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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NOT FOR PUBLICATION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. CC-06-1408-PaMkB
ANNETTE D. GOODE-PARKER, Debtor.	Bk. No. LA 01-30943-BR
ANNETTE D. GOODE-PARKER; PAULA LAURA GIBSON, Appellants,	
v.	**M E M O R A N D U M**[1]
ALFRED SIEGEL, Chapter 7 Trustee; LAW OFFICES OF HAROLD GREENBERG; HAROLD GREENBERG; CARLO FISCO, Appellees.	

Argued and submitted on May 17, 2007
at Pasadena, California

Filed - June 14, 2007

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

Honorable Barry Russell, Bankruptcy Judge, Presiding.

Before: PAPPAS, MARKELL[2] and BRANDT, 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] The Honorable Bruce A. Markell, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

This is an appeal from the bankruptcy court's order approving a chapter 7[3] trustee's compromise of a legal malpractice action filed originally by a debtor against her divorce lawyer. We AFFIRM.

FACTS

Appellant Annette Goode-Parker ("Debtor") retained Appellee Harold Greenberg ("Greenberg")[4] to represent her in a divorce action on May 29, 2001. At that time, Debtor and her spouse, Marvin Parker, jointly owned a condominium in Los Angeles County (the "Property"). Debtor desired to retain the Property, but the mortgage payments on the condominium were delinquent, and a foreclosure sale was scheduled to occur on June 6, 2001. Greenberg alleges that, at his urging, Wells Fargo Bank, the mortgage holder, agreed to a 30-day stay of the sale. However, no satisfactory arrangement was negotiated during this time to prevent the foreclosure.

To deal with this predicament, allegedly based upon advice given to her by Greenberg,[5] Debtor filed a pro se petition for relief under chapter 13 of the Bankruptcy Code on July 6, 2001.

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

[4] Unless otherwise noted, we refer to Greenberg, his law firm, and his associate, Carlo Fisco, collectively as "Greenberg."

[5] Debtor alleges that Greenberg advised her that filing bankruptcy was the only way she could save her ownership interest in the Property.

On July 12, 2001, Greenberg submitted an Order to Show Cause to the state Family Court designed to require Parker to demonstrate why Debtor should not be awarded title to the Property. This request was made, according to Debtor, because Wells Fargo had told her it could not negotiate a work-out on the mortgage loan with her unless title to the Property was in her name alone. However, a show cause hearing was never held, allegedly because Debtor's spouse was never served with the order.

An attorney, Jeffrey Wishman, appeared for Debtor in her bankruptcy case on July 20, 2001. However, Debtor was unable to devise a chapter 13 plan that would pay both the Wells Fargo arrearages and a large tax claim, so she moved to convert the case to chapter 7. The bankruptcy court granted this motion on March 12, 2002. Appellee Alfred Siegel was appointed chapter 7 trustee ("Trustee") in the case.

The bankruptcy court granted Debtor a discharge on June 24, 2002; the bankruptcy case was closed on July 12, 2002.

The Property was sold at a foreclosure sale on July 26, 2002, for $140,050. On August 10, 2002, Debtor received a letter from Wells Fargo informing her of the sale. It was then that she realized that the advice allegedly given to her by Greenberg to file for bankruptcy relief was, in her opinion, wrong.

In January 2003, Greenberg moved to withdraw as divorce counsel. Debtor did not object.

On June 25, 2003, through attorney Paula Lauren Gibson ("Gibson"), Debtor commenced a malpractice action against Greenberg, Annette Goode-Parker v. Harold Greenberg et al., in Los Angeles Superior Court, Case no. BC-299713 (the "Malpractice

Action"). On February 3, 2004, a second amended complaint was filed in the Malpractice Action alleging, among other things, that Greenberg was negligent in not obtaining title to the Property for Debtor, and in advising her to file the bankruptcy petition. Greenberg appeared in the Malpractice Action, and denied that he had been negligent or that Debtor had suffered any damages as a result of any of his acts or omissions.

In December 2004, Gibson withdrew as counsel for Debtor in the Malpractice Action.[6] Debtor engaged new counsel, David Cordier.

On March 29, 2005, the Superior Court granted Greenberg's motion for judgment on the pleadings, holding that because she had filed what eventually became a chapter 7 bankruptcy case, Debtor lacked standing to prosecute the Malpractice Action. However, the state court granted leave to Trustee to intervene as the proper party-plaintiff in the Malpractice Action. On April 13, 2005, Greenberg notified Trustee of the state court's ruling on Debtor's standing, and that Trustee had been granted leave to intervene. Until that time, Trustee had been unaware of the existence of the Malpractice Action.

On June 21, 2005, Trustee moved to reopen the bankruptcy case in order to participate in, and administer any recovery from, the Malpractice Action. The motion was granted by the bankruptcy

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[6] On January 9, 2006, Gibson filed a proof of claim in Debtor's bankruptcy case for "reasonable attorney fees" and $3,500 costs incurred while serving as Debtor's state court counsel. Trustee objected to that claim, and on November 6, 2006, the bankruptcy court ordered that the claim be disallowed. That order is the subject of another appeal before the Panel, BAP No. CC-07-1030-PaBMk.

court on August 15, 2005, and Trustee was reappointed.[7]

On January 6, 2006, the bankruptcy court ordered the parties to the Malpractice Action to participate in a mediation. On March 16, 2006, the mediator submitted his report stating that the mediation had not resulted in a settlement. However, the report reflects that Debtor and Trustee reached an agreement concerning any further negotiations. The details of that agreement between Debtor and Trustee were not disclosed in the mediator's report, but both Trustee's counsel and Debtor indicate that they agreed that the value of the Malpractice Action was $150,000. This agreement was never approved by the bankruptcy court. Debtor argues, in reliance on this agreement, that she thereafter expected there to be surplus funds generated in the estate in excess of the amount required to pay all creditors' claims and which would be returned to her.

After the unsuccessful mediation, the parties returned to state court to litigate the Malpractice Action. The state court set a trial date for July 26, 2006. On June 26, 2006, Trustee filed an application to approve the employment of David Cordier as special counsel for Trustee to litigate the Malpractice Action. On or about June 28, 2006, the Superior Court awarded discovery sanctions of $1,350 each against the Trustee and his bankruptcy counsel, Helen Frazer,[8] for failure to produce certain expert

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[7] Presumably, Trustee did indeed intervene as a plaintiff in the Malpractice Action. While not establishing that this occurred, the record on appeal provides no indication to the contrary.

[8] Frazer is Trustee's bankruptcy counsel and also advised Trustee in the Malpractice Action before the bankruptcy court (continued...)

witnesses retained by Debtor for deposition.

On the eve of trial, the parties to the Malpractice Action agreed to attend a settlement conference. At that conference, Trustee and Greenberg agreed to settle the Malpractice Action. On July 24, 2006, Trustee filed a motion in the bankruptcy court to approve the compromise of the Malpractice Action (the "Settlement Motion").

Under the terms of the proposed compromise, Greenberg agreed to pay $35,000 to the bankruptcy estate, to withdraw his proof of claim in the bankruptcy case in the amount of $3,137.82, and to waive payment of the discovery sanctions. In return, Trustee agreed to dismiss the Malpractice Action against Greenberg with prejudice. On August 29, 2006, Debtor and Gibson filed separate objections to the Settlement Motion, although both Gibson and Debtor incorporated the other's grounds for objections as their own.[9]

The bankruptcy court conducted a hearing concerning the Settlement Motion on September 12, 2006, at which Trustee and Greenberg appeared through counsel, and Debtor and Gibson appeared in person. All of the parties argued their positions. At the conclusion of the hearing, the bankruptcy court announced its intention to approve the compromise. The bankruptcy court cited two factors to support its approval: (1) that Debtor and Gibson

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[8](...continued)
authorized the employment of David Cordier as his special counsel for the Malpractice Action.

[9] Greenberg also filed a limited objection regarding the date for payment of the settlement funds, which was eventually sustained by the bankruptcy court. This aspect of the court's ruling is not implicated in this appeal.

had submitted no admissible evidence in opposition to the evidence offered by Trustee in support of the Settlement Motion; and (2) that, based upon the facts as shown by Trustee, the terms of the proposed compromise were reasonable. Tr. Hr'g 25:19-22; 25:23-26:1 (September 12, 2006). On October 10, 2006, the bankruptcy court entered an order approving the compromise. In its order, the bankruptcy court again summarized the factors it had considered in approving the Settlement Motion:

> In determining the fairness, reasonableness and adequacy of the proposed settlement, the Court has considered: (a) the probability of success in litigation, (b) the complexity of the litigation, including, but not limited to the administrative costs involved in pursuing the litigation and the attendant delay in closing the bankruptcy case and (c) the best interests of creditors of the estate.

Debtor filed a timely[10] appeal of the order granting the Settlement Motion and approving the compromise on November 9, 2006.

JURISDICTION

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

ISSUES ON APPEAL

Whether the bankruptcy court abused its discretion in deciding that Appellants had not submitted admissible evidence to support their objections to the Settlement Motion, in denying

[10] At Appellants' request, the bankruptcy court granted an extension of time to appeal in an order entered on October 23, 2006.

Gibson the opportunity to testify at the hearing, and in denying Gibson's request for a continuance of the hearing to supplement the record with admissible evidence.

Whether the bankruptcy court abused its discretion in granting the Settlement Motion and approving the compromise.

STANDARDS OF REVIEW

The bankruptcy court's approval of a compromise is reviewed for abuse of discretion. Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001). Evidentiary rulings are reviewed for abuse of discretion. Am. Express Travel Related Serv. Co., Inc. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 442-43 (9th Cir. BAP 2005) (citing Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1011 (9th Cir. 1997)). The denial of a motion for continuance is also reviewed for abuse of discretion. Hasso v. Mozsgai (In re La Sierra Fin. Serv., Inc), 290 B.R. 718, 726 (9th Cir. BAP 2002).

"A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings." Lehtinen v. Lehtinen (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP 2005) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)). When applying the abuse of discretion standard, there must be "a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached before reversal is proper." In re Lehtinen, 332 B.R. at 411 (quoting In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998)).

DISCUSSION

1. The bankruptcy court did not abuse its discretion in deciding that Appellants submitted no admissible evidence to support their objections to the Settlement Motion, in denying Gibson the opportunity to testify at the hearing, and in denying Gibson's request for a continuance of the hearing to supplement the record with admissible evidence.

A.

In their August 29, 2006, objections to the Settlement Motion, Gibson[11] and Debtor each joined in the opposition submitted by the other. Debtor attached more than 175 pages of various documents to her opposition briefs, which Appellants claim support their position that the proposed compromise was not fair and reasonable. On September 5, 2006, Greenberg submitted eight evidentiary objections to the documents attached to Debtor's opposition brief. Four of the objections asserted violations of

[11] Trustee argues that Gibson lacks standing to object to Trustee's proposed compromise because Gibson does not hold an allowable creditor's claim in Debtor's bankruptcy case. As a result, Trustee contends that Gibson lacks any pecuniary interest in the outcome of the Malpractice Action. As noted above, we consider the validity of Gibson's claim as a creditor in the related appeal, CC-07-1030. However, at the time of the hearing on the Settlement Motion, Gibson's claim had not been disallowed.

Moreover, Trustee has not questioned Debtor's standing to object to the compromise, nor do we. Debtor argues that, had the Malpractice Action been litigated to a conclusion, or at least not settled for less than the $150,000 as previously agreed by Trustee, that all creditors in her bankruptcy case would have been fully paid and a surplus returned to her. Debtor thus has a "judicially cognizable interest" in the settlement. Bennett v. Spear, 520 U.S. 154, 167-68 (1997). Debtor also satisfies the "pecuniary interest" test for standing to object to the Settlement Motion in the bankruptcy court. La Sierra Fin. Serv., 290 B.R. at 728. Because in Debtor's opposition to the Settlement Motion she expressly incorporated Gibson's objections, the Panel need not resolve Gibson's standing.

FED. R. EVID. 901(a),[12] because the attached documents were not properly authenticated or sponsored by appropriate witness declarations or other evidence.[13]

At the hearing, the bankruptcy court voiced its concern about the admissibility of the various attachments to Debtor's opposition as shown in a colloquy with Gibson:

> THE COURT: Well, in any case, my question though more fundamentally - - in fact, it's true of both of you. I don't see any evidence presented in your opposition, any admissible - - that is evidence admissible in the Federal Rules of Evidence. Can you show me any - -
>
> MS. GIBSON: Well, your Honor, by virtue of the application of Bankruptcy Rule 9011 by filing these papers with the Court, we are in fact representing that they are properly evidence to be presented to this Court.
>
> THE COURT: No, no, Rule 9011 is, as you're aware obviously, a sanction for doing various bad things. It's never a substitute for a declaration under penalty of perjury for evidence.
>
> MS. GIBSON: Well, your Honor, if that's the only thing you think is a problem with it, we can amend - -
>
> THE COURT: My question to you is have you presented any - - you say only as it is a minor thing. It's not a minor thing at all. Have you presented any evidence admissible under the Federal Rules of Evidence?

Tr. Hr'g 6:18 – 7:11 (September 2, 2002).

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[12] FED. R. EVID. 901(a) provides that the requirement of authentication or identification as a condition precedent to admissibility of a document be "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

[13] The other objections argued that several of the offered documents were inadmissible hearsay in violation of FED. R. EVID. 802, or irrelevant under FED. R. EVID. 402.

The bankruptcy court was correct in observing that the certification of a pleading by signature of a party or an attorney under Rule 9011 is not a substitute for properly authenticating evidence. Indeed, according to the text of the Rule, a party submitting a paper to the court thereby certifies "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ." Rule 9011(b)(3)(emphasis added). In other words, a certification under Rule 9011 is a representation by the proponent that there is evidentiary support, or discoverable evidentiary support, for the contents of the document available; it does not authenticate or provide that evidence as required by FED. R. EVID. 901(a).

Gibson effectively acknowledged to the bankruptcy court that the evidentiary submissions were not authenticated:

> MS. GIBSON: Well, I believe that everything that was attached to the Debtor's position is, in fact, admissible evidence. The only thing that's missing is the declarations saying that these are true and correct copies - -

Tr. Hr'g 7:12-16 (September 12, 2006). Gibson then offered to authenticate the documents through her oral testimony. The bankruptcy court declined that offer:

> MS. GIBSON: Well, your Honor, if you want to put me under oath and have me testify currently to the veracity of the documents that are attached, I will be willing to do that.
>
> THE COURT: It's not that simple. I think you understand it is your burden. This is not

> Small Claims Court. You just don't walk in and we start changing things. There are time limits for filing papers. It simply hasn't been done. So neither of you have any evidence whatsoever in opposition.

Tr. Hr'g. 8:23 - 9:7.

The bankruptcy court's decision is supported by its Local Rules, which specify the requirements for oppositions to motions:

> [E]ach interested party opposing, joining, or responding to the motion shall file and serve not later than 14 days before the date designated for hearing . . . (A) A brief but complete written statement of all reasons in opposition thereto or in support or joinder thereof, and answering memorandum of points and authorities, declarations and copies of all photographs and documentary evidence on which the responding party intends to rely.

Bankr. C.D. Cal. Local Rule 9013-1(a)(7) (emphasis added). Those rules impose a similar condition on the moving party:

> Factual contentions involved in any motion or opposition to a motion shall be presented, heard, and determined upon declarations and other written evidence. Verifications of motions are not sufficient to constitute evidence on a motion, unless otherwise ordered by the court.

Bankr. C.D. Cal. Local Rule 9013-1(a)(13). Under these Rules, the bankruptcy court acted within its discretion in requiring that Appellants make proper evidentiary submissions in connection with their objections to the Settlement Motion.

We have also previously commented on the propriety of the denial of a request to submit oral testimony at a hearing in lieu of adequate written submissions:

> Evidence on motions may be taken by way of affidavit pursuant to Civil Rule 43(e). Fed. R. Bankr. P. 9017 (Fed. R. Civ. P. 43 applies in bankruptcy). When, as here, the court is permitted to take evidence by affidavit and the time for presenting affidavits has passed,

> the hearing that occurs on the merits need only be for purposes of entertaining argument based on the evidentiary record that has been established by affidavit or deposition. Whether to take actual testimony in open court is a matter of judicial discretion[.]

Garner v. Shier (In re Garner), 246 B.R. 617, 623-24 (9th Cir. BAP 2000) (emphasis added).

Here, the record before the bankruptcy court shows that the Settlement Motion was filed, and notice of the hearing served[14] on the parties, on July 24, 2006. The hearing on the Settlement Motion took place as provided in the notice on September 12, 2006, some 50 days later, a full month more than the 20-day minimum notice required for a compromise hearing under Rule 2002(a)(3).

Appellants filed oppositions to the Settlement Motion on August 29, 2006. Replies to these oppositions were filed, as well as evidentiary objections raised by Greenberg, on September 5, 2006. Given the ample notice given to Appellants concerning the Settlement Motion,[15] and Greenberg's evidentiary objections, the bankruptcy court did not abuse its discretion in ruling that Appellants' documents were inadmissible, and that oral testimony to authenticate the documents not be allowed.[16]

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[14] We examine Gibson's objection concerning notice below.

[15] This is especially true as to Gibson, who is an attorney and must be presumed to be familiar with, or at least able to research and discover, the requirements of the rules of evidence, bankruptcy and local rules, all mandating the proper authentication of evidence in advance of the hearing.

[16] The Local Rules address a situation in which a party requests to submit oral testimony in lieu of written declarations or other evidence:

> The court may, at its discretion, in addition to or in lieu of declaratory evidence, require

(continued...)

Nor did the bankruptcy court err in refusing Gibson's request for a continuance in order to submit written authentication and other evidence to salvage Appellants' case:

> MS. GIBSON: Your Honor, then I would request leave to amend to submit a declaration saying under penalty of perjury that this is the case. But I believe that under the application of the sanction rule as you called it - - in fact, by filing the papers, we are certifying the authenticity.
>
> THE COURT: Well, certifying authenticity is not, first of all in any case, simply not the law. So the problem that you have and I'm not - - this is the date for the hearing. You've had plenty of time[.]

Tr. Hr'g 8:2-11.

"In reviewing a denial of a motion to continue, we consider four factors: diligence of the requesting party, usefulness of the continuance, inconvenience to the court and the other side, and prejudice from the denial." In re La Sierra Fin. Serv., 290 B.R. at 734 (citing United States v. Pope, 841 F.2d 954, 956 (9th Cir. 1988)). The weight attributed to each factor "may vary with the extent of the showings on the other factors." United States v. Flynt, 756 F.2d 1352, 1359 (9th Cir. 1985).

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[16](...continued)

> or allow oral examination of any declarant or any other witness in accordance with F.R.B.P. 9017. When the court intends to take such testimony, it will give the parties 2 court days notice of its intention, if possible, or may grant such a continuance as it may deem appropriate.

Bankr. C.D. Cal. Local Rule 9013-1(a)(13)(A). As a result, while the bankruptcy court had discretion to allow Gibson to provide oral testimony to authenticate the offered documents, it would have been required to provide Trustee two days advance notice of its decision to do so.

The record reflects a lack of diligence on the part of Appellants to comply with the Local Rules and the Federal Rules of Evidence. During the discussion regarding the lack of admissible evidence presented, Gibson complained that the bankruptcy court was being "hypertechnical" in requiring compliance with the Rules. Tr. Hr'g 12:6-8. Appellants indicated the continuance would be used to file a declaration to authenticate the documents. However, Appellants failed to address Greenberg's other evidentiary objections, such as hearsay and relevance. Here, Appellants had all of the purported evidence in their possession, but simply disregarded the applicable Rules and procedures required for inclusion of their documents as exhibits in the record.

It is within the discretion of the bankruptcy court to require that those rules be observed. The court decided that Appellants "had plenty of time" to prepare for the hearing and to comply with the Rules. Neither Gibson nor Debtor should have been surprised by the evidentiary issues; they had been raised by Greenberg in his objections to the offered documents in his pleading filed and served a week before the hearing. Had Appellants wished to cure the evidentiary defects, they could have requested a continuance or attempted to comply with the Local Rules prior to the hearing.

In addition, Trustee, Greenberg, and the bankruptcy court would have presumably been inconvenienced if a continuance of the hearing had been granted. Delay and expenses to the bankruptcy estate would be occasioned by a continuance, and depending upon how Appellants intended to proceed, additional preparation for a

continued hearing may have been required.

On the other hand, it may also be assumed that Appellants suffered significant prejudice when the bankruptcy court refused to allow them time to properly present their evidence. In effect, because of their failure to adequately prepare for the hearing and abide by the rules, they lost this contest. But, even so, in weighing the factors in this case, we cannot conclude the bankruptcy court abused its discretion in denying Appellants additional time to present evidence.

In sum, the bankruptcy court did not abuse its discretion in deciding that the documents attached to Debtor's opposition to the Settlement Motion were inadmissible as evidence, in denying Gibson the opportunity to testify at the hearing, and in denying a continuance of the hearing so that Appellants could provide admissible evidence.

B.

Because Appellants' evidence was inadmissible, like the bankruptcy court, we do not reach the merits of many of the various objections raised in Appellants' oppositions to the Settlement Motion. However, there are two issues raised by Appellants in their briefs which can be addressed given the record on appeal. First, Gibson argues on appeal that she did not have adequate notice of the hearing on the Settlement Motion. And second, Appellants charge that the compromise was "tainted" because, they allege, Trustee and his counsel were motivated to settle the Malpractice Action to avoid payment of the monetary sanctions imposed by the state court. We reject both arguments.

Gibson first suggested a notice issue, not in her written objection,[17] but in comments made to the bankruptcy court at the hearing:

> MS. GIBSON: One more thing, your Honor. In terms of the notice that the Trustee – I just need to have this corrected because she's serving me under an erroneous name and address.
>
> THE COURT: Well, that's obviously a problem. Why don't you tell me what the correct name is –
>
> MS. GIBSON: My correct name is Paula Lauren Gibson and my correct address is 1332 ½ South Mansfield, Los Angeles, California 90019.
>
> THE COURT: Looking at your pleading, that's what's on here.
>
> MS. GIBSON: Right. If you look at their proof of service, you'll see that they served Lauren Gibson at some other zip code.
>
> THE COURT: Well, obviously –
>
> MS. GIBSON: I knew about it because Annette [Debtor] is also my roommate.

Tr. Hr'g 14:5-21.

In this exchange, Gibson did not object that she was not correctly served; she merely asked that the Trustee's records be corrected. Additionally, she acknowledged that she was aware of the Settlement Motion and hearing notice because her roommate, Debtor, had apparently received them.

Moreover, Gibson alleges on appeal that the proof of service concerning the notice and Settlement Motion shows that they were mailed to her using an incorrect name and at an incorrect address. However, Gibson did not provide any sworn declaration or other

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[17] Neither the objection of Gibson, nor the objection of Debtor, which was filed on the same day, August 29, 2006, raise a notice issue.

evidence that the proof of service of the notice and Settlement Motion indicates an incorrect address and/or incorrect name, nor is her allegation supported by the record on appeal or the bankruptcy court's docket.

Instead, in the record on appeal, a proof of service is attached to the notice and Settlement Motion, executed by an employee of the attorney for Trustee. That proof of service declares under penalty of perjury that the notice and Settlement Motion were mailed on July 24, 2006, to, among others, Paula Lauren Gibson, at the same address that Gibson told the bankruptcy court was her correct address at the hearing, and which address appears on all papers she submitted in the record on appeal.[18]

Based on the record on appeal, coupled with Gibson's failure to provide any additional evidence of misdirected notice, and her admission that she was given access to the Settlement Motion by Debtor, we decline to conclude Gibson was not properly served with the motion.

We also reject Appellants' allegation that Trustee and his bankruptcy counsel were "bribed" to accept the settlement, an extremely grave, and on these facts, reckless, indictment. In particular, Appellants note that Trustee and his counsel were each

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[18] We have examined the docket of the bankruptcy court in order to confirm that the proof of service attached to the Settlement Motion in the record on appeal, showing that Paula Lauren Gibson was served in her correct name and at her correct address, is the same proof of service attached to the Settlement Motion in the bankruptcy court's docket, entered on July 25, 2006. Dkt. no. 93, end of section 4. We find that they are identical.

It is possible that Gibson is confusing the proof of service attached to the Settlement Motion, which is before us in this appeal, with the proof of service on Trustee's objection to her claim, which we examine in related appeal CC-07-1030.

ordered to pay $1,350 to Greenberg by the Superior Court in connection with discovery violations in the Malpractice Action. In the settlement, in addition to paying the bankruptcy estate $35,000, Greenberg agreed to waive payment of the sanctions. According to Appellants, these facts demonstrate that Trustee and his attorney acted out of self-interest in agreeing to the settlement. We disagree with this conclusion.

A review of the record on appeal shows that the sanctions were imposed because Trustee and his attorney failed to produce for deposition certain expert witnesses previously retained by the Debtor to address the professional standard of care issues.[19] Appellants' contention that Trustee and his attorney agreed to settle the Malpractice Action because they wanted to escape personal liability for these discovery sanctions is suspect.

We are unaware of any case law holding that a discovery sanction incurred by a trustee in a related state court proceeding is a personal liability, and not an administrative expense, of the bankruptcy estate. Indeed, we have held that even more blameworthy[20] costs incurred by a trustee, such as tort

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[19] Appellants attempted to augment the record on appeal by motion on February 2, 2007. Appellants requested that we consider two state court minute orders apparently relating to the discovery sanctions imposed on Trustee and his counsel. In Order Denying Motion to Augment, Goode-Parker v. Greenberg (9th Cir. BAP, February 26, 2007), we denied their motion because "papers neither filed with the [bankruptcy] court nor admitted into evidence can not be part of the record on appeal. Kirshner v. Uniden Corp. Of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988)."

[20] Even Appellants note that the actions that led to the sanctions were excusable: "However, on or about June 30, 2006, Harold Greenberg took advantage of the Trustee's relative lack of knowledge of the case, and inability to come up to speed on such short notice, and filed two motions for personal sanctions (footnote omitted) against the Trustee, and his counsel which were granted." Appellants' Opening Brief at 7.

liabilities, may constitute an administrative expense payable by the estate:

> Section 503(b)(1)(A) defines administrative claims to include "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after commencement of the case. . . ." These expenses include the liabilities that arise out of the trustee or debtor in possession's actual and necessary costs of administering the estate. Reading Co. v. Brown, 391 U.S. 471 (1968).

Industrial Comm'n of Ariz. v. Solot (In re Sierra Pac. Broadcasters), 185 B.R. 575, 578 (9th Cir. BAP 1995). The reference to the Reading decision is particularly appropriate here. In Reading, the Supreme Court held that satisfaction of a tort liability incurred by a receiver during an arrangement proceeding under the former Bankruptcy Act was an administrative expense, since the liability arose out of actions taken within the scope of the receiver's authority.[21] Presumably, any sanctions incurred by Trustee and his counsel were also based upon acts taken within the scope of Trustee's authority, and potentially payable from the estate.[22]

We also note that the bankruptcy court was fully informed of the sanctions waiver, and must have considered this term of the

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[21] Reading dealt with § 64(a) of the old Bankruptcy Act, but as we noted in Sierra Pac. Broadcasters, that provision is virtually identical to § 503(b). Thus, the analysis in Reading remains good law.

[22] Our review here is based on the unique circumstances of this case. We do not hold that all sanctions that may be imposed on a bankruptcy trustee by a non-bankruptcy court are reimbursable from the estate. Other situations can be envisioned where a trustee could be personally liable, such as, for example, sanctions imposed for a trustee's contempt or for activities beyond the legitimate scope of his or her duties as trustee of a bankruptcy estate.

settlement when it approved the compromise. There is simply no adequate basis in the record to accept Appellants' characterization of the waiver of sanctions in the settlement agreement as a "bribe."

2. The bankruptcy court did not abuse its discretion in granting the Settlement Motion and approving the compromise.

The bankruptcy court concluded the hearing on the Settlement Motion with its decision, noting that "I am going to grant the compromise for a couple of reasons. Number one, really only evidence on one side. . . . I'm satisfied on the record before me that under the circumstances that this is a reasonable settlement." Tr. Hr'g 25:18 – 26:1. The court formalized this ruling in its order approving the settlement on October 10, 2006.

> In determining the fairness, reasonableness and adequacy of the proposed settlement, the Court has considered: (a) the probability of success in litigation, (b) the complexity of the litigation, including, but not limited to the administrative costs involved in pursuing the litigation and the attendant delay in closing the bankruptcy cases and (c) the best interests of creditors of the estate.

In doing so, the bankruptcy court applied the proper standard for approving settlement agreements as articulated by our Court of Appeals in In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986), which we reiterated in Goodwin v. Mickey Thompson Entm't Group, Inc., 292 B.R. 415, 420 (9th Cir. BAP 2003).[23]

The record amply supports the bankruptcy court's conclusion that the compromise terms were fair and reasonable. Regarding the

[23] The bankruptcy court's order combined two of the A&C Properties factors into a single criterion in paragraph (b). However, we do not believe this materially affected the court's decision.

probability of success in the Malpractice Action, Trustee's uncontroverted declaration reviews the substantial impediments to recovery by Trustee in the Malpractice Action, including issues of both liability and damages. This topic was also discussed at length at the hearing on September 12, 2006, and was not contradicted by Appellants. Tr. Hr'g 2:9-17 et seq.

For example, it was questionable whether Trustee could establish at trial of the Malpractice Action that Greenberg's alleged negligence in failing to obtain title to the Property for Debtor, and then advising her to file a chapter 13 bankruptcy case, actually caused her loss of the Property. There was also a significant issue over the extent of Debtor's damages as a result of the foreclosure. The state court had entered an order that Debtor's valuation expert not be allowed to testify at trial. Furthermore, the Wells Fargo manager had apparently testified at a deposition that it was speculative whether, even if Debtor had acquired sole title to the Property, the bank would have renegotiated the terms of the mortgage loan to forgive the payment defaults. Given these challenges, the bankruptcy court could certainly conclude that Trustee's chances for success at trial in the Malpractice Action were dim.

The bankruptcy court was well acquainted with the extent and complexity of the issues in the Malpractice Action. The bankruptcy court could conclude that proceeding to trial in state court could increase the administrative expenses in the bankruptcy case. Moreover, the bankruptcy court was well aware that this was a "no asset" case and that there were no funds available for protracted litigation. In addition, the Malpractice Action was

already three years old, and further litigation of the Malpractice Action could potentially significantly delay conclusion of the bankruptcy case.

Finally, there is evidence in the record to show that the settlement was in the best interests of the creditors. Other than Gibson, no other creditors opposed the Settlement Motion. And Trustee's counsel had provided in a sworn declaration in the Settlement Motion that, if the compromise was approved, "there will be allowed unsecured claims of approximately $30,000 and that the proposed $35,000 will provide a meaningful distribution to allowed creditors."

We conclude that the bankruptcy court did not abuse its discretion in approving the settlement.

CONCLUSION

We AFFIRM the decision of the bankruptcy court.