

APR 05 2006

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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. WW-05-1084-SDK
)
 EWALD S. MAUSER,) Bk. No. 04-13753
)
 Debtor.)
)
 _____)
)
 EWALD S. MAUSER,)
)
 Appellant,)
)
 v.) **MEMORANDUM¹**
)
 DENNIS L. BURMAN, Chapter 7)
 Trustee,)
)
 Appellee.)
 _____)

Submitted Without Argument on October 21, 2005²

Filed - April 5, 2006

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: SMITH, DUNN³ and KLEIN, Bankruptcy Judges.

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

² An order was entered that cancelled oral argument leaving the appeal to be submitted and determined on the briefs and the appellate record.

³ Hon. Randall L. Dunn, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Ewald S. Mauser ("Appellant" and "Debtor") appeals orders of
2 the bankruptcy court granting the chapter 7 trustee's motion for
3 denial of all his exemptions and denying his motion to dismiss
4 the chapter 7 case. We REVERSE and REMAND.

5 **I. FACTS**

6 Debtor filed a chapter 13⁴ petition on March 19, 2004. In
7 August 2004, Debtor's first attorney withdrew as his attorney of
8 record and Debtor proceeded pro se from that time through
9 December 13, 2004.

10 In September 2004, a creditor moved to convert the case to a
11 chapter 7 on the grounds that Debtor 1) fraudulently transferred
12 property of the estate, 2) was unable to confirm a plan, and 3)
13 was uncooperative in providing information regarding his
14 financial condition.

15 The hearing on the conversion motion was held on October 13,
16 2004. At some point during the hearing, Debtor orally requested
17 that his bankruptcy case be dismissed:

18 I ask the court to dismiss this whole case.
19 This goes on now since 2000, and they're
20 using - they are using me and my friend
Anna Christian and Doris for their endeavor
to make money

21 The court did not rule directly on the oral motion to
22 dismiss, but instead granted the motion to convert.

23 Following the conversion, Debtor moved to dismiss the
24 chapter 7 case.⁵ Shortly thereafter, the chapter 7 trustee

25
26 ⁴ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

28 ⁵ This motion is not included in the record on appeal. A
copy of the pleading was obtained by the panel from the
(continued...)

1 objected to all of Debtor's exemptions on the grounds that he
2 failed to provide requested financial information, turn over
3 assets of the estate, or otherwise cooperate with the trustee.
4 Debtor responded, pro se, to the exemption objection with a 291
5 page pleading described by his current counsel as "prefaced with
6 . . . fractured English and somewhat incoherent logic."

7 The objection to the exemptions was first heard on January
8 12, 2005. At that hearing, the trustee advised the court of what
9 he perceived as Debtor's continuing failure to cooperate in
10 providing financial records and in the marketing of his residence
11 for sale, among other things. The court admonished Debtor, who
12 now was represented by counsel, that he needed to "get [his] act
13 together here and get this information and start cooperating with
14 these guys." The hearing was continued to February 9, 2005 to
15 allow Debtor to resolve the various issues raised by the trustee.

16 At the continued hearing, the trustee reported that no

17 _____
18 ⁵(...continued)
19 bankruptcy docket. With the exception of the caption, clearly
20 labeled "Motion to Dismiss," the grounds upon which the motion
21 was based are undeterminable. The pleading, which includes as
22 apparent exhibits a collection of various letters and state court
23 pleadings of unknown relevance, states in its entirety:

24 Motion to Dismiss!
25 Case NO:04-13753-ttg
26 I feel Injustices happened to me from all
27 sides of the Law I blame from my Part is
28 Misunderstanding of the Lawyer language I
am 68 Years old Sick falsely accused,
looking for a Peaceful Settlement, even
with Mr. Herman. I need Protection to make
2005 a satisfactory Life, therefore I need
to reach that goal, for all of us.

(grammatical mistakes in original). It does not appear that the
motion was served on creditors.

1 claim of exemption is a final appealable order. In re Arnold,
2 252 B.R. 778, 784 (9th Cir. BAP 2000). By order of the panel
3 entered July 5, 2005, leave to appeal the denial of Debtor's
4 dismissal motion was granted.

5 **III. ISSUES PRESENTED**

- 6 1. Whether the bankruptcy court erred in denying Debtor's
7 oral motion to dismiss his chapter 13 case at the
8 October 13, 2004 hearing on the conversion motion; and
- 9 2. Whether the bankruptcy court erred in granting the
10 chapter 7 trustee's motion objecting to the allowance
11 of Debtor's exemptions and denying Debtor's motion to
12 dismiss the bankruptcy case.

13 **IV. STANDARD OF REVIEW**

14 The panel reviews the denial of a debtor's motion to
15 voluntarily dismiss a bankruptcy case for an abuse of discretion.
16 See In re Leach, 130 B.R. 855, 856 (9th Cir. BAP 1991). A
17 bankruptcy court abuses its discretion if it bases its ruling
18 upon an erroneous view of the law or a clearly erroneous
19 assessment of the evidence. In re Beatty, 162 B.R. 853, 855 (9th
20 Cir. BAP 1994). The panel also finds abuse of discretion if it
21 has a definite and firm conviction that the trial court committed
22 a clear error of judgment in the conclusion it reached upon
23 weighing the relevant factors. United States v. Finley, 301 F.3d
24 1000, 1007 (9th Cir. 2002). Questions regarding the right of a
25 debtor to claim exemptions are questions of law reviewed de novo.
26 In re Arnold, 252 B.R. at 784; In Goswami, 304 B.R. 386 (9th Cir.
27 BAP 2003). A bankruptcy court's finding of bad faith is reviewed
28 for clear error. In re Eisen, 14 F.3d 469, 470 (9th Cir. 1994).

1 **V. DISCUSSION**

2 A. Debtor Had an Absolute Right to Dismiss His Chapter 13 Case
3 Prior to the Entry of the Order Converting It to Chapter 7

4 Under § 1307(b), the court "shall dismiss" a chapter 13 case
5 that has not previously been converted "on request of the debtor
6 at any time." This panel recognized the absolute right of a
7 debtor to obtain a dismissal of a chapter 13 case in Beatty.
8 There, the debtor requested the dismissal of her chapter 13 case
9 following the court's oral decision to grant a motion to convert
10 but prior to the entry of a written order. The bankruptcy court
11 nevertheless entered an order converting the case and denying
12 dismissal. On appeal, we reversed, holding that the bankruptcy
13 court "must dismiss the case upon the debtor's request for
14 dismissal under section 1307(b) if that request is made prior to
15 the effective time of an order converting the case to chapter 7."
16 In re Beatty, 162 B.R. at 857.

17 Though much of Debtor's filed pleadings in the case are
18 difficult to follow and fairly indecipherable, his oral request
19 for dismissal of the chapter 13 case at the conversion hearing
20 was clear and unequivocal. The bankruptcy court clearly erred in
21 entering the order converting the case in the face of the
22 dismissal request. While it is true that Debtor did not appeal
23 the conversion order, it is also true that the court did not
24 specifically acknowledge or rule on Debtor's request (though
25 denial is implicit in the decision to grant conversion).
26 Further, it is not clear from the transcript of the hearing that
27 the court ever considered the request.

1 Under the circumstances, Debtor's post-conversion motion to
2 dismiss may be deemed either a request for a ruling on the
3 original request or a motion for reconsideration of the implicit
4 denial of the request pursuant to Rule 60(b). However the motion
5 is treated, our decision in Beatty dictates that Debtor's oral
6 request for dismissal of the chapter 13 case should have been
7 granted. We believe not granting the motion was an abuse of
8 discretion.

9 B. Denial of Exemptions/Denial of Motion to Dismiss Chapter 7
10 Case

11 While the record might very well support the bankruptcy
12 court's decision to deny the exemptions, see In re Arnold, 252
13 B.R. at 784, and the denial of Debtor's motion to dismiss the
14 chapter 7 case, because we find that the court abused its
15 discretion by not granting the request to dismiss the case in the
16 first instance, i.e., while it was a chapter 13, we need not
17 render a ruling on the subsequent post-conversion request for
18 denial of Debtor's exemptions.

19 **VI. CONCLUSION**

20 Based upon the foregoing, this matter is REVERSED and
21 REMANDED to the bankruptcy court with instructions to enter
22 orders 1) dismissing the chapter 13 case and 2) vacating the
23 orders converting the case to chapter 7 and denying Debtor's
24 exemptions.