NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-04-1461-PMaS
CHARLES E. BLAIR,	Bk. No. 01-17265
Debtor.	
CHARLES E. BLAIR,	
Appellant,	
v.	**MEMORANDUM**[1]
BETH MAXWELL STRATTON, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on
May 20, 2005 at Sacramento, California

Filed - June 20, 2005

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

Honorable Whitney Rimel, Bankruptcy Judge, Presiding

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Before: PERRIS, MARLAR 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.

The debtor in this chapter 7[2] case argues that the bankruptcy court erred in determining that the base upon which the trustee's fees were calculated could include funds disbursed by an escrow agent at the trustee's direction. We AFFIRM.

FACTS[3]

During the course of the bankruptcy case of Charles Eugene Blair ("debtor"), Beth Maxwell Stratton ("the trustee") administered two parcels of real property, referred to as the Rose Avenue Property and the Apartments. The trustee's administration culminated in the sale of both parcels free and clear of existing liens.

The bankruptcy court's orders approving sale of the properties specifically contemplated the use of an escrow agent to close the sales and pay off certain secured creditors. Both sales resulted in net funds for the estate. Debtor's creditors received 100% of their claims and there was a surplus for debtor.[4]

The trustee filed a Final Report and Application for Compensation and Reimbursement ("the fee application") requesting

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[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

[3] We have provided an abbreviated set of facts. Debtor states in his opening brief that he agrees with the statement of facts set forth by the bankruptcy court in its published opinion. See In re Blair, 313 B.R. 865 (Bankr. E.D. Cal. 2004).

[4] There is no dispute that the bankruptcy estate in this case is solvent. As a result, debtor has standing to challenge the trustee's fee application. See, e.g., In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7, 10 (1st Cir. 1993)(a solvent debtor has standing to appeal orders affecting the size of his estate).

fees in the amount of $34,726.47. As the Bankruptcy Code requires, the trustee calculated her maximum fees based on disbursements in the case. The trustee included in the base amount funds disbursed to the secured creditors by the escrow company in connection with liquidation of the two properties.

Debtor objected to the amount of fees requested by the trustee. The bankruptcy court entered an order overruling debtor's objection and awarding the trustee the full amount of fees requested. Debtor timely appealed.

ISSUE

Whether the bankruptcy court erred in determining that a chapter 7 trustee's fee base can include amounts distributed to secured creditors through the escrow process.

STANDARD OF REVIEW

A bankruptcy court's award of trustee fees "will be upheld unless the awarding court abused its discretion or erroneously applied the law." S.W. Media, Inc. v. Rau, 708 F.2d 419, 422 (9th Cir. 1983). Debtor argues that the bankruptcy court erroneously applied the law, because it misconstrued § 326(a). This is a question of law that we review de novo. See In re Crouch, 199 B.R. 690, 691 (9th Cir. BAP 1996).

The trustee argues that "[t]he issue of whether the escrow holders . . . were acting as agents of the trustee is a question of fact[,]" which is reviewed for clear error. Appellee's Brief at 10. The clear error standard of review does not apply, because, as we discuss below, there is no question that the court authorized the

trustee to use an escrow handler in connection with the property sales. The resolution of this appeal turns on the proper construction of § 326(a), which is a question of law subject to de novo review.

DISCUSSION

The Bankruptcy Code directs that a trustee be awarded "reasonable compensation for actual, necessary services rendered . . . ." § 330(a)(1)(A). The compensation allowed under § 330 is subject to the ceiling set forth in § 326(a), which limits a chapter 7 trustee's compensation to a percentage of the funds disbursed by the trustee to creditors, specifically including secured creditors.[5] Debtor does not dispute the reasonableness of the compensation allowed to the trustee under § 330. The only argument raised by debtor on appeal is that the bankruptcy court exceeded the maximum amount allowed under § 326(a), because it improperly included in the base amount funds distributed to the secured creditors by the escrow agent.

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[5] § 326(a) states as follows:

> In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

Two bankruptcy court decisions cited by the trustee are directly on point. In In re Reid, 251 B.R. 512 (Bankr. W.D. Mo. 2000), the chapter 7 trustee discovered, marketed and sold several parcels of real property. Secured lienholders were paid by escrow agents at the closings. As framed by the bankruptcy court, the issue presented in Reid was

> whether those payments represent "moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including the holders of secured claims," even though the trustee did not himself write a check to those creditors.

Id. at 517 (quoting § 326(a))(footnote omitted). The court in Reid held as follows:

> I find that moneys can be disbursed by the trustee to creditors even though the trustee does not write the check or deliver an envelop [sic] with cash to such creditors. Buyers of real property may well be more comfortable, and more willing to buy, if the sale is closed through a third party, such as a title company or a real estate broker. That third party, who makes the actual disbursements to the secured creditor, does so pursuant to instructions from the trustee. In that situation, I find that disbursements are made "by" the trustee.

Id. at 518.

The second case, In re Tyczka, 287 B.R. 465 (Bankr. E.D. Mo. 2002), followed Reid. In Tyczka, the chapter 7 trustee authorized the title company to pay two secured creditors from the proceeds of the sale of debtor's residence. The court held that the funds distributed to the secured creditors by the title company could be included in the trustee's fee base, stating as follows:

> It is of no consequence that the disbursements of sale proceeds to the secured creditors . . . were actually made by the title company, rather than by [the] Trustee. [The] Trustee authorized these disbursements through his participation in the closing process. Therefore, the disbursements made by the

> title company are properly included in the calculation of [the] Trustee's maximum fees.

Id. at 469.

Debtor's reliance on In re Moreno, 295 B.R. 402 (Bankr. S.D. Fla. 2003) and In re Indoor-Outdoor Dining, Inc., 77 B.R. 952 (Bankr. S.D. Fla. 1987), is misplaced. The courts in Moreno and Indoor-Outdoor held that a trustee's fee base could not include funds distributed to creditors by a settlement agent and a title company, respectively. While we find the reasoning of Moreno and Indoor-Outdoor questionable, we need not decide whether the reasoning is persuasive because of factual distinctions. The trustees in Moreno and Indoor-Outdoor each failed to obtain court approval for the use of a third party to disburse the sale proceeds. See Moreno, 295 B.R. at 403; Indoor-Outdoor, 77 B.R. at 953. In contrast, the bankruptcy court in this case "expressly approved the use of an escrow holder and its role in distributing the sale proceeds to secured creditors" when it entered the orders approving sale of the properties. In re Blair, 313 B.R. 865, 869 (Bankr. E.D. Cal. 2004).

The Ninth Circuit Court of Appeals has observed that the policy underlying § 326(a) is to ensure that a trustee is compensated commensurate with the value of the services conferred on the bankruptcy estate. S.W. Media, Inc. v. Rau, 708 F.2d 419, 423 (9th Cir. 1983). "'The crucial test seems to be . . . whether or not the particular property or fund has been justifiably administered in the bankruptcy court, or whether or not the trustee has properly

performed services in relation thereto.'" Id. at 424 n.4 (quoting In re Schautz, 390 F.2d 797, 800 (2d Cir. 1968)). In this case, debtor does not dispute the bankruptcy court's finding that the sales benefitted the estate, and thus that the trustee justifiably administered the properties. See Blair, 313 B.R. at 870. Likewise, there is no suggestion that the trustee improperly performed her services.

Debtor argues that the bankruptcy court's interpretation of § 326(a) violates the plain meaning rule of statutory construction. We reject this argument. While § 326(a) provides that a trustee's compensation is based on amounts disbursed "by the trustee[,]" allowing the fee base to include funds distributed to the secured creditors through the escrow process is not inconsistent with the plain meaning of § 326(a), because the escrow handler was acting as the trustee's agent and following the trustee's instructions when it distributed funds to the secured creditors. Therefore, in a legal sense, the distributions were made by the trustee.

"An escrow holder is an agent . . . of the parties to the escrow." Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co., 41 P.3d 548, 551 (Cal. 2002). An agent is "[o]ne who is authorized to act for or in the place of another; a representative." BLACK'S LAW DICTIONARY 68 (8th ed. 2004). A court should "presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so." United States v. Baxter Int'l Inc., 345 F.3d 866, 900 (11th Cir. 2003), cert. denied, 124 S.

Ct. 2907 (2004). See also In re Tsurukawa, 287 B.R. 515, 525 (9th Cir. BAP 2002)(Congress generally did not intend for the Bankruptcy Code to preempt common law).

There is no indication that Congress intended to override well-established principles of agency law when it enacted § 326(a). To the contrary, the legislative history indicates that Congress intended that a trustee be compensated for liquidating secured property:

> It should be noted that the bases (sic) on which the maximum fee is computed includes moneys turned over to secured creditors, to cover the situation where the trustee liquidates property subject to a lien and distributes the proceeds.

8 NORTON BANKRUPTCY CODE PAMPHLET 2004-2005 EDITION, 157 (quoting House and Senate reports). As the court in Reid correctly noted, parties routinely use a neutral third party to liquidate real property. 251 B.R. at 518.

While debtor does not dispute that the bankruptcy court did, in fact, authorize the use of an escrow agent when it approved sale of the properties, he does argue that the court's authorization was improper, because the agent was not employed pursuant to § 327 and because use of the escrow agent violated § 345.

We decline to address these arguments. Nothing in the record provided on appeal suggests that debtor raised either of these arguments at any point in the bankruptcy proceedings. We do not consider an issue raised for the first time on appeal where, as here, there are no exceptional circumstances, no change in the law since the trial court acted and the issue is not a pure issue of

law. In re Ehrle, 189 B.R. 771 (9th Cir. BAP 1995). The bankruptcy court expressly authorized use of an escrow agent when it entered the orders approving sale of the properties. If debtor believed that that authorization violated §§ 327 and/or 345, the time to object was in connection with the sale of the properties. Debtor will not be permitted to collaterally attack the sale orders in this appeal.

If we were to reach the merits of debtor's arguments regarding §§ 327 and 345, we likely would reject them. Section 327 states as follows:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

Not every person employed by a trustee is a "professional person" within the meaning of § 327. A "professional person" "'is one who takes a central role in the administration of the bankruptcy estate and in the bankruptcy proceedings[.]'" In re Napoleon, 233 B.R. 910, 914 n.1 (Bankr. N.J. 1999)(quoting In re D'Lites of Am., Inc., 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989)). Individuals or entities that perform mechanical, nondiscretionary tasks are not "professional persons" within the meaning of § 327. In re ACandS, Inc., 297 B.R. 395, 402 (Bankr. Del. 2003); In re Fretheim, 102 B.R. 298, 299 (Bankr. Conn. 1989). An escrow agent cannot exercise discretion; it is a limited agent that "must comply strictly with the instructions of the parties." Summit Fin., 41 P.3d at 552.

Section 345 states, in relevant part, as follows:

> (a) A trustee . . . may make such deposit or investment of the money of the estate . . . as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.
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> (b) Except with respect to a deposit or investment that is insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States, the trustee shall require from an entity with which such money is deposited or invested-
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> (1) a bond-
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> (A) in favor of the United States;
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> (B) secured by the undertaking of a corporate surety approved by the United States trustee for the district in which the case is pending; and
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> (C) conditioned on-
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> (i) a proper accounting for all money so deposited or invested and for any return on such money;
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> (ii) prompt repayment of such money and return; and
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> (iii) faithful performance of duties as a depository; or
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> (2) the deposit of securities of the kind specified in section 9303 of title 31;
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> unless the court for cause orders otherwise.

(Emphasis supplied.) Section 345 regulates the types of deposits and investments a trustee may make. The trustee in this case did not deposit the sale proceeds with the escrow company; the purchasers of the properties did. Debtor does not allege that the trustee failed to comply with § 345 when the net funds were ultimately transferred to her by the escrow agent. Even if § 345

did apply, a court can order that the security requirements of § 345 not apply when cause exists. The bankruptcy court in this case arguably did just that when it approved the use of an escrow agent in the sale orders.[6]

Finally, debtor's discussion of the constructive disbursement doctrine is not relevant to the matter before us for two reasons. First, the constructive disbursement doctrine "allows a trustee to receive compensation for disbursements of property or other consideration which are deemed to be 'moneys disbursed or turned over' under § 326(a)." In re Lan Assocs. XI, L.P., 192 F.3d 109, 118 (3d Cir. 1999)(quoting § 326(a)). In this case, actual money was disbursed.[7] Second, as the Lan court noted, the courts are split as to the propriety of allowing a trustee's compensation to be based on the value of property or other non-monetary consideration. See id. at 118 (rejecting constructive disbursement doctrine).

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[6] Debtor, in his reply brief, requests that we take judicial notice of a copy of a list of authorized depositories for the Eastern District of California. The escrow agent used by the trustee (Fidelity Title) does not appear on the list. We hereby deny debtor's request for judicial notice. There is no indication that the list was made part of the record before the bankruptcy court. We cannot consider evidence that was not filed below. In re McCoy, 111 B.R. 276, 279 (9th Cir. BAP 1990). In addition, taking judicial notice of the list would serve no purpose, given our conclusion that § 345 is not implicated in this case.

[7] The courts in Moreno and Indoor-Outdoor, which cases are discussed above, rejected application of the constructive disbursement doctrine as an alternative basis for disallowing the requested fees. It is not clear why the Moreno and Indoor-Outdoor courts even discussed the constructive disbursement doctrine, given that actual money, not property or other non-monetary consideration, was disbursed in both cases.

However, despite debtor's convoluted arguments to the contrary, the Ninth Circuit adopted the constructive disbursement doctrine in York Int'l Bldg., Inc. v. Chaney, 527 F.2d 1061, 1074 n.12 (9th Cir. 1975)(treating assumption of existing mortgage as a disbursement), a fact it acknowledged, in dicta, in a subsequent case. See Rau, 708 F.2d at 423-24.

CONCLUSION

For the reasons set forth above, we AFFIRM.