NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-07-1188-McPaMk
AMR MOHSEN,	Bk. No. 05-50662
Debtor.	
AMR MOHSEN,	
Appellant,	
v.	**MEMORANDUM**[1]
CAROL WU, Chapter 7 Trustee, and STATE FARM FIRE AND CASUALTY CO.,	
Appellees.	

Argued by Telephone Conference
and Submitted on February 22, 2008

Filed - March 6, 2008

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Before: MCMANUS,[2] PAPPAS, and MARKELL, 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] Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

The debtor appeals from an order entered on May 1, 2007, approving the compromise of litigation between the bankruptcy trustee and the insurer of the debtor's fire-damaged home. We conclude that the bankruptcy court did not abuse its discretion when it approved the compromise. We AFFIRM.

FACTS

Amr Mohsen filed a chapter 11 petition on February 8, 2005. Even though State Farm Fire and Casualty Company ("State Farm") had paid the debtor in excess of $1.7 million for fire damage to his home and its contents, he believed he was owed more. When State Farm refused to pay more, Mohsen filed an adversary proceeding. State Farm denied it had any further liability to Mohsen.

In the adversary proceeding, Mohsen sought $99,915 for living expenses, $9,697 in late fees incurred in connection with the rental of a temporary home, $4,102 for moving expenses, $10,843 for an alarm system, $1,967 for a weather system, and $232,264 for the replacement cost of personal property.

After the bankruptcy case was converted to one under chapter 7, Carol Wu was appointed the chapter 7 trustee. Wu then took over the prosecution of the adversary proceeding. She retained counsel who reviewed and analyzed documents produced by Mohsen, the discovery produced in the adversary proceeding, voluminous documents produced by State Farm, and State Farm's analysis of the insurance claim. Her counsel also attended the depositions of Mohsen and Kip Martin, an adjuster who represented Mohsen in his dealings with State Farm, and reviewed the depositions of

William Young and Todd Randolph, who both worked on Mohsen's residence after the fire.

Approximately three months after her appointment as the trustee, Wu moved for approval of a compromise of the adversary proceeding. Under the terms of the compromise, State Farm agreed to pay the bankruptcy estate $30,000 to settle the adversary proceeding.

Mohsen filed an opposition to the motion to approve the compromise but did not attend the hearing because, as related by the trustee's attorney, he was being moved from "the north jail in Oakland to the U.S. Penitentiary in Lompoc." Mohsen had been convicted of several crimes, including perjury.

The trustee's motion indicated that she had discovered no evidence to support Mohsen's claim that State Farm owed more for losses sustained as a result of the fire. Her motion revealed:

- Because the repair of the fire damage to the residence should have taken three months, and because State Farm had already paid Mohsen approximately $65,000 per month for ten months of living expenses, the claim for additional living expenses was weak.
- Mohsen's insurance policy did not cover reimbursement of rental late fees. Further, the late fees had been incurred after Mohsen had received $700,000 from State Farm.
- Mohsen's moving expenses had been overpaid by $2,691.
- Mohsen's alarm system was not functional before the fire. The contractor who supposedly repaired the alarm system testified that the system had not been damaged by the

fire.

- Mohsen had failed to submit supporting documentation relating to a weather system.
- Mohsen had not taken into account the depreciation of his personal property nor a $70,000 agreed value for salvaged Persian rugs he had retained. Mohsen's calculations also did not involve actual replacement cost of damaged items because some of the items he purchased did not replace destroyed property, and Mohsen had not replaced other property within the two-year time limit mandated by the insurance policy.

At a hearing on April 25, 2007, the court approved the compromise. The order approving the compromise was entered on May 1, 2007, and two days later Wu and State Farm stipulated to the dismissal of the adversary proceeding with prejudice.

On May 11, Mohsen filed a timely notice of appeal. He did not seek a stay pending appeal.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b)(2)(A), (O) and 1334. We have jurisdiction under 28 U.S.C. §§ 158(a)(1) and (c)(1).

STANDARD OF REVIEW

We examine our own jurisdiction, including mootness issues, de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 110 (9th Cir. BAP 2005).

A bankruptcy court's approval of a compromise is reviewed for an abuse of discretion. See Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1380 (9th Cir. 1986); Debbie Reynolds

Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001). A bankruptcy court abuses its discretion if, among other things, it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. See The Cannery Row Co. v. The Leisure Corp. (In re The Leisure Corp.), 234 B.R. 916, 920 (9th Cir. BAP 1999); Ho v. Dowell (In re Ho), 247 B.R. 867, 871 (9th Cir. BAP 2002).

DISCUSSION

Mohsen argues that the bankruptcy court abused its discretion when it approved the compromise because: (1) the bankruptcy court failed to make findings of fact supporting its approval; (2) to the extent the bankruptcy court made findings of fact, they were clearly erroneous; (3) the bankruptcy court ignored his objections to the compromise; (4) the bankruptcy court erroneously shifted the burden of proof by requiring that he prove the compromise should not be approved; and (5) the compromise is not fair and equitable and does not serve the best interests of the estate and its creditors.

Mohsen also asks the Panel to strike the appellees late-filed brief.

Wu and State Farm believe the bankruptcy court properly approved the compromise, but even if it should not have approved it, the appeal is moot because Mohsen did not obtain a stay pending appeal.

1. The Appellees' Late-Filed Brief Will Be Considered

Mohsen's argument that the appellees' brief be stricken because it was filed late is rejected.

The appellees' brief was filed late. On August 20, 2007, the Panel gave Mohsen an extension of time to file his opening brief. In that order, the appellees were instructed to file their brief within 15 days of service of Mohsen's opening brief. See also Fed. R. Bankr. P. 8009(a)(2). The docket reflects that Mohsen's opening brief was served on October 4, 2007, but the appellees' brief was not filed until October 25, six days after the prescribed deadline.

Sanctions for filing a brief late should only be imposed when warranted, such as when the late filing causes prejudice to another party. Pan Am. Bank of Los Angeles v. Mallas Enters., Inc. (In re Mallas Enters., Inc.), 37 B.R. 964, 966-67 (9th Cir. BAP 1984).

Here, Mohsen has made no showing that he suffered prejudice due to the late filing of the appellees' brief. He merely states that the late filing forced him to prepare his reply brief one week after he had initially planned. While Mohsen asserts that this change in plans created "conflict with [an]other commitment made for that week, resulting in prejudicial compromises," he does not elaborate further.

In the absence of any demonstrated prejudice and because Mohsen was able to file a reply brief, we conclude there is no basis for striking the appellees' brief.

2. The Appeal Is Not Moot

Nor will the appeal be dismissed because it is moot.

"The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for [the appellate] court to provide." Focus Media, Inc. v. Nat'l Broad.

Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004) (quoting Pintlar Corp. v. Fid. & Cas. Co. (In re Pintlar Corp.), 124 F.3d 1310, 1312 (9th Cir. 1997)).

"Bankruptcy appeals may become moot in one of two (somewhat overlapping) ways. First, events may occur that make it impossible for the appellate court to fashion effective relief." Focus Media, 378 F.3d at 922. For instance, after a trustee sells property to a third party not before the court, the appellate court may be powerless to undo the sale. The court cannot fashion effective relief because the third-party purchaser is not subject to the appeal.

"Second, an appeal may become equitably moot when '[a]ppellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court,' thus 'permitt[ing] such a comprehensive change of circumstances to occur as to render it inequitable . . . to consider the merits of the appeal.'" Focus Media, 378 F.3d at 923 (quoting Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981)).

This case presents neither of these situations.

After approval of the compromise, the appellees entered into a stipulation pursuant to Fed. R. Civ. P. 41(a)(1)(ii), made applicable by Fed. R. Bankr. P. 7041, dismissing the adversary proceeding with prejudice.

Both parties to the adversary proceeding, Wu and State Farm, are parties to this appeal. Therefore, in the event Mohsen were successful in obtaining a reversal of the order approving the compromise, this Panel can fashion effective relief by directing

the bankruptcy court to vacate the dismissal of the adversary proceeding.

The appeal, then, is not moot.

3. The Bankruptcy Court Made Findings of Fact

Mohsen complains that the bankruptcy court did not make findings of fact to support its approval of the compromise. This is not correct.

On a motion by the trustee, and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. A & C Props., 784 F.2d at 1381. This requires that the bankruptcy court consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

At the April 25, 2007, hearing on the approval of the compromise, the bankruptcy court made the following findings of fact: (1) "it is uncertain whether State Farm owes additional funds on the claim of the [d]ebtor;" (2) Mohsen had been uncooperative; (3) "it is unlikely that [the trustee] would be successful in further litigation" against State Farm; (4) "the difficulties . . . in the matter of collection, [do] not appear to be an issue if the trustee were to prevail;" (5) "the costs and the inconvenience are too great for the estate;" (6) the trustee had "diligently researched and evaluated the merits of

[Mohsen's] allegations that State Farm owes him money" and had concluded that she cannot continue the litigation in good faith; and (7) the continuation of the adversary proceeding "would be detrimental to the estate and the creditors."

Point by point, the bankruptcy court extracted from the record facts addressing each of the Woodson factors necessary to a determination that a compromise is equitable and fair.

Findings of fact, even cursory ones, are sufficient as long as the appellate court can determine whether the bankruptcy court clearly erred in its findings. See Tex. Extrusion Corp. v. Palmer, Palmer & Coffee (In re Tex. Extrusion Corp.), 836 F.2d 217, 221 (5th Cir. 1988). See also Gupta v. E. Tex. State Univ., 654 F.2d 411, 415 (5th Cir. 1981).

This Panel is satisfied that the bankruptcy court both made findings of fact and, as discussed below, that its view and assessment of the evidence was not clearly erroneous.

4. The Bankruptcy Court's Findings of Fact Were Not Clearly Erroneous

Mohsen maintains that no facts support the approval of the compromise.

This is not the case. The record contains evidence upon which the bankruptcy court could, and did, rationally base its decision to approve the compromise. The Leisure Corp., 234 B.R. at 921.

The trustee's motion and memorandum of points and authorities, the supporting declaration of Yoshie Valadez, counsel for the trustee, and the trustee's reply to Mohsen's opposition, provided a sufficient factual record to support

approval of the compromise.

The motion documents outline the trustee's efforts to prosecute the adversary proceeding and to assess the claim against State Farm. The trustee informed the bankruptcy court she had discovered no evidence to support the claim and that Mohsen had provided her with only ten pages of documents in support of his claim. Those documents either did not support the claim or were contradicted by other evidence we have summarized above.

The trustee's motion also revealed another impediment to continuing the fight against State Farm. Mohsen had been convicted of, among other things, perjury. Although the bankruptcy court did not expressly mention this conviction when approving the compromise, that conviction potentially tainted Mohsen's credibility, calling into further question his largely undocumented assertions about the merits of his claim.

This Panel is satisfied that the record contains evidence upon which the bankruptcy court could rationally base its decision to approve the compromise. Its view of this record was not clearly erroneous.

5. The Bankruptcy Court Did Not Ignore Mohsen's Objections

Mohsen maintains that the bankruptcy court ignored his objections to the compromise and relied exclusively on the trustee's opinion about the merits of the compromise.

Mohsen believes the bankruptcy court did not consider, among other things: (a) the trustee's failure to depose his adjuster, Kip Martin, regarding two $30,000 settlements between Mohsen and State Farm; (b) the trustee's failure to depose his general

contractor regarding the time needed for repairs to the residence; (c) the trustee's failure to depose Kirt Murotsume, a State Farm representative; (d) evidence contradicting the trustee's allegations that Mohsen was uncooperative; (e) State Farm's bad faith conduct that made negotiations with State Farm futile; and (f) whether the trustee met her duties under 11 U.S.C. § 704.

The bankruptcy court considered Mohsen's objections when it found that the trustee had "diligently researched and evaluated the merits of [Mohsen's] allegations that State Farm owes him money."

It is not incumbent on the bankruptcy court to conduct a trial, or even a "mini-trial," in order to refute, point by point, every objection raised by a party unhappy with a compromise. Any such requirement would remove a significant incentive for settlement – the avoidance of litigation costs. Port O'Call Inv. Co. v. Blair (In re Blair), 538 F.2d 849, 851-52 (9th Cir. 1976). The bankruptcy court is required only to find a reasoned basis in the record supporting a conclusion that the compromise is fair and equitable.

In this regard, the bankruptcy court is given the latitude to consider the opinions of the trustee, the debtor, and the creditors when considering the approval of a compromise. Blair, 538 F.2d at 851-52.

Here, the bankruptcy court considered the opinions of the trustee and Mohsen regarding the merits of the underlying claim as well as the compromise. It found the trustee's position, and the facts upon which it was based, more persuasive.

The trustee's position was based on extensive research and analysis. She had retained counsel who reviewed and analyzed documents produced by Mohsen and by others in the discovery process. Voluminous documents were produced for the trustee by State Farm but very little was produced by Mohsen.

After this investigation, the trustee concluded that the claim against State Farm was weak. The bankruptcy court agreed and, as indicated above, this view of the record was not clearly erroneous.

6. It Was Not an Abuse of Discretion to Conclude That the Compromise Was Fair and Equitable

Mohsen nonetheless argues that the compromise is not fair and equitable and does not serve the best interest of the estate.

A bankruptcy court abuses its discretion when approving a compromise if it bases its approval on an erroneous view of the law or a clearly erroneous assessment of the evidence. The Leisure Corp., 234 B.R. at 920.

In this case, the bankruptcy court applied the correct law. The bankruptcy court applied the standard for approval of a compromise set out in A & C Props. and Woodson.

Mohsen maintains that the bankruptcy court incorrectly applied this standard to the facts in his case. But, as discussed above, because the bankruptcy court's determination of the relevant facts was not clearly erroneous, this Panel cannot second guess the bankruptcy court's conclusion that the compromise was fair and equitable. See Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006). That is, it did not abuse its discretion when approving the compromise.

7. The Bankruptcy Court Did Not Shift the Burden of Proof to Mohsen

Mohsen asserts that the bankruptcy court erroneously shifted the burden of proof from the trustee to him by ignoring his objections to the compromise.

As discussed above, however, the bankruptcy court did not ignore Mohsen's objections. The court addressed them when it accepted the trustee's assessment of Mohsen's allegations.

Further, a review of the record does not indicate the bankruptcy court shifted the burden of proof from the trustee to Mohsen by requiring that Mohsen prove the compromise was unfair and inequitable.

CONCLUSION

When it approved the compromise between the trustee and State Farm, the bankruptcy court did not abuse its discretion because its approval was not based on an erroneous view of the law or a clearly erroneous assessment of the evidence.

We AFFIRM.