NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-06-1071-PaLB
ROBERT J. SHUTAK,	Bk. No. ND 01-10537-RR
Debtor.	Adv. No. ND 04-01130-RR
ROBERT J. SHUTAK,	
Appellant,	
v.	**MEMORANDUM**[1]
WALTER WEISKIRCH, DOROTHY SHAUGHNESSY, THOMAS J. SAVOCA, II,	
Appellees.	

Argued and Submitted on September 22, 2006,
at Pasadena, California

Filed - October 11, 2006

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

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding.

Before: PAPPAS, LEE[2] and BRANDT, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[2] Hon. W. Richard Lee, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

Appellant Robert J. Shutak challenges both the form of the bankruptcy court's order dismissing an adversary proceeding, and the process employed by the bankruptcy court in entering that order. He does not appeal the dismissal itself. We AFFIRM.

FACTS

Appellant filed a petition under chapter 13[3] of the Bankruptcy Code on February 26, 2001. He was represented by his attorney, John R. Read, III ("Read"). Dorothy Shaughnessy and Walter Weiskirch, creditors holding money judgments against Appellant, were listed as unsecured creditors on Appellant's Schedule F filed on March 13, 2001. They were not listed as secured creditors on Schedule D filed on that date, nor were they listed on the master mailing matrix submitted with the petition. There is no indication in the record or on the bankruptcy court's case docket that the master mailing matrix was ever amended to add Weiskirch, Shaughnessy or their attorney, Thomas J. Savoca, II.

On March 13, 2001, Appellant filed his first proposed chapter 13 plan. Neither Shaughnessy nor Weiskirch were listed on the proof of service for the plan. Then, on November 8, 2001, Appellant filed an amended plan and Schedule F, listing Shaughnessy and Weiskirch as unsecured creditors. Again, neither Shaughnessy nor Weiskirch were listed on the proof of service

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[3] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure (also "Fed. R. Bankr. P."), which make applicable certain Federal Rules of Civil Procedure (also "Fed. R. Civ. P.").

attached to the amended Schedule F.[4] On December 26, 2001, the bankruptcy court confirmed the chapter 13 plan.

On April 27, 2004, Appellant filed a motion for permission to incur debt to refinance his home. The bankruptcy court granted the motion by order entered May 31, 2004. Neither Shaughnessy nor Weiskirch were listed on the proof of service attached to that order.

A hearing was scheduled for September 9, 2004, on the chapter 13 trustee's motion to dismiss Appellant's chapter 13 case. Shaughnessy and Weiskirch allege that the first time they became aware of Appellant's bankruptcy case was when they received notice of the September 9, 2004, hearing. When they learned of the pending bankruptcy case,[5] Shaughnessy and Weiskirch filed proofs of claims numbers 12, 13 and 14 on July 21, 2004 for $6,425.00, $16,957.00 and $72,048.42, respectively. These claims are based upon money judgments entered in their favor against Appellant in June 2000 and October 1999.

Appellant filed an adversary complaint against Shaughnessy, Weiskirch and Savoca on August 9, 2004. He pleaded, inter alia, that the defendants had wrongfully prevented the close of escrow on the refinance loan on Appellant's house by demanding excessive payoffs to satisfy the judgment liens they held against the property.

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[4] There is no proof of service attached to the copy of the Amended Plan in the bankruptcy court docket. The proof of service attached to the Amended Schedule F lists only Appellant, his attorney, the U.S. Trustee and the Chapter 13 trustee as parties served.

[5] The notice of hearing was docketed on June 30, 2004. The proof of service for the notice of hearing is not in the docket.

On April 12, 2005, in the bankruptcy case, the court conducted a hearing on Appellant's objection to Shaughnessy's and Weiskirch's claims. On April 20, 2005, the court issued an order allowing claims 12, 13 and 14. Those claims have been paid.

On September 22, 2005, Appellees filed a motion to dismiss the adversary proceeding with a request for sanctions. There were three stated grounds in the motion. Appellees allege that Read unreasonably and vexatiously multiplied the proceedings; that Read and Appellant acted with improper motives and bad faith in the bankruptcy case by employing such tactics as failing to notify parties, filing frivolous objections to claims, persisting in asserting arguments that the bankruptcy court had rejected and ignoring the court's suggestions to meet with the parties; and that Read acted in willful disobedience of court orders. The motion to dismiss sought sanctions against Read pursuant to 28 U.S.C. § 1927, Fed. R. Bankr. P. 9011, and the court's inherent powers. It appears that the motion sought dismissal of the adversary proceeding under the court's inherent powers as a terminating sanction.

On January 31, 2006, the bankruptcy court conducted a pre-trial conference in the adversary proceeding and a hearing on the motion for dismissal and sanctions. In considering the motion, the court first reviewed the history of the filings in the adversary proceeding. The court noted, based upon information in the record, that Shaughnessy and Weiskirch had been listed as unsecured creditors in Appellant's schedules, but were not listed on the mailing matrix and, consequently, were not given notice of either the pendency of the bankruptcy case or any subsequent

events in the case until they received the notice of the September 9, 2004, hearing on the trustee's motion to dismiss. The court then addressed Appellant directly and asked him whether Shaughnessy or Weiskirch had been served with any notices in the bankruptcy case or the adversary proceeding before the trustee's dismissal motion.[6] Whereupon, the following exchange occurred:

> THE COURT: There's nothing - - nothing on the docket indicating that they've ever been added [to the mailing matrix] by the Debtor. There's no proof of service.
>
> SHUTAK: That's correct, Your Honor. That's correct.
>
> THE COURT: Okay, it's your problem then, Mr. Shutak.
>
> SHUTAK: Well, Your Honor, during this period of trying to get a loan that the - both escrow and mortgage broker did contact Mr. Savoca in February of 2004 telling him that - I assume they told him that I was getting a refinance and please send in your demand because you are the attorney for the lien holders.
>
> THE COURT: Oh, boy is that - that hearsay or what?
>
> READ: We have a letter on that issue.
>
> SHUTAK: We have letters.
>
> THE COURT: It's still hearsay. Judgment for the Defendants.
>
> . . . .
>
> THE COURT: This - you were [acting with] unclean hands. You were trying to negotiate a settlement for $29,000, oh, maybe $21,000. Meanwhile you're filing your complaint, and you're saying it's all their fault because they have this outrageous demand and you can't - and you're losing your loan. Well, it's only because they were never part of the bankruptcy to begin with. They were put on

[6] Appellant, a former attorney, was not sworn as a witness and was directed to address the court from the attorney's podium. He introduced himself as "Robert Shutak appearing for himself presently." ER at 153.

> Schedule F. They were never put by the Debtor on any mailing list. They were never served with anything by the Debtor. Any delay, any loss suffered by the Debtor is his own fault. There is no suit here, and I'm not going to even require – I'm not going to dignify this with any further requirement of litigation. It's over. I'm non-suiting the Plaintiff on this.

Tr. Hr'g 59:24 – 61:7 (January 31, 2006).

The bankruptcy judge then ruled that the court had no authority to award sanctions under 28 U.S.C. § 1927, and that she would not exercise her discretion to impose sanctions pursuant to her inherent powers. However, the court ordered the adversary proceeding dismissed. Tr. Hr'g 62:24-25.

The bankruptcy court then addressed preparation of an order dismissing the adversary proceeding:

> READ: Your Honor, who is to prepare the order? Is the court going to prepare the order?
>
> THE COURT: No. Mr. Savoca will, for the – and it will say for the reasons set forth on the record, the motion to dismiss is granted on substantive grounds, not as a terminating sanction. . . .
>
> SAVOCA: So let's just state it again clearly for the court and state it for –
>
> THE COURT: Okay.
>
> SAVOCA: For the reasons set forth –
>
> THE COURT: On the record.
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> SAVOCA: – on the record, the complaint is dismissed on substantive grounds. Judgment for defendants.
>
> THE COURT: Yes.
>
> SAVOCA: Period?
>
> THE COURT: Period.
>
> SAVOCA: Nothing else to put?

THE COURT: That's it. It's very vanilla.

Tr. Hr'g 62:21 – 64:13.

On February 3, 2006, Savoca submitted a proposed order dismissing the adversary proceeding which included the following provision:

> . . . [T]he evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged for the reasons set forth on the record, the complaint is dismissed on substantive grounds: Judgment for Defendants.

On February 6, 2006, Appellant's attorney, Read, submitted a "Counter Proposed Order for Nonsuit" which read, in part: ". . . The Court determined that this matter is a nonsuit based upon substantive grounds as set forth in the record."

On February 7, 2006, the bankruptcy court signed and entered Savoca's form of order. However, the judge added, in her own handwriting and initialed, "No sanctions are awarded." Read's proposed order, which was placed in the bankruptcy court's file, bears the following handwritten text: "Not signed. Signed plaintiff's submitted order." There is no signature or initials accompanying this note. There is another written entry on this copy of the order in what appears to be different handwriting: "Not signed. 2-7-06 C[?]G."

On February 8, 2006, Appellant filed an objection to the order submitted by Savoca, arguing that the Counter Proposed Order more accurately reflected the bankruptcy court's decision.

Then, on February 16, 2006, Appellant timely filed an appeal

of the order entered by the bankruptcy court.[7]

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b). This Panel has jurisdiction pursuant to 28 U.S.C. § 158(b)(1).

ISSUE

Whether the bankruptcy court erred in entering Appellee's form of order dismissing the adversary proceeding.

STANDARDS OF REVIEW

"Construction of a court order is a purely legal issue," a question of law. Hamilton v. Leavy, 322 F.3d 776, 783 (3d Cir. 2001). Alleged discrepancies between oral and written orders of a court are reviewed de novo. United States v. Bonnano, 146 F.3d 502, 511 (7th Cir. 1998).

We review a bankruptcy court's compliance with local rules for an abuse of discretion. Hinton v. NMI Pac. Enters., 5 F.3d 3971, 394 (9th Cir. 1993). "Broad deference" is owed to the trial court's interpretation of its local rules. See Christian v. Mattel, Inc., 286 F.3d 1118, 1119 (9th Cir. 2002)("[C]ourt has considerable latitude in . . . enforcing local rules."); DeLange v. Dutra Constr. Co., 105 F.3d 916, 919 (9th Cir. 1999)("broad discretion in interpreting and applying their local rules").

[7] Later, Appellant submitted to the clerk another copy of the Counter Proposed Order that had apparently been given to him. It was docketed in the adversary proceeding on April 13, 2006. It bears the following unsigned comment: "This matter has been appealed. Not signed." Again, a second comment in a different handwriting reads: "Not signed. 4-13-06. C[?]G."

DISCUSSION

Understanding the scope of Appellant's arguments on appeal is critical to the disposition of the issues. As evidenced from Appellant's briefs, and as the Panel confirmed through its questions to Appellant's counsel at oral argument, Appellant does not challenge the propriety of the bankruptcy court's dismissal of his adversary complaint against Appellees.[8] Instead, Appellant insists that the bankruptcy court erred in the form of the order of dismissal it entered. Appellant also objects to the process by which the dismissal order was entered and asserts that it was improper.

I.

Appellant argues that the form of order dismissing the adversary proceeding signed by the bankruptcy judge was inconsistent with the reasons and instructions she stated on the record at the hearing on Appellees' motion to dismiss. Appellant points out that the order prepared and submitted by Savoca, which was signed by the court, contains the phrase, "the evidence having been fully considered, the issues having been duly heard." Appellant contends that the parties presented no evidence to the bankruptcy court, no evidentiary hearing was held, and as a result, that the bankruptcy court, in the reasons stated for its decision, could not have intended to address the merits of Appellant's claims against Appellees, or the specific factual and legal issues raised in the complaint. According to Appellant, the

[8] Accordingly, we express no opinion concerning the bankruptcy court's decision in this regard.

record instead demonstrates that the bankruptcy court ordered entry of a "nonsuit" against Appellant (which, he suggests, therefore constitutes a sort of "tie" in this contest) and that no ruling on the merits occurred or was intended by the court.

Appellees respond that the order they presented to the bankruptcy judge, which was signed by the court, did indeed properly reflect the court's statements on the record of the hearing. Further, they argue that the court's decision was "on substantive grounds," and must be considered an involuntary dismissal on the merits.

We first note that, contrary to Appellant's position, the form of order entered by the bankruptcy court is not defective because it recites that the court considered "evidence." While no trial was held, and no witnesses testified, the parties each submitted declarations and documents to support their respective positions. In addition, the bankruptcy court's comments at the hearing detail the various pleadings and bankruptcy schedules it considered in concluding that Appellant had failed to timely notify Appellees of the pendency of the bankruptcy case. That the bankruptcy court referred to these matters in the record as "evidence" in the order it entered, while perhaps imprecise, is not improper.

Moreover, we disagree with Appellant's position that the order does not correctly reflect the ruling of the bankruptcy court made at the hearing.

While the parties' interpretations of the order differ, both invite the Panel to review the bankruptcy court's statements made at the hearing on January 31, 2006, to determine if they are

consistent with the language of the order actually entered by the court. Although we may look to the bankruptcy court's oral rulings to assist us in interpreting the order entered by the court, we may not consider the oral and written orders of equal value. The court of appeals has instructed that, where the record includes both oral and written rulings on the same matter, the written order controls. United States v. Robinson, 20 F.3d 1030, 1033 (9th Cir. 1994). "[O]ral responses from the bench may fail to convey the judge's ultimate evaluation. Subsequent consideration may cause the [trial] judge to modify his or her views." Ellison v. Shell Oil Co., 882 F.2d 349, 352 (9th Cir. 1989).

However, in this instance, we believe the bankruptcy judge's statements at the motion hearing and the language included in the order entered later are indeed consistent. Both the terminology employed in the written order, and the statements of the bankruptcy judge made at the hearing on Appellee's motion to dismiss, indicate that the bankruptcy court intended the order to constitute an involuntary dismissal of the adversary proceeding on the merits (i.e., "on substantive grounds") because, in the court's opinion, "there are no grounds for the adversary proceeding." Tr. Hr'g 65:24-25. The written order and the oral rulings both contain the critical phrase, "the complaint is dismissed on substantive grounds." Given the procedural context in which this ruling was rendered (at a hearing on Appellees' motion to dismiss), we conclude the court's order constituted an involuntary dismissal, on the merits, for failure to state a claim upon which relief could be granted.

Appellant makes much of the use by the bankruptcy judge at the hearing of the term "nonsuit." Appellant argues that, by invoking this term, the court intended that the action be dismissed on procedural grounds, not on the merits. In support of the argument, Appellant cites to Black's Law Dictionary, which, according to Appellant, defines nonsuit as "a term broadly applied to a variety of determinations of an action which do not adjudicate issues on the merits." Appellant's Open. Br. at 12-13.

Appellant fails to identify the particular edition of Black's that contains this definition; it is not found in the current, Eighth Edition. The current edition has two alternative definitions of nonsuit:

> 1. A plaintiff's voluntary dismissal of a case or of a defendant, without a decision on the merits.
>
> 2. A court's dismissal of a case or of a defendant because the plaintiff has failed to make out a legal case or to bring forward sufficient evidence.

Black's Law Dictionary 1084 (8th ed. 2004)(emphasis added).

Since the dismissal in this action was not a voluntary action taken by the Appellant, but was instead ordered by the court, we think the second definition should apply. Contrary to Appellant's argument, it would appear that the term "nonsuit" when used in this context is synonymous with dismissal for failure to state a claim.[9]

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[9] Although the term nonsuit does not appear with any regularity in modern federal case law, nor is it used in the Federal Rules of Appellate, Bankruptcy or Civil Procedure, it occasionally appears in the procedural codes and case law of several states as interchangeable with demurrer and/or failure to state a claim. See, e.g., Mont. Code Anno., Ch 20, Rule 41(b); Oregon Rev. Stat. 18 230 (repealed 1979).

In any case, we note that the bankruptcy court did not direct Savoca to include the word "nonsuit" in preparing his order. In contrast, the judge did insist that the order recite that the adversary proceeding was "dismissed on substantive grounds." Had the court wished the term "nonsuit" to appear in the definitive, written order, she could have instructed Savoca to include it. The bankruptcy judge could also have inserted it herself in the final order. That the judge did not add the term is significant here because she did insert the phrase, "No sanctions are awarded" and initialed that entry, clearly indicating that she reviewed the order before signing it and inserted any additional provisions she deemed necessary.

Fed. R. Bankr. P. 7012(b) incorporates Fed. R. Civ. P. 12(b) for application in adversary proceedings. Fed. R. Civ. P. 12(b), in turn, provides that a motion to dismiss an action may be premised upon the plaintiff's "failure to state a claim upon which relief may be granted." When a trial court dismisses an action pursuant to Rule 12(b)(6), it necessarily concludes that, after taking every well-pleaded fact in the complaint as true, that "it appears beyond a doubt that [the plaintiff] can prove no set of facts that would entitle it to relief." In re Zimmer, 313 F.3d at 1222, citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Stoll v. Quintinar (In re Stoll), 252 B.R. 492, 495 (9th Cir. BAP 2000).

Admittedly, the bankruptcy court did not explicitly invoke Fed. R. Civ. P. 12(b)(6) (or any other statute or rule, for that matter) as the predicate for its decision to dismiss the adversary proceeding. However, we think a fair reading of the transcript of

the hearing on January 31, 2006, supports our conclusion that the bankruptcy court intended her use of the term nonsuit in the oral rulings as the equivalent of a dismissal for failure to state a claim:

> What's relevant is [Shaughnessy and Weiskirch] weren't part of this case. . . . Nobody said to me, "Well, gee whiz, the first time these people ever ever ever knew anything about this bankruptcy case was a week and a half before they filed their proofs of claim, and any delay occasioned was the Debtor's own fault because Weiskirch and Shaughnessy were never involved." So these are the findings of the court. I am non-suiting the Plaintiff.

Tr. Hr'g 61:24 – 62:6

> Any delay, any loss suffered by the Debtor is his own fault. There is no suit here, and I'm not going to even require – I'm not going to dignify this with any further requirement of litigation. It's over. I'm non-suiting the Plaintiff on this.

Tr. Hr'g 61:2-7.

> <u>There are no grounds for the adversary proceeding.</u> Mr. Shutak never included these creditors on his master mailing list. The first time they figured it out was after they were contacted for a beneficiary demand when he got his order for refinancing.

Tr. Hr'g 65:24 – 66:3 (emphasis added).

These remarks evidence the court's conclusion that, regardless of the conduct in which Appellees allegedly engaged, any harm suffered as a result was occasioned by Appellant's failure to notify Appellees of the pendency of Appellant's bankruptcy case. As the bankruptcy court puts it, "any loss suffered by [Appellant] is his own fault." To us, assuming the bankruptcy court's conclusion is appropriate, this is a classic

invocation of failure to state a claim. "Dismissal for failure to state a claim under Rule 12(b)(6) is a judgment on the merits." Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 (1982), cited in Stewart v. U.S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002).

And even though the order signed and entered by the court does not cite the Rule, we think its language is consistent with this conclusion. As noted above, the court stated in its oral rulings, "this matter is a nonsuit based upon substantive grounds as set forth in the record." Because, in the legal dictionary sense, a nonsuit is an involuntary dismissal because the plaintiff "failed to make out a legal case," the order reiterates the court's conclusion that Appellant has failed to state a valid claim for relief.

II.

Appellant also complains that the bankruptcy court violated its own local rules in entering Savoca's form or order. In particular, Appellant points to Local Bankruptcy Rule 9021-1(a)(4), which allows a party seven days to object to the form of order proposed by another party.[10] We do not agree that the bankruptcy court violated this rule, but even were that correct, Appellant suffered no prejudice.

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[10] Central District of California L.B.R. 9021-1(a)(4): Separate Objection. Opposing counsel may, within 7 court days after service of a copy of a document prepared pursuant to Local Bankruptcy Rule, file and serve objections to the form of the document, setting forth the grounds thereof. A proposed alternative form of order so labeled, shall be lodged with the objections. A courtesy copy of the objection and proposed alternative form of order shall be delivered to chambers upon filing. The failure to file objections shall be deemed a waiver of any defects in the form of the document.

Savoca submitted Appellees' proposed form of order on February 3; Read submitted Appellant's proposed form of order on February 6. The bankruptcy court entered Savoca's order on February 7. It was not until February 8 that Read submitted an objection to Savoca's form of order, within the time allowed by the local rule, but obviously after the bankruptcy court had already entered Savoca's form of order.

We think the bankruptcy court could have properly considered Appellant's competing form of order submitted on February 6 as tantamount to an objection to entry of Savoca's order. If so, there was no good reason for the bankruptcy court to allow Appellant additional time to object to Savoca's order. Once a party has responded to a suggested form of order, it is not a violation of the local rule for the bankruptcy court to act.

Importantly, though, on Read's form of order, the bankruptcy court noted in handwriting that it was "Not signed. Signed plaintiff's submitted order", and the date noted on the order, again in handwriting, is "2-7-06". The bankruptcy court was incorrect when, in declining to enter Appellant's form of order, it indicated it had entered "plaintiff's" order. In fact, it had entered defendants' (Savoca's/Appellees') order. But we find this to be harmless error. The handwritten notes on the rejected order show that the bankruptcy judge considered and rejected Appellant's order on February 7 after signing the Savoca order. Since the bankruptcy court had Appellant's form of order in hand when it acted, Appellant suffered no prejudice by the bankruptcy court's entry of an order before expiration of the objection time under

the local rule.[11]

CONCLUSION

We think both the bankruptcy court's oral statements at the hearing, and the language of the order it later entered, are consistent and show that the court intended to order the involuntary dismissal of the adversary proceeding based upon Appellant's failure to state a claim upon which relief could be granted. We also conclude that the bankruptcy court did not violate its local rules in the manner in which it entered the order, or even if it did, Appellant suffered no prejudice thereby. For these reasons, we AFFIRM the order entered by the bankruptcy court.

[11] We also note what seems to be an outright contradiction in Appellant's Reply Brief regarding the bankruptcy judge's execution of the dismissal order. On page 9, lines 20-21, Appellant states, "The Trial Judge signed [the dismissal order] and therefore must have read and considered its content." However, on page 10, lines 13-14, Appellant states, "In this matter before the Panel, the Court did not read what was signed and ignored the Appellant's proposed Order." Despite Appellant's confusion over what occurred, it is clear to us from the record that the bankruptcy court indeed did read Savoca's form of order, made changes to it, and signed it only after having reviewed Appellant's proposed form of order.