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NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-06-1275-PaDMo
)		
PHILIP CHARLES HEATH and)	Bk. No.	ND 03-10028-RR
MARLENE THERESE HEATH,)		
)		
Debtors.)		
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PHILIP CHARLES HEATH and)		
MARLENE THERESE HEATH,)		
)		
Appellants,)		
v.)	<u>MEMORANDUM</u> ¹	
)		
DAVID Y. FARMER, Chapter 7)		
Trustee,)		
)		
Appellee.)		
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Argued and Submitted on March 22, 2007
at Pasadena, California

Filed - April 2, 2007

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

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and MONTALI, 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.

1 This is an appeal from an order of the bankruptcy court
2 allowing a chapter 7² trustee's administrative claims for
3 compensation and reimbursement of expenses incurred in connection
4 with selling Appellants' home. We AFFIRM.

5 **FACTS**

6 Appellants Philip and Marlene Heath filed a voluntary chapter
7 7 petition on January 6, 2003. On their Schedule A, they listed
8 their residence in Ventura, California ("the Property"),
9 indicating that the Property had a value of \$228,000, and that it
10 was subject to a secured claim of \$154,653. In Schedule C,
11 Appellants claimed a homestead exemption in their residence under
12 California law for \$75,000. This exemption claim was not
13 challenged, and it was deemed allowed. § 522(1) (providing that
14 unless a party in interest objects, "the property claimed as
15 exempt on [Schedule C] is exempt."). Appellants were granted a
16 discharge on April 16, 2003.

17 Appellee David Farmer was appointed to serve as chapter 7
18 trustee. In a letter dated February 11, 2004, Appellee advised
19 Appellants that, based upon his opinion of its value, he intended
20 to liquidate the Property. On March 25, 2004, Appellee applied to
21 the court to employ a realtor to market the Property. The
22 bankruptcy court approved employment of the realtor on March 26,
23
24

25 ² 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 most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20,
2005, 119 Stat. 23.

1 2004.³

2 On May 5, 2004, Appellants commenced a chapter 13 case.
3 Their plan proposed to pay unsecured claims in full, although all
4 unsecured claims were scheduled as disputed. The plan also
5 proposed to satisfy the interests of Appellee, as chapter 7
6 trustee, in the Property by paying a fixed amount to him over the
7 term of the plan, thereby treating Appellee's "claim" in the same
8 fashion, according to Appellants, as that of a judgment lien
9 creditor.

10 Appellee responded to this tactic by filing a motion for
11 relief from the automatic stay in the chapter 13 case, seeking
12 possession of and permission to sell the Property in the chapter 7
13 case. Appellants opposed the motion. The stay relief motion was
14 granted by the bankruptcy court in an order entered on June 28,
15 2004. Appellants appealed the order granting the motion for
16 relief from stay, but we later dismissed the appeal as moot
17 because, by that time, the Property had been sold. Heath v.
18 Farmer, BAP no. CC-04-1361 (April 20, 2005).⁴

19 _____
20 ³ Appellants were also active in their chapter 7 case during
21 this time. They filed objections to all the unsecured claims
22 filed in their case, and asked that they be disallowed, on the
23 ground that the creditors' proofs of claim did not attach a
24 writing evidencing the claims as required by Rule 3001. The
25 bankruptcy court ruled that Appellants were estopped from filing
26 objections which were inconsistent with their own schedules, and
27 overruled Appellants' objections. We affirmed the bankruptcy
28 court's decision in a published opinion. Heath v. Am. Express (In
re Heath), 331 B.R. 424 (9th Cir. BAP 2005). There was no further
appeal.

26 ⁴ Following the order in the chapter 13 case granting relief
27 from stay to the Appellee, Appellants were unsuccessful in
28 confirming a chapter 13 plan. They submitted three plans. The
original plan, submitted on May 17, 2004, provided for payments of
\$300 per month for 60 months, and listed one debt to Appellants'
attorney for \$2,500. The amended plan, filed January 14, 2005,
provided for payments of \$25 per month for up to 60 months, again
(continued...)

1 Appellee's realtor secured an offer of \$325,000 for the
2 purchase of the Property, and Appellee filed a motion for approval
3 of the sale in the chapter 7 case. A hearing concerning the sale
4 motion was conducted on September 15, 2004. The bankruptcy court
5 approved the sale in an order entered on January 3, 2005. The
6 order authorized Appellee to disburse the following amounts
7 directly from escrow: \$16,250 to the realtor; all sums due for
8 real property taxes; \$192,000 due on the mortgage against the
9 Property; and \$37,653⁵ to Appellants, representing their homestead
10 exemption. The balance of the sale proceeds was retained by
11 Appellee for distribution to unsecured creditors. Appellants did
12 not appeal the order approving sale of the Property.

13 Appellee submitted his proposed final accounting and
14 application for approval of his fees and expenses, and those of
15 his attorney, on June 14, 2006. Appellants opposed the
16 application for fees and expenses. They argued that Appellee and
17 his attorney's services in connection with obtaining stay relief

18 _____
19 ⁴(...continued)
20 listing only the debt to their attorney for \$2,500. A second
21 amended plan was submitted on June 10, 2005, providing for
22 payments of \$350 per month for 48 months and listing \$16,766.35 in
23 claims (\$2,500 in unpaid attorney's fees, \$9,215.75 to IRS,
24 \$5,888.41 to the Franchise Tax Board and \$1,637.19 to the Chapter
25 13 trustee). The confirmation hearing was continued twice and was
never held. The court dismissed the chapter 13 case on November
23, 2005, because Appellants had failed to make the required pre-
confirmation payments. The dismissal was with prejudice,
prohibiting Appellants from filing any proceedings under any
chapter of the Bankruptcy Code for 180 days without prior approval
of the court.

26 ⁵ Appellants sought a homestead exemption of \$75,000. The
27 court surcharged this sum by \$37,347 representing funds borrowed
28 by Appellants post-petition against the Property without court
approval. The sum distributed to Appellants therefore represents
the difference between the payoff on the second mortgage and the
homestead exemption.

1 in their chapter 13 case, the sale of the Property, and
2 administering the proceeds generated by the Property sale, were
3 not necessary, since they had proposed to pay Appellee amounts
4 necessary to satisfy creditor claims through their proposed
5 chapter 13 plan.

6 The bankruptcy court approved Appellee's application for fees
7 and expenses on July 28, 2006.⁶ Appellants filed a timely appeal
8 of the order approving the fee application on August 4, 2006.

9 JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b)(2)(A). We have jurisdiction pursuant to 28
12 U.S.C. § 158.

13 ISSUE

14 Whether the bankruptcy court erred in awarding compensation
15 and expenses for the services provided by Appellee and his
16 attorney in connection with the liquidation of the Property in the
17 chapter 7 case.

18 STANDARD OF REVIEW

19 We review the bankruptcy court's award of compensation and
20 expenses for abuse of discretion. Dawson v. Wash. Mut. Bank, F.A.

21 _____
22 ⁶ Appellee's final report listed total receipts of
23 \$348,808.99, including \$325,203.97 in proceeds from the sale of
24 the Property and \$22,500.00 from settlements of certain preference
25 actions, plus interest earned. Appellee had disbursed \$258,269.31
26 pursuant to earlier authorizations of the court, including
27 \$200,166.28 to secured creditors, \$37,653.00 to Appellants for
28 their homestead exemption, and \$16,250.00 in interim fees to
professionals, and miscellaneous minor expenditures. The balance
on hand was \$90,539.68, from which Appellee proposed to pay
\$48,851.37 to himself and his professionals, \$310 in court costs,
and \$41,378.31 to unsecured creditors. The total amount of
allowed unsecured claims in the case was \$41,489.78, and thus
those creditors would receive a 99.73 percent return on their
claims. There were no surplus funds for Appellants.

1 (In re Dawson), 367 F.3d 1174, 1177 (9th Cir. 2004); Larson v.
2 U.S. Trustee (In re Larson), 174 B.R. 797, 801 (9th Cir. BAP
3 1994).

4 DISCUSSION

5 While Appellants' theory in this appeal challenging the award
6 of compensation and expenses to Appellee and his attorney is
7 convoluted, simply put, they believe there was no need for
8 Appellee to have sold the Property and, therefore, he and his
9 attorney should not be paid for their services in doing so. We
10 agree with their suggestion that "the crux of the matter is what
11 rights did each of the parties have in the Property when the
12 Chapter 13 petition was filed?"⁷ Our response to this question
13 is a simple one: Appellants had no rights in the Property; the
14 chapter 7 bankruptcy estate, represented by Appellee as trustee,
15 was the owner of all rights in the Property; and Appellee's
16 efforts in liquidating the Property were necessary, indeed
17 mandated, under the Bankruptcy Code.⁸

18 I.

19 A review of elementary principles of the Bankruptcy Code is
20 helpful in understanding the resolution of the issue in this

21 ⁷ Appellants Reply Brief at 2.

22 ⁸ While we dispose of this issue below, we note that, if
23 Appellants truly opposed Appellee's right to sell the Property,
24 they should have appealed the order approving the sale. That they
25 did not is the reason, we presume, they are relegated to arguing
26 about whether Appellee, as chapter 7 trustee, and his attorney,
27 should be paid for their services. We are puzzled by Appellants'
28 failure to convert their chapter 7 case to a case under chapter 13
pursuant to § 706, rather than file a concurrent chapter 13 case.
Appellants presumably represent, as recently characterized by the
U.S. Supreme Court, "honest but unfortunate debtors who . . .
possess an absolute right to convert their cases from Chapter 7 to
Chapter 13" Marrama v. Citizens Bank of Mass., 549 U.S.
(2007). Timely conversion of the chapter 7 case would have
terminated the authority of Appellee to sell the Property.

1 appeal. When a chapter 7 case is commenced, all of a debtor's
2 legal and equitable interests in property at that date become the
3 property of the bankruptcy estate. § 541(a); Irwin Mortg. Co. v.
4 Tippett (In re Tippett), 338 B.R. 82, 86 (9th Cir. BAP 2006). A
5 chapter 7 trustee is appointed to serve as the official
6 representative, and to administer the assets, of the bankruptcy
7 estate. §§ 701(a), 701(b); 702(d). In the words of the Code, "The
8 trustee shall - (1) collect and reduce to money the property of
9 the estate for which such trustee serves, and close such estate as
10 expeditiously as is compatible with the best interests of parties
11 in interest. . . ." § 704(a)(1).

12 An asset remains property of a chapter 7 bankruptcy estate
13 until it is abandoned or the bankruptcy case is closed.
14 §§ 554(c), 554(d); 349(b)(3). Palm v. Klapperman (In re Cady),
15 266 B.R. 172 (9th Cir. BAP 2001). If property is burdensome, or
16 of inconsequential value and benefit to the estate, the trustee
17 may abandon it. § 554(a); Rule 6007(a). However, the abandonment
18 of an asset by a chapter 7 trustee requires some affirmative act,
19 coupled with some evidence of intent to abandon the asset. Pace
20 v. Battley (In re Pace), 146 B.R. 562 (9th Cir. BAP 1992). The
21 trustee may be compelled to abandon property of the estate, upon
22 request by a party in interest (including the debtor), after
23 notice and a hearing. § 554(b); Rule 6007(b).

24 To enable the trustee to fulfill the duty to "collect and
25 reduce to money the property of the estate," the trustee may,
26 after notice and a hearing, sell property of the estate.
27 § 363(b); Rules 2002(a)(2), 2002(c)(1). When sold, if an asset is
28 subject to a valid secured claim, the trustee must distribute the

1 sale proceeds to the holder to satisfy that claim. § 725. When
2 the estate has been fully administered, the trustee must
3 distribute the proceeds, first in payment of administrative and
4 priority claims, then in payment of allowed creditors' claims,
5 with the balance of funds, if any, distributed to the debtor.
6 § 726(a)(1)-(6). The trustee, and those professionals employed by
7 the trustee, may receive reasonable compensation and reimbursement
8 of expenses. §§ 326(a); 330(a)(1). The compensation and expenses
9 awarded to the chapter 7 trustee and professionals constitute
10 administrative expense claims. §§ 503(b)(2); 507(a)(1).

11 **II.**

12 These basic tenets of bankruptcy law are applicable to the
13 facts of this appeal. When Appellants filed their chapter 7
14 bankruptcy case, the Property became property of the bankruptcy
15 estate. Appellee, as the appointed chapter 7 trustee, was duty-
16 bound under the Code to sell the Property, and use the proceeds to
17 pay secured, administrative and unsecured claimants. Appellee did
18 not abandon the Property, nor did any interested party, including
19 Appellants, ever move to compel him to abandon the Property.
20 Instead, Appellee, after considerable effort, sold the Property.

21 As required by the Code, Appellee used the Property sale
22 proceeds to pay the secured claim against the Property. He also
23 allowed Appellants their exemption, in the amount provided by the
24 applicable state exemption statute (although the bankruptcy court
25 surcharged that exemption to pay a loan against the Property
26 incurred by Appellants post-petition without court permission).
27 And in his final accounting, Appellee proposed to distribute the
28 balance of money generated from the sale of the Property, together

1 with the other funds he had collected in administering the
2 bankruptcy estate, to administrative and unsecured claimants. As
3 it turns out, after payment of the mortgages, satisfaction of
4 Appellants' exemption, and payment of administrative expenses,
5 unsecured creditors will receive just slightly less than full
6 payment.

7 The Property remained an asset of the chapter 7 estate when
8 Appellants filed their Chapter 13 petition.⁹ Appellants retained
9 the right to an exemption in the proceeds from the sale of the
10 Property received by Appellee when the Property was sold. But as
11 the Court of Appeals made clear in Hyman v. Plotkin (In re Hyman),
12 967 F.2d 1316, 1321 (9th Cir. 1992), California law gave
13 Appellants an "exemption as of the time of sale, not a[n] . . .
14 equity interest in the property."¹⁰

15 When measured against the policies embodied in the Bankruptcy
16 Code, this was a successful, if lengthy, bankruptcy case

18 ⁹ Technically, all Appellants' rights in property in
19 existence when they commenced their chapter 13 case became
20 property of the bankruptcy estate created by such filing.
21 § 1306(a). However, it is generally accepted that property cannot
22 be an asset of two bankruptcy estates simultaneously. Grimes v.
23 United States, 117 B.R. 531, 533 (9th Cir. BAP 1990), citing
24 Bateman v. Grover (In re Berg), 45 B.R. 899, 903 (9th Cir. BAP
1984). See also In re Saylor, 869 F.2d 1434, 1438 (11th Cir.
1989); In re Sanchez-Dobazo, 343 B.R. 742, 745 (Bankr. S.D. Fla.
2006); In re Strohscher, 278 B.R. 432, 437 (Bankr. N.D. Ohio
2002); In re Studio Five Clothing Stores, Inc., 192 B.R. 998, 1006
(Bankr. C.D. Cal. 1996).

25 ¹⁰ This decision also explains that a chapter 7 bankruptcy
26 estate, and not the debtor, is entitled to any appreciation in the
27 value of estate assets during the pendency of the bankruptcy case.
28 In re Hyman, 967 F.2d at 1321. While Appellants complain about
the unfairness of Appellee's late decision to sell the Property,
the Court of Appeals suggests the appropriate response to their
concerns: "To the extent the trustee delays selling the home to
wait for it to appreciate, the debtor gets to live in it for free.
If the debtor believes he is being prejudiced by the trustee's
delay, he can move for abandonment." Id.

1 administration. From the creditors' perspective, their claims
2 were paid in full, or nearly so, a rather unusual outcome in a
3 chapter 7 case. In addition, Appellants received a discharge and
4 their homestead exemption was satisfied. In short, Appellants
5 received a financial fresh start, while creditors' interests were
6 respected and treated fairly.

7 **III.**

8 The thrust of Appellants' argument on appeal is their novel
9 suggestion that all of their rights in the Property did not pass
10 to the chapter 7 bankruptcy estate when they filed their
11 bankruptcy petition. They argue that they retained an amorphous
12 property right with respect to the Property which they refer to as
13 a "stick."¹¹ At no point do Appellants precisely articulate the
14 attributes or legal significance of such stick. It would appear
15 they contend this stick empowered them to prevent Appellee from
16 selling the Property. We know of no such power under the
17 Bankruptcy Code or case law.

18 Appellants argue that Appellee's status and rights in the
19 chapter 13 case were akin to that of a state law judgment lien
20 creditor. As a result, Appellants contend that Appellee's rights
21 (and presumably those of the chapter 7 bankruptcy estate) could be
22 restructured and satisfied by making payments to Appellee through
23 a chapter 13 plan. See § 1325(a)(5). We disagree.

24
25 ¹¹ We assume that Appellants are referring to some variation
26 on the theory of property ownership as a bundle of sticks or
rights (*i.e.*, possession, devisement, alienation, etc.).
27 Interestingly, at oral argument, Appellants' counsel employed yet
28 another metaphor, arguing that Appellants' rights in the Property
were like one of many facets on a diamond. Neither analogy
supports Appellants' argument.

1 It is correct that a chapter 7 trustee is given the status of
2 a hypothetical judicial lien creditor for purposes of avoiding and
3 recovering certain pre-bankruptcy transfers of property by a
4 chapter 7 debtor. § 544(a)(1); Chbat v. Tleel, 876 F.2d 769, 773
5 (9th Cir. 1989) ("Section 544 was designed to aid the trustee in
6 recovering properties of the estate for the eventual benefit of
7 creditors."). But this avoiding power was not intended as a
8 limitation on the trustee's authority to accomplish the
9 fundamental goal of every chapter 7 case: the liquidation of
10 estate assets for the benefit of creditors. The Bankruptcy Code
11 unambiguously authorizes a chapter 7 trustee to sell assets of the
12 estate without approval of the debtor. § 363(b). Any suggestion
13 that the protections afforded a debtor in relation to enforcement
14 of judgments under state law in any way limit the powers of a
15 chapter 7 trustee to sell assets of a bankruptcy estate fails in
16 the face of the Supremacy Clause of the U.S. Constitution:¹²

17 State law is nullified to the extent that it
18 actually conflicts with federal law. Such a
19 conflict arises when . . . state law stands as
20 an obstacle to the accomplishment and
execution of the full purposes and objectives
of Congress.

21 Hillsborough County, Fla. v. Auto. Medical Laboratories, Inc., 471
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24 ¹² This Constitution, and the Laws of the United
25 States which shall be made in Pursuance
26 thereof; and all Treaties made, or which shall
27 be made, under the authority of the United
28 States, shall be the supreme Law of the land;
and the Judges in every State shall be bound
thereby, any Thing in the Constitution or Laws
of any State to the contrary notwithstanding.
U.S. CONST. art. VI ¶ 2.

1 U.S. 707, 721 (1985).¹³ Appellants are wrong in their attempts to
2 characterize Appellee as a lien creditor for purposes of their
3 chapter 13 case.¹⁴

4 Appellee and his professionals were entitled to reasonable
5 compensation for "actual, necessary services," together with
6 reimbursement of their "actual, necessary expenses." § 330(a)(1),
7 (2). "[T]he standard is an objective one as to whether the fees

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10 ¹³ There are some limitations on a trustee's authority to
11 sell property of a bankruptcy estate. See, e.g.,
12 § 363(f) (limiting trustee's power to sell property free and clear
13 of state law liens and interests), and § 363(h) (limiting
14 trustee's power to sell property free and clear of a co-owner's
15 interest). However, such limitations are imposed by the
16 Bankruptcy Code, not state law.

17 ¹⁴ The bankruptcy court correctly rebuffed Appellants'
18 contentions:

19 I reject your argument that the Trustee only
20 stands in the shoes of a judgment creditor . .
21 . . The Trustee stands in the shoes of the
22 owner of the property. He takes title as of
23 commencement of the chapter 7 case to all of
24 the assets of the Debtor, wherever situated,
25 both real, personal, tangible, intangible.
26 He's - he's not standing in the shoes of some
27 judgment creditor and can only do what a
28 judgment creditor can do. He can sell the
property. . . . I have ruled in this case
that [Trustee] had title to the property,
could sell the property under [Hyman], all the
appreciation went to the estate, the chapter 7
estate. The house was a chapter 7 asset.
When the chapter 13 was filed, it did not
miraculously become a chapter 13 asset and
jump out of the Chapter 7 estate. That would
make the whole bankruptcy system a big mess.
You could always avoid a trustee taking
unpopular action by, "Oh, let's file a
different case" and jump the assets out of his
case so he can't do anything with them.
That's what you're suggesting in the case here
and it just isn't so.

Tr. Hr'g 7:15-24 - 8:2-18 (July 26, 2006).

1 were reasonable and necessary at the time they were incurred.”
2 Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re
3 Mednet), 251 B.R. 103, 107 (9th Cir. BAP 2000) (quoting In re Auto
4 Parts Club, Inc., 211 B.R. 29, 35 (9th Cir. BAP 1997)). To be
5 compensable, the services and expenses must benefit the bankruptcy
6 estate and be “necessary for its proper administration.”
7 Canatella v. Towers (In re Alcalá), 918 F.2d 99, 103 (9th Cir.
8 1990). See also Rubner & Kutner, P.C. v. U.S. Trustee (In re
9 Lederman Enter., Inc.), 997 F.2d 1321, 1323 (10th Cir. 1993) (“An
10 element of whether the services were ‘necessary’ is whether they
11 benefitted [sic] the bankruptcy estate.”).

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13
14 The sole basis for the objection to the fees and costs sought
15 in this case was Appellants’ contention that Appellee’s efforts in
16 selling the Property in the chapter 7 case were not necessary.¹⁵
17 Like the bankruptcy court, we conclude that, not only were
18 Appellee’s efforts necessary, since the Property constituted a
19 valuable asset of the chapter 7 bankruptcy estate, but also
20 Appellee was obliged by his statutory duties as trustee to sell
21 the Property. This sale generated a significant surplus over
22 administrative expenses and secured claims for distribution to
23 unsecured creditors. Put another way, Appellee’s efforts clearly
24 benefited the creditors of the estate. As a result, we conclude
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27 ¹⁵ Appellants did not challenge the reasonableness of the
28 amounts sought for compensation and expenses for Appellee or his
attorney in the bankruptcy court, nor have they done so on appeal.

1 that Appellee and his attorney were entitled to compensation and
2 expenses.

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4 **CONCLUSION**

5 We AFFIRM the order of the bankruptcy court.
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