

APR 13 2005

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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NOT FOR PUBLICATION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.	ID-04-1364-KSB
)		
7	LINDA L. BALL,)	Bk. No.	00-42223
)		
8	Debtor.)		
)		
9	_____)		
)		
10	LINDA L. BALL,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	FORREST HYMAS, Chapter 12)		
	Trustee,)		
14	Appellee.)		
)		
15	_____)		

Argued by Telephone Conference
and Submitted on March 23, 2005

Filed - April 13, 2005

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH, and BRANDT, Bankruptcy Judges.

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

1 The debtor appeals from an order denying her application to
2 employ a realtor retroactively. We hold that we lack
3 jurisdiction because the debtor lacks standing to appeal. The
4 debtor's appeal is hereby DISMISSED.

5
6 FACTS

7 On December 29, 2000, the debtor, Linda Ball, filed a
8 chapter 11 bankruptcy case. On July 3, 2001, the chapter 11 case
9 was converted to a chapter 12 case by order of the bankruptcy
10 court, and a trustee was appointed. On November 20, 2001, the
11 debtor's chapter 12 plan was confirmed. Under the plan, the
12 debtor was to make three annual plan payments starting on March
13 15, 2002.

14 In 2003, the debtor realized she would be unable to make her
15 third and final plan payment because of poor weather conditions
16 and price issues. In early 2004, the debtor's son was contacted
17 by a realtor, Lloyd Smith, who had clients (who turned out to be
18 neighbors of the debtor) interested in purchasing some farm
19 property in the debtor's area. On January 21, 2004, the debtor
20 signed an exclusive seller representation agreement retaining
21 Smith, a broker and owner of Mountain West Realty, as her
22 realtor.¹

23 On April 12, 2004, the chapter 12 trustee filed a motion to
24 dismiss the debtor's chapter 12 case because the debtor did not
25 pay her plan payment due on March 15, 2004.

26 Before the motion to dismiss was heard, there was an
27 acceptable offer to purchase the debtor's property. On May 7,

28

¹References herein to Smith include references to Mountain
West Realty.

1 2004, the debtor filed a motion to sell property proposing to
2 sell the property for \$193,700, with \$9,685 of the sale proceeds
3 going to Smith as a brokerage commission.

4 In light of the motion to sell, the chapter 12 trustee
5 stated that he would recommend approval of the motion to sell
6 and, if approved by the court, would withdraw his motion to
7 dismiss.

8 On May 19, 2004, the court approved the motion to sell, but
9 stated "there shall be no distribution of any realtor's
10 commission at this point in time" because Smith's employment had
11 not been approved by the court.

12 On May 26, 2004, the debtor filed an Application to Employ
13 Realtor retroactively. On June 15, 2004, the court held a
14 hearing on the application and took the matter under advisement.

15 On July 8, 2004, the court filed a Memorandum of Decision
16 denying Smith's employment retroactively because the debtor and
17 Smith did not demonstrate that "exceptional circumstances"
18 prevented them from obtaining the court's approval of the
19 realtor's services in a timely fashion.

20 The court's reasoning for denying the application was
21 tripartite. First, the court found that because the debtor was a
22 long time chapter 11/12 debtor, she

23 should not be able to plead ignorance of the rules
24 governing her bankruptcy case as an excuse for failing
25 to consult the chapter 12 trustee or her attorney
26 concerning the various legal details associated with
selling a substantial portion of her real property,
including the need to obtain court approval to employ a
realtor.

27 Second, the court found that Smith, a professional, made no
28 effort to inquire into the debtor's status as a chapter 12 debtor

1 even though such information is a matter of public record
2 available at no cost on the internet. Because Smith did not do
3 any investigation, the court found that he could not cite
4 inadvertence as his reason for not seeking timely approval of his
5 employment.

6 Finally, the court found that the debtor's attorney was an
7 experienced bankruptcy attorney who had a duty to properly advise
8 his client "about the nuances of the bankruptcy law, including
9 the need to obtain court approval of any professional employed
10 during the bankruptcy case." The court also found that the
11 debtor's attorney waited for nearly three weeks after filing the
12 motion to sell before filing an application to employ Smith
13 retroactively. In light of the delay, the court found that "such
14 a cavalier approach to compliance with the rules does not deserve
15 the court's consideration."

16 The court entered an order denying the application to employ
17 realtor retroactively the same day.

18 The debtor timely appealed.

19 At oral argument, it was reported that the sale proceeds are
20 currently being held by either the title company or the chapter
21 12 trustee pending resolution of this appeal.

22 23 JURISDICTION

24 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
25 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

26 27 ISSUE

28 Whether the debtor has standing to prosecute this appeal.

1 STANDARD OF REVIEW

2 The question of our jurisdiction is a question of law we may
3 raise sua sponte and that we address de novo. Menk v. LaPaglia
4 (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

5
6 DISCUSSION

7 On appeal, the debtor argues that the bankruptcy court
8 abused its discretion when it refused to employ Smith
9 retroactively. The bankruptcy court was not persuaded that a
10 satisfactory explanation had been provided for why prior
11 employment authorization was not obtained, which is a requirement
12 in this circuit for retroactive compensation. Atkins v. Wain,
13 Samuel & Co. (In re Atkins), 69 F.3d 970, 973 (9th Cir. 1995).
14 Under the circumstances we review the employment motion as
15 including the denial of a request to pay an expense of
16 administration.

17 Initially we must determine if the debtor has standing to
18 prosecute this appeal for the benefit of a real estate agent.

19 Standing is a jurisdictional requirement that remains open
20 to review at all stages of the litigation. Paine v. Dickey (In
21 re Paine), 250 B.R. 99, 104 (9th Cir. BAP 2000). Moreover, the
22 appellant has an affirmative duty to establish standing. Hasso
23 v. Mozsgai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 726
24 (9th Cir. BAP 2002).

25 Although the debtor's standing was not raised as an issue in
26 the briefing, we have an independent duty to consider standing
27 and solicited the debtor's view at oral argument. Aheong v.
28 Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 238 (9th Cir.

1 BAP 2002).

2 Appellate standing in bankruptcy is determined under the
3 "persons aggrieved" test. Menk, 241 B.R. at 917. Only one who
4 is "directly and adversely affected" pecuniarily has standing to
5 appeal a bankruptcy court's order. Id.; Everex Sys., Inc v.
6 Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673, 675 (9th Cir.
7 1996); Brady v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d
8 1329, 1334 (9th Cir. 1985); Fondiller v. Robertson (In re
9 Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983).

10 In this case, the debtor is under no legal obligation to
11 compensate Smith if we uphold the order denying retroactive
12 employment and compensation. The only person who is directly and
13 adversely affected pecuniarily if we uphold the order is the real
14 estate agent, who is not a party to this appeal. Smith plainly
15 had standing to participate in the litigation of the motion and
16 in the appeal because the gravamen of the issue is whether to pay
17 Smith a commission as an expense of administration.

18 Furthermore, the net proceeds of the sale of her real
19 property vest in the debtor. 11 U.S.C. § 1227(b). While she has
20 no enforceable legal obligation to pay the commission, there is
21 no legal impediment to her doing so after her bankruptcy ends, so
22 long as her payment is genuinely voluntary.

23 Although the appellant suggests some interesting issues
24 regarding chapter 12 debtors and their professionals, the absence
25 of standing and the lack of an adversary to argue the other side
26 of the question each counsel against addressing them now.

1 CONCLUSION

2 Because the debtor is not directly and adversely affected
3 pecuniarily by the order denying the retroactive employment and
4 compensation of Smith, she lacks standing to appeal and we must
5 DISMISS for lack of jurisdiction.

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