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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NOT FOR PUBLICATION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

In re:) BAP No. WW-05-1262-KSD
)
 ANTHONY J. SARP; BARBARA SARP;) Bk. No. 03-24716-KAO
 KATMAI LODGE, LTD.,)
)
 Debtors.)
)
)
 FIRST HERITAGE BANK,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 ANTHONY J. SARP; BARBARA SARP;))
 KEESAL, YOUNG and LOGAN,))
 DAVID MORK, TRUSTEE,))
))
 Appellees.))

Argued and Submitted on October 21, 2005
at Seattle, Washington

Filed - November 2, 2005

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

Honorable Karen A. Overstreet, Chief Bankruptcy Judge, Presiding

Before: KLEIN, SMITH, and DUNN,** 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.

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

1 This is an appeal from an "Agreed Order of Abandonment,"
2 granting debtors' "Ex Parte Motion for Entry of Agreed Order of
3 Abandonment." The court granted the motion without a hearing,
4 without making findings of fact and conclusions of law, and
5 without addressing appellant's opposition. Appellant learned of
6 the ex parte motion only by monitoring the docket. We VACATE and
7 REMAND.

8
9 FACTS

10 On November 13, 2003, Anthony Sarp (co-debtor and appellee)
11 filed a chapter 11 petition. Less than one month later, on
12 December 5, 2003, Katmai, Ltd., an entity owned by debtor Anthony
13 Sarp, filed a chapter 11 petition. Seven days later, Barbara
14 Sarp (co-debtor and appellee) filed a chapter 11 petition.

15 On February 10, 2004, the Sarp individual cases were
16 substantively consolidated (collectively, "Sarps").¹ The Sarps
17 scheduled their residence, but did not claim a homestead
18 exemption in their residence in their original schedules. Per
19 the Sarps' schedules, the residence (the "property") had a value
20 of \$280,000.

21 On November 23, 2004, CityBank, secured by a second deed of
22 trust, filed a "renewed" motion for relief from stay in
23 connection with the Sarps' property. CityBank asserted that the
24 value of the property was \$360,000, based on an appraisal filed
25 in support of its motion. CityBank used the following numbers to

26
27 ¹Less than a year later, on December 17, 2004, the Sarps'
28 chapter 11 case was substantively consolidated with Katmai,
Ltd.'s chapter 11 case.

1 come to the conclusion that the property had an equity cushion of
2 \$21,128.00:

3	\$360,000	current market value
	- 36,000	costs of resale
4	- 6,000	costs of foreclosure
	- 43,000	balance of first deed of trust
5	-236,035	currently due to CityBank
	- 3,000	estimated attorney fees
6	- 9,576	additional interest during foreclosure
	<u>- 5,261</u>	delinquent 2003 property taxes
7	\$21,128	current equity cushion

8 On December 13, 2004, debtors filed a response accepting
9 CityBank's value of the property and explaining that by
10 CityBank's own admission the property had an equity cushion. The
11 opposition further explained that adequate protection payments
12 were being made to CityBank in the amount of \$1,650 per month.

13 On December 17, 2004, the court granted CityBank's relief
14 from stay motion.

15 On February 16, 2005, the Sarps filed a motion to compel the
16 trustee to abandon the property pursuant to § 554.² The Sarps'
17 motion contended that the property was encumbered by three deeds
18 of trust (but, in fact, was encumbered by only two) and had a
19 value of \$280,000. They listed three obligations that encumbered
20 the property: (1) a first deed of trust in favor of Countrywide
21 with a current balance of \$43,000; (2) a second deed of trust in
22 favor of CityBank with a current balance of \$243,000; and (3) a
23 pre-judgment writ of attachment against the property for a claim
24 in excess of \$100,000.

25 The trustee filed an opposition to the motion to abandon in
26 which creditor Keesal, Young & Logan ("KYL") joined. KYL had an

27
28 ²A chapter 11 trustee was appointed to the Sarps' case in
2004.

1 interest in the property pursuant to a writ of attachment.³

2 The trustee's opposition contended that the property had
3 value to the estate and that no cause existed for abandonment
4 pursuant to 11 U.S.C. § 554. Trustee valued the property at
5 \$360,000, relying on the appraisal used by CityBank in support of
6 its motion for relief from stay. The motion listed three
7 encumbrances against the property: (1) the first deed of trust in
8 the amount of \$43,000; (2) the second deed of trust in the amount
9 of \$236,035; and (3) KYL's interest in the property (and other
10 assets) pursuant to a writ of attachment. No amount was listed
11 in connection with KYL's interest in the property.

12 On March 11, 2005, the court entered an order denying the
13 Sarps' motion to abandon. The order denied the motion "without
14 prejudice to presentation of a motion or agreed order at a later
15 date on notice to KYL and the trustee." The order denying the
16 motion was entered on docket and was not appealed.

17 Almost two months later, on April 7, 2005, the substantively
18 consolidated cases were converted to chapter 7.

19 On June 6, 2005, almost three months after the original
20 motion to abandon property was denied, debtors filed an "Ex Parte
21 Motion for Entry of Agreed Order of Abandonment" and an "Agreed
22 Order of Abandonment," which order was signed by counsel for the
23 debtors as "present[or]" and was "[a]pproved for entry, notice of
24 presentation waived" by counsel for the trustee and KYL.

26
27 ³KYL filed a proof of claim in the amount of \$187,000. The
28 proof of claim listed an interest in Sarps' Merrill Lynch
accounts, stock in Katmai Lodge, Ltd. and Katmai Pro Shop, Inc.,
the subject property, and a customer list for Katmai Lodge, Ltd.

1 Both the ex parte motion and the order were one paragraph in
2 length and, for the most part, were mirror images of each other.
3 The motion generally recited the background facts, including the
4 fact that the court previously held a hearing on the Sarps'
5 motion to abandon, the trustee and KYL objected to the motion,
6 and the court denied the motion without prejudice. The motion
7 concluded by stating that the trustee and KYL "have agreed to the
8 entry of such an Order." Likewise, the "Agreed Order" recited
9 the procedural history, and recited that the trustee
10 "subsequently" (i.e., after March 11, 2005) determined that the
11 property was of inconsequential value and benefit to the estate
12 and burdensome, and recited that the objecting parties had
13 withdrawn their objection.

14 On June 7, 2005, the day after the Sarps filed the ex parte
15 motion and order, appellant First Heritage Bank ("FHB") timely
16 filed an objection and requested that the ex parte motion be set
17 for hearing. FHB objected to proceeding without notice and
18 hearing where the evidentiary record of the March 11 hearing
19 established that the property had value from the estate.

20 Later the same day, the court signed and entered the "Agreed
21 Order Of Abandonment."

22 FHB timely appealed.

23 24 JURISDICTION

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

1 ISSUE

2 Whether the bankruptcy court abused its discretion by
3 granting a motion to abandon property without hearing and notice
4 when the court had previously denied a motion to abandon the same
5 property three months earlier.

6
7 STANDARD OF REVIEW

8 Once a bankruptcy court has determined whether the factual
9 predicates necessary for abandonment are present, the court's
10 decision to authorize or deny abandonment is reviewed for an abuse
11 of discretion; it is an abuse of discretion to apply an incorrect
12 legal standard. Vu v. Kendall (In re Vu), 245 B.R. 644, 647 (9th
13 Cir. BAP 2000), citing Johnston v. Webster (In re Johnston), 49
14 F.3d 538, 540 (9th Cir. 1995). The bankruptcy court's conclusions
15 of law are reviewed de novo. Higgins v. Vortex Fishing Sys.,
16 Inc., 379 F.3d 701, 705 (9th Cir. 2004); Galam v. Carmel (In re
17 Larry's Apt., LLC), 249 F.3d 832, 836 (9th Cir. 2001).

18
19 DISCUSSION

20 The instant appeal presents circumstances that cause pause.
21 First, even though the "agreed order" authorizing abandonment
22 purported to be merely a revision of the order entered three
23 months earlier denying the earlier motion to abandon, the nature
24 of the revision (reaching a totally opposite result) and the
25 passage of time necessitated notice to creditors and an
26 opportunity to oppose. Second, neither the order on appeal nor
27 the order denying the predecessor motion were supported by
28 findings of fact and conclusions of law rendered in accordance

1 with Federal Rule of Civil Procedure 52, as incorporated by
2 Federal Rules of Bankruptcy Procedure 7052 and 9014. Third,
3 it appears the court may have entered the ex parte order without
4 having knowledge of the opposition.

5 The standard for granting a motion to abandon property is
6 fixed by statute: after notice and hearing, the trustee may
7 abandon property of the estate that is burdensome to the estate or
8 that is of inconsequential value and benefit to the estate. 11
9 U.S.C. § 554(a).

10 The Sarps argue that FHB lacks standing because FHB did not
11 appear and participate in the motion proceedings in March. We are
12 not persuaded.

13 The March 11 order was final with respect to the motion to
14 abandon. Notice of that motion had been given to all creditors.
15 Fed. R. Bankr. P. 6007. We agree with the Sarps that the March 11
16 order was appealable and not appealed.

17 The language in the March 11 order stating that the denial
18 was "without prejudice to an agreed order" is ambiguous in the
19 sense that it does not specify whether further notice, or a
20 further motion, would be required. Under ordinary principles of
21 preclusion, such a direction establishes that the order is not to
22 be regarded as preclusive under the rules of res judicata. See
23 Alary Corp. v. Sims (In re Associated Vintage Group, Inc.), 283
24 B.R. 549, 557-58 (9th Cir. BAP 2002); Restatement (Second) of
25 Judgements § 26(1)(b). The passage of nearly three months from
26 the March 11 order to the June 17 order, coupled with the proposed
27 shift to a diametrically opposed result, make it appropriate to
28 expect that there would be either a new proceeding or notice to

1 enable a creditor to be heard in opposition.

2 Moreover, a creditor who sits inactive on the sidelines of an
3 abandonment matter while someone else contests the merits has
4 standing to attempt to step in when the initial contestant
5 subsequently makes a separate peace. New or additional
6 information may have caused the initial opponent to change its
7 position, or it may even have made a side deal that might warrant
8 scrutiny.⁴ While the intervening creditor may be required to
9 explain its prior inactivity before being allowed to be heard when
10 there has not been a significant passage of time, the long
11 interval between the March 11 order and the June 17 order, coupled
12 with the inconsistent numbers regarding value in the prior
13 evidence, required, at a minimum that FHB be allowed to be heard
14 in opposition and may have required a new motion to abandon. In
15 short, FHB has standing to contest the abandonment.

16 Regardless of whether another noticed motion was required,
17 the problem remains that the absence of the required findings of
18 fact and conclusions of law regarding the motion upon which the
19 court acted make it impracticable for us to review the merits of
20 the abandonment order.

21 We note that the timing of the entry of the June 17 order
22 indicates that the bankruptcy court was not aware of the
23

24 ⁴Indeed, counsel for the Sarps asserted during oral argument
25 of this appeal that there actually had been new information, in
26 the form of another appraisal, that led to the change of
27 position. The order, itself, recites that the trustee's change
28 of position was based on a "subsequent" determination. If the
change of position was based on new evidence that was never put
before the court and the rest of the creditor body, including
FHB, then a hearing was necessary.

1 opposition and that, if it had been, it might have conducted a
2 hearing that would have settled the matter with findings.
3 Specifically, on June 6, 2005, the Sarps filed their "Ex Parte
4 Motion for Entry of Agreed Order of Abandonment." The next day,
5 FHB filed an objection. Later that same day, the bankruptcy court
6 entered the order of abandonment. This suggests the bankruptcy
7 court might not have been aware of the objection when it entered
8 the order.⁵ The "agreed order" procedure followed by the court in
9 the apparent interest of administrative convenience, but which did
10 not comport with the Federal Rules of Bankruptcy Procedure,
11 carries with it the risk that trouble of the nature presented by
12 this appeal will arise upon occasion and necessitate further
13 judicial action.

14 Since the procedural error inherent in the absence of
15 findings cripples our ability to review the substantive merits of
16 whether the property in question was burdensome to the estate or
17 of inconsequential value and benefit to the estate, we will remand
18 so that the requisite findings can be made on this fundamentally
19 fact-intensive matter.

20 21 CONCLUSION

22 For the foregoing reasons, we VACATE and REMAND for further
23 proceedings consistent with this decision.

24
25 _____
26 ⁵Among other things, we do not know whether the court
27 included KYL's lien in its calculation, and, if it did, in what
28 amount. Although the Sarps contend that the equity cushion,
whatever that number may be, was also "subject to the debtors'
homestead rights," they did not claim an exemption in the
property until August 18, 2005.