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NOT FOR PUBLICATION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

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In re:)	BAP No.	NC-05-1110-MaSZ
)		
ERNEST WILBERT HICKS, JR.,)	Bk. No.	03-55289-JRG
)		
Debtor.)		
_____)		
)		
ERNEST WILBERT HICKS, JR.,)		
)		
Appellant,)		
v.)		
)		
SUZANNE L. DECKER, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

MEMORANDUM¹

Argued and Submitted on November 16, 2005
at San Francisco, California

Filed - February 1, 2006

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

Honorable James R. Grube, Bankruptcy Judge, Presiding.

Before: Marlar, Smith and Zurzolo,² 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, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Vincent P. Zurzolo, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 **INTRODUCTION**

2
3 After a trial, the bankruptcy court revoked the chapter 7³
4 debtor's discharge based on his refusal to obey a court order to
5 cooperate with the chapter 7 trustee ("Trustee") and her broker in
6 their efforts to sell his residence.

7 In this appeal, the debtor contends that his behavior did not
8 amount to a "refusal" to obey, as that term is used in the
9 discharge statute, and that the bankruptcy court erroneously based
10 its ruling on equitable considerations beyond the scope of the
11 order.

12 Our review reveals neither an incorrect application of the
13 law nor clear error in the bankruptcy court's findings, which were
14 sufficient for a ruling under § 727(d)(3), and therefore we
15 AFFIRM.

16
17 **FACTS**

18
19 Ernest Wilbert Hicks, Jr. ("Debtor") filed a voluntary
20 chapter 7 petition on August 18, 2003. He received a bankruptcy
21 discharge in November, 2003.

22 As of the petition date, Debtor owned real property (the
23 "Property"), consisting of a house on five acres of land in
24 Gilroy, California. Debtor estimated its value at \$800,000, and
25

26 ³ Unless otherwise indicated, all chapter and section
27 references are to the pre-amended Bankruptcy Code, 11 U.S.C.
28 §§ 101-1330 in effect when this case was filed, and prior to the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
("BAPCPA"). Rule references are to the Federal Rules of
Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036.

1 it was encumbered by a first deed of trust in the amount of
2 \$636,000, and by a second deed of trust in the amount of \$65,000.
3 As of the petition date, Debtor figured that there was no
4 nonexempt equity considering the encumbrances and homestead
5 exemption. However, Trustee subsequently avoided the second deed
6 of trust and recovered the \$65,000 for the estate, yielding
7 nonexempt equity in the Property.

8 Trustee believed the Property was worth more than \$800,000.
9 All parties agreed the Property was in good condition even though
10 certain construction items and repairs were yet to be completed.

11 In late 2003, Trustee initiated efforts to sell the Property,
12 and the bankruptcy court approved the employment of Trustee's real
13 estate broker, David Cauchi ("Cauchi"), for that purpose.

14 Cauchi's initial efforts to obtain Debtor's cooperation were
15 unsuccessful, and upon Trustee's motion, the bankruptcy court
16 entered an "Order Directing the Debtor To Provide Access To Real
17 Property And To Cooperate In The Sale of Real Property" (the
18 "Order"), on January 26, 2004, which stated in pertinent part:

19 IT IS HEREBY ORDERED that [Debtor] shall immediately
20 cooperate with the Trustee's real estate broker, provide
21 access to the [Property], provide a key to the Property,
22 and permit the broker to post a "For Sale" sign in front
of the Property, to install a lock box on the house, to
hold open houses, and to take prospective buyers through
the Property on 24 hours' notice.

23 Thereafter, Cauchi listed the Property for sale at \$875,000,
24 but immediately took it off the market pending negotiations
25 between Debtor and Trustee to allow Debtor to buy the estate's
26 interest in the Property. Those negotiations were unsuccessful.

27 Trustee then filed a complaint to revoke Debtor's discharge
28 based, in part, on Debtor's alleged refusal to obey the Order,

1 pursuant to §§ 727(d) (3) and (a) (6) (A). Trustee's motion for
2 summary judgment on the complaint was heard on May 13, 2004. The
3 bankruptcy court concluded that a trial would be necessary and
4 denied the motion without prejudice.

5 Meanwhile, the court instructed the parties to cooperate in
6 the showing and sale of the Property. Specifically, the
7 bankruptcy court noted Debtor's resistance to sell, and stated:

8 THE COURT: Mr. Hicks, let me just tell you something
9 because you sit there and you keep dropping your head and
10 you keep shaking your head, and I can appreciate the fact
11 that you're very upset about this. And if I were sitting
12 there, I'd be very upset about this too. This is not
13 something that is at anybody's whim or within my
14 discretion as to what I do. Congress makes a bankruptcy
15 law. I don't make it. Congress makes it and Congress
16 says here's the way it works, and here's what you do.

17 And so number one, you have a duty, according to the
18 Bankruptcy Code, the bankruptcy law, to cooperate with the
19 trustee. The trustee wants to look at something. The
20 trustee gets to look at something. It's not up to me
21 whether they get to look. As long as they act politely
22 and in a businesslike fashion, they get to look. That's
23 number one.

24 Tr. of Proceedings (May 13, 2004), p. 22:7-22.

25 The parties then agreed to show the Property by appointment
26 only. The bankruptcy court commented that Debtor's request to set
27 parameters on showing the Property was reasonable, assuming his
28 full cooperation.

29 Finally, when Debtor's attorney expressed concern that
30 Trustee's sale efforts might continue indefinitely, the bankruptcy
31 court suggested that Debtor file a motion to compel abandonment.
32 Debtor filed the motion, but it was not resolved prior to the

1 trial on the complaint.⁴

2 Following the hearing, Trustee re-listed the Property for
3 sale at \$875,000 and there was immediate interest in it. Michelle
4 Beltran ("Ms. Beltran"), a local real estate broker, represented a
5 family who visited the Property on or about May 16, 2004. Ms.
6 Beltran's husband, a contractor, also accompanied her for the
7 showing in order to advise on the cost to construct or repair the
8 incomplete items. They were also accompanied by a sheriff's
9 deputy, as Ms. Beltran had been advised to obtain a "civil
10 standby" for the rural showing.

11 At that first visit, the Beltrons later testified, Debtor had
12 posted multiple signs inside the house with curses, such as "a
13 curse on all who entered uninvited," and with upside-down crosses.
14 Tr. of Proceedings (Aug. 11, 2004), p. 107:1-4. Debtor had also
15 posted lists of alleged defects with the Property in prominent
16 places throughout the house. Another sign had a child's picture,
17 supposedly Debtor's son, with a quotation stating that if the
18 house were sold, the son would have nowhere to live. Between the
19 first and second showing, Debtor removed these signs.

20 During a second showing of the Property, Debtor refused to
21 allow access to the contractor, even though the prospective buyers
22 required advice on improvements, such as the placement of a barn
23 and on the cost of completion of certain items on the Property.

24 In each case, the prospective buyers did not follow through
25 with offers. On June 11, 2004, Trustee filed a first amended
26 complaint to revoke Debtor's bankruptcy discharge under

27

28 ⁴ The bankruptcy court docket reveals that the motion was
denied without prejudice by order entered on September 2, 2004.

1 §§ 727(d) (3) and (a) (6) (A).⁵ Trustee alleged that Debtor “had
2 refused to obey a lawful order of the court, directing him, in
3 January, 2004, to cooperate with the Trustee in the marketing and
4 efforts to sell the Debtor’s Property.” Id. at 3-4, ¶ 22. The
5 trial went forward on August 11, 2004, and the following testimony
6 was pertinent to the court’s ruling.

7
8 **Trial Testimony**

9
10 **1. Trustee’s Broker, David Cauchi**

11
12 Cauchi testified that, from Debtor’s comments at that first
13 meeting, his opinion was that the sale would be difficult.
14 Initially, Debtor did not give Cauchi a key nor allow him to
15 install a lock box, nor did he return Cauchi’s telephone calls.
16 For these reasons, Cauchi and Trustee requested the court’s Order
17 requiring Debtor to cooperate.

18 Cauchi viewed the Property in January, 2004, and listed it
19 for a price of \$875,000. Cauchi testified that after the Order

20
21 ⁵ Trustee also asserted a § 727(d) (1) count which alleged
22 that: “Debtor’s discharge was obtained through fraud, and that the
23 Debtor had the intent, at the time that the discharge was entered,
24 to retain for himself the non-exempt estate property, specifically
25 the non-exempt equity in the Property, and has in fact retained
for himself the non-exempt equity in the Property, as shown by the
Debtor’s deliberate efforts to hinder and discourage potential
buyers of the Property.” First Amended Complaint (June 11, 2004),
p. 3, ¶ 19.

26 This count was not upheld by the bankruptcy court, nor has
27 fraud been raised as an issue in this appeal. Therefore, the
28 issue has been waived and we do not address it, except as it may
affect our jurisdiction. Doty v. Co. of Lassen, 37 F.3d 540, 548
(9th Cir. 1994) (by failing to brief an issue on appeal, the
appellant waives his right to raise that issue). See the
jurisdictional discussion, below.

1 was entered, Debtor still did not comply with it, but was
2 negotiating with Trustee for a settlement in regards to purchasing
3 the equity. Therefore, Cauchi took the Property off of the market
4 in late February, 2004, so that it would not get "stale." Tr. of
5 Proceedings (Aug. 11, 2004), p. 22:10.

6 Cauchi relisted the Property in May, 2004, after which time
7 Debtor gave him a key, and he was able to put a lock box on the
8 Property in June, 2004. (However, Debtor admitted, under cross-
9 examination, that he did not give Cauchi a key or access to
10 install the lock box until July, 2004. See id. at 180:23-25;
11 181:3-10.)

12 Cauchi also stated that on two occasions he found that the
13 "for sale" sign on the Property had been removed and was lying on
14 the ground, and that he reattached it.

15

16

2. The Beltrons

17

a. First Showing

18 Ms. Beltran and her husband Dick ("Mr. Beltran"), a
19 contractor, testified that, in mid-May, 2004, they showed the
20 property to a family with three children. Based on her
21 conversations with Cauchi and the rural setting, Ms. Beltran had
22 requested that a sheriff be present.

23 When they arrived at the Property, Debtor met them. The
24 sheriff asked Debtor to lock up two very large dogs which were
25 running loose. Debtor then led the people into the house through
26 the garage, first requiring them to take off their shoes so as not
27

28

1 to scuff up the floors. In her letter evidence,⁶ Ms. Beltran
2 stated that Debtor also instructed them not to open any doors,
3 cupboards or drawers.

4 Mr. and Ms. Beltran testified that when they went inside,
5 there were papers taped to the floors, walls and windows of the
6 house. Ms. Beltran stated: "[T]he writing on it was a curse, a
7 curse on all who entered uninvited. . . . And there was [an]
8 upside down crucifix on it." Id. at 107:1-4 (alteration added).

9 Ms. Beltran described the proliferation of signs and how
10 Debtor captured the buyers' attention by listing problems with the
11 Property:

12 Q. Was it one poster, two posters, three posters?

13 A. Very, very many posters. In the laundry room it was on
14 the floor, it was on the wall, it was on the window. We
15 went through into the main hallway. It was on the
16 floor, on the walls, on the bedroom windows. I mean,
17 just to a point of ridiculous, in my mind. And the same
18 repetition until we went into the master bedroom.

19 Q. What was there?

20 A. Well, that great big, beautiful window was - had the
21 same stuff, but then it had a big long list of problems
22 with this property. And, of course clients go right to
23 it and they are staring there and reading them, you
24 know, instead of viewing the property like they should.

25 Q. Do you recall what some of those problems were that were
26 listed on there?

27 A. A thing about a rodent infestation, rattlesnakes, leaky
28 roof, no PG&E, trucking company next door. "You'll be
kicking my child out into the streets."

Q. Did you get the impression that the signs were set up
for the purpose of preventing a sale of the house?

. . . .

27 ⁶ Ms. Beltran's follow-up letter to Cauchi was also admitted
28 into evidence in which she repeated these allegations and added a
few more details. (See May 18, 2004 letter.)

1 A. They threw me, too. Yes, they were there. Plus the
2 fact that it said, "It won't appraise for over 600,000,"
3

4 Id., at 107:5-25; 108:1-4.

5 Afterwards, the prospective buyers discussed making an offer,
6 but did not follow through. Ms. Beltran testified that, in her
7 opinion, their decision was related to the signs and posters on
8 the Property.

9 **b. Second Showing**

10 Ms. Beltran then took another couple to see the Property.
11 They were interested in erecting a barn, and Mr. Beltran came
12 along to advise on construction and repairs. However, the
13 Beltrons testified that after Debtor had a discussion with the
14 sheriff, the sheriff would not let Mr. Beltran onto the Property.

15 She further testified that the prospective buyers' inability
16 to "visualize" the barn, without Mr. Beltran's input, influenced
17 their decision not to make an offer. Id. at 114:25.

18 Ms. Beltran also testified that, when driving by the
19 Property, she saw the "for sale" sign unhinged and lying on the
20 ground.

21
22 **3. Debtor's Neighbor**

23
24 Debtor's neighbor, Robert Maciel ("Maciel"), who owned the
25 trucking company, also testified that he had viewed the property
26 with his interested friends on or about May 16, 2004, and recalled
27 seeing the posters, including one of a child who apparently
28 represented Debtor's son, asking "Where will I live?"

1 He testified:

2 A. Mr. Hicks had - well, there were numerous . . .
3 pieces of paper all throughout the house, in every
4 room. They all had writings, sayings on them. The
5 ones that stand out my [sic] head the most were,
6 "Curse those who" - to - "want to buy this house."
7 There was another one of a picture of this - this
8 child and in the -- one of the -- in the hallway or
in the bedroom. "If you buy this house" -- it was a
quote coming from this child -- "If you buy this
house, where am I to go? Where will I live? Seven
reasons why not to buy this home." That one stood
out the most, because I was number seven, and said
because of a trucking company lives next door.

9 Id. at 149:5-16.

10 Maciel also observed that the "for sale" sign was sometimes
11 up and sometimes down.

12

13 **4. Debtor**

14

15 Debtor took the stand as well.⁷ He testified that he took
16 down the offending posters after his attorney told him to.

17 He admitted asking the sheriff to keep Mr. Beltran off the
18 Property for the second showing. He explained, as follows:

19 So Ms. Beltran came down, . . . And said that she was the
20 Realtor and she would be showing the property.

21 At that time I saw who she was bringing. I informed
22 the sheriff that the one gentleman that was with her, I
23 believe was her husband and not a potential client. He
24 had been on the property once before and I was only
25 willing to show the property to the clients, the Realtors,
and any of their associates.

26 And she said that - I think she said that she'd
talked [sic] to them and come back. So she went.

27 The officer talked to me for a few more minutes. He
28 went and spoke to them and came back. And he said,
"That's fine. There's no objection to that. Can they now

26

27 ⁷ The transcript of Debtor's testimony in the excerpts of
28 record is sketchy. We may presume that any additional transcript
would not have been helpful to Debtor's case. McCarthy v. Prince
(In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

1 view the property?"
2 I said, "Yeah, no problem."

3 Id. at 172:10-25.

4 In cross-examination, Debtor testified that he learned from
5 his attorney, in January of 2004, that Trustee would be selling
6 the Property. Although he stated that his attorney had sent him a
7 copy of the Order, Debtor did not specify when he actually saw it
8 or learned its contents.

9 Debtor further testified that he had made only three monthly
10 payments of \$4,000 each on the first deed of trust and had not
11 paid any property taxes postpetition.

12 13 **The Court's Ruling**

14
15 On January 20, 2005, the bankruptcy court issued its oral
16 ruling on the first amended complaint.

17 First, the court found that the Order compelled Debtor's
18 cooperation in the sale of the property and directed him to
19 immediately cooperate with Trustee's broker.

20 Next, it found that Cauchi's testimony was factually
21 ambiguous and did not prove that Debtor knew about the Order
22 between December of 2003, when Cauchi first began his efforts to
23 sell the Property, and the May 13, 2004 summary judgment hearing,
24 when Debtor was made aware of his duty to cooperate with Trustee
25 and Cauchi, and of the Order itself. Therefore, the bankruptcy
26 court based its ruling on Debtor's behavior after May 13, 2004,
27 which time period included both showings of the Property by Ms.
28 Beltran.

1 Next, the bankruptcy court made the following findings:

2 After this [May 13, 2004] hearing, the property was
3 shown by Ms. Beltran to potential buyers. Ms. Beltran
4 testified that she wrote the letter dated May 18, 2004
5 immediately after showing the property.

6 The letter and Ms. Beltran's testimony outlined what
7 she saw at this showing. When she entered Mr. Hicks' home
8 with her client she noticed that there were signs on the
9 walls with curses, such as: A curse on all who enter
10 uninvited.

11 There were upside down crucifixes on the signs. She
12 elaborated that signs to the same effect were put up
13 throughout the house, on the floor, on windows, and she
14 stated that it was to the point of being ridiculous.

15 In addition, when she entered the master bedroom she
16 saw that there was a large sign up on the wall which
17 posted all the problems with the house that would affect
18 a potential buyer.

19 Nevertheless, she was confident after this showing
20 that an offer would be made. However, the client later
21 contacted her and told her that they would not make an
22 offer. She was of the impression that it was due in large
23 part to the signs Mr. Hicks had put up throughout the
24 house.

25 On the second showing of the property to a potential
26 buyer, Mr. Hicks would not let the buyer's contractor go
27 on the property. Mr. Hicks stated it was because he had
28 already been on the property once before.

Ms. Beltran felt that an offer was not made on the
house because the buyer did not have the assistance of the
contractor to help visualize the improvements that she
wanted to make.

21 Court's Oral Ruling (Jan. 20, 2005), pp. 6:20-25, 7:1-22.

22 The bankruptcy court further found that Debtor took these
23 actions in order "to discourage any sale of the Property" and that
24 his "behavior during the showings discouraged any offers." Id. at
25 10:7-13. Therefore, the bankruptcy court determined that Debtor
26 had ignored the Order and failed in his affirmative duties,
27 including his "duty to participate in that [bankruptcy] proceeding
28 by meeting the requirements of the Bankruptcy Code and by obeying

1 the Court's lawful orders." Id. at 9:21-24. The court stated:

2 Debtors are not free to ignore a court's orders.
3 [Debtor] went beyond ignoring the Court's January 26th
4 order. He chose to flaunt the very process he chose to
participate in.

5 Id. at 9:24-25-10:1.

6 Debtor's behavior was "particularly disturbing," the
7 bankruptcy court found, in regards to upholding the integrity of
8 the bankruptcy process. Id. at 10:2. To wit, Debtor had not kept
9 current on the mortgage payments, and if the Property were not
10 sold by Trustee, then a foreclosure sale would be detrimental to
11 the unsecured creditors. Essentially, the court found, Debtor's
12 behavior "prevented the equitable distribution of the estate among
13 his creditors by prolonging the period it took to sell the
14 property and increasing the arrearages owed to the secured
15 creditor holding the first deed of trust." Id. at 10:14-17.⁸

16 The court concluded that it would revoke Debtor's discharge
17 under § 727(d)(3) "in order to uphold the integrity of the
18 bankruptcy process." Id. at 10:18-19. The judgment was entered
19 on January 26, 2005, and was timely appealed by Debtor.

20

21 **ISSUES**

22

- 23 1. Whether we have jurisdiction over a judgment which
24 resolved only one count of a two-count complaint.

25

26

27

28 ⁸ We take judicial notice of the sale of the Property for
\$801,000 in November, 2004. See Order Approving Sale (Nov. 17,
2004).

1 historical facts are established, the rule of law is undisputed,
2 and the issue is whether the facts satisfy the legal rule." Id.

3
4 **DISCUSSION**

5
6 **A. Our Jurisdiction**

7
8 The judgment revoking Debtor's discharge did not dismiss the
9 alternative count under § 727(d)(1). Under this circumstance, we
10 may raise, sua sponte, the threshold question of whether we have
11 jurisdiction over an appeal of a judgment as to only one count of
12 a multiple-count complaint. See Belli v. Temkin (In re Belli),
13 268 B.R. 851, 853 (9th Cir. BAP 2001).

14 The panel has jurisdiction over appeals from final orders.
15 See 28 U.S.C. § 158(a)(1)(A). Judgments that resolve only one
16 claim in a multiple-claim adversary proceeding may be
17 interlocutory, unless the bankruptcy court has certified the
18 judgment for appeal. A court which rules on one count of a
19 multiple-count complaint ordinarily will dismiss the adversary
20 proceeding in regard to the remaining counts following a trial on
21 the merits, see Roberts v. Erhard (In re Roberts), 331 B.R. 876,
22 880 (9th Cir. BAP 2005). Or, the court can certify for immediate
23 appeal a judgment of less than all claims, under Federal Rule of
24 Civil Procedure ("FRCP") 54(b) (incorporated by Bankruptcy Rule

25
26 _____
27 ⁹(...continued)
28 affirm on any basis fairly supported by the record. Aheong v.
Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 240 n.8 (9th
Cir. BAP 2002).

1 7054).¹⁰ Here, the bankruptcy court did neither.

2 The jurisdictional question turns on whether the §§ 727(d)(1)
3 and (d)(3) counts were separate claims. See Talamini v. Allstate
4 Ins. Co., 470 U.S. 1067, 1069 n.5 (1985) (“‘The line between
5 deciding one of several claims and deciding only part of a single
6 claim is sometimes very obscure.’”) (quoting 10 C. Wright, A.
7 Miller & M. Kane, Fed. Prac. & Proc. § 2657, pp. 60-61 (1983)).
8 The Ninth Circuit has held that “[t]he word 'claim' in Rule 54(b)
9 refers to a set of facts giving rise to legal rights in the
10 claimant, not to legal theories of recovery based upon those
11 [same] facts.” CMAX, Inc. v. Drewry Photocolor Corp., 295 F.2d
12 695, 697 (9th Cir. 1961) (alteration added). Where one claim is
13 stated in two ways for the purpose of presenting two legal
14 theories of recovery, FRCP 54(b) is inapplicable. Id.

15 In Belli, we held that a complaint to determine the
16 nondischargeability of a debt that asserts claims under both

17

18 ¹⁰ FRCP 54(b) provides:

19 **(b) Judgment Upon Multiple Claims or Involving Multiple**
20 **Parties.** When more than one claim for relief is presented
21 in an action, whether as a claim, counterclaim, cross-
22 claim, or third-party claim, or when multiple parties are
23 involved, the court may direct the entry of a final
24 judgment as to one or more but fewer than all of the
25 claims or parties only upon an express determination that
26 there is no just reason for delay and upon an express
27 direction for the entry of judgment. In the absence of
28 such determination and direction, any order or other form
of decision, however designated, which adjudicates fewer
than all the claims or the rights and liabilities of fewer
than all the parties shall not terminate the action as to
any of the claims or parties, and the order or other form
of decision is subject to revision at any time before the
entry of judgment adjudicating all the claims and the
rights and liabilities of all the parties.

FRCP 54(b).

1 § 523(a)(4) (fiduciary fraud) and § 523(a)(6) (willful and
2 malicious injury) was a multiple-claim complaint, which was
3 subject to Rule 54(b) in a partial summary judgment proceeding.
4 However, the issue of whether the subsections of § 523 could be a
5 single claim was not addressed in Belli.

6 The various subsections of § 727(d), like the § 523
7 exceptions, require proof of different facts. Subsection (d)(1)
8 requires proof of fraudulent intent at the time of discharge.
9 Here, Debtor already obtained his discharge, in November, 2003,
10 before Trustee had even begun her efforts to sell the Property.
11 And yet, in the first amended complaint, Trustee relied on the
12 same facts for both counts. To wit, Trustee alleged that proof of
13 Debtor's fraudulent intent could be "shown by the Debtor's
14 deliberate efforts to hinder and discourage potential buyers of
15 the Property." First Amended Complaint (June 11, 2004), p. 3,
16 ¶ 19. In essence, Trustee asserted two legal theories based on
17 the same underlying facts.

18 Therefore, we hold that FRCP 54(b) was inapplicable,¹¹ and we
19 have jurisdiction over the final order.

20
21 ¹¹ Even if the § 727 counts were independent claims, the
22 death-knell doctrine is a possible exception to Rule 54(b) that
23 applies in this case. That doctrine requires the appellant to
24 have been put effectively out of court. Belli, 268 B.R. at 857.
25 See also Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir.
1966) ("Where the effect of a district court's order, if not
26 reviewed, is the death knell of the action, review should be
27 allowed."), cert. denied, 386 U.S. 1035 (1967). But see Eluska v.
28 Andrus, 587 F.2d 996, 1000-01 (9th Cir. 1978) (noting disapproval
of this theory by the Supreme Court).

26 Here, the court's adjudication of the remaining count is
27 dead. Debtor's discharge has already been revoked, the trial on
28 the merits is over, Trustee has not requested a continued trial
date on the remaining count, and the Property, which Debtor
allegedly sought to retain with fraudulent intent, has been sold
by the bankruptcy estate.

1 **B. Revocation of Discharge for Refusal to Obey a Lawful Order:**
2 **§ 727(d) (3) and § 727(a) (6) (A)**

3 Section 727 "is the heart of the fresh start provisions of
4 the bankruptcy law" and "must be construed liberally in favor of
5 the debtor and strictly against the objector." Beauchamp v. Hoose
6 (In re Beauchamp), 236 B.R. 727, 730 (9th Cir. BAP 1999)
7 (citations omitted), aff'd, 5 Fed. Appx. 743 (9th Cir. 2001).

8 Nevertheless, a bankruptcy discharge and fresh start are
9 intended only for honest debtors, First Beverly Bank v. Adeeb (In
10 re Adeeb), 787 F.2d 1339, 1345 (9th Cir. 1986), and for those who
11 comply with the requirements of the Bankruptcy Code and Rules, and
12 with orders of the court. The denial of discharge under § 727 is
13 consistent with the well-established principle that "[t]here is no
14 constitutional right to obtain a discharge of one's debts in
15 bankruptcy." United States v. Kras, 409 U.S. 434, 446 (1973).

16 Trustee, as the plaintiff, has the initial burden of going
17 forward and the ultimate burden to prove the elements of § 727 by
18 a preponderance of the evidence. See Searles, 317 B.R. at 377;
19 Grogan v. Garner, 498 U.S. 279, 291 (1991); 6 Collier on
20 Bankruptcy ¶ 727.09[1] (15th ed. rev. 2005). Once Trustee has
21 produced sufficient evidence to support the claim, the burden of
22 going forward then shifts to Debtor to satisfactorily explain his
23 behavior. See Chalik v. Moorefield (In re Chalik), 748 F.2d 616,
24 619 (11th Cir. 1984); 6 Collier, supra.

25 Section 727(d) (3) provides that the court shall revoke a
26 debtor's discharge upon the trustee's request if the debtor
27 committed an act enumerated in § 727(a) (6). Section 727(a) (6) (A)
28 provides that a debtor is not entitled to a discharge if he "has

1 refused . . . to obey any lawful order of the court, other than an
2 order to respond to a material question or to testify." 11 U.S.C.
3 § 727(a)(6)(A).

4 Trustee asserted, and the bankruptcy court found, that
5 Debtor's conduct violated the Order which mandated his cooperation
6 in regards to the sale of the Property.

7 Debtor does not dispute the bankruptcy court's specific
8 findings regarding his awareness of the Order and his conduct
9 during the first and second showings of the Property. He concedes
10 that he posted the signs and posters, and that he would not allow
11 Mr. Beltran onto the Property for the second showing. Debtor
12 challenges, however, the bankruptcy court's conclusion that he
13 "refused" to obey the Order, as that term is used in
14 § 727(a)(6)(A). Specifically, Debtor maintains that his behavior
15 was merely bad judgment or protected expression of opinion.

16 When interpreting a statute on appeal, the task begins with
17 the language of the statute itself. United States v. Ron Pair
18 Enters., Inc., 489 U.S. 235, 241 (1989). When a statute's
19 language is plain, "the sole function of the courts is to enforce
20 it according to its terms." Id. (quoting Caminetti v. United
21 States, 242 U.S. 470, 485 (1917)).

22 "Refuse" means "to express oneself as unwilling to accept" or
23 "to show or express unwillingness to do or comply with." Miriam-
24 Webster OnLine Dictionary (2005-2006). This common definition is
25 clear and it requires a willful expression of noncompliance.

26 The question whether Debtor's behavior constituted a refusal
27 to obey the Order, because it was a "willful expression of
28 noncompliance," is a mixed question of fact and law. Searles, 317

1 B.R. at 373. Mixed questions are reviewed de novo because the
2 court, in selecting and applying the applicable law, "consider[s]
3 legal concepts and exercise[s] judgment about values animating
4 legal principles." Id.

5 The entire evidence reveals that Debtor, being motivated by a
6 desire to retain the nonexempt equity in the Property, took
7 affirmative steps to control the disposition of the Property, in
8 hopes that it would eventually be abandoned to him. Indeed,
9 Debtor was informed, at the May 13, 2004 hearing, that the court
10 would not allow Trustee's sale efforts to go on indefinitely. In
11 May, 2004, he attempted to frustrate the sales, and in June, 2004,
12 he filed a motion to compel abandonment.

13 The bankruptcy court found that by mid-May, 2004, Debtor was
14 fully aware of the Order and of his duty to cooperate with Trustee
15 in the sale efforts. Nevertheless, Debtor engaged in delay and
16 scare tactics at the two showings by Ms. Beltran, which frustrated
17 the sale process. The evidence was undisputed that his conduct
18 resulted in the loss of offers from both potential buyers.

19 Therefore, Debtor's conduct in posting offensive signs and
20 information that could undermine any potential sale, as well as in
21 preventing Mr. Beltran from giving contractor's advice, were all
22 willful expressions of noncompliance with Trustee's sale efforts.
23 We conclude that Debtor's behavior constituted a "refusal" to obey
24 as that term is used in the statute.

25

26 **C. The Bankruptcy Court's Findings**

27

28 Debtor contends that the bankruptcy court's ruling was based

1 on equitable considerations that exceeded the scope of any
2 violation of the Order. He finds support for this argument in the
3 bankruptcy court's ruling that Debtor "went beyond ignoring" the
4 Order, as well as its findings concerning the effects of Debtor's
5 affirmative actions upon the estate. To the contrary, Debtor
6 contends that he obeyed the Order and therefore, there were no
7 grounds for revocation under §§ 727(d)(3) and (a)(6)(A). We
8 disagree.

9 This argument simply presents a factual question: whether the
10 bankruptcy court made sufficient findings to meet the statutory
11 requirements for revocation.

12 The bankruptcy court found that the Order compelled Debtor to
13 cooperate with Trustee in the sale of the Property as well as
14 directing him to perform certain immediate steps to cooperate with
15 Cauchi. It further determined that Debtor had ignored the Order
16 based on his conduct during the two showings.

17 The Order required affirmative acts from Debtor:

- 18 1. "immediately cooperate with the Trustee's real
estate broker";
- 19 2. "provide access to the [Property]";
- 20 3. "provide a key to the Property";
- 21 4. "permit the broker to"
 - 22 a) "post a "For Sale" sign in front of the Property";
 - 23 b) "install a lock box on the house";
 - 24 c) "hold open houses"; and
 - 25 d) "take prospective buyers through the Property on 24
hours' notice."

26 Debtor maintains that he performed steps 2 through 4 and that
27 those steps showed his compliance with step 1. That
28 interpretation is not in accord with the express terms of the
Order, because step 1 is a separate "cooperation provision" that
also required Debtor's compliance. Such "cooperation provision"

1 is a reinforcement of the Bankruptcy Code, which provides that
2 debtors have a duty to "cooperate with the trustee as necessary to
3 enable the trustee to perform the trustee's duties under this
4 title." 11 U.S.C. § 521(3). As a corollary, any conduct which
5 frustrates a trustee's efforts is a violation of the Code. In
6 this case, a violation of the Code and the Order are one and the
7 same.

8 The undisputed evidence was overwhelming of Debtor's
9 noncompliance with the cooperation provision of the Order. When
10 the first buyers came to see the Property, including children,
11 Debtor's two large dogs had to be locked up, on the sheriff's
12 orders.¹² Then, Debtor restricted the showing by requiring Ms. and
13 Mr. Beltran and the family to remove their shoes and not to open
14 any doors or drawers. In addition, Debtor posted curses and
15 offensive signs throughout the house to intimidate the buyers,
16 usurped the broker's presentation by focusing the buyers'
17 attention on his posted list of problems with the Property, and
18 pointed out to them that the house was allegedly worth less than
19 the listing price. He then discouraged the second buyers by not
20 allowing access to their chosen contractor in order to advise
21 them, even though the house had construction items still to be
22 completed. It was uncontroverted that the lack of offers from
23 both buyers was due, at least in part, to Debtor's conduct during

24
25 ¹² We may affirm on any basis fairly supported by the record.
26 United States v. Hemmen, 51 F.3d 883, 891 (9th Cir. 1995). "A
27 reviewing court may 'look to facts in the record not specifically
28 mentioned by the fact finder when such facts support the fact
finder's factual findings and inferences.'" Leavitt v. Soto (In
re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP 1997 (quoting In re
Love, 957 F.2d 1350, 1362 (7th Cir. 1992)), aff'd, 171 F.3d 1219
(9th Cir. 1999).

1 the showings. Therefore, the bankruptcy court's ultimate finding,
2 that Debtor's conduct during the showings was intended to, and
3 did, discourage and frustrate Trustee's efforts to sell the
4 property, was not clearly erroneous. See Anderson v. City of
5 Bessemer City, N.C., 470 U.S. 564, 573 (1985) (finding is clearly
6 erroneous "when although there is evidence to support it, the
7 reviewing court on the entire evidence is left with the definite
8 and firm conviction that a mistake has been committed").

9 The bankruptcy court properly found that Debtor's conduct was
10 not only a violation of the Order but also an abuse of the Code,
11 from which the Order sprung. These findings were sufficient
12 grounds to deny Debtor his discharge.

13 Finally, Debtor maintains that revoking his discharge was too
14 severe a sanction for his behavior. "Denial of discharge is a
15 harsh result. However, bankruptcy has its roots in equity. To
16 get equity, one must do equity." Bernard v. Sheaffer (In re
17 Bernard), 96 F.3d 1279, 1283 (9th Cir. 1996). To the extent
18 Debtor maintains that discharge was improper because he complied
19 with other provisions of the same Order, such argument misses the
20 mark. Debtor failed in his duty to cooperate, notwithstanding his
21 alleged technical compliance with other, more specific
22 instructions.¹³

24 ¹³ Moreover, the evidence reveals that Debtor's acquiescence
25 in the Order's other directives was merely half-hearted. Indeed,
26 he provided a key to the Property and access to Cauchi to install
27 a lock box, but not until July of 2004, two months after the May
28 summary judgment hearing. He also allowed a "For Sale" sign to be
erected, but it could be inferred that he was responsible for the
sign being down on the ground, a phenomenon repeatedly witnessed
by Cauchi, Ms. Bernard, and the neighbor. Debtor did not deny or
controvert these facts in the testimony provided on appeal.

