

JUN 30 2006

NOT FOR PUBLICATION

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

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	CC-05-1091-BKPa
)		
DAWN JEAN KYLE,)	Bk. No.	LA 01-42196-VZ
)		
Debtor.)		
_____)		
)		
DAWN JEAN KYLE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
CAROLYN A. DYE, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 18, 2006 at
Pasadena, California

Filed - June 30, 2006

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

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

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

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Chapter 7² debtor Dawn Jean Kyle filed an emergency motion to
2 abandon real property situated in Michigan and for sanctions against
3 appellee trustee Carolyn Dye for her alleged negligence in failing to
4 properly administer and maintain the property. Finding no basis to hear
5 it on shortened time, the bankruptcy court denied the motion. Kyle
6 timely appealed in pro per.

7 The court later granted the trustee's unopposed motion to abandon
8 the property. That issue being resolved, this appeal is limited to the
9 sanctions issue.

10 Although the order is interlocutory, we grant appellant leave and
11 AFFIRM.

12 13 I. FACTS

14 Kyle filed her chapter 7 petition in 2001, scheduling a house in
15 Detroit, Wayne County, Michigan, which was uninhabited and was in a
16 deteriorating condition. Approximately three years post-petition, on 18
17 February 2005, she filed an emergency motion under L.B.R. 9075-1(a)(2)³
18 to abandon the property as having no value to the estate. The emergency
19 motion was prompted by a notice issued in January 2005 by Wayne County,
20 Michigan, that the property would be forfeited unless outstanding
21 property taxes (totaling \$831) were paid by 1 March 2005. Exhibit B to
22 the Emergency Motion. Kyle's emergency motion stated the property's
23

24
25 ² Absent contrary indication, all "Code," chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
27 its amendment by the Bankruptcy Abuse Prevention and Consumer
28 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which the adversary proceeding and these appeals arise was filed
before its effective date (generally 17 October 2005). All "Rule"
references are to the Federal Rules of Bankruptcy Procedure. All
"L.B.R." references are to the Local Bankruptcy Rules, Central
District of California.

³ Authorizing hearing of motions on 48-hours notice or less.

1 value at \$5000, subject to a \$25,000 deed of trust and the City of
2 Detroit's lis pendens.

3 In the same emergency motion Kyle sought sanctions against the
4 trustee, alleging negligence and breach of duty in the administration
5 (or lack thereof) of the property. She requested an award of \$30,919.10
6 as reimbursement for expenses, including travel to Michigan (air fare,
7 hotel and car rental), payment of Wayne County and City of Detroit
8 property taxes, and costs for locks and various property repairs. Kyle
9 recounted, in her supporting declaration, a contentious history of
10 litigation over several issues, including those relating to this
11 property, and distribution of the proceeds of sale and exemption for
12 another property. These issues are not before us on this appeal,
13 although we have seen some of them before. See In re Kyle, 317 B.R. 390
14 (9th Cir. BAP 2004).

15 It does not appear from the record that Kyle served her motion on
16 the trustee; in any case, there was no response. The bankruptcy court
17 denied her motion without hearing, finding no emergency because Kyle had
18 not established that:

- 19 1. [she] . . . will suffer immediate and irreparable injury,
20 loss or that damage will result to moving party;
- 21 2. there is a danger that notice to an opposing party will
22 result in that party's flight or destruction of evidence; or
- 23 3. that exigent circumstances . . . prevent [the] moving party
24 from having its Motion heard on regular notice . . . [citing]
In re Intermagnetics America, Inc., 101 B.R. 191 (C.D. Cal.
1989).

25 Order, 23 February 2005.

26 Two days later, Kyle filed her notice of appeal. The motion for
27 sanctions was never thereafter noted on the court's motions calendar,
28 and the bankruptcy court has not considered it on the merits.

1 We review a court's decision to impose sanctions for an abuse of
2 discretion, whether imposed under the court's inherent power, Section
3 105, or Rule 9011. Chambers v. NASCO, Inc., 501 U.S. 32, 55 (1991); Doi
4 v. Halekulani Corp., 276 F.3d 1131, 1140 (9th Cir. 2002); In re Roman,
5 283 B.R. 1, 7 (9th Cir. BAP 2002); and In re Grantham Bros., 922 F.2d
6 1438, 1441 n.2 (9th Cir. 1991).

7 Under the abuse of discretion standard, we must have a definite and
8 firm conviction that the bankruptcy court committed a clear error of
9 judgment in the conclusion that it reached before reversal is proper.
10 In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

11

12 V. DISCUSSION

13 A. Jurisdiction

14 1. Mootness

15 An appeal is moot if events have occurred after the entry of the
16 order being appealed that prevent an appellate court from granting
17 effective relief. In re Dynamic Brokers, Inc., 293 B.R. 489, 493-94
18 (9th Cir. BAP 2003). Even though the property has been abandoned and
19 is no longer part of the estate, the sanctions issue remains.

20 2. Finality

21 Appellant treats the appeal as from a denial of sanctions. But the
22 order on appeal - denying the emergency motion because no emergency was
23 shown - is interlocutory, as the trustee has argued in her brief.

24 We have jurisdiction to hear bankruptcy appeals from final
25 judgments, orders, and decrees, 28 U.S.C. § 158, and Rule 8003(c) gives
26 us discretion to treat an appeal improperly taken as a motion for leave
27 to appeal, and we grant leave.

1 B. Merits

2 1. Emergency

3 Appellant has neither briefed the issue of whether there was any
4 emergency requiring an urgent hearing on the sanctions motion, nor has
5 she even argued that the bankruptcy court applied an incorrect standard
6 in ruling that the motion should not be heard on an emergency basis. She
7 has therefore waived that issue. In re Sedona Institute, 220 B.R. 74,
8 76 (9th Cir. BAP 1998).

9 In any event there is no apparent error: there was no urgency or
10 danger which required the sanctions motion to be heard before the
11 forfeiture deadline. See Mission Power Eng'g Co. v. Continental Cas.
12 Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995) (outlining appropriate basis
13 for an emergency motion); U.S. v. Real Property Located at 22 Santa
14 Barbara Drive, 264 F.3d 860, 870 (9th Cir. 2001) (ex parte proceedings
15 are appropriate in only a narrow set of circumstances). And any urgent
16 circumstances evaporated with the entry of the order abandoning the
17 property before the deadline for avoiding the tax forfeiture. There was
18 no abuse of discretion here.

19 2. Sanctions

20 Kyle's sanctions request is based on the trustee's failure to
21 administer the property. Appellant claims the trustee had been aware
22 for up to three years that the property was in a dangerous condition but
23 she failed to timely address the issues. Basically, she seeks damages
24 for alleged breaches of, or failures to perform, trustee duties.⁴

25 ⁴ A trustee's duties are:

26 ". . . to gather and liquidate the property of the estate,
27 to be accountable for the estate, ensure that the debtor
28 performs his or her obligations, investigate the finances of
the debtor, review the proofs of claim, and where

(continued...)

1 There are three possible bases for sanctions: Rule 9011, § 105, and
2 the court's inherent authority. Kyle has not specified under which
3 authority she proceeds, nor argued the applicable standards in her
4 briefs.

5 Imposing sanctions under Rule 9011⁵ requires an inquiry into the
6 pleadings, whereby the court considers whether the attorney or party

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8 ⁴(...continued)

9 appropriate, oppose the debtor's discharge, be available to
10 provide relevant information to parties-in-interest, and by
11 court order, operate the business on a short-term basis. The
12 trustee also must prepare the final report and an accounting
13 for the administration of the estate." In re Castillo, 297
14 F.3d 940, 950-51 (9th Cir. 2002), as amended. See § 704(1).

15 ⁵ The rule provides, in part:

16 (b) Representations to the Court. By presenting to the
17 court (whether by signing, filing, submitting, or later
18 advocating) a petition, pleading, written motion, or other
19 paper, an attorney or unrepresented party is certifying that
20 to the best of the person's knowledge, information, and
21 belief, formed after an inquiry reasonable under the
22 circumstances,--

23 (1) it is not being presented for any improper purpose,
24 such as to harass or to cause unnecessary delay or
25 needless increase in the cost of litigation;

26 (2) the claims, defenses, and other legal contentions
27 therein

28 are warranted by existing law or by a nonfrivolous
argument for the extension, modification, or reversal
of existing law or the establishment of new law;

 (3) the allegations and other factual contentions have
evidentiary support or, if specifically so identified,
are likely to have evidentiary support after a
reasonable opportunity for further investigation or
discovery; and

 (4) the denials of factual contentions are warranted on
the evidence or, if specifically so identified, are
reasonably based on a lack of information or belief.

 (c) Sanctions. If, after notice and a reasonable
opportunity to respond, the court determines that
subdivision (b) has been violated, the court may, subject to
the conditions stated below, impose an appropriate sanction
upon the attorneys, law firms, or parties that have violated
subdivision (b) or are responsible for the violation.

1 signing the document made a reasonable inquiry to determine the factual
2 and legal basis of a particular document, and whether the attorney or
3 signing party interposed the document for any improper purpose. Rule
4 9011(b); see also In re Nathurst, 183 B.R. 953 (Bankr. M.D. Fla. 1995)
5 (trustee sanctioned under Rule 9011 for improperly issuing document to
6 procure debtor's arrest). Rule 9011 sanctions require only a showing of
7 "objectively unreasonable conduct."⁶ In re DeVille, 361 F.3d 539, 548
8 (9th Cir. 2004) (citation omitted).

9 But the rule does not apply here: "Rule 9011 sanctions are not an
10 appropriate remedy for this alleged misconduct since they are only
11 available with regard to papers filed with the court, not attorney
12 misconduct." Trulis v. Barton, 107 F.3d 685, 695 (9th Cir.
13 1995) (emphasis added). Kyle's motion allegations do not pertain to any
14 particular document or pleading; rather, they relate to the trustee's
15 actions, conduct, judgment, and handling of estate property over a
16 period of years.

17 Sanctions under § 105(a) are for contempt, and require a showing by
18 clear and convincing evidence of a violation of a specific and definite
19 court order, In re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002), and "an
20 explicit finding of bad faith or willful misconduct, . . . something more
21 egregious than mere negligence or recklessness." In re Dyer, 322 F.3d
22 1178, 1196 (9th Cir. 2003) (citation omitted). Kyle's motion alleges no
23 violation of any particular order of the bankruptcy court.

24 Finally, the inherent authority of the bankruptcy court authorizes
25 an award of sanctions for litigation abuses if the statute or rules are
26 inadequate. DeVille, 361 F.3d at 551. Sanctions may be justified if the

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28 ⁶ As to chapter 13 trustees, see Philip White, Jr., Bankruptcy
Rule 9011 Sanctions in Chapter 13 Bankruptcy Proceedings, 199 A.L.R.
Fed. 21 (2005).

1 court finds that the party acted "in bad faith, vexatiously, wantonly,
2 or for oppressive reasons." Id. at 544 (citation omitted). Again, the
3 motion alleges improper conduct in the management of the bankruptcy
4 estate, not in litigation.

5 Thus it is far from clear that Kyle could have prevailed had the
6 bankruptcy court addressed the merits of her request for sanctions. Kyle
7 is in essence seeking compensatory damages, and may or may not have
8 grounds for an action against the trustee. See In re HCS Corp., 59 B.R.
9 307, 309 (Bankr. S.D.Cal. 1986) (trustee may be sued under § 323(b)), and
10 In re Castillo, 297 F.3d at 951-52 (discussing limitations on trustee's
11 quasi-judicial immunity). But no such action is before us, and we
12 express no opinion on the possible merits of any such action, nor on the
13 impact, if any, of the abandonment order on such an action, nor of the
14 efficacy of the nunc pro tunc provision of that order.

15 Even if the bankruptcy court's order is viewed as a denial of Kyle's
16 request for sanctions on the merits, she has not shown any error, much
17 less an abuse of discretion. Rather she has simply reargued the merits.
18 We will affirm.

19
20 C. Cross-Motions for Sanctions on Appeal

21 We now turn to the trustee's motion for sanctions against Kyle for
22 pursuit of a frivolous appeal under Rule 8020.

23 We do not see this appeal as wholly without merit: the language of
24 the order could be understood as a final order denying sanctions. In
25 contrast with Intermagnetics, 101 B.R. at 194, cited by the bankruptcy
26 court in its order, wherein the motion was denied "without prejudice to
27 its being brought properly as a noticed motion," the order on appeal does
28 not make explicit that Kyle's sanctions motion could be heard on regular

1 notice. And as we have observed above, Kyle's allegations may support
2 a cause of action against the trustee, though we express no opinion on
3 the value of such action. Even though we affirm, this is not a frivolous
4 appeal. There remain the parties' earlier sanctions motions, arising
5 from this appeal's tumultuous history of service issues. There has been
6 a great deal of bad blood between the parties, none of direct relevance
7 to the merits. We are not in a position to make factual findings, see
8 In re Thomas, 287 B.R. 782, 786 (9th Cir. BAP 2002), and while we do not
9 condone the childish acts alleged, nor the liberal accusations of
10 misconduct, we decline to remand for fact finding. It is difficult to
11 see how anything more than bruised dignity and some incidental expense
12 is at stake, and these parties do not need yet another occasion for
13 conflict.

14 On balance, we decline to award sanctions to either party.

15 Finally, Kyle's briefs raise an indirectly related issue: she
16 asserts that the trustee has unnecessarily delayed distribution of her
17 homestead exemption in accordance with our unpublished disposition of 10
18 August 2004 in No. CC-03-1620, affirmed by the Ninth Circuit in No. 04-
19 57195. The delay has apparently drained what few remaining drops of
20 civility may have remained between the parties. We see no reason why the
21 bankruptcy court should not promptly address this matter and direct the
22 trustee promptly to disburse to Kyle her homestead exemption less any
23 appropriate surcharge. While the trustee's counsel indicated at argument
24 that she was considering seeking review in the Supreme Court, given that
25 the central issues are of her diligence in seeking relief from an order
26 and California exemption law, the prospects of a successful petition for
27 certiorari seem remote.

1 **VI. CONCLUSION**

2 We grant leave for this interlocutory appeal, and AFFIRM, as there
3 was no abuse of discretion in denying the emergency motion for sanctions.

4 All pending motions are DENIED.
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