

JUN 13 2007

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NOT FOR PUBLICATION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

6	In re:)	BAP No.	CC-06-1196-KPaD
)		
7	RICHARD ALLAN BELOTTI and)	Bk. No.	RS 04-15966-MG
	SHARON ANN BELOTTI,)		
8)		
	Debtors.)		
9	_____)		
)		
10	MICHAEL W. WATKINS,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	RICHARD ALLAN BELOTTI; SHARON)		
	ANN BELOTTI; N.L. HANOVER,)		
14	Chapter 7 Trustee,)		
)		
15	Appellees.)		
16	_____)		

Submitted Without Oral Argument on June 6, 2007

Filed - June 13, 2007

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

Honorable Mitchel R. Goldberg, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and DUNN, 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.

1 PER CURIAM:

2
3 The Appellant, Michael W. Watkins, appeals the order of the
4 U.S. Bankruptcy Court for the Central District of California,
5 Riverside Division, entered July 6, 2006, denying the claim filed
6 by Appellant and denying Appellant's motion to transfer the
7 matter to the U.S. District Court for the Middle District of
8 Tennessee. We AFFIRM.

9
10 FACTS

11 Appellees Richard and Sharon Belotti are chapter 7 debtors
12 who filed the underlying bankruptcy case in 2004 in the U.S.
13 Bankruptcy Court for the Central District of California,
14 Riverside Division.

15 Appellee N.L. Hanover serves as the chapter 7 trustee in the
16 Belotti bankruptcy case.

17 The dispute between Appellant Michael W. Watkins and the
18 Belottis relates to a failed residential construction contract
19 between the Belottis and Advanced Technologies for Building,
20 Inc., a contractor with which Appellant was connected, for the
21 construction of a residence in California.

22 Appellant filed a proof of secured claim in the bankruptcy
23 case for \$2,001,780, and represented that it was based on "Civil
24 Action BBC 00433." He listed his address as "9588 SVL BOX,
25 Victorville, Ca 92392."

26 Attached to the proof of claim were two documents from Case
27 No. BBC00433, Superior Court of the State of California, County
28 of San Bernardino, Central Court. One document was entitled

1 "Cross Complaint of Michael W. Watkins" in which Appellant
2 asserted that he owned a patent and alleged four specific causes
3 of action against the Belottis: negligent misrepresentation;
4 fraud; perjury; and malicious prosecution. On each count, he
5 demanded \$2,000,000. The other document, entitled "Mandatory
6 Settlement Conference Mediation Brief," was prepared by Appellant
7 and itemized \$1,780 of costs to be added to his \$2,000,000
8 demand. Both of the state-court documents reflected the same
9 Victorville, California address as that which appeared on the
10 proof of claim.

11 Appellant filed an amended proof of claim on May 4, 2005.
12 The amendment redesignated the claim from secured status to
13 unsecured, nonpriority status but did not change the \$2,001,780
14 sum claimed. The amended proof of claim listed Appellant's
15 address as "1100 E. Victoria Street, Apt I 5, Carson, Ca 90746."

16 The debtors objected to Appellant's claim on February 23,
17 2006. The exhibits to the objection included a 54-page
18 "Tentative Opinion" issued by the Court of Appeal of the State of
19 California, Fourth Appellate District, Division Two, in Case No.
20 E032558 (Super. Ct. No. VCVVS025786), an appeal captioned
21 "Virginia Louise Watkins et al. v. Stephen P. Sands, as Registrar
22 of Contractors, et al." It is a review of an order issued by the
23 Contractors State License Board revoking the contractor's license
24 of Advanced Technologies for Building, Inc., barring Virginia
25 Watkins (spouse of Appellant Michael William Watkins) and Michael
26 David Watkins (son of Appellant Michael William Watkins) from
27 serving as principal of any licensed contractor, and ordering
28 Virginia Watkins and Michael David Watkins to pay restitution or

1 reimburse the state board for its investigation and enforcement
2 costs. A California superior court had affirmed the
3 administrative order. The Fourth District Court of Appeal
4 affirmed except as to restitution and reimbursement.

5 Appellant filed a "Response to Notice of Objection" on March
6 23, 2006, asserting that "[t]he case is now before the United
7 States District Court Middle District of Tennessee, Nashville.
8 Case # 3 06 0197." The remainder of the Response described the
9 Tennessee lawsuit (which is said to be a patent infringement
10 action against a number of defendants and seeks \$100,000,000) and
11 appeared to assert that the bankruptcy court did not have
12 jurisdiction to resolve the matter. Appellant signed his name as
13 "Michael W. Watkins, *sui juris* citizen of Tennessee and of the
14 United States" and provided an address of 224 Edith Ave.,
15 Nashville, TN 37207."

16 At a hearing on March 30, 2006, the bankruptcy court
17 sustained the objection to claim, but granted leave to amend the
18 claim. Tr. 3/30/06 at pp. 25-27.

19 Appellant filed on April 6, 2006, a paper entitled "Amended
20 Claim of Michael W. Watkins and Motion to Transfer to United
21 States District Court Middle District of Tennessee Case # 3 06
22 0197 Where There is a Related Pending Case." To the extent it
23 was an amendment to the proof of claim, it merely asserted that
24 the matter was now within the exclusive jurisdiction of the
25 district court. The remainder of the document is styled a Motion
26 to Transfer and contains what appear to be the allegations of a
27 complaint in which six causes of action are asserted, only one of
28 which is patent infringement.

1 The chapter 7 trustee filed an opposition objecting to the
2 claim to the extent it was a claim, opposing transfer to a
3 different district, and asserting that any request for permission
4 to sue the trustee that might be construed as being present in
5 the document should be denied.

6 The bankruptcy court conducted a hearing on May 11, 2006.
7 It declined to transfer the claim and disallowed the claim with
8 prejudice. Tr. 5/11/06 at pp. 20-25.

9 A notice of appeal was filed by Appellant on May 25, 2006.
10 No Statement of Election to have the appeal heard by the district
11 court pursuant to 28 U.S.C. § 158(c)(1), as required by Federal
12 Rule of Bankruptcy Procedure 8001(e), was filed.

13 The order denying the motion to transfer and rejecting the
14 claim based on the ruling announced in open court on May 11,
15 2006, was not entered until July 6, 2006.

16 After our motions panel denied a motion to transfer this
17 appeal to the U.S. District Court for the Middle District of
18 Tennessee, that panel ordered a temporary remand for the limited
19 purpose of affording Appellant an opportunity to establish, as a
20 matter of fact, that he had made a timely election to have this
21 appeal heard by the U.S. District Court for the Central District
22 of California, even though the record did not reflect that a
23 timely election to have the appeal heard by the district court
24 pursuant to 28 U.S.C. § 158(c)(1) was filed in compliance Rule
25 8001(e). After the time allotted for the remand expired without
26 Appellant having taken action to establish that there was a
27 timely election, that panel ruled that the appeal is properly
28

1 before it and ordered Appellant to file his opening brief and
2 excerpts of record not later than April 30, 2007.

3 Appellant filed his opening brief on April 30, 2007, but did
4 not file excerpts of record as an appendix to the brief as
5 required by Federal Rule of Bankruptcy Procedure 8009(b).

6 Appellees' briefs were filed May 15, 2007, by chapter 7
7 trustee N.L. Hanover and May 17, 2007, by Richard and Sharon
8 Belotti. Appellant's reply brief was filed June 4, 2007. The
9 appeal has now been fully briefed. Appellant still has not filed
10 an appendix containing excerpts of the record. Appellee Hanover,
11 however, did file an Appellee's Appendix.

12 13 ISSUES

14 1. Whether this appeal should be resolved without oral
15 argument.

16 2. Whether this Panel has jurisdiction.

17 3. Whether the claim was correctly disallowed.

18 4. Whether the motion to transfer was correctly denied.
19

20 STANDARDS OF REVIEW

21 We review questions of law, including the application of
22 procedural rules, de novo, and questions of fact for clear error.
23 Garvida v. Litton Loan Serv'g, LLP (In re Garvida), 347 B.R. 697,
24 703 (9th Cir. BAP 2006). We review questions of jurisdiction de
25 novo. Donald v. Curry (In re Donald), 328 B.R. 192, 196 (9th
26 Cir. BAP 2005). A decision regarding transfer is reviewed for
27 abuse of discretion. Jones v. GNC Franchising, Inc., 211 F.3d
28 495, 498 (9th Cir. 2000); Donald, 328 B.R. at 196.

1 JURISDICTION

2 The bankruptcy court had jurisdiction over these matters
3 pursuant to 28 U.S.C. § 1334; they are core proceedings under 28
4 U.S.C. § 157(b) (2) (B). We have appellate jurisdiction pursuant
5 to 28 U.S.C. § 158(a) and (c) (1).

6
7 DISCUSSION

8 We begin by explaining our procedure and jurisdiction before
9 addressing the disallowance of Appellant's claim and the denial
10 of his motion to transfer.

11
12 I

13 The procedural issue is whether we should take this appeal
14 as submitted in its current posture. It subdivides into whether
15 Appellant has complied with his obligations regarding filings and
16 whether it is appropriate to act without oral argument.

17 We have examined the briefs with care and are satisfied that
18 we are able to engage in meaningful review of the issues
19 presented. See Syncom Capital Corp. v. Wade, 924 F.2d 167, 169
20 (9th Cir. 1991); Sw. Adm'rs, Inc. v. Lopez, 781 F.2d 1378, 1378-
21 80 (9th Cir. 1986); McCarthy v. Prince (In re McCarthy), 230 B.R.
22 414, 417 (9th Cir. BAP 1999).

23 The burden to provide a transcript and findings of fact and
24 conclusions of law is on the Appellant. As the person appealing,
25 he has the ultimate persuasive burden to demonstrate the
26 existence of error that would warrant altering the status quo
27 established by the order being appealed. Kyle v. Dye (In re
28 Kyle), 317 B.R. 390, 394 (9th Cir. BAP 2004), aff'd, 170 F. App'x

1 457 (9th Cir. 2006); Gionis v. Wayne (In re Gionis), 170 B.R.
2 675, 680-81 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir.
3 1996) (citing cases); cf. Cogliano v. Anderson (In re Cogliano),
4 355 B.R. 792, 803 (9th Cir. BAP 2006) (burden to assure complete
5 record).

6 We are able to conduct meaningful review because the
7 Appellee's Appendix is sufficiently extensive as to apprise us of
8 what occurred in the bankruptcy court; and the briefs reveal that
9 the issues are essentially questions of law that are not fact-
10 intensive. We are entitled to presume from Appellant's decision
11 not to supply excerpts of the record that he does not believe
12 that any additional excerpts would be helpful in his effort to
13 demonstrate error. Gionis, 170 B.R. at 681. We have also
14 examined the bankruptcy court's docket in order to gain a fuller
15 understanding of the proceedings.

16 Accordingly, we will exercise our discretion to proceed with
17 the consideration of the appeal and, further, exercise our
18 discretion under Federal Rule of Bankruptcy Procedure 8012 and
19 9th Cir. BAP Rule 8012-1 by determining that the facts and legal
20 arguments are adequately presented in the briefs and record and
21 the decisional process would not be significantly aided by oral
22 argument. Now that the position and theory of the Appellant are
23 known, it is appropriate to decide this appeal without oral
24 argument, further delay, and further burden on the parties.

25
26 II

27 Next, there is the question whether we have jurisdiction to
28 hear this appeal. We conclude that we do.

1 The governing statute is 28 U.S.C. § 158(c)(1), which
2 provides in relevant part that:

3 each appeal under subsection (a) shall be heard by a 3-
4 judge panel of the bankruptcy appellate panel service
established under subsection (b)(1) unless –

5 (A) the appellant elects at the time of filing the
appeal; or

6 (B) any other party elects, not later than 30 days
7 after service of notice of the appeal; to have such appeal
heard by the district court.

8 28 U.S.C. § 158(c)(1).

9 This statute is implemented by Federal Rule of Bankruptcy
10 Procedure 8001(e):

11 (e) Election to Have Appeal Heard by District Court
12 Instead of Bankruptcy Appellate Panel. An election to have
13 an appeal heard by the district court under 28 U.S.C.
§ 158(c)(1) may be made only by a statement of election
14 contained in a separate writing filed within the time
prescribed by 28 U.S.C. § 158(c)(1).

15 Fed. R. Bankr. P. 8001(e).

16 During the initial stages of the processing of this appeal,
17 Appellant asserted that he had made a statement of election to
18 have the appeal heard by the district but indicated that it had
19 not been accepted or had been lost by the bankruptcy court clerk.
20 This presented a factual question as to what actually happened.
21 Accordingly, we remanded to the bankruptcy court for a limited
22 period to afford Appellant an opportunity to demonstrate as a
23 factual matter that he actually had made the election.

24 The period of the remand expired without the Appellant
25 having taken steps to establish that he actually made the
26 election in the form required by Rule 8001(e) and within the time
27 prescribed by 28 U.S.C. § 158(c)(1).

28

1 Appellant was afforded a reasonable opportunity to establish
2 that he had filed a correct and timely statement of election to
3 have the appeal heard by the U.S. District Court for the Central
4 District of California. We infer from his inaction that a
5 factual inquiry by the bankruptcy court would not support his
6 position.

7 It follows from the absence of a correct and timely
8 statement of election to have the appeal heard by the district
9 court, that this Panel has jurisdiction to hear the appeal by
10 virtue of 28 U.S.C. § 158(c)(1).

11
12 III

13 The first issue raised by Appellant relates to the
14 bankruptcy court's denial of the Appellant's claim. The merits
15 of that decision are not called into question. Rather, the focus
16 of the Appellant is on his assertion that there is federal
17 subject matter jurisdiction over his claim and that he has a
18 right to trial by jury on the merits of the claim. These are
19 questions of law that we review de novo.

20 We agree that there is federal subject-matter jurisdiction
21 to resolve the claim. Nothing in the record (or in the court's
22 docket) suggests that the bankruptcy court's order that the claim
23 be "denied" (which the hearing transcripts reveal was based on
24 sustaining an objection to claim and disallowing the claim with
25 prejudice) was based on lack of subject-matter jurisdiction.
26 Thus, this aspect of the argument in the opening brief does not
27 present a material question or controversy.

