

MAR 6 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NOT FOR PUBLICATION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 No. NC-07-1188-McPaMk
)
 7 AMR MOHSEN,) Bk. No. 05-50662
)
 8)
)
 9 Debtor.)
)
 10 AMR MOHSEN,)
)
 11 Appellant,)
)
 12 v.) **MEMORANDUM¹**
)
 13 CAROL WU, Chapter 7 Trustee,)
 and STATE FARM FIRE AND)
 14 CASUALTY CO.,)
)
 15 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.

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.

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

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

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

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

16 • Because the repair of the fire damage to the residence
17 should have taken three months, and because State Farm had
18 already paid Mohsen approximately \$65,000 per month for ten
19 months of living expenses, the claim for additional living
20 expenses was weak.

21 • Mohsen's insurance policy did not cover reimbursement
22 of rental late fees. Further, the late fees had been
23 incurred after Mohsen had received \$700,000 from State Farm.

24 • Mohsen's moving expenses had been overpaid by \$2,691.

25 • Mohsen's alarm system was not functional before the
26 fire. The contractor who supposedly repaired the alarm
27 system testified that the system had not been damaged by the
28

1 fire.

2 • Mohsen had failed to submit supporting documentation
3 relating to a weather system.

4 • Mohsen had not taken into account the depreciation of
5 his personal property nor a \$70,000 agreed value for
6 salvaged Persian rugs he had retained. Mohsen's
7 calculations also did not involve actual replacement cost of
8 damaged items because some of the items he purchased did not
9 replace destroyed property, and Mohsen had not replaced
10 other property within the two-year time limit mandated by
11 the insurance policy.

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

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

18 **JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C.
20 §§ 157(b) (2) (A), (O) and 1334. We have jurisdiction under 28
21 U.S.C. §§ 158(a) (1) and (c) (1).

22 **STANDARD OF REVIEW**

23 We examine our own jurisdiction, including mootness issues,
24 de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma),
25 324 B.R. 92, 110 (9th Cir. BAP 2005).

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

1 Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds
2 Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001). A
3 bankruptcy court abuses its discretion if, among other things, it
4 bases its ruling upon an erroneous view of the law or a clearly
5 erroneous assessment of the evidence. See The Cannery Row Co. v.
6 The Leisure Corp. (In re The Leisure Corp.), 234 B.R. 916, 920
7 (9th Cir. BAP 1999); Ho v. Dowell (In re Ho), 247 B.R. 867, 871
8 (9th Cir. BAP 2002).

9 **DISCUSSION**

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

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

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

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

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

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

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

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

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

24 2. The Appeal Is Not Moot

25 Nor will the appeal be dismissed because it is moot.

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

1 Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir.
2 2004) (quoting Pintlar Corp. v. Fid. & Cas. Co. (In re Pintlar
3 Corp.), 124 F.3d 1310, 1312 (9th Cir. 1997)).

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

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

20 This case presents neither of these situations.

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

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

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

3 The appeal, then, is not moot.

4 3. The Bankruptcy Court Made Findings of Fact

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

8 On a motion by the trustee, and after notice and a hearing,
9 the court may approve a compromise or settlement. Fed. R. Bankr.
10 P. 9019. Approval of a compromise must be based upon
11 considerations of fairness and equity. A & C Props., 784 F.2d at
12 1381. This requires that the bankruptcy court consider and
13 balance four factors: 1) the probability of success in the
14 litigation; 2) the difficulties, if any, to be encountered in the
15 matter of collection; 3) the complexity of the litigation
16 involved; and 4) the paramount interest of the creditors with a
17 proper deference to their reasonable views. Woodson v. Fireman's
18 Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

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

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

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

8 Findings of fact, even cursory ones, are sufficient as long
9 as the appellate court can determine whether the bankruptcy court
10 clearly erred in its findings. See Tex. Extrusion Corp. v.
11 Palmer, Palmer & Coffee (In re Tex. Extrusion Corp.), 836 F.2d
12 217, 221 (5th Cir. 1988). See also Gupta v. E. Tex. State Univ.,
13 654 F.2d 411, 415 (5th Cir. 1981).

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

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

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

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

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

1 approval of the compromise.

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

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

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

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

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

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

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

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

12 It is not incumbent on the bankruptcy court to conduct a
13 trial, or even a "mini-trial," in order to refute, point by
14 point, every objection raised by a party unhappy with a
15 compromise. Any such requirement would remove a significant
16 incentive for settlement - the avoidance of litigation costs.
17 Port O'Call Inv. Co. v. Blair (In re Blair), 538 F.2d 849, 851-52
18 (9th Cir. 1976). The bankruptcy court is required only to find a
19 reasoned basis in the record supporting a conclusion that the
20 compromise is fair and equitable.

21 In this regard, the bankruptcy court is given the latitude
22 to consider the opinions of the trustee, the debtor, and the
23 creditors when considering the approval of a compromise. Blair,
24 538 F.2d at 851-52.

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

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

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

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

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

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

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

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

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

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

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

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

13 **CONCLUSION**

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

18 We AFFIRM.
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