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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NOT FOR PUBLICATION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. CC-12-1186-HaMkH
)
 MAURA SANTANA and) Bk. No. 10-14139-WB
 TEODORO SANTANA,)
)
 Debtors.)
 _____)
)
 ESPERANZA VENTUS BADA;)
 LAW OFFICES OF ESPERANZA V. BADA,)
)
 Appellants,)
)
 v.) **M E M O R A N D U M**¹
)
 NANCY K. CURRY, Chapter 13 Trustee;)
 TEODORO SANTANA; MAURA SANTANA,)
)
 Appellees.)
 _____)

Submitted Without Oral Argument
on September 21, 2012

Filed - December 19, 2012

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

Honorable Julia W. Brand, Bankruptcy Judge, Presiding

Before: HAMMOND², HOLLOWELL and MARKELL Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. M. Elaine Hammond, Bankruptcy Judge for the Northern District of California, sitting by designation.

1 for Carlson as Debtor's counsel.

2 On June 25, 2010, Appellee Nancy Curry, chapter 13 trustee,
3 ("Trustee") filed a motion for an order requiring Carlson to provide
4 an accounting of attorney fees received and to disgorge such fees
5 ("Carlson Disgorgement Motion"). In support of the motion the
6 Trustee filed the declaration of debtor Maura Santana who stated
7 that neither Bada nor Carlson advised Debtors regarding their
8 chapter 13 cases or answered Debtors' questions. Debtors never
9 learned why their First Chapter 13 Case was dismissed. The Carlson
10 Disgorgement Motion was served upon Carlson at Law Firm on June 25,
11 2010.

12 Debtors' Second Chapter 13 Case was dismissed on August 5,
13 2010. However, the court retained jurisdiction "on all issues
14 arising under Bankruptcy Code Sections 110, 329 and 362." Order and
15 Notice of Dismissal (Aug. 5, 2010) at p.1.⁴

16 Carlson did not respond to the Carlson Disgorgement Motion. At
17 the July 21, 2010 hearing, the court ordered Carlson to provide a
18 detailed accounting of all fees received in both chapter 13 cases
19

20 ⁴ In order to fully understand the facts underlying this
21 appeal, we have taken judicial notice of documents filed with the
22 bankruptcy court on its electronic docket. See O'Rourke v. Seaboard
23 Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1988); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

24 A further review of the bankruptcy docket shows that the Second
25 Chapter 13 Case was closed on March 2, 2011. With an order entered
26 November 28, 2011, the closing order was set aside due to clerical
error and the case reopened "for further administration of the
motion for an Order to Show Cause filed on 6-27-11."

1 and to disgorge such fees by August 31, 2010 ("Carlson Disgorgement
2 Order").

3 On June 27, 2011, the Trustee filed a motion for an order to
4 show cause why Debtors' former attorneys Carlson and Bada should not
5 be held in contempt for failure to comply with the Carlson
6 Disgorgement Order ("Motion for OSC"). It was served upon Carlson
7 at Law Firm and at his State Bar address as well as upon Bada at her
8 State Bar address.

9 Bada filed an opposition to the Motion for OSC on July 6, 2011,
10 stating that she was not named a party in Trustee's prior motion as
11 well as the Carlson Disgorgement Order and should therefore not be
12 held in contempt.

13 The Motion for OSC was set for hearing on January 11, 2012.
14 The Notice of Rescheduled Hearing was served upon Carlson and Bada
15 at their respective State Bar addresses.

16 The Trustee filed a response to Bada's opposition on
17 December 14, 2011, stating that Bada consulted with Debtors prior to
18 filing the petition and was counsel of record for the First
19 Chapter 13 Case, for which she received \$4,000 as well as the
20 petition filing fee of \$274.

21 Bada filed a reply to Trustee's response on December 28, 2011,
22 addressing the merits of the Trustee's disgorgement request. Bada
23 argued that Debtors are not entitled to disgorgement because: 1) The
24 fees paid were earned because Carlson provided all services
25 necessary and made all appearances. The First Chapter 13 case was
26 dismissed due to Debtors' failure to cooperate. 2) Bada was not

1 named a party in Trustee's motion or the Carlson Disgorgement Order
2 and had no standing to respond to the motion. By asking the court
3 to hold Bada in contempt Trustee is denying Bada the constitutional
4 right to due process. 3) The fees paid were a classic retainer,
5 earned upon receipt, that never became property of the estate and
6 that is, thus, not subject to disgorgement.

7 Again on January 4, 2012, Bada filed a supplemental reply
8 listing further case law in support of her contention that a classic
9 retainer is not subject to disgorgement.

10 The Motion for OSC was heard on January 11, 2012. At the
11 hearing the court stated that it is "an issue" that neither Bada nor
12 Law Firm were identified in the Carlson Disgorgement Motion. The
13 court further stated that it will "issue a separate order, an
14 initial order, requiring Mrs. Bada to account and disgorge . . . on
15 [its] own motion." Hr'g Tr. January 11, 2012 at p. 1, line 23
16 through p.2, line 1. Moreover, the court found that the retainer
17 agreement identified Bada and Law Firm as attorneys who received the
18 fees. Bada confirmed having received the fees as cash payment.
19 Thereupon the court told Bada "[y]ou need to account and disgorge"
20 and reiterated that it will issue a separate order requiring Bada
21 and Law Firm to account and disgorge. Hr'g Tr. January 11, 2012 at
22 p. 2, line 6.

23 Following the hearing the court granted the Motion for OSC as
24 to Carlson and set a hearing for March 7, 2012, ("Carlson OSC
25 Order").

26 The court also entered an order on February 10, 2012, requiring

1 Bada to provide a detailed accounting of fees received in both
2 chapter 13 cases and to disgorge such fees⁵ by March 1, 2012 ("First
3 Bada Order"). The First Bada Order was served upon Carlson at Law
4 Firm on February 12, 2012. The "Notice of Entered Order and Service
5 List" attached to the order also shows service to Bada at Law Firm,
6 but does not indicate a date.

7 On February 15, 2012, Bada filed a response to the Carlson OSC
8 Order stating that in case she was required to respond prior to the
9 March 7, 2012 hearing she submits her arguments as listed in the
10 December 28, 2011 opposition. She further requested that the court
11 at the March 7, 2012 hearing make a determination as to whether the
12 fees paid were a classic retainer.

13 On March 20, 2012, the court again entered an order requiring
14 Bada to account in detail and disgorge fees received in both
15 chapter 13 cases by April 10, 2012, ("Second Bada Order").⁶

16 Bada filed a Notice of Appeal of the Second Bada Order on
17 April 2, 2012.

18 She also filed a response to the Second Bada Order on April 10,
19 2012, essentially stating the same arguments as made in her
20 appellate brief.

21
22 ⁵ We do not understand why the bankruptcy court ordered
23 accounting and disgorgement at the same time. Since one follows the
24 other, courts usually order an accounting first and based on the
accounting received address the amount to be disgorged.

25 ⁶ This order is substantially the same order that was entered
26 February 10, 2012, aside from expressly naming Bada and Law Firm as
recipients of the fees and a new due date.

1 Cir. 2004). A factual finding is clearly erroneous if, after
2 reviewing the record, the appellate court has a definite conviction
3 an error has been made. In re Beauchamp, 236 B.R. 727, 729-730 (9th
4 Cir. BAP 1999). A bankruptcy court's determination of attorneys'
5 fees will not be disturbed on review "unless the bankruptcy court
6 abused its discretion or erroneously applied the law." In re
7 Strand, 375 F.3d 854, 856-57 (9th Cir. 2004); see also Sunbelt
8 Developers, 608 F.3d at 461.

10 DISCUSSION

11 Finality and Appealability of Second Bada Order

12 Before addressing the issues raised in the parties' briefs, we
13 turn to the peculiar history of the order on appeal.

14 In this case the bankruptcy court entered three disgorgement
15 orders and one order to show cause.

16 The Carlson Disgorgement Order was entered on June 25, 2010;
17 the Carlson OSC Order on February 10, 2012.

18 The court also issued two disgorgement orders with
19 substantially the same content addressed to Bada. The First Bada
20 Order was entered on February 10, 2012, and served by BNC upon
21 Carlson at Law Firm on February 12, 2012. The "Notice of Entered
22 Order and Service List" attached to the order also shows service to
23 Bada at Law Firm, but does not indicate a date. The Second Bada
24 Order was entered on March 20, 2012, and served exactly as the prior
25 order on March 22, 2012.

26 Bada filed a Notice of Appeal regarding the Second Bada Order.

1 In her brief she claims not having received service of the First
2 Bada Order, but acknowledges service of the Second Bada Order that
3 was served the same way as the prior order. The bankruptcy docket
4 is completely silent as to the bankruptcy court's reasons for
5 entering the Second Bada Order.

6 We review the appellate record to determine if the First Bada
7 Order is a final order. "A disposition is final if it contains 'a
8 *complete act of adjudication,*' that is, a full adjudication of the
9 issues at bar, and clearly evidences the judge's intention that it
10 be the court's final act in the matter." Slimick v. Silva
11 (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990).

12 At the January 11, 2012 hearing on the Motion for OSC, the
13 court stated that as a result of due process concerns, it would
14 issue an "initial order" to Bada requiring Bada to account and
15 disgorge by February 1. Hr'g Tr. January 11, 2012 at p. 1, line 23
16 through p. 2, line 20. The First Bada Order was then entered on
17 February 10, 2012. At the next hearing, on March 7, 2012, the court
18 stated that she had entered on February 10, 2012 the First Bada
19 Order requiring Bada to account and disgorge. Hr'g Tr. March 7, 2012
20 at p. 3, lines 5-10. Thus, the court's statements at both hearings
21 support a finding that the court intended the First Bada Order to be
22 a final order. Further, the language of the First Bada Order and
23 Second Bada Order is virtually identical. This strong identity
24 between the two orders and the court's statements on the record show
25 that the First Bada Order was a complete adjudication and the
26 court's final act in the matter of disgorgement. Entry of the

