

JUN 17 2005

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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NOT FOR PUBLICATION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**

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In re:)	BAP No. NC-04-1331-PBS
)	
MARTIN F. VRABEL,)	Bk. No. 04-40559
)	
Debtor.)	
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MARTIN F. VRABEL AND SOPHIE)	
VRABEL,)	
)	
Appellants,)	
)	
v.)	MEMORANDUM¹
)	
MARTHA G. BRONITSKY, Chapter 13)	
Trustee; WASHINGTON MUTUAL BANK;)	
G. JUDSON SCOTT, JR.; MICHAEL)	
QUIRK,)	
)	
Appellees.)	
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Argued and Submitted on
May 19, 2005 at San Jose, California

Filed - June 17, 2005

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

Honorable Randall J. Newsome, Chief Bankruptcy Judge, Presiding

Before: PERRIS, BRANDT and SMITH, 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 The issue in this appeal is whether the bankruptcy court erred
2 in entering an order barring a nondebtor spouse from filing
3 bankruptcy for 180 days after dismissal of her husband's bankruptcy
4 case.² While there was no jurisdictional defect, the nondebtor
5 spouse was denied due process. We therefore REVERSE and REMAND for
6 the nondebtor spouse to be given adequate notice and opportunity to
7 respond, if the bankruptcy court deems it appropriate to pursue a
8 bar order against her.

9 FACTS

10 Martin F. Vrabel ("debtor") filed the chapter 13³ petition out
11 of which this appeal arises in February 2004. Debtor's wife, Sophie
12 Vrabel ("Sophie"), is not listed as a joint debtor on the bankruptcy
13 petition. Debtor and Sophie claim to have an ownership interest in
14 a certain parcel of real property. Debtor filed his bankruptcy
15 petition to stop an imminent foreclosure.

16 Appellee Washington Mutual Bank ("WMB"), which holds first and
17 second trust deeds on the property, filed motions for relief from
18 stay. On June 3, 2004, the court held a hearing on the motions for
19 relief and other matters. Appellants did not provide us with a
20 transcript of this hearing. However, there is no dispute that one
21 of the issues discussed at the hearing was the possibility that

22
23 ² The order on appeal addresses other matters. For the
24 reasons explained below, the only issue before us in this appeal is
25 the propriety of entry of the 180-day bar against the debtor's
26 spouse.

³ Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 debtor and Sophie had engaged in misconduct in connection with
2 debtor's bankruptcy case.

3 The bankruptcy court continued the June 3 hearing to June 17,
4 and entered an order to show cause, stating as follows:

5 Pursuant to the record established at a June 3, 2004 hearing .
6 . . ., the Court hereby orders Martin F. Vrabel to appear on June
7 17, 2004 . . . and show cause why [debtor's] bankruptcy case
8 should not be dismissed, with prejudice.

9 After the June 17 continued hearing, the court entered an order
10 granting WMB conditional relief from stay, disposing of several
11 other matters, and stating as follows:

12 5. The Court's *Order to Show Cause* filed on June 4, 2004
13 (doc. 51) is hereby vacated. If this case is, however,
14 subsequently dismissed for any reason, that dismissal
15 shall be with prejudice as to the Debtor, and both the
16 Debtor and Sophie Vrabel shall be prohibited from filing
17 another bankruptcy case of any kind for 180 days from the
18 date of dismissal of this case.

19 June 23, 2004 Order, at 2. Debtor and Sophie timely appealed.⁴

20 On January 21, 2005, debtor's case was dismissed for failure to
21 make plan payments. We have entered an order limiting the issue on
22 appeal to whether the bankruptcy court erred in imposing a 180-day
23 bar against Sophie, because that is the sole issue raised by
24 appellants on appeal that has not become moot as a result of the
25 dismissal of debtor's case. We also expedited this appeal, because
26 an order barring access to bankruptcy for 180 days is not subject to

24 ⁴ The notice of appeal states that only debtor "hereby
25 appeals[.]" However, both debtor and Sophie signed the notice of
26 appeal. Sophie also signed the opening brief on appeal, identifying
herself as an appellant. We therefore conclude that Sophie is an
appellant in this appeal.

1 review after passage of 180 days. See In re Fernandez, 227 B.R.
2 174, 178 (9th Cir. BAP 1998). The 180 day period expires on July
3 20, 2005.

4 ISSUES

- 5 1. Whether the bankruptcy court had jurisdiction.
- 6 2. Whether the bankruptcy court violated due process in
7 imposing a 180-day bar against Sophie.⁵

8 STANDARDS OF REVIEW

9 Questions of jurisdiction are reviewed de novo. In re
10 Castlerock Properties, 781 F.2d 159, 161 (9th Cir. 1986). Whether
11 an individual was afforded due process is a question of law, which
12 we also review de novo. In re Niles, 106 F.3d 1456, 1459 (9th Cir.
13 1997); In re Repp, 307 B.R. 144, 148 (9th Cir. BAP 2004).

14 DISCUSSION

15 1. Jurisdiction

16 An order entered without subject matter or personal
17 jurisdiction is void. In re Pac. Land Sales, Inc., 187 B.R. 302,
18 309 (9th Cir. BAP 1995). It is not clear whether appellants contest
19 the bankruptcy court's subject matter jurisdiction over the matter
20 at issue in this appeal (entry of a 180-day bar order against a non-
21

22
23 ⁵ Appellants state in the "Introduction" section of their
24 opening brief that the bankruptcy court also erred in imposing a
25 180-day bar against debtor. This statement is not supported by any
26 subsequent argument in appellants' appellate brief. Therefore, we
deem it waived. See Acosta-Huerta v. Estelle, 7 F.3d 139, 144 (9th
Cir. 1992) (issues raised in appellate brief but not supported by
argument are deemed abandoned).

1 debtor) or personal jurisdiction over Sophie. Therefore, we will
2 address both subjects.

3 A. Subject Matter Jurisdiction

4 28 U.S.C. § 1334(a) provides the federal district courts with
5 original and exclusive jurisdiction over bankruptcy cases. The
6 district courts have referred bankruptcy cases to the bankruptcy
7 courts, as provided for by 28 U.S.C. § 157.⁶ 1 Alan N. Resnick &
8 Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 3.01[1] (15th ed. Rev. 2004).
9 The bankruptcy court in this case had subject matter jurisdiction to
10 enter the order on appeal, because the order flows from the court's
11 exercise of jurisdiction over debtor's bankruptcy case.

12 The 180-day bar order entered against Sophie in this case is
13 effectively an injunction entered by the court sua sponte pursuant
14 to § 105(a).⁷ Section 105(a) states that a bankruptcy "court may

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16 ⁶ "Each district court may provide that any or all cases
17 under title 11 . . . shall be referred to the bankruptcy judges for
the district." 28 U.S.C. § 157(a).

18 ⁷ Appellants argue that the court violated § 109(g) in
19 entering the 180-day bar against Sophie, because she is not a debtor
in the bankruptcy case out of which this appeal arises. Section 109
states as follows:

20
21 (g) Notwithstanding any other provision of this section, no
22 individual or family farmer may be a debtor under this title
who has been a debtor in a case pending under this title at any
time in the preceding 180 days if--

23 (1) the case was dismissed by the court for willful
24 failure of the debtor to abide by orders of the court, or
25 to appear before the court in proper prosecution of the
case; or

26 (2) the debtor requested and obtained the voluntary

(continued...)

1 issue any order, process or judgment that is necessary or
2 appropriate to carry out the provisions of" the Bankruptcy Code.
3 Congress anticipated that a § 105(a) injunction would be used to
4 enjoin nondebtors in certain circumstances. 2 Resnick & Sommer,
5 COLLIER ON BANKRUPTCY ¶ 105.03 (15th ed. Rev. 2000). See also In re
6 Schwinn Bicycle Co., 210 B.R. 747, 761 (Bankr. N.D. Ill.
7 1997) (§ 105(a) repeatedly has been held to empower a bankruptcy
8 court to enjoin parties other than the debtor), aff'd, 217 B.R. 790
9 (N.D. Ill. 1997). Moreover, a court may enjoin a party on its own
10 motion, if such action is necessary or appropriate to prevent an
11 abuse of the bankruptcy system. See In re Graves, 279 B.R. 266, 273
12 (9th Cir. BAP 2002).

13 A bankruptcy court acting pursuant to § 105(a) has the power to
14 prevent a continuing abuse of the bankruptcy system by multiple
15 parties acting in concert. In re Yiman, 214 B.R. 463, 466 (Bankr.
16 D. Md. 1997); In re Kinney, 51 B.R. 840 (Bankr. C.D. Cal. 1985).
17 Here, the bankruptcy court found that debtor and Sophie committed
18 fraud and engaged in other abusive conduct in connection with
19 debtor's chapter 13 case. See Transcript of June 24, 2004 Hearing,
20 12:16-24. While appellants suggest that the court erred in these
21 findings, the record provided on appeal is not sufficient to permit
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23 ⁷(...continued)

24 dismissal of the case following the filing of a request
25 for relief from the automatic stay provided by section 362
of this title.

26 The facts of this case indicate that the court imposed the bar order
pursuant to § 105(a), not § 109(g).

1 review of that question, because appellants did not provide us with
2 transcripts of the June 3 and 17 hearings. An appellant is obliged
3 to provide the appellate court with a record sufficient for
4 meaningful review. United States v. Vasquez, 985 F.2d 491, 495
5 (10th Cir. 1993). When the appellant fails to provide a complete
6 record, we are entitled to presume that the appellant does not
7 regard the missing portions as helpful. In re McCarthy, 230 B.R.
8 414, 417 (9th Cir. BAP 1999).

9 B. Personal Jurisdiction

10 A defect in personal jurisdiction is a defense that may be
11 waived. In re Pac. Land Sales, Inc., 187 B.R. 302, 309 (9th Cir.
12 BAP 1995). Sophie submitted to the bankruptcy court's exercise of
13 jurisdiction over her by virtue of her extensive, voluntary
14 participation in debtor's bankruptcy case.

15 Sophie affirmatively invoked the jurisdiction of the bankruptcy
16 court on several occasions. She filed multiple motions to conduct
17 2004 exams of individuals claiming to hold liens on the property.
18 She also jointly filed an opposition to WMB's motions for relief
19 from stay, requesting sanctions against WMB under Rule 9011. Sophie
20 did not limit her appearances before the bankruptcy court in any of
21 the pleadings she filed in the bankruptcy court. Therefore, we
22 conclude that she consented to the bankruptcy court's exercise of
23 adjudicatory authority over her.

24 In addition, Sophie responded to the bankruptcy court's order
25 to show cause, directly addressing the subject of the court's
26 concerns about the propriety of her and debtor's conduct in debtor's

1 bankruptcy case. See Declaration of Sophie Vrabel in Response to
2 Order to Show Cause and Relief from Stay. Sophie's declaration is
3 akin to a responsive pleading. Sophie did not assert a lack of
4 personal jurisdiction in her declaration, thus waiving any defect in
5 the court's exercise of such jurisdiction. See Benny v. Pipes, 799
6 F.2d 489, 492 (9th Cir. 1986) (defect in personal jurisdiction waived
7 by the filing of a responsive pleading that fails to contest
8 jurisdiction), opinion amended on other grounds, 807 F.2d 1514 (9th
9 Cir. 1986).

10 2. Due Process

11 Appellants argue that Sophie was denied due process when the
12 bankruptcy court entered a 180-day bar against her. WMB does not
13 address appellants' due process argument in its appellate brief.

14 Due process requires adequate notice and an opportunity to be
15 heard. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
16 (1950); In re Colortran, Inc., 218 B.R. 507, 511 (9th Cir. BAP
17 1997).

18 An elementary and fundamental requirement of due process in any
19 proceeding which is to be accorded finality is notice
20 reasonably calculated, under all the circumstances, to apprise
interested parties of the pendency of the action and afford
them an opportunity to present their objections.

21 Mullane, 339 U.S. at 314. An order is void if entered in a manner
22 inconsistent with due process. In re Loloee, 241 B.R. 655, 661 (9th
23 Cir. BAP 1999).

24 There is no question that, had WMB or any other third party
25 requested entry of a bar order against Sophie, it would have had to
26 have done so by filing an adversary complaint. See In re Roeben,

1 294 B.R. 840, 846 (Bankr. E.D. Ark. 2003). Rule 7001(7) requires an
2 adversary proceeding to obtain an injunction. Adversary proceedings
3 in bankruptcy are commenced by the filing of a complaint, Rule 7003,
4 which must be served in accordance with Rule 7004.

5 As we discuss above, a bankruptcy court can impose an
6 injunction on its own motion pursuant to § 105(a). However,

7 [a] bankruptcy court acting on its own motion in a matter that
8 ordinarily requires an adversary proceeding must, in deference
9 to principles of due process, assure that the defendant is
10 afforded procedural protections that inhere in an adversary
11 proceeding because the rules of procedure generally define what
12 process is due.

13 In re Graves, 279 B.R. 266, 274 (9th Cir. BAP 2002).

14 The bankruptcy court failed to afford Sophie due process,
15 because there is no indication that the court gave Sophie any notice
16 whatsoever that it was considering entry of a bar order against her,
17 much less notice approaching the quality of that required to
18 institute an adversary proceeding in compliance with the Rules
19 discussed above. Immediately after the June 3 hearing, the court
20 entered the show cause order set forth above, but that order only
21 addressed the dismissal of debtor's case. Without prior notice,
22 Sophie did not have an adequate opportunity to address the court's
23 concerns or object to entry of the bar order.

24 CONCLUSION

25 While there was no defect in the bankruptcy court's exercise of
26 subject matter or personal jurisdiction, Sophie was not afforded due
27 process when the court entered the 180-day bar order. Therefore, we
28 REVERSE and REMAND for Sophie to be given adequate notice and

1 opportunity to respond, if the bankruptcy court deems it appropriate
2 to pursue a bar order against her.

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