

MAR 01 2007

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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NOT FOR PUBLICATION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.	NC-06-1257-KPaD
)		
7	LARRY A. FRAGA,)	Bk. No.	00-44500
)		
8	Debtor.)	Adv. No.	06-04005
)		
9	_____)		
)		
10	KRISTINE M. KELLY,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	DUBOFF LAW GROUP, LLC,)		
)		
14	Appellee.)		
)		

Argued and Submitted on February 21, 2007
at Sacramento, California

Filed - March 1, 2007

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

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and DUNN, 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.

1 The debtor's attorney, Kristine Kelly, appeals from an order
2 awarding sanctions in favor of appellee, Duboff Law Group, LLC,
3 under Federal Rule of Bankruptcy Procedure 9011 jointly and
4 severally against her and her client in connection with the
5 response to a lawsuit to collect professional fees that were not
6 a prepetition debt. We conclude that the court's decision was
7 not an abuse of discretion and AFFIRM.

8
9 FACTS

10 The debtor received a discharge on January 23, 2002, in an
11 involuntary chapter 7 case in the United States Bankruptcy Court
12 for the Northern District of California that was filed in August
13 2000 and in which an Order for Relief was entered in September
14 2000.

15 A few months prior to the filing of the involuntary
16 petition, the debtor and appellee entered into a written contract
17 for advisory legal services to be performed by appellee regarding
18 copyright matters.¹ Appellee performed legal services for the
19 debtor both before and after the Order for Relief was entered in
20 the bankruptcy case. The debtor did not inform appellee of the
21 bankruptcy case and did not schedule it as a creditor.

22 Appellee sent monthly invoices to the debtor for work
23 performed, and the debtor timely paid the invoices in full until
24 June 2001. Still unaware of the bankruptcy, appellee continued
25 performing legal services for the debtor at his request through
26

27 ¹The debtor originally entered into an agreement with
28 appellees' predecessor in interest DuBoff, Dorband, Cushing and
King.

1 October 2002. The debtor made partial payments to appellee in
2 June and September 2001, and made no payments thereafter.

3 In October 2002, appellee brought suit against the debtor in
4 Oregon state court for unpaid fees and costs attributable to a
5 period beginning in August 2001 ("Oregon Action"). The debtor
6 was duly served with notice, but did not respond, and the
7 debtor's default was entered.

8 Appellee subsequently learned of the debtor's bankruptcy
9 and, out of caution, moved to have its Oregon Action abated and
10 filed a proof of claim for \$18,643.24 in the bankruptcy case.
11 The chapter 7 trustee objected to the claim on the grounds that
12 (1) it was a post-petition claim because the legal services at
13 issue were rendered to the debtor after the commencement of the
14 case; and, in the alternative, (2) it was filed after the claims
15 bar date. Appellee did not oppose, and the claim was disallowed,
16 rather than deemed to be tardy.

17 Appellee thereafter returned to the Oregon court and
18 reinstated the Oregon Action. The Oregon court entered a default
19 judgment against the debtor in March 2005 in the amount of
20 \$35,001.72, plus post-judgment interest.²

21 Appellee obtained a sister state judgment in California in
22 August 2005 and scheduled a debtor's examination under California
23 judgment enforcement procedure. The debtor did not appear at the
24 debtor's examination, and the California Superior Court for the
25 County of Fresno issued a bench warrant for the debtor's arrest.

27 ²The total amount represents: \$18,643.24 (principal) +
28 \$6,372.38 (pre-judgment interest) + \$9,430 (attorney's fees) +
\$556.10 (costs).

1 In response to the bench warrant, the debtor contacted and
2 retained appellant as his attorney. Appellant, acting on behalf
3 of the debtor, filed a motion in California state court to stay
4 enforcement of appellee's judgment and to recall the bench
5 warrant. The debtor argued that the bankruptcy discharge barred
6 enforcement of the judgment. The California court denied the
7 debtor's motion concluding that, because the underlying debt was
8 incurred post-petition and because the Oregon Action was
9 commenced following the debtor's discharge, the bankruptcy
10 injunction did not bar enforcement of the Oregon judgment. The
11 California court awarded appellee its attorney's fees associated
12 with defending the motion by way of tentative ruling that
13 appellant concedes was allowed to become final pursuant to
14 California Rule of Court 3.1312(a) (formerly Rule 391(a)) and
15 California Civil Procedure Code § 1019.5(a).

16 On January 4, 2006, the day after the California court
17 announced its tentative ruling, appellant, as attorney for the
18 debtor, filed an adversary proceeding against appellee in the
19 bankruptcy court alleging that appellee had violated the
20 discharge injunction under 11 U.S.C. § 524(a)(2) by continuing to
21 prosecute the Oregon Action and attempting to enforce the
22 judgment in California.

23 The complaint alleged that the judgment was based on a debt
24 for legal services performed prepetition, and the only post-
25 petition services were for tracking the debtor's bankruptcy and
26 attempting to collect unpaid fees and costs. The complaint did
27 not disclose that the California court had denied the debtor's
28 motion to stay enforcement of the judgment or that the court had

1 ruled that the underlying debt was a post-petition debt that was
2 not discharged.

3 Pursuant to the "safe harbor" procedure of Federal Rule of
4 Bankruptcy Procedure 9011(c)(1)(A), in January 2006, appellee
5 sent appellant a letter informing her of its intent to file a
6 Motion for Rule 9011 Sanctions if she did not voluntarily dismiss
7 her adversary complaint by January 20, 2006. Despite the
8 warning, appellant did not voluntarily dismiss her complaint.

9 On March 9, 2006, appellee filed a Motion for Summary
10 Judgment ("MSJ") and a motion for Rule 9011 Sanctions ("Rule 9011
11 Motion")³. In its Rule 9011 Motion, appellee requested
12 attorney's fees and costs in connection with the adversary
13 proceeding as sanctions.

14 A hearing was held on April 6, 2006. The bankruptcy court
15 granted the summary judgment motion from the bench and took the
16 Rule 9011 Motion under submission. On April 18, 2006, the court
17 issued a Memorandum Decision granting the Rule 9011 Motion. The
18 court approved appellee's request for attorney's fees (not yet
19 quantified) and costs in connection with defending itself in the
20 adversary proceeding, and announced that the award would be made
21 jointly and severally against both the debtor and appellant.⁴

22 On May 19, 2006, the bankruptcy court issued a Final
23 Memorandum Regarding Rule 9011 Sanctions awarding appellee

24
25 ³Appellee actually filed a Motion for Sanctions pursuant to
26 Federal Rule of Civil Procedure 11. Federal Rule of Bankruptcy
27 Procedure 9011 mirrors Rule 11 and is the sanctions provision
28 that is applicable in bankruptcy proceedings. Unless otherwise
indicated, all sanctions rule references are to the Federal Rules
of Bankruptcy Procedure.

⁴The court gave appellee thirty days to file a statement of
fees and expenses associated with the adversary proceeding.

1 \$17,421 in fees and \$331.81 in costs jointly and severally
2 against the debtor and appellant.

3 A final order was entered on June 6, 2006, and a timely
4 appeal ensued.⁵

5
6 JURISDICTION

7 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
8 We have jurisdiction under 28 U.S.C. § 158(a)(1).

9
10 ISSUE

11 Whether the bankruptcy court erred when it imposed monetary
12 sanctions under Rule 9011.

13
14 STANDARD OF REVIEW

15 The bankruptcy court's decision to award sanctions under
16 Rule 9011 is reviewed for an abuse of discretion. Smyth v. City
17 of Oakland (In re Brooks-Hamilton), 329 B.R. 270, 277 (9th Cir.
18 BAP 2005).

19
20 DISCUSSION

21 Rule 9011 imposes an obligation upon an attorney to ensure
22 that all bankruptcy court submissions are "truthful and for
23 proper litigation purposes." Brooks-Hamilton, 329 B.R. at 277.

24
25
26

⁵The debtor and the appellant filed one notice of appeal.
27 Appellant subsequently moved to withdraw as debtor's attorney and
28 to bifurcate her appeal. The BAP granted appellant's motion and
opened the current appeal (06-1257). Both appeals continued
separately until November 9, 2006, when the debtor's appeal was
dismissed for lack of prosecution.

1 The Rule imposes an affirmative duty to conduct a reasonable
2 investigation into the law and facts before submitting a
3 pleading, motion, or other paper to the court. Bus. Guides, Inc.
4 v. Chromatic Comm. Enters., Inc., 498 U.S. 533, 551 (1991).

5 The applicable standard against which an attorney's conduct
6 is measured is one of objective reasonableness under the
7 circumstances. Id. In other words, would a competent attorney
8 admitted to practice before the bankruptcy court have signed and
9 submitted the subject pleading, motion, or other paper to the
10 court? See Brooks-Hamilton, 329 B.R. at 277. If the answer is
11 no, then Rule 9011 sanctions may be warranted.

12 Rule 9011 provides, in pertinent part:

13 (b) REPRESENTATIONS TO THE COURT. By presenting to the
14 court . . . a petition, pleading, written motion, or
15 other paper, an attorney or unrepresented party is
16 certifying that to the best of the person's knowledge,
information, and belief, formed after an inquiry
reasonable under the circumstances, -

17 (1) it is not being presented for any improper
18 purpose, such as to harass or to cause the unnecessary
delay or needless increase in the cost of litigation;

19 (2) the claims, defenses, and other legal
20 contentions therein are warranted by existing law or by
21 a nonfrivolous argument for the extension,
22 modification, or reversal of existing law or the
23 establishment of new law;

24 (3) the allegations and other factual contentions
25 have evidentiary support or, if specifically so
26 identified, are likely to have evidentiary support
27 after a reasonable opportunity for further
28 investigation or discovery[.]

29 Fed. R. Bankr. P. 9011(b).

30 In its Rule 9011 Motion, appellee alleged that the claims
31 contained in the complaint and signed and submitted to the court
32 by appellant were contrary to controlling Ninth Circuit

1 authority, and that it contained gross misstatements of
2 underlying fact.

3 Appellee specifically argued that it is well established in
4 the Ninth Circuit that post-petition legal services provided to a
5 chapter 7 debtor, even when provided pursuant to a pre-petition
6 contract, constitute post-petition debt. See Gordon v. Hines (In
7 re Hines), 147 F.3d 1185, 1190-91 (9th Cir. 1998); Knutson v.
8 Tredinnick (In re Tredinnick), 264 B.R. 573, 577 (9th Cir. BAP
9 2001). Because it is a post-petition debt that is not
10 dischargeable in bankruptcy, it may be collected without
11 violating the automatic stay. See Sanchez v. Gordon (In re
12 Sanchez), 241 F.3d 1148, 1150-51 (9th Cir. 2001).

13 Appellee argued that had appellant conducted even a cursory
14 search of the law, she would have discovered that the position
15 she advocated on behalf of her client was legally unsupportable.
16 Appellee also alleged that appellant made multiple
17 misrepresentations of fact to the bankruptcy court.

18 The bankruptcy court agreed with appellee and found that
19 appellant "may have failed to conduct adequate research before
20 filing the complaint so as to determine the relevant law." The
21 court also found that appellant's "selected omission" of a
22 substantial portion of an exhibit that described the legal
23 services provided to the debtor post-petition that was filed by
24 appellee in the Oregon Action was not "accidental" and "goes
25 beyond incompetence or frivolousness and constitutes an attempted
26 fraud on the court."

27 Pursuant to Rule 9011(c), the court awarded appellee its
28 requested attorney's fees and costs associated with bringing the

1 adversary proceeding on both the debtor and appellant jointly and
2 severally.

3 On appeal, appellant argues that the court's award of
4 sanctions was an abuse of discretion because the complaint she
5 filed on behalf of the debtor was "with merit" and "was presented
6 appropriately and amply supported by the facts available at the
7 time."⁶

8 Appellant asserts that her "professional opinion" was based
9 on facts presented to her by the debtor, which included the
10 relation of a statement made to him by his former attorney that
11 appellee was violating the automatic stay by pursuing debt
12 collection in state court.

13 Appellant asserts further that she "reasonably relied" on
14 her client's representations when making the decision to assert
15 the claims contained in the complaint and that her "reasonable
16 reliance" may be justified "even though the client's
17 representations proved to be untrue."

18 As noted, reasonableness is judged by an objective standard.
19 A competent attorney would not have relied on second-hand legal
20 advice from her client that was supposedly given to that client

21
22 ⁶On 11/24/06, we received a letter from appellee stating
23 that it is waiving its right to appear and defend against
24 appellant's appeal and respond to her opening brief. The
25 bankruptcy court's sanctions order was imposed jointly and
26 severally on both the debtor and appellant. The debtor, who is
not a party to this appeal, paid to appellee the entire amount of
the sanctions award. Thus, appellee contends it no longer has an
interest in this appeal due to the fact that it has collected all
the funds to which it is entitled under the sanctions order.

27 The appeal is not moot, however, because appellant could be
28 asked by her former client to pay and because the sanction is the
subject of mandatory reporting by the State Bar of California.
Cal. Bus. & Prof. Code § 6068(o)(3).

1 by his former attorney. A competent attorney, before signing and
2 filing a complaint with the bankruptcy court, would have done, at
3 least, a cursory search to ensure that the debtor's position was
4 supported by existing law or by a nonfrivolous argument for the
5 extension, modification, or reversal of existing law or the
6 establishment of new law. A competent attorney would have
7 voluntarily dismissed the complaint when opposing counsel
8 informed her of controlling Ninth Circuit authority that directly
9 contradicts the legal positions advanced in the complaint.

10 Prior to filing its Rule 9011 Motion, appellee warned
11 appellant that the factual contentions contained in the complaint
12 were without evidentiary support and the legal arguments were not
13 warranted by existing law. Appellant chose to continue with the
14 adversary proceeding despite being warned by appellee of its
15 intent to file a Rule 9011 Motion for Sanctions unless she
16 dismissed the complaint.

17 Appellant's actions were not objectively reasonable under
18 the circumstances. An objectively reasonable attorney would not
19 have filed the subject complaint, and, when faced with a motion
20 for Rule 9011 sanctions, would have voluntarily dismissed the
21 complaint. "Rule 9011 prohibits an attorney from signing and
22 filing pleadings that are without legal support." Brooks-
23 Hamilton, 329 B.R. at 278. Hence, there was no error in
24 determining that Rule 9011 was violated.

25 Determining what sanctions to impose for filing a complaint
26 in violation of Rule 9011 is a matter of wide discretion for the
27 bankruptcy court. Id. at 285. The bankruptcy court initially
28 awarded appellee its requested, yet unquantified, attorney's fees

1 and costs associated with the adversary proceeding. The court
2 allowed appellee time to file a statement of fees and expenses,
3 and also allowed appellant time to file an opposition.

4 Within the allowed time period, appellee filed a statement
5 requesting \$16,996 in attorney's fees and \$331.81 in costs.
6 Appellant objected to the fees as excessive. Appellee filed a
7 response arguing that it had incurred an additional \$2,700 in
8 attorney's fees since filing its initial statement.

9 The court examined all the filings and awarded appellee
10 \$17,421 in attorney's fees and \$331.81 in costs and stated that
11 the "court is satisfied that this award is sufficient to deter
12 future misconduct."

13 We cannot say that the bankruptcy court's decision is based
14 on an erroneous view of the law or clearly erroneous factual
15 findings. We conclude that the bankruptcy court did not abuse
16 its discretion when it awarded sanctions in favor of appellee.⁷

18 CONCLUSION

19 The bankruptcy court did not err when it awarded sanctions
20 in favor of appellee pursuant to Rule 9011. Appellant's actions
21 were not objectively reasonable, and she did not meet her burden
22 to prove to us that the bankruptcy court abused its discretion.

23 AFFIRMED.

24
25 ⁷Appellant's brief also challenges the bankruptcy court's
26 order granting summary judgment in favor of appellee. In her
27 reply brief, appellant concedes that she lacks standing to
28 challenge that order because she has no personal interest in the
order due to the fact she was not a party to the adversary
action. Therefore, we need not address her arguments that relate
to the summary judgment order.