NOT FOR PUBLICATION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; KATMAI LODGE, LTD., Debtors.	Bk. No. 03-24716-KAO
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.

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

FACTS

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

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

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

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

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

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

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

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

On February 16, 2005, the Sarps filed a motion to compel the trustee to abandon the property pursuant to § 554.[2] The Sarps' motion contended that the property was encumbered by three deeds of trust (but, in fact, was encumbered by only two) and had a value of $280,000. They listed three obligations that encumbered the property: (1) a first deed of trust in favor of Countrywide with a current balance of $43,000; (2) a second deed of trust in favor of CityBank with a current balance of $243,000; and (3) a pre-judgment writ of attachment against the property for a claim in excess of $100,000.

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

[2]A chapter 11 trustee was appointed to the Sarps' case in 2004.

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

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

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

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

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

---

[3]KYL filed a proof of claim in the amount of $187,000. The 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.

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

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

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

FHB timely appealed.

JURISDICTION

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

ISSUE

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

STANDARD OF REVIEW

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

DISCUSSION

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

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

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

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

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

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

enable a creditor to be heard in opposition.

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

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

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

---

[4]Indeed, counsel for the Sarps asserted during oral argument of this appeal that there actually had been new information, in the form of another appraisal, that led to the change of position. The order, itself, recites that the trustee's change 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.

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

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

CONCLUSION

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

---

[5]Among other things, we do not know whether the court included KYL's lien in its calculation, and, if it did, in what 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.