

JUN 25 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NOT FOR PUBLICATION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

In re:)	BAP No.	WW-06-1421-KMoR
)		
J'AMY LYNN OWENS,)	Bk. No.	06-13051
)		
Debtor.)		
)		
)		
SHULKIN HUTTON INC., P.S.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
KENNETH TREIGER; J'AMY LYNN)		
OWENS; BANK OF AMERICA; THE)		
VICENS.)		
)		
Appellees.)		

Argued and Submitted on May 23, 2007
 at Seattle, Washington

Filed - June 25, 2007

Appeal from the United States Bankruptcy Court
 for the Western District of Washington

Honorable Karen A. Overstreet, Chief bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and RIBLET,** Bankruptcy Judges.

*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.

**Hon. Robin L. Riblet, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Appellant, Shulkin Hutton Inc., counsel for the debtor in
2 her first chapter 11 case, appeals the order dismissing her
3 second chapter 11 case, which the bankruptcy court dismissed for
4 cause as a bad faith filing. We AFFIRM.

5
6 FACTS

7 The debtor, J'Amy Owens, and appellee, Ken Treiger, were
8 married in July 1997, separated in June 2000, filed for marital
9 dissolution in February 2001, and received a final divorce decree
10 as to status in June 2002. The state court reserved jurisdiction
11 over debt and property issues until after completion of separate
12 pending bankruptcy cases filed by each spouse in the Western
13 District of Washington. Treiger had filed a chapter 13 case on
14 January 30, 2002 (case no. 02-11124), and Owens had filed a
15 chapter 11 case on February 19, 2002 (case no. 02-12018).

16 The reserved property distribution issues centered on two
17 parcels of real property located in Seattle, Washington,
18 purchased by Owens and Treiger in the interval between their
19 separation and final divorce decree. Owens and Treiger obtained
20 title to and financed the properties as husband and wife. Owens
21 lived in the home located on Maplewood Place, and Treiger lived
22 in the home located on First Avenue North. Treiger's annual
23 earning capacity is approximately \$60,000, whereas Owens' annual
24 earning capacity is between \$150,000 and \$800,000.

25 On February 22, 2002, the bankruptcy court in Treiger's case
26 ordered relief from stay to allow the state court divorce
27 proceedings to continue.

1 Treiger's chapter 13 case was converted to chapter 7 on
2 April 3, 2002. James Rigby was appointed as the case trustee.

3 On June 19, 2002, the state court entered a Decree of
4 Dissolution, but expressly reserved resolution of property and
5 debt issues until the conclusion of the Owens and Treiger
6 bankruptcy cases.

7 Treiger's chapter 7 trustee filed an adversary proceeding
8 against Owens (who was then a chapter 11 debtor in possession
9 represented by the present appellant) on May 9, 2003, to
10 establish the Maplewood property as community property of Owens
11 and Treiger, and thus property of Treiger's bankruptcy estate
12 (Adv. Proc. No. 03-01209).

13 After a trial, the bankruptcy court ruled that the Maplewood
14 property was community property and therefore property of
15 Treiger's chapter 7 bankruptcy estate pursuant to 11 U.S.C.
16 § 541(a)(2). The bankruptcy court's ruling was affirmed on
17 appeal by the United States District Court. While further appeal
18 to the Ninth Circuit was pending, the case trustee and Owens
19 entered into a settlement agreement.

20 The bankruptcy court approved a settlement according to
21 which Owens paid the Treiger case trustee \$215,000 in full
22 satisfaction of all claims of the Treiger estate against Owens,
23 including all claims the trustee asserted with respect to the
24 Maplewood property. The trustee conveyed the estate's entire
25 interest in the property to Owens by means of a quitclaim deed.

26 On March 21, 2005, Treiger's chapter 7 case was closed, and
27 on July 5, 2005, Owens' chapter 11 case was dismissed.

28

1 Owens and Treiger then returned to state court to resume
2 proceedings regarding the division of property between the
3 parties. During the state court proceedings, Treiger's attorney
4 took the position that the state court could include the
5 Maplewood property in the division of property between the
6 parties. Owens regarded this as an illegitimate circumvention of
7 Treiger case trustee's settlement with Owens.

8 On March 19, 2006, Owens filed a motion to reopen Treiger's
9 chapter 7 case to prevent any action by the state court to deal
10 with the Maplewood property on the legal ground that the order of
11 sale to her was res judicata. Treiger objected. The bankruptcy
12 court denied the motion to reopen on May 12, 2006.

13 While the motion to reopen was pending, on April 17, 2006,
14 the state court issued a ruling on the division and distribution
15 of the remaining property and debt issues left unresolved by the
16 final dissolution decree.

17 The state court ruled that it had subject-matter
18 jurisdiction to try issues of property and debt distribution
19 between Owens and Treiger. This included authority pursuant to
20 Revised Code of Washington § 26.090.080 ("RCW") to make a just
21 and equitable distribution of the property, whether community or
22 separate, of the parties.

23 With respect to the Maplewood property, the state court took
24 into account that Owens paid Treiger's chapter 7 trustee \$215,000
25 for the estate's interest in the property. The state court then
26 considered the source of the \$215,000, which included \$150,000
27 given or loaned to Owens from a friend that was thus her separate
28 property. The remaining \$65,000 consisted of proceeds from

1 Owens' sale of community property.

2 Since the funds used to pay the trustee were both community
3 and separate property, the state court concluded that the
4 Maplewood property was "both separate and community property."

5 The court ordered the Maplewood property sold, with the
6 mortgage satisfied and with the remaining proceeds distributed
7 one-half to each party. It reasoned that Owens had a
8 substantially greater earning capacity than Treiger and that
9 Treiger is the primary residential custodian of their child.

10 The state court entered a supplemental dissolution decree,
11 followed by findings of fact and conclusions of law on post-
12 dissolution division of property and financial issues. Owens'
13 appeal to the Washington Court of Appeals was denied, as was an
14 emergency effort to have the Ninth Circuit intervene.

15 The sale of the Maplewood property was scheduled for
16 September 28, 2006. Owens filed a second chapter 11 case on
17 September 7, 2006, in which she was represented by new counsel
18 (Case No. 06-13501). Owens filed an adversary complaint against
19 Treiger to set aside the transfer of the Maplewood property
20 pursuant to 11 U.S.C. §§ 544 and 548 (Adv. Proc. No. 06-01407),
21 which was later dismissed for lack of prosecution.

22 On September 13, 2006, Treiger filed a motion to dismiss
23 Owens' second chapter 11 case as a bad faith filing and/or
24 approve the state court ordered sale of the Maplewood property.
25 At a hearing on September 15, 2006, the motion to dismiss was
26 heard by a judge substituting for the judge assigned to the case.
27 The motion to dismiss was denied, but Treiger's oral motion for
28 relief from stay to allow the sale of the Maplewood property to

1 proceed was granted.

2 On September 29, 2006, Treiger filed a renewed motion to
3 dismiss. Shulkin Hutton, asserting creditor status due to unpaid
4 legal bills from the first Owens chapter 11 case, opposed
5 dismissal (but has not included that opposition in its designated
6 record). The bankruptcy judge to whom the case had been assigned
7 from the outset issued a tentative ruling indicating that it was
8 inclined to dismiss the case. After a hearing on October 26,
9 2006, the bankruptcy court issued its final order dismissing the
10 chapter 11 case with prejudice. The court ruled that there was
11 cause to act and that dismissal was in the best interests of
12 creditors and the estate.

13 Owens filed a timely motion for reconsideration that was
14 subsequently denied.

15 Shulkin Hutton appealed.

17 JURISDICTION

18 The bankruptcy court had subject-matter jurisdiction via 28
19 U.S.C. § 1334 over this core proceeding under 28 U.S.C.
20 § 157(b)(2). We have jurisdiction under 28 U.S.C. § 158(a)(1).
21

22 ISSUE

23 Whether dismissal of the chapter 11 case was an abuse of
24 discretion.
25

26 STANDARD OF REVIEW

27 Dismissal of a chapter 11 case and the denial of
28 reconsideration are reviewed for abuse of discretion. Greenfield

1 Drive Storage Park v. Cal. Para-Prof'l Servs., Inc. (In re
2 Greenfield Drive Storage Park), 207 B.R. 913, 916 (9th Cir. BAP
3 1997); Capt. Blythers, Inc. v. Thompson (In re Capt. Blythers,
4 Inc.), 311 B.R. 530, 534 (9th Cir. BAP 2004), aff'd mem., 182 F.
5 App'x 708 (9th Cir. 2006). A court abuses its discretion if it
6 bases its ruling on a clearly erroneous view of the facts or an
7 incorrect rule of law. Cooter & Gell v. Hartmarx Corp., 496 U.S.
8 384, 405 (1990). A court also abuses discretion if the Panel is
9 left with a definite and firm conviction that the court committed
10 clear error of judgment in the conclusion it reached after
11 weighing all the relevant factors. Wall St. Plaza, LLC v. JSJF
12 Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006).

14 DISCUSSION

15 The bankruptcy court dismissed Owens' chapter 11 case for
16 cause, concluding that dismissal was in the best interests of
17 creditors and the estate. The court found that Owens' filing
18 lacked good faith and was made as a litigation tactic to avoid
19 the state-court ordered sale of the Maplewood property.

21 I

22 The basic authority for dismissing a chapter 11 case is
23 Bankruptcy Code § 1112(b), which authorizes a court, for cause,
24 to dismiss or convert a chapter 11 case, "whichever is in the
25 best interests of creditors and the estate." 11 U.S.C.
26 § 1112(b) (2005 Supp.).

27 Section 1112(b) was amended in 2005 to substitute "court
28 shall" in lieu of "court may" convert or dismiss upon a showing

1 of "cause," to impose a demonstrative burden on the opponent of
2 conversion or dismissal, and to fix a statutory schedule for
3 deciding the motion promptly. 11 U.S.C. §§ 1112(b)(1)-(3). In
4 effect, new § 1112(b) operates to establish a presumption that
5 there will be either conversion or dismissal if "cause" is shown.

6
7 II

8 The first step in the analysis is whether there is "cause"
9 for purposes of § 1112(b).

10 The bankruptcy court ruled that the dispute over the
11 Maplewood property was a two-party dispute over which the state
12 court had jurisdiction. The court also ruled that the case was
13 not filed in good faith, but rather was filed as a litigation
14 tactic to prevent the sale of the Maplewood property, stating
15 "this is the classic acrimonious divorce where both parties
16 refuse to move on."

17 Although the court did not put a finer point on its
18 analysis, there are at least two adequate, independent bases for
19 concluding that there was "cause" for purposes of § 1112(b).

20
21 A

22 The court's determination that the case was not filed in
23 good faith and, under the circumstances, was merely a litigation
24 tactic, is consistent with our decisions recognizing that bad
25 faith filing can be "cause" for converting or dismissing a
26 chapter 11 case. See Marsch v. Marsch (In re Marsch), 36 F.3d
27 825, 828 (9th Cir. 1994); St. Paul Self Storage Ltd. P'ship v.
28 Port Authority (In re St. Paul Self Storage Ltd. P'Ship), 185

1 B.R. 580, 582 (9th Cir. BAP 1995) ("St. Paul").

2 In this context, the analysis of "cause" entails a balancing
3 of "whether a debtor is attempting to unreasonably deter and
4 harass creditors or attempting to effect a speedy, efficient
5 reorganization on a feasible basis." Marsch, 36 F.3d at 828.

6 Evidence probative of the question includes consideration of
7 the number of assets, ongoing economic activity, resources with
8 which to make adequate protection payments and the nature and
9 complexity of underlying nonbankruptcy litigation. St. Paul, 185
10 B.R. at 582-83.

11 Under that balancing, the court did not err in finding
12 "cause" in accordance with the Marsch-St. Paul rationale.

13 This was the basis asserted by Treiger in his motion to
14 dismiss. The court agreed it constituted "cause." We agree.

15
16 B

17 There is an adequate, independent basis to conclude there
18 was § 1112(b) "cause."

19 Such "cause" exists where there is diminution of the estate
20 and absence of a reasonable likelihood of rehabilitation. 11
21 U.S.C. § 1112(b) (4) (A).

22 The purpose of the chapter 11 filing was to block the sale
23 of the Maplewood property as ordered by the state court. Delay,
24 in the absence of a rising market, equates with a substantial
25 risk of diminution of net value with respect to financed real
26 estate on which taxes and loan interest payments accrue.
27 Moreover, rehabilitation was not a purpose being pursued by the
28 debtor. Hence, there is also "cause" under § 1112(b) (4) (A).

1 III

2 There being adequate, independent bases for concluding that
3 there was § 1112(b) "cause," the question becomes whether
4 dismissal was in the best interest of creditors and the estate.
5 11 U.S.C. § 1112(b) (1).

6 Treiger's position in his motion was that he preferred that
7 the case be dismissed. He is a creditor by virtue of his
8 litigation posture with the debtor.

9 Another creditor, appellant's former attorney, preferred
10 that the case not be dismissed and not be converted. Since the
11 debtor has substantial earning capacity in the range of \$150,000
12 to \$800,000 per annum, the appellant would be better served by
13 dismissal of the case without a discharge because there is no
14 reason to suspect that he would be paid only if the case were to
15 remain open. A discharge would wipe out appellant's claim in a
16 case in which it is not apparent that the estate would be able to
17 pay the obligation in full; dismissal leaves appellant with
18 resort to the debtor's future income as a source of payment.

19 The interests of the estate also figure into the
20 calculation. Here, there was not an estate that was being
21 preserved or maximized for the benefit of standard reorganization
22 constituencies. Relief from stay had been granted with respect
23 to the Maplewood property. There was essentially nothing else
24 that would be accomplished through chapter 11. Hence, the
25 interests of the estate would not be harmed by dismissal.

26 In light of these considerations, we cannot say that the
27 court abused its discretion by deciding that the best interests
28 of creditors and the estate would be served by dismissal.

1 CONCLUSION

2 The bankruptcy court did not apply incorrect legal
3 standards, rely on a clearly erroneous view of the facts, or
4 otherwise leave us with a definite and firm impression that a
5 mistake was committed. Hence, it did not abuse discretion when
6 it dismissed Owens' chapter 11 case and subsequently denied
7 reconsideration. AFFIRMED.

8
9
10 KLEIN, Bankruptcy Judge, concurring:

11
12 I join the majority analysis and write separately to note
13 that there are two other adequate, independent bases for
14 affirming an order dismissing the case: (1) abstention under 11
15 U.S.C. § 305(a) on the premise that the interests of creditors
16 and the debtor would be better served by dismissal; and (2)
17 discretionary abstention under 28 U.S.C. § 1334(c)(1).

18 Although the court invoked neither theory, we are permitted
19 to affirm for any reason supported by the record. Dittman v.
20 California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); Donald v.
21 Curry (In re Donald), 328 B.R. 192, 204 (9th Cir. BAP 2005).

22
23 I

24 We are confronted by what is fundamentally a two-party
25 dispute regarding the division of property in a Washington
26 marital dissolution that is subject to Washington law.

27 In the course of the parties' bankruptcy proceedings, the
28 state court and the bankruptcy court followed the rule that state

1 divorce court jurisdiction over the disposition of community
2 property terminates upon the filing of bankruptcy if the
3 bankruptcy is filed before a final state court judgment dividing
4 the divorcing couple's property. Keller v. Keller (In re
5 Keller), 185 B.R. 796, 800 (9th Cir. BAP 1995).

6 Once both Owens and Treiger filed bankruptcy, the state
7 court proceedings were suspended until relief from stay was
8 granted by the bankruptcy court to continue with the divorce
9 proceedings in state court. The state court then proceeded to
10 enter a judgment dissolving the marriage, but reserved the
11 authority to decide the property and debt issues after the
12 bankruptcy cases were closed.

13 The bankruptcy court then liquidated Treiger's non-exempt
14 assets, paid creditors, and approved a settlement agreement
15 between Treiger's case trustee and Owens with respect to the
16 trustee's interest in the Maplewood property. The settlement
17 allowed Owens to purchase the Treiger estate's community interest
18 in the Maplewood property and thereby rendered it Owens' separate
19 property. Treiger's bankruptcy case was subsequently closed, and
20 Owens' first chapter 11 case was dismissed.

21 That did not, however, terminate the matter of division and
22 distribution of property as between the divorcing spouses.
23 Jurisdiction over the division and distribution of the parties'
24 property as between themselves pursuant to the divorce then
25 returned to the state court. Teel v. Teel (In re Teel), 34 B.R.
26 762, 764 (9th Cir. BAP 1983).

27 The state court was then obliged to complete the property
28 and debt distribution that it deferred until the end of the

1 bankruptcy cases. The state court, acting pursuant to RCW
2 § 26.09.080,¹ had jurisdiction to make a fair and equitable
3 distribution of all parties' property - community and separate.

4 Under Washington law, Owens' separate property, which
5 included the Maplewood property she had acquired from Treiger's
6 chapter 7 estate, was available for distribution. The state
7 court examined the source of the funds Owens used to purchase the
8 estate's interest in the Maplewood property and determined that
9 the Maplewood property was both community and separate, and
10 divided it amongst the parties pursuant to state law. Owens'
11 appeals of the state court order were unsuccessful, and the order
12 is now final.

13
14
15 ¹RCW § 26.09.080 provides:

16 In a proceeding for dissolution of marriage, legal
17 separation, declaration of invalidity, or in a
18 proceeding for disposition of property following
19 dissolution of the marriage by a court which lacked
20 personal jurisdiction over the absent spouse or lacked
21 jurisdiction to dispose of the property, the court
22 shall, without regard to marital misconduct, make such
23 disposition of the property and the liabilities of the
24 parties, either community or separate, as shall appear
25 just and equitable after considering all relevant
26 factors including, but not limited to:

- 27 (1) The nature and extent of the community property;
- 28 (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

Wash. Rev. Code § 26.09.080.

1 The bankruptcy court concluded that the state court acted
2 within its jurisdiction and ordered relief from stay to allow the
3 sale to proceed. Any further dispute over the Maplewood property
4 is between Owens and Treiger and must be resolved in state court.

5 We reject appellant's position that the state court lacked
6 subject-matter jurisdiction to try issues of property and debt
7 distribution attendant to a marital dissolution. The purchase by
8 Owens of Treiger's community property interest in the Maplewood
9 property from Treiger's bankruptcy estate did not extinguish
10 Treiger's ability to argue under RCW § 26.09.080 that "just and
11 equitable" distribution of separate property could take into
12 account the separate property that Owens acquired by purchasing
13 Treiger's community property interest from his bankruptcy estate.
14 We agree with every other court that has considered this
15 jurisdictional argument in the course of this prolonged divorce
16 and bankruptcy litigation.

17 The Washington courts, both trial courts and appellate
18 courts, have established that the sale of the Maplewood property
19 is an appropriate feature of a "just and equitable" distribution
20 of property pursuant to RCW § 26.09.080. Their jurisdiction to
21 do so is beyond cavil.

22 The interests of creditors and the debtor are better served
23 by respecting the integrity of the Washington judicial system.

24 Accordingly, the dismissal of this chapter 11 case can also
25 be affirmed as an appropriate exercise of Bankruptcy Code § 305.

26 If the bankruptcy court had explicitly invoked § 305(a), our
27 decision to affirm would be the end of review because further
28 review by the court of appeals or the United States Supreme Court

1 is not permitted under this section. 11 U.S.C. § 305(c).

2
3 II

4 Since the entire chapter 11 case is fundamentally a two-
5 party marital dissolution dispute, one can also support dismissal
6 on the basis of discretionary abstention in the interests of
7 justice, comity with state courts, and respect for state law.

8 Judicial Code § 1334(c)(1) provides:

9 Except with respect to a case under chapter 15 of title
10 11, nothing in this section prevents a district court
11 in the interest of justice, or in the interest of
12 comity with State courts or respect for State law, from
abstaining from hearing a particular proceeding arising
under title 11 or arising in or related to a case under
title 11.

13 28 U.S.C. § 1334(c)(1).

14 Thus, the bankruptcy court had the authority to abstain from
15 hearing the divorce property distribution proceeding in the
16 "interest of comity" with the Washington courts on matters purely
17 pertaining to state law.

18 In view of the fact that this is the only real dispute
19 involved in the chapter 11 case, the effect of a discretionary
20 § 1334(c)(1) abstention would also necessitate dismissal of the
21 chapter 11 case on the premise that there is no bankruptcy
22 business to accomplish. As with Bankruptcy Code § 305, if the
23 bankruptcy court had invoked § 1334(c)(1) abstention, all
24 appellate review would have stopped here.