

NOV 26 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NOT FOR PUBLICATION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. | NC-08-1117-DJuMk |
| |) | | NC-08-1148-DJuMk |
| ADELINA B. WILLIAMS and |) | | |
| ANTHONY L. WILLIAMS, |) | | |
| |) | Bk. No. | 08-41065 |
| Debtors. |) | | |
| <hr/> | | | |
| ADELINA B. WILLIAMS and |) | | |
| ANTHONY L. WILLIAMS, |) | | |
| |) | | |
| Appellants, |) | | |
| |) | | |
| v. |) | MEMORANDUM¹ | |
| |) | | |
| MARTHA G. BRONITSKY, Chapter |) | | |
| 13 Trustee; U.S. TRUSTEE, |) | | |
| |) | | |
| Appellees. ² |) | | |
| <hr/> | | | |

Argued and Submitted on November 20, 2008
at San Francisco, California

Filed - November 26, 2008

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

Honorable Leslie J. Tchaikovsky, Bankruptcy Judge, Presiding

Before: DUNN, JURY and MARKELL, 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 Rule 8013-1.

²Appellees did not participate in this appeal.

1 Chapter 13³ debtors appeal both the dismissal of their case
2 for failure to comply with the credit counseling requirements of
3 11 U.S.C. § 109(h) and the order discharging the chapter 13
4 trustee. We AFFIRM both of the bankruptcy court's decisions.

5 **I. FACTS⁴**

6 Adelina B. Williams and Anthony L. Williams ("the
7 Williams"), without the assistance of counsel, filed a joint
8 chapter 13 petition ("Petition") on March 7, 2008, in order to
9 prevent the scheduled foreclosure sale of their residence.
10 Attached to the Petition was an "Exhibit D⁵ - Individual Debtor's
11 Statement of Compliance With Credit Counseling Requirement"
12
13
14

15 ³Unless otherwise indicated, all chapter, section and rule
16 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
17 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

18 ⁴On August 7, 2008, a motions panel issued an order waiving
19 as to Appellants both formal briefing and the filing of an
20 appendix and/or excerpts of the record. See Fed. R. Bankr. P.
21 8009(b) and 8019. Because no record was supplied by Appellants,
22 we have reviewed and rely on the bankruptcy court docket. Atwood
23 v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233
(9th Cir. BAP 2003) (the BAP may supplement incomplete excerpts
of record with information obtained from the bankruptcy court
docket).

24 ⁵Exhibit D is an official form. The instructions are
25 explicit on the face of Exhibit D and warn debtors of their
26 failure to check truthfully one of the five statements concerning
27 credit counseling. The form also states, "Every individual
28 debtor must file this Exhibit D. If a joint petition is filed,
each spouse must complete and file a separate Exhibit D. Check
one of the five statements below and attach any documents
directed."

1 signed by Mrs. Williams and dated February 19, 2008.⁶ Although
2 Mrs. Williams did not check any of the five boxes included on
3 Exhibit D, she did insert text after the form statement in
4 paragraph 3. Paragraph 3 provides:

5 I certify that I requested credit counseling services
6 from an approved agency but was unable to obtain the
7 services during the five days from the time I made my
8 request, and the following exigent circumstances merit
9 a temporary waiver of the credit counseling requirement
so I can file my bankruptcy case now. *[Must be
accompanied by a motion for determination by the
court.] [Summarize exigent circumstances here.]*

10 Mrs. Williams summarized her exigent circumstances as follows:
11 "By Motion: Waver [sic] of Need. Case against former employer
12 (Whistleblower Statutes)."

13 Also attached to the Petition was a document titled
14 "Debtor's Motion to Bankruptcy Court for Waver [sic] of Credit
15 Counseling." This motion was signed by Mrs. Williams,
16 purportedly on behalf of herself and Mr. Williams. The content
17 of the motion in its entirety reads:

18 In that Debtors have never abused their credit
19 privileges and are in trouble only due to exigent
20 circumstances beyond their control. In that nearly
21 five years ago, Husband was fired from his job of 13
22 years as a mechanic at United Airlines, due to
23 Whistleblower Retaliation (Williams v. United Airlines
C-04-3787-CW). An appeal from this judge's decision
24 was handed down by the Ninth Circuit Court on September
25 12, 2007, wherein the judges sent the case to the
26 United States Dept. of Labor. (Williams v. United
27 Airlines 2008-AIR-0003) scheduled for trial on March
28 12, 2008. (Exhibit-A).

During the course of this 4-year-long legal proceeding,
Husband was unable to obtain employment due to an open
case against United, and stringent employment

⁶No Exhibit D signed by Mr. Williams is in the bankruptcy
court records.

1 background requirements of local employers. After
2 numerous attempts of Injunctive Relief have been denied
3 by United, Debtors have had to rely on equity cash-outs
4 from their home, and Husband wife's credit merely to
5 survive. Now Debtor's home is in foreclosure, with an
6 impending sale of April 22, 2008 (Exhibit-B); and this
7 Bankruptcy filing is needed to prevent this from
8 happening, until final Case disposition by
9 Administrative Law Judge Gerald M. Etchingham, U.S.
10 Department of Labor. (See: Procedures for the Handling
11 of Discrimination Complaints Under Section 519 of the
12 Wendell H. Ford Aviation Investment and Reform Act for
13 the 21st Century; Sub. C, Miscellaneous Provisions
14 Standard No: 1979.114).

15 In the end, it is certain that the Dept. of Labor shall
16 rule in Debtor's favor.

17 Attached to this motion were the trial notice and the foreclosure
18 notice.

19 The docket entry for the Petition includes the following
20 comment: "EXHIBIT D FILED BUT NO OPTION WAS SELECTED. NO
21 CERTIFICATE OF CREDIT COUNSELING FILED."

22 On March 24, 2008, the chapter 13 Trustee ("Trustee") filed
23 her motion to dismiss the Petition based on the Williams' failure
24 to file required case documents, including (a) either a
25 certification of prefiling consumer credit counseling or a
26 declaration of exigent circumstances regarding prefiling consumer
27 credit counseling, (b) the balance of their schedules, (c) a
28 chapter 13 plan, (d) a matrix, and (e) Form B22C. The motion
advised the Williams that they had twenty days from March 24 to
file a written request for hearing on the proposed dismissal. The
twenty days expired on April 14, 2008.

On April 8, 2008, the Williams filed their Form B22C, and on
April 15, 2008, the Williams filed both their chapter 13 plan and
their objection ("Objection") to the Trustee's proposed
dismissal. Earlier on April 15, 2008, however, the Trustee had

1 (1) filed her declaration stating that the Williams had made no
2 response to the motion to dismiss and (2) submitted an order for
3 the dismissal of the case. The bankruptcy court entered the
4 dismissal order on the same date, before the Williams' Objection
5 was docketed. In the Objection, the Williams state that they
6 "filed" the motion for waiver of the credit counseling
7 requirement on February 19, 2008, but that no "response was given
8 by Bankruptcy Court;" that they filed the motion for waiver again
9 on April 4, 2008;⁷ and that they filed their Form B22C on April
10 5, 2008. The bankruptcy court took no action on the Objection
11 after the Dismissal Order was entered.

12 The Williams promptly filed a motion for reconsideration of
13 the Dismissal Order and a motion for stay pending appeal. The
14 bankruptcy court denied both motions on April 29, 2008. In its
15 memorandum and order, the bankruptcy court stated:

16 The Court writes this memorandum to explain better to
17 the Debtors why their motions must be denied. Aside
18 from other inadequacies with their handling of their
19 case, as noted above, the Debtors are simply ineligible
20 to be debtors in this case due to their failure to
21 obtain pre-petition credit counseling or to establish a
22 basis for either permanently excusing them from
23 obtaining such counseling or for extending the time
24 within which they may obtain such counseling post-
25 petition and then obtaining the counseling post-
26 petition. For that reason alone, the motions must be
27 denied.

23 The Williams filed their notice of appeal (NC-08-1117) on the
24 same day.

26 ⁷The bankruptcy court docket reflects that no document was
27 filed on April 4, 2008; nor is there a docket entry for the
28 motion for waiver of the credit counseling requirement on any
date after April 4, 2008.

1 On May 20, 2008, the Trustee filed her final account.
2 Thereafter, an order discharging the Trustee was entered May 28,
3 2008. The Williams filed their notice of appeal (NC-08-1148)
4 with respect to that order on June 3, 2008.

5 On August 12, 2008, the Williams' mortgage creditor filed a
6 motion for relief from stay ("362 Motion"), which the bankruptcy
7 court heard on August 29, 2008. The Williams filed no response
8 to the 362 Motion. At the hearing, the bankruptcy court ruled
9 that the case had been dismissed and that if no order staying the
10 dismissal had been entered, the case remains dismissed. The
11 bankruptcy court agreed to enter a "comfort order" granting the
12 creditor relief from the automatic stay. The order was entered
13 September 17, 2008.

14 II. JURISDICTION

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b) (2) (A).

17 We cannot exercise jurisdiction over a moot appeal. I.R.S.
18 v. Patullo (In re Patullo), 271 F.3d 898, 900 (9th Cir. 2001).
19 The test for mootness is whether we still can grant effective
20 relief to the appealing party if we decide the merits in his or
21 her favor. Pilate v. Burrell (In re Burrell), 415 F.3d 994, 998
22 (9th Cir. 2005). If a case becomes moot while an appeal is
23 pending, we must dismiss the appeal. Patullo, 271 F.3d at 900.

24 Examples of situations where we cannot grant effective
25 relief to an appealing party are when funds have been disbursed
26 to nonparties or when subject property has been sold to a good
27 faith purchaser. See Beatty v. Traub (In re Beatty), 162 B.R.
28 853, 856 (9th Cir. BAP 1994).

1 In this case, our review of the bankruptcy court docket and
2 the Williams' October 31, 2008, motion for stay pending appeal
3 alerted us to the fact that a foreclosure sale of the Williams'
4 residence was scheduled for November 18, 2008. However, at oral
5 argument, Mr. Williams advised us that the foreclosure sale had
6 been postponed. In addition, the Trustee reported in her final
7 account that priority and unsecured claims totaling \$24,539.31
8 had been filed in the Williams' chapter 13 case that could be
9 subject to discharge in bankruptcy. Based on the record before
10 us at this time, it is unclear whether we would be precluded from
11 granting any effective relief to the Williams if they prevailed
12 in this appeal. Accordingly, we will proceed to consider the
13 merits of the Williams' appeal. We have jurisdiction under
14 28 U.S.C. § 158.

15 III. ISSUES

16 Whether the bankruptcy court erred in dismissing the
17 Williams' case.

18 Whether the bankruptcy court erred in discharging the
19 Trustee.

20 IV. STANDARDS OF REVIEW

21 We review an order dismissing a chapter 13 bankruptcy case
22 for abuse of discretion. Brown v. Sobczak (In re Sobczak), 369
23 B.R. 512, 516 (9th Cir. BAP 2007). Under the abuse of discretion
24 standard, we must affirm the decision of the bankruptcy court
25 unless (1) we have a definite and firm conviction that the
26 bankruptcy court committed a clear error of judgment in the
27 conclusion it reached upon weighing the relevant factors, (2) the
28 bankruptcy court applied the wrong law, or (3) the bankruptcy

1 court rested its decision on clearly erroneous findings of
2 material fact. Delay v. Gordon, 475 F.3d 1039, 1043 (9th Cir.
3 2007).

4 We review issues of statutory construction and conclusions
5 of law, including interpretation of provisions of the Bankruptcy
6 Code, de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,
7 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003).

8 V. DISCUSSION

9 A. The Dismissal Order Appeal (NC-08-1117).

10 This case involves application of the credit counseling
11 requirement contained in § 109(h). We previously have discussed
12 § 109(h)'s purposes and parameters.

13 The new § 109(h) requires, as a condition to
14 eligibility for bankruptcy relief, that within 180 days
15 prior to an individual debtor's bankruptcy filing, the
16 debtor receive (1) a briefing as to available
17 opportunities for credit counseling, and (2) assistance
18 in performing a budget analysis from a nonprofit credit
19 counseling agency, approved ordinarily by the United
States Trustee (collectively, "credit counseling"). The
purpose of these provisions is to require debtors at
least to explore the utility of credit counseling as an
option before throwing in the towel and seeking a
discharge of their debts in bankruptcy.

20 Mendez v. Salven (In re Mendez), 367 B.R. 109, 114 (9th Cir. BAP
21 2007). In order to be eligible for chapter 13 relief, the
22 Williams, like other debtors, were required to obtain credit
23 counseling.

24 The Williams do not dispute that they did not obtain credit
25 counseling either before or after they filed their Petition.
26 Instead, they assert that the bankruptcy court erred when it
27
28

1 failed to waive⁸ the credit counseling requirement based on the
2 "exigent" circumstances of Mr. Williams's litigation with his
3 former employer and the economic impact that litigation has had
4 on the Williams. We agree with the bankruptcy court that the
5 grounds stated by the Williams in support of their request to be
6 excused permanently from satisfying the credit counseling
7 requirement were inadequate. Section 109(h)(4) explicitly
8 establishes the only circumstances under which the credit
9 counseling requirement can be waived:

10 The requirements of paragraph (1) shall not apply with
11 respect to a debtor whom the court determines, after
12 notice and hearing, is unable to complete those
13 requirements because of incapacity, disability, or
14 active military duty in a military combat zone. For
15 the purposes of this paragraph, incapacity means that
16 the debtor is impaired by reason of mental illness or
17 mental deficiency so that he is incapable of realizing
18 and making rational decisions with respect to his
19 financial responsibilities; and 'disability' means that
20 the debtor is so physically impaired as to be unable,
21 after reasonable effort, to participate in an in
22 person, telephone, or Internet briefing required under
23 paragraph (1).

18 The Williams did not assert before the bankruptcy court, and do
19 not assert on appeal, that they suffer from an incapacity or
20 disability as defined in § 109(h)(4), or that they were serving
21 on active military duty in a combat zone.

22 The language of § 109(h)(1) provides that unless an
23 individual has obtained the credit counseling mandated by

25 ⁸Although Mrs. Williams inserted her comments in the Exhibit
26 D paragraph relating to a temporary waiver, it is clear from the
27 pleadings both in the bankruptcy court and on appeal that the
28 Williams did not obtain credit counseling at any time. Mr.
Williams confirmed at oral argument that he and Mrs. Williams had
not obtained the required credit counseling.

1 statute, he "may not be a debtor under this title." Because the
2 Williams failed to obtain credit counseling, they were not
3 eligible to be debtors. The bankruptcy court did not err when it
4 dismissed the case.

5 B. Appeal of Order Discharging Trustee (NC-08-1148)

6 The Williams have not articulated any basis for contending
7 that the bankruptcy court erred in entering the order discharging
8 the Trustee. Once the Trustee filed her final account certifying
9 that the estate had been fully administered, there was nothing
10 more for the Trustee to do. Although the bankruptcy case remains
11 open, presumably because of these pending appeals, that is a
12 matter of court administration only. The bankruptcy court did
13 not err when it discharged the Trustee.

14 **VI. CONCLUSION**

15 NC-08-1117. We do not have a definite and firm conviction
16 that the bankruptcy court committed a clear error of judgment
17 when it dismissed the Williams' case for failing to meet the
18 credit counseling requirement of § 109(h). The bankruptcy court
19 neither applied the wrong law nor committed clear error in its
20 factual findings. The Williams were not eligible for chapter 13
21 relief as a result of their failure to comply with § 109(h).

22 NC-08-1148. Further, the Williams did not address the basis
23 for their appeal of the order discharging the Trustee, and we
24 have found no error in entry of that purely administrative order.

25 We AFFIRM.