

JAN 18 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NOT FOR PUBLICATION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-06-1051-SJB
7	PEPI SCHAFLEL,)	Bk. No. 99-42138-NS
8	Debtor.)	
9	_____)	
10	PEPI SCHAFLEL,)	
11	Appellant,)	
12	v.)	MEMORANDUM¹
13	RICHARD J. SPEAR, Chapter 7)	
14	Trustee,)	
15	Appellee.)	
	_____)	

Argued and Submitted on
September 13, 2006, at Sacramento, California

Filed - January 18, 2007

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

Honorable Randall J. Newsome, Chief Bankruptcy Judge, presiding

Before: SMITH, JURY² and BRANDT, Bankruptcy Judges.

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 Hon. Meredith A. Jury, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The chapter 7 trustee sought approval of his final report
2 which provided for the payment of administrative fees to
3 trustee's counsel. The bankruptcy court approved the final
4 report (the "Final Report Order") and concurrently entered an
5 order discharging the trustee of any further administrative
6 duties while allowing the case to remain open due to Debtor's
7 pending appeals before the United States Supreme Court (the
8 "Trustee Discharge Order"). Debtor appeals both orders. We
9 AFFIRM the appeal as to the Trustee Discharge Order and DISMISS
10 the Final Report Order appeal on jurisdictional grounds.

11 I. FACTS

12 On March 26, 1996, Pepi Schafler ("Debtor") filed a chapter
13 7 petition³ in the District of Maryland. Shortly thereafter, the
14 trustee filed his no distribution report, and a final decree was
15 entered on July 9, 1996, closing the case.

16 After the case was closed, the trustee received information
17 from an interested party regarding potential undisclosed assets.
18 Based on this information, the trustee sought to have the case
19 reopened and the final decree vacated in order to permit him to
20 investigate and pursue recovery of the potential estate assets.
21 The case was reopened on May 7, 1998.

22 Pursuant to Debtor's request, on March 12, 1999, the case
23 was transferred to the Northern District of California.⁴

24
25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

⁴ Debtor relocated to San Francisco to assist in the care
of her terminally ill brother.

1 Subsequently, the successor trustee⁵ initiated an adversary
2 proceeding against Debtor for a declaration that certain assets,
3 namely stock certificates and bonds held in trust and a
4 condominium, were property of the bankruptcy estate.

5 On December 20, 2000, the bankruptcy court ruled that Debtor
6 had fraudulently concealed her interest in the assets and deemed
7 them property of the estate. Debtor appealed the judgment to the
8 District Court and then to the Ninth Circuit. Both courts
9 affirmed. Debtor sought review of the Ninth Circuit's ruling to
10 the United States Supreme Court but was denied certiorari.

11 On February 14, 2001, while her appeal to the District Court
12 was pending, Debtor filed an amended schedule C in which she
13 claimed that an Individual Retirement Account ("IRA") was exempt
14 from the bankruptcy estate. The trustee objected to the
15 exemption on the ground that Debtor initially failed to disclose
16 the IRA on her petition. The court sustained the objection,
17 finding that she had fraudulently concealed the IRA. Debtor
18 appealed the bankruptcy court's ruling to the District Court
19 which affirmed the decision.

20 The trustee eventually recovered most of the assets and by
21 December 2005 had completed the administration of the estate.⁶

23 ⁵ The chapter 7 trustee in Maryland was Scott D. Field.
24 Richard Spear was appointed as the successor trustee when the
25 case transferred to the Northern District of California. Richard
Spear is the appellee in this appeal.

26 ⁶ The final report states that all assets of Debtor in the
27 trustee's possession have been reduced to cash. However, the
28 trustee was unable to liquidate certain stocks because of
Debtor's failure to locate and provide the stock certificates to
the trustee.

1 Consequently, on December 6, 2005, the trustee filed his final
2 report, later amended on December 16, 2005. The final report
3 showed total receipts of \$377,598.15, disbursements of
4 \$268,732.68, and a balance of funds on hand of \$109,042.66. The
5 hearing on the final report was set for January 12, 2006.

6 In connection with the final report, Goldberg, Stinnett,
7 Meyers, & Davis ("GSMD"), counsel to the trustee in California,
8 filed its second and final application for compensation and
9 reimbursement of expenses, requesting fees of \$217,851.50 and
10 expenses of \$20,375.17. The law firm of Whiteford, Taylor &
11 Presenton ("WTP"), counsel to the initial trustee in Maryland,
12 also filed a final application for fees of \$53,170.50 and
13 expenses of \$3,551.80.

14 On December 23, 2005, Debtor filed a "Motion In Opposition
15 To The Proceedings Of January 12, 2006." The opposition did not
16 direct any specific objections to the final report or to the fees
17 and expenses of GSMD and WTP, but instead asserted Debtor's
18 objection to the proceeding on the basis of her belief that it
19 was "intended to legitimize the conspiracy racketeering theft,
20 fraud and malicious misconduct by all of the participants."

21 On January 11, 2006, in light of the hearing on the final
22 report and his intent to close the case, the trustee filed an
23 "Application For Order That Undisclosed Assets Not Be Deemed
24 Abandoned At Close Of Case" (the "Abandonment Application"). By
25 the Abandonment Application, the trustee requested that upon the
26 closing of Debtor's bankruptcy case, the court not deem abandoned
27 any assets that Debtor had not turned over to the trustee
28 pursuant to orders of the court or which had not been listed on

1 Debtor's schedules. In response, Debtor filed a "Motion To Deny
2 Application Re Closing Of The Case And Not Abandon Petitioner's
3 Asset" wherein Debtor requested the court not close her case due
4 to her pending petitions to the United States Supreme Court.⁷

5 On January 12, 2006, the court conducted a hearing on the
6 trustee's final report, the professionals' final fee
7 applications, and the Abandonment Application, as well as
8 Debtor's opposition to closing the case. All parties, except
9 Debtor, were in attendance. In approving both fee applications,
10 the court made clear that it went through "each and every page of
11 both applications and . . . reviewed all the time records
12 therein." Hr'g Tr. at 6, Jan. 12, 2006. Specifically, the court
13 found that

14 under Section 330(a) that the amounts that
15 I'm about to award do constitute reasonable
16 compensation for actual and necessary
17 expenses rendered by a Trustee; that I've
18 examined the nature, extent, and value of the
19 services and the time spent; the rates
20 charged, whether the services were necessary
21 to and beneficial to the estate; and whether
22 or not there was a reasonable amount of time,
23 expense, commensurate with the complexity and
24 difficulties which can't be overemphasized in
25 this case; and that the fees, the hourly
26 rates, appear to be - and the charges appear
27 to be based upon comparable charges by
28 comparably skilled practitioners; that there
wasn't any unnecessary duplication; and that
the services when they were rendered were
reasonably likely to benefit the estate and
were necessary to the administration of the
case.

25 Id. Based on its findings, the court awarded \$40,000 in fees and
26

27 ⁷ The pending petitions concerned Debtor's allegations of
28 extortion and the theft of her exempt assets by the bankruptcy
court, the trustee, and the trustee's counsel.

1 expenses to WTP,⁸ \$217,851.50 in fees and expenses of \$20,375.17
2 to GSMD, and approved the final report.

3 The court then addressed the Abandonment Application and the
4 closure of the case. In light of Debtor's three appeals pending
5 before the United States Supreme Court, the court found it
6 appropriate to enter an order that relieved the trustee of all
7 further administrative responsibilities, but kept the case open
8 pending information from the trustee that the case could be
9 closed. The court believed that structuring the order in this
10 manner accomplished everyone's goals without complicating the
11 legal issues regarding abandonment, which had already been
12 litigated through numerous appeals. In addition, the order
13 relieved the parties of the burden of having to pay a reopening
14 fee if any decision by the Supreme Court required further action
15 in the case or the trustee discovered undisclosed assets that
16 needed to be administered.

17 Debtor appeals.

18 **II. ISSUES⁹**

19 1) Whether Debtor's appeal of the Trustee Discharge Order
20 articulates any specific issue warranting review by this
21 panel.

22 ⁸ WTP originally requested more than \$50,000 in fees and
23 expenses. At the hearing, in light of concerns expressed by the
24 court, as well as the objections of the trustee, WTP agreed to
fees in the reduced amount of \$40,000.

25 ⁹ Debtor presents numerous protestations regarding alleged
26 acts of extortion, fraud, theft, and racketeering on the part of
27 the bankruptcy judge, the trustee, GSMD, and others in her
opening and reply briefs. As the criminal allegations go beyond
28 the scope of this appeal, we decline to consider these matters.
Birting Fisheries, Inc. v. Huse-Sporsen (In re Birting Fisheries,
Inc.), 300 B.R. 489, 504 n.15 (9th Cir. BAP 2003).

1 2) Whether the appeal of the Final Report Order is moot.

2 **III. JURISDICTION**

3 Federal subject matter jurisdiction is founded under 28
4 U.S.C. §§ 1334(b) and 157(b)(1). We have appellate jurisdiction
5 over final orders pursuant to 28 U.S.C. § 158(b)(1) and (c)(1).

6 **IV. DISCUSSION**

7 As a preliminary matter, the trustee argues that the appeal
8 should be dismissed due to Debtor's failure to comply with
9 certain of the Federal Rules of Appellate Procedure ("FRAP") and
10 the Federal Rules of Bankruptcy Procedure ("FRBP"). Specifically,
11 the trustee complains that Debtor's opening brief fails to
12 conform to 1) FRBP 8010 or FRAP 32(a), which provides the
13 requirements for the form of the briefs; 2) FRAP 28, which
14 requires an appropriate jurisdictional statement, appropriate
15 references to record, appropriate summary of argument, and
16 statement of applicable standard of review with respect to each
17 issue presented; and 3) FRBP 8006 and FRBP 8009, which require an
18 appellant to include an appendix that includes a copy of the
19 order or judgment appealed from.

20 While it is true that Debtor has not strictly complied with
21 the appellate rules, prose litigants should be given latitude in
22 complying with the FRAP and FRBP and be held to "less stringent
23 standards than formal pleadings drafted by lawyers." Haines v.
24 Kerner, 404 U.S. 519, 520 (1972); see also Ms. S. v. Vashion
25 Island Sch. Dist., 337 F.3d 1115, 1125 n.15 (9th Cir. 2003).
26 Consequently, instead of dismissing the appeals on procedural
27 grounds, we have chosen to rule on them based on the merits.

1. Debtor Fails to Present Any Issues Which Warrant the Reversal of the Trustee Discharge Order

In reviewing Debtor's briefs as to the Trustee Discharge Order appeal, the only recognizable argument is that the Trustee Discharge Order was decided ex parte without proper notice to her, thus it should be reversed on due process grounds. The allegations of lack of due process regarding the Trustee Discharge Order are raised for the first time in Debtor's reply brief, thereby (ironically) depriving the trustee of an opportunity to address the issue in his responsive brief. The latitude granted to the shortcomings of pleadings presented by pro se litigants must cease when the due process rights of their opponents are adversely affected. See Leer, 844 F.2d at 634. And "arguments not raised by a party in [her] opening brief are deemed waived." Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999); Eberle v. City of Anaheim, 901 F.2d 814, 817-18 (9th Cir. 1990) ("It is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs.").

Even if we were to consider this argument, the proof of service attached to the Trustee Discharge Order indicates that Debtor was served at her correct address. Moreover, the court did not enter the Trustee Discharge Order until after it held a hearing, which had been properly noticed, on the Abandonment Application and Debtor's "Motion To Deny Application Re Closing Of The Case And Not Abandon Petitioner's Asset." Thus, Debtor's due process arguments would be an insufficient basis for us to vacate the Trustee Discharge Order in any event.

1 Because Debtor's opening brief does not include any other
2 arguments concerning the Trustee Discharge Order from which we
3 can construe an issue, we deem Debtor's appeal of the Trustee
4 Discharge Order as to any other issue to be abandoned. See Leer
5 v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a
6 brief which are not supported by argument are deemed
7 abandoned."); see also FRAP 28(a)(4) (the brief of an appellant
8 must contain "the contentions of the appellant with respect to
9 the issues presented. . . ."). Accordingly, Debtor's appeal of
10 the Trustee Discharge Order fails.

11 2. No Relief Can Be Granted as to the Final Report Order Making
12 Debtor's Appeal of It Moot

13 Although Debtor does not clearly articulate any specific
14 issues regarding the Final Report Order, based upon a close
15 review of her opening and reply briefs, we construe her argument
16 to be as follows: the bankruptcy court abused its discretion in
17 approving the final report which allowed for the disbursement of
18 GSMD's and WTP's final fees and costs.

19 A court lacks jurisdiction over appeals which are moot.
20 Baker & Drake, Inc., v. Pub. Serv. Comm'n of Nev. (In re Baker &
21 Drake, Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994). An appeal will
22 be dismissed as moot if the requested appellate relief is
23 impracticable. See id. "Failure to obtain a stay, standing
24 alone, is often fatal[,] if the appeal is associated with
25 property that has been sold to a third party or is based upon a
26 simple plan of reorganization that has been substantially
27 culminated. Id.

1 An appellant's failure to obtain a stay of an order
2 authorizing the payment of attorney's fees to a party to the
3 appeal, however, does not cause the appeal to be moot. Int'l
4 Envtl. Dynamics, Inc., v. Logan (In re Int'l Env'tl. Dynamics,
5 Inc.), 718 F.2d 322, 325-36 (9th Cir. 1983). In such a
6 situation, we have the ability to "fashion effective relief by
7 remanding with instructions to the bankruptcy court to order the
8 return of erroneously disbursed funds." Id. at 326.

9 Debtor is appealing the Final Report Order which approved
10 the disbursement of fees by the trustee to WTP and GSMD. The
11 only party to this appeal, however, is the trustee. As a result,
12 we only have the ability to remand with instructions to the
13 bankruptcy court to order the disgorgement of any fees paid to
14 the trustee. According to the final report, the trustee was not
15 awarded any fees. Consequently, for us to be able to provide
16 effective relief to Debtor (i.e., the return of the funds paid to
17 WTP and GSMD), Debtor needed to obtain a stay of the Final Report
18 Order prior to distribution. No stay was obtained by Debtor
19 prior to the trustee's distribution¹⁰; therefore, the trustee had
20 every right to disburse estate funds to pay the fees approved in
21 the Final Report Order, including those to WTP and GSMD.¹¹

23
24 ¹⁰ Debtor filed a motion with the panel requesting a stay
25 of the Final Report Order. The panel denied the motion on the
26 grounds that she failed to "demonstrate irreparable injury or
27 probability of success on the merits sufficient to obtain a stay
28 pending appeal." Order Denying Stay Pending Appeal at 2, Apr. 7,
2006.

¹¹ There were also separate orders entered on January 19,
2006, that approved the fees of WTP and GSMD. Debtor did not
appeal either of those orders.

1 Because the trustee has already made all distributions pursuant
2 to the final report, which we have no legal authority to undo,
3 Debtor's requested relief that the distributed funds be returned
4 is impracticable. Accordingly, we lack jurisdiction over the
5 appeal as to the final report on the grounds that it is moot.

6 **V. CONCLUSION**

7 For the foregoing reasons, we AFFIRM as to the Trustee
8 Discharge Order, and DISMISS the appeal of the Final Report
9 Order.

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