and the bankruptcy court was assessing
the impact in her court of the improper and bad faith activities
in state court.