

OCT 11 2006

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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NOT FOR PUBLICATION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**

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In re:)	BAP No.	CC-06-1071-PaLB
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ROBERT J. SHUTAK,)	Bk. No.	ND 01-10537-RR
)		
Debtor.)	Adv. No.	ND 04-01130-RR
)		
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ROBERT J. SHUTAK,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
WALTER WEISKIRCH, DOROTHY)		
SHAUGHNESSY, THOMAS J.)		
SAVOCA, II,)		
)		
Appellees.)		
)		
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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, LEE² and BRANDT, Bankruptcy Judges.

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.

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

5
6 **FACTS**

7 Appellant filed a petition under chapter 13³ of the
8 Bankruptcy Code on February 26, 2001. He was represented by his
9 attorney, John R. Read, III ("Read"). Dorothy Shaughnessy and
10 Walter Weiskirch, creditors holding money judgments against
11 Appellant, were listed as unsecured creditors on Appellant's
12 Schedule F filed on March 13, 2001. They were not listed as
13 secured creditors on Schedule D filed on that date, nor were they
14 listed on the master mailing matrix submitted with the petition.
15 There is no indication in the record or on the bankruptcy court's
16 case docket that the master mailing matrix was ever amended to add
17 Weiskirch, Shaughnessy or their attorney, Thomas J. Savoca, II.

18 On March 13, 2001, Appellant filed his first proposed chapter
19 13 plan. Neither Shaughnessy nor Weiskirch were listed on the
20 proof of service for the plan. Then, on November 8, 2001,
21 Appellant filed an amended plan and Schedule F, listing
22 Shaughnessy and Weiskirch as unsecured creditors. Again, neither
23 Shaughnessy nor Weiskirch were listed on the proof of service

24
25 ³ Unless otherwise indicated, all "Code," "chapter" and
26 "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330 prior to its amendment by the Bankruptcy Abuse Prevention and
28 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.").

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

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

8 A hearing was scheduled for September 9, 2004, on the chapter
9 13 trustee's motion to dismiss Appellant's chapter 13 case.
10 Shaughnessy and Weiskirch allege that the first time they became
11 aware of Appellant's bankruptcy case was when they received notice
12 of the September 9, 2004, hearing. When they learned of the
13 pending bankruptcy case,⁵ Shaughnessy and Weiskirch filed proofs
14 of claims numbers 12, 13 and 14 on July 21, 2004 for \$6,425.00,
15 \$16,957.00 and \$72,048.42, respectively. These claims are based
16 upon money judgments entered in their favor against Appellant in
17 June 2000 and October 1999.

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

24
25 ⁴ There is no proof of service attached to the copy of the
26 Amended Plan in the bankruptcy court docket. The proof of service
27 attached to the Amended Schedule F lists only Appellant, his
28 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.

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

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

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

1 events in the case until they received the notice of the September
2 9, 2004, hearing on the trustee's motion to dismiss. The court
3 then addressed Appellant directly and asked him whether
4 Shaughnessy or Weiskirch had been served with any notices in the
5 bankruptcy case or the adversary proceeding before the trustee's
6 dismissal motion.⁶ Whereupon, the following exchange occurred:

7 THE COURT: There's nothing - - nothing on the
8 docket indicating that they've ever been added
9 [to the mailing matrix] by the Debtor.
10 There's no proof of service.

11 SHUTAK: That's correct, Your Honor. That's
12 correct.

13 THE COURT: Okay, it's your problem then, Mr.
14 Shutak.

15 SHUTAK: Well, Your Honor, during this period
16 of trying to get a loan that the - both escrow
17 and mortgage broker did contact Mr. Savoca in
18 February of 2004 telling him that - I assume
19 they told him that I was getting a refinance
20 and please send in your demand because you are
21 the attorney for the lien holders.

22 THE COURT: Oh, boy is that - that hearsay or what?

23 READ: We have a letter on that issue.

24 SHUTAK: We have letters.

25 THE COURT: It's still hearsay. Judgment for
26 the Defendants.

27

28 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.

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

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

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

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

18 READ: Your Honor, who is to prepare the order?
19 Is the court going to prepare the order?

20 THE COURT: No. Mr. Savoca will, for the - and
21 it will say for the reasons set forth on the
22 record, the motion to dismiss is granted on
23 substantive grounds, not as a terminating
24 sanction. . . .

25 SAVOCA: So let's just state it again clearly
26 for the court and state it for -

27 THE COURT: Okay.

28 SAVOCA: For the reasons set forth -

THE COURT: On the record.

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?

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

2 Tr. Hr'g 62:21 - 64:13.

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

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

11 On February 6, 2006, Appellant's attorney, Read, submitted a
12 "Counter Proposed Order for Nonsuit" which read, in part:

13 ". . . The Court determined that this matter is a nonsuit based
14 upon substantive grounds as set forth in the record."

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

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

27 Then, on February 16, 2006, Appellant timely filed an appeal
28

1 of the order entered by the bankruptcy court.⁷

2
3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b). This Panel has jurisdiction pursuant to 28
6 U.S.C. § 158(b)(1).

7
8 **ISSUE**

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

11
12 **STANDARDS OF REVIEW**

13 "Construction of a court order is a purely legal issue," a
14 question of law. Hamilton v. Leavy, 322 F.3d 776, 783 (3d Cir.
15 2001). Alleged discrepancies between oral and written orders of a
16 court are reviewed de novo. United States v. Bonnano, 146 F.3d
17 502, 511 (7th Cir. 1998).

18 We review a bankruptcy court's compliance with local rules
19 for an abuse of discretion. Hinton v. NMI Pac. Enters., 5 F.3d
20 3971, 394 (9th Cir. 1993). "Broad deference" is owed to the trial
21 court's interpretation of its local rules. See Christian v.
22 Mattel, Inc., 286 F.3d 1118, 1119 (9th Cir. 2002) ("[C]ourt has
23 considerable latitude in . . . enforcing local rules."); DeLange
24 v. Dutra Constr. Co., 105 F.3d 916, 919 (9th Cir. 1999) ("broad
25 discretion in interpreting and applying their local rules").

26
27 ⁷ Later, Appellant submitted to the clerk another copy of
28 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."

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

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

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

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

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

1 consistent with the language of the order actually entered by the
2 court. Although we may look to the bankruptcy court's oral
3 rulings to assist us in interpreting the order entered by the
4 court, we may not consider the oral and written orders of equal
5 value. The court of appeals has instructed that, where the record
6 includes both oral and written rulings on the same matter, the
7 written order controls. United States v. Robinson, 20 F.3d 1030,
8 1033 (9th Cir. 1994). "[O]ral responses from the bench may fail to
9 convey the judge's ultimate evaluation. Subsequent consideration
10 may cause the [trial] judge to modify his or her views." Ellison
11 v. Shell Oil Co., 882 F.2d 349, 352 (9th Cir. 1989).

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

28

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

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

13 1. A plaintiff's voluntary dismissal of a
14 case or of a defendant, without a decision on
the merits.

15 2. A court's dismissal of a case or of a
16 defendant because the plaintiff has failed to
17 make out a legal case or to bring forward
sufficient evidence.

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

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

26 ⁹ Although the term nonsuit does not appear with any
27 regularity in modern federal case law, nor is it used in the
28 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).

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

13 Fed. R. Bankr. P. 7012(b) incorporates Fed. R. Civ. P. 12(b)
14 for application in adversary proceedings. Fed. R. Civ. P. 12(b),
15 in turn, provides that a motion to dismiss an action may be
16 premised upon the plaintiff's "failure to state a claim upon which
17 relief may be granted." When a trial court dismisses an action
18 pursuant to Rule 12(b)(6), it necessarily concludes that, after
19 taking every well-pleaded fact in the complaint as true, that "it
20 appears beyond a doubt that [the plaintiff] can prove no set of
21 facts that would entitle it to relief." In re Zimmer, 313 F.3d at
22 1222, citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Stoll v.
23 Quintinar (In re Stoll), 252 B.R. 492, 495 (9th Cir. BAP 2000).

24
25 Admittedly, the bankruptcy court did not explicitly invoke
26 Fed. R. Civ. P. 12(b)(6) (or any other statute or rule, for that
27 matter) as the predicate for its decision to dismiss the adversary
28 proceeding. However, we think a fair reading of the transcript of

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

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

11 Tr. Hr'g 61:24 - 62:6

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

16 Tr. Hr'g 61:2-7.

17 There are no grounds for the adversary
18 proceeding. Mr. Shutak never included these
19 creditors on his master mailing list. The
20 first time they figured it out was after they
21 were contacted for a beneficiary demand when
22 he got his order for refinancing.

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

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

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

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

14 II.

15 Appellant also complains that the bankruptcy court violated
16 its own local rules in entering Savoca's form or order. In
17 particular, Appellant points to Local Bankruptcy Rule 9021-
18 1(a)(4), which allows a party seven days to object to the form of
19 order proposed by another party.¹⁰ We do not agree that the
20 bankruptcy court violated this rule, but even were that correct,
21 Appellant suffered no prejudice.

22
23
24 ¹⁰ Central District of California L.B.R. 9021-1(a)(4):
25 Separate Objection. Opposing counsel may, within 7 court days
26 after service of a copy of a document prepared pursuant to Local
27 Bankruptcy Rule, file and serve objections to the form of the
28 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.

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

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

15 Importantly, though, on Read's form of order, the bankruptcy
16 court noted in handwriting that it was "Not signed. Signed
17 plaintiff's submitted order", and the date noted on the order,
18 again in handwriting, is "2-7-06". The bankruptcy court was
19 incorrect when, in declining to enter Appellant's form of order,
20 it indicated it had entered "plaintiff's" order. In fact, it had
21 entered defendants' (Savoca's/Appellees') order. But we find this
22 to be harmless error. The handwritten notes on the rejected order
23 show that the bankruptcy judge considered and rejected Appellant's
24 order on February 7 after signing the Savoca order. Since the
25 bankruptcy court had Appellant's form of order in hand when it
26 acted, Appellant suffered no prejudice by the bankruptcy court's
27 entry of an order before expiration of the objection time under
28

1 the local rule.¹¹

2 **CONCLUSION**

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

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22 ¹¹ We also note what seems to be an outright contradiction in
23 Appellant's Reply Brief regarding the bankruptcy judge's execution
24 of the dismissal order. On page 9, lines 20-21, Appellant states,
25 "The Trial Judge signed [the dismissal order] and therefore must
26 have read and considered its content." However, on page 10, lines
27 13-14, Appellant states, "In this matter before the Panel, the
28 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.