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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NOT FOR PUBLICATION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

5	In re:)	BAP No.	CC-10-1103-MkHKi
6	AGNES B. CREGAR,)	Bk. No.	RS 09-23096-CB
7	Debtor.)		
8	_____)		
9	AGNES B. CREGAR,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	CHRISTOPHER R. BARCLAY,)		
13	Chapter 7 Trustee,)		
14	Appellee.)		
	_____)		

Argued and Submitted on September 23, 2010
at Pasadena, California

Filed - November 19, 2010

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Glenn Ward Calsada of the Law Offices of Glenn Ward Calsada appeared for Appellant Agnes B. Cregar
Yosina Lissebeck of Solomon Ward Seidenwurm & Smith, LLP appeared for Appellee Christopher R. Barclay, Chapter 7 Trustee

Before: MARKELL, HOLLOWELL and KIRSCHER, Bankruptcy Judges.

*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.

1 as exempt on her Schedule C list of property claimed as exempt.
2 Cregar's Schedule B did not list any accounts receivable or any
3 contingent or unliquidated claims for wages earned but not yet
4 paid.

5 The Trustee first examined Cregar pursuant to § 341(a) on
6 July 24, 2009. The Trustee continued the examination from time
7 to time, with the last date of examination occurring on
8 January, 6, 2010. Neither party has provided us with a record of
9 the examinations, but the Trustee apparently requested, and
10 Cregar apparently produced, various documents pertaining to her
11 financial condition.

12 Based on the examinations and Cregar's documents, the
13 Trustee sent Cregar a demand letter on October 29, 2009.
14 According to the Trustee, Cregar's actual bank account balances
15 on the date of her bankruptcy filing were more than double what
16 Cregar represented on her Schedule B. Whereas Cregar had listed
17 \$5,000 as the aggregate amount held in her bank accounts, the
18 actual aggregate amount was \$10,235.79. In addition, the Trustee
19 asserted that Cregar had failed to disclose on her schedules
20 \$21,236.25 in accounts receivable that, at the time of her
21 bankruptcy filing, she was owed on account of prepetition
22 anesthesiologist services.

23 The so-called accounts receivable, in part, consisted of
24 \$10,736.25 that Saint Mary's Medical Center owed Cregar for
25 services rendered in May 2009. Saint Mary's Medical Center paid
26 this amount to Cregar by check on June 15, 2009. According to
27 the Trustee, Cregar deposited Saint Mary's check on June 22,
28 2009, after she filed her bankruptcy but before she filed her

1 bankruptcy schedules. The remainder of the unreported
2 receivables consisted of monies that Sung O. Hyun, MD, a
3 professional corporation ("Hyun"), owed Cregar for services
4 rendered in May and June 2009. Hyun paid Cregar \$21,000 by check
5 dated July 12, 2009, but the Trustee only attributed 50% of the
6 \$21,000 to Cregar's prepetition services (apparently because
7 Cregar filed her bankruptcy halfway through June 2009). The
8 Trustee's October 29, 2009, demand letter requested that Cregar
9 turnover to the Trustee within ten days the unreported portion of
10 Cregar's bank account balances (\$5,235.79) and the unreported
11 prepetition accounts receivable (\$21,236.25).

12 In response to the Trustee's October 29, 2009, demand
13 letter, Cregar filed amended bankruptcy schedules on November 18,
14 2009. Cregar's Amended Schedule B listed the full \$10,235.79
15 that Cregar held in her bank accounts on the date of her
16 bankruptcy filing, and also listed \$21,236.25 in "Earned Wages
17 received post petition." Whereas the Trustee characterized the
18 \$21,236.25 as accounts receivable, the Debtor asserted that this
19 amount actually constituted wages from employment. Cregar's
20 Amended Schedule C claimed all of the above amounts as exempt
21 under Cal Code of Civil Procedure §§ 703.140(b)(1), (b)(5) and
22 706.050, and under 15 U.S.C. § 1673. As additional legal support
23 for her claimed exemptions, Cregar cited to an unreported
24 bankruptcy case, In re Lantz, Case No. 0713481-A-7K (Bankr. E.D.
25 Cal. January 13, 2009).

26 On February 5, 2010, the Trustee timely filed an objection
27
28

1 to Cregar's amended exemption claims.³ The Trustee reiterated
2 the points that he had made in his October 29, 2009, demand
3 letter. In essence, he asserted that Cregar's undervaluation of
4 her bank accounts and her failure to report amounts owed to her
5 for prepetition services amounted to bad faith that should result
6 in disallowance of her exemption claims as amended. The Trustee
7 also argued that Cregar's service agreements, her work history as
8 an anesthetist, and disclosures that she made in her bankruptcy
9 filings and in her tax returns all established that the monies
10 she was paid for her May and June services were business income,
11 or receivables, and were not wages from employment.

12 On February 23, 2010, Cregar filed her response and her
13 declaration in opposition to the Trustee's exemption claim
14 objection. Cregar did not dispute that she had undervalued her
15 bank accounts by 50%, or that she had failed to list \$21,236.25
16 in wages/receivables. However, she argued that these
17 inaccuracies were the result of her inadvertence or mistake,
18 rather than bad faith. Cregar argued that, because she
19 historically accounted for her income and expenses on a cash
20 basis, she initially believed that her earned but unpaid
21 wages/receivables did not count as assets that needed to be
22 reported on her bankruptcy schedules. As for the bank accounts,
23 according to Cregar, as a result of the financial pressure she
24 was experiencing at the time, she just plain forgot to add in all
25 of the balances from her three bank accounts into her schedules.

26 ³The Trustee filed his exemption claim objection within
27 thirty days of the January 6, 2010 conclusion of Cregar's
28 § 341(a) examination, and thus the objection was timely under
Rule 4003(b).

1 Cregar further asserted that, at all times, she cooperated with
2 the Trustee's examination and his requests for documents, and
3 that her cooperation negated any inference that she initially
4 attempted to conceal some of her assets by not listing them in
5 her schedules.

6 The balance of Cregar's response was devoted to the issue of
7 whether the receivables/wages should be properly characterized as
8 receivables or wages, and whether they qualify for exemption
9 under California law. Finally, Cregar requested an evidentiary
10 hearing, as she contended that an evidentiary hearing was
11 necessary to resolve disputed material questions of fact.⁴ While
12 Cregar's response indicated a dispute as to a number of facts
13 concerning the characterization issue, the only apparent disputed
14 fact relevant to Cregar's alleged bad faith was the ultimate
15 fact of her subjective state of mind.

16 The bankruptcy court held oral argument on the Trustee's
17 exemption claim objection on March 10, 2010. Prior to the
18 hearing, the court issued a bare-bones tentative ruling
19 sustaining the Trustee's objection; the tentative ruling did not
20 offer any findings or legal analysis in support of the court's
21 ruling.⁵

23 ⁴Cregar also had asserted the need for an evidentiary
24 hearing in a letter she sent to the Trustee in November 2009.

25 ⁵Neither of the parties included the tentative ruling in
26 excerpts of record, but we retrieved it from the bankruptcy
27 court's public website, www.cacb.uscourts.gov. We can take
28 judicial notice of its contents. See O'Rourke v. Seaboard Sur.
Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1989); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 Cregar primarily argued at the hearing that there was
2 insufficient evidence that she intentionally attempted to conceal
3 assets by omitting or understating assets in her original
4 schedules. The bankruptcy court disagreed. According to the
5 court:

6 And it's really inconceivable to me that somebody who
7 is under this time of extreme financial pressure can
8 forget that they worked for someone, maybe they don't
9 have the contract, and know that some money is going to
10 be coming in and just kind of forget about it. \$21,000
11 is a lot of money to anyone I think and to have to be
12 asked by the trustee I see that as bad faith in general
13 with regard to the bankruptcy system.

14 The CD [one of Cregar's three so-called bank accounts]
15 if it were just one thing maybe not but the \$21,000
16 that's a lot of money. She may not have known exactly
17 how much it was going to be, but she knew she had a big
18 receivable coming in and she just happens to file
19 bankruptcy right at the time that money is about to
20 come in. I see that as having badges of bad faith all
21 over the place.

22 Hearing Transcript (March 10, 2010) at 7:18-8:6. The court also
23 found it significant that Cregar did not amend her schedules
24 until after the Trustee confronted her on the omitted/undervalued
25 items and demanded turnover of funds.

26 Cregar reiterated her request for an evidentiary hearing,
27 but the court expressed its intention to abide by its tentative.
28 The bankruptcy court thereafter entered an order sustaining in
full the Trustee's objection to Cregar's amended exemption
claims, and Cregar timely appealed.

29 JURISDICTION

30 The bankruptcy court had jurisdiction under 28 U.S.C.
31 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
32 § 158.
33

1 **ISSUE**

2 Did the bankruptcy court abuse its discretion when it
3 declined to hold an evidentiary hearing on the Trustee's
4 exemption claim objection?⁶

5 **STANDARDS OF REVIEW**

6 The bankruptcy court's decision not to conduct an
7 evidentiary hearing is subject to review under the abuse of
8 discretion standard. See Tyner v. Nicholson (In re Nicholson),
9 435 B.R. 622, 629 (9th Cir. BAP 2010). Under this standard, we
10 apply a two-part test. First, we consider de novo whether the
11 bankruptcy court identified the correct law to consider in light
12 of the relief requested. United States v. Hinkson, 585 F.3d
13 1247, 1262 (9th Cir. 2009). Second, we review the bankruptcy
14 court's factual findings, and its application of those findings
15 to the relevant law, to determine whether they were either
16 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
17 inferences that may be drawn from the facts in the record.'" Id.
18 (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564,
19 577 (1985)).

20 **DISCUSSION**

21 **A. Generally applicable law on exemptions, amendments to
22 bankruptcy schedules and bad faith.**

23 Upon filing, all of Cregar's legal and equitable interests
24 in property became part of her bankruptcy estate, subject to her

25 _____
26 ⁶The parties also have briefed on appeal issues concerning
27 the sufficiency of the evidence tending to show bad faith, the
28 proper characterization of the receivables/wages, and the extent
to which the receivables/wages are exempt under California law.
In light of our holding, below, we decline to reach these issues.

1 exemption rights. §§ 541(a) and 522; Schwab v. Reilly, 130 S.Ct.
2 2652, 2657 (2010). Property of the estate also includes all
3 “[p]roceeds, product, offspring, rents, or profits of or from
4 property of the estate, except such as are earnings from services
5 performed by an individual debtor after the commencement of the
6 case.” § 541(a)(6). A debtor must list her assets on her
7 bankruptcy schedules whether or not she claims them as exempt.
8 See §§ 521(a)(1)(B)(i), 522(l).

9 Amendments to a debtor’s schedules, including exemption
10 claims, are liberally permitted at any time before the case is
11 closed. See Rule 1009(a). However, a bankruptcy court may
12 disallow an amended exemption claim if the trustee or another
13 party in interest timely objects and shows that the debtor has
14 acted in bad faith or that the creditors have been prejudiced.
15 In re Nicholson, 435 B.R. at 630; Arnold v. Gill (In re Arnold),
16 252 B.R. 778, 784 (9th Cir. BAP 2000). In order to prevail on
17 the bad faith issue, the objecting party must establish bad faith
18 by a preponderance of the evidence. In re Nicholson, 435 B.R. at
19 634.

20 The bankruptcy court must consider the totality of the
21 circumstances in determining whether the debtor acted in bad
22 faith. In re Nicholson, 435 B.R. at 634. An intentional attempt
23 to conceal estate assets is a recognized basis for finding bad
24 faith. See id.; In re Arnold, 252 B.R. at 785. A finding of
25 intentional concealment is sufficient to support a court’s
26 decision to disallow an exemption claim on bad-faith grounds
27 because our bankruptcy system cannot effectively function unless
28 debtors honestly report their financial condition. See In re

1 Yonikus, 996 F.2d 866, 872 (7th Cir. 1993). The debtor's
2 subjective state of mind is an important factor in determining
3 debtor's intent and alleged bad faith. See Nicholson, 435 B.R.
4 at 635 (citing Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828
5 (9th Cir. 1994)).

6 The bankruptcy court must make sufficient findings to
7 support its determination of bad faith. Cogliano v. Anderson
8 (In re Cogliano), 355 B.R. 792, 801 (9th Cir. BAP 2006) (citing
9 Garner v. Shier (In re Garner), 246 B.R. 617, 623 (9th Cir. BAP
10 2000)); Magallanes v. Williams (In re Magallanes), 96 B.R. 253,
11 256 (9th Cir. BAP 1988); see also Rule 9014(c) (incorporating the
12 provisions of Rule 7052, which in turn incorporates Civil Rule
13 52). Civil Rule 52 provides in relevant part:

14 (a) Effect. In all actions tried upon the facts without
15 a jury . . . , the court shall find the facts specially
16 and state separately its conclusions of law thereon,
17 and judgment shall be entered pursuant to Rule 58. . .
18 . It will be sufficient if the findings of fact and
19 conclusions of law are stated orally and recorded in
20 open court following the close of the evidence or
21 appear in an opinion or memorandum of decision filed by
22 the court.

19 The bankruptcy court here made no formal written findings,
20 but a fair reading of the transcript from the March 10, 2010
21 hearing indicates that the court found that Cregar had
22 intentionally concealed earned but unpaid wages/receivables, and
23 had intentionally undervalued her bank accounts, at the time she
24 filed her original bankruptcy schedules, and thus her amended
25 exemption claims should be disallowed on the grounds of bad
26 faith.

27 **B. Absence of requested evidentiary hearing.**

28 Two competing rules control the requirement of an

1 evidentiary hearing in bankruptcy cases. On the one hand, in
2 "motion practice" bankruptcy courts generally enjoy broad
3 discretion to determine whether to hold an evidentiary hearing at
4 which live testimony can be presented. See Civil Rule 43(c)
5 (made applicable in bankruptcy cases by Rule 9017). On the other
6 hand, Rule 9014 (which governs "contested matters") was amended
7 in 2002 to add a provision specifying that "[t]estimony of
8 witnesses with respect to disputed material factual issues shall
9 be taken in the same manner as testimony in an adversary
10 proceeding." Fed.R.Bankr.P. 9014(d). The Advisory Committee
11 Note accompanying this amendment explains:

12 [s]ubdivision (d) is added to clarify that **if the**
13 **motion cannot be decided without resolving a disputed**
14 **material issue of fact, an evidentiary hearing must be**
15 **held at which testimony of witnesses is taken in the**
16 **same manner as testimony is taken in an adversary**
17 **proceeding or at a trial in a district court civil**
18 **case. Rule 43(a), rather than Rule 43(e) [now Rule**
19 **43(c)], F.R.Civ.P. would govern the evidentiary hearing**
20 **on the factual dispute.** Under Rule 9017, the Federal
21 Rules of Evidence also apply in a contested matter.
22 Nothing in the rule prohibits a court from resolving
23 any matter that is submitted on affidavits by agreement
24 of the parties.

25 2002 Advisory Committee Note to Fed.R.Bankr.P. 9014(d) (emphasis
26 added).

27 Simply put, Civil Rule 43(c) (incorporated by Rule 9017)
28 affords a bankruptcy court with discretion to not hold an
evidentiary hearing on motions, and Rule 9014(d) limits that
discretion. However, we need not attempt to reconcile Rule
9014(d) with Civil Rule 43(c) (as applied in bankruptcy cases).
For our purposes, it suffices for us to say that the need for an
evidentiary hearing on the issue of Cregar's intent was clear and
compelling, and it was an abuse of discretion under either of the

1 above-cited rules for the bankruptcy court to not hold an
2 evidentiary hearing on the issue of Cregar's subjective state of
3 mind.

4 As stated above, a debtor's subjective state of mind is an
5 important factor in determining the debtor's intent and alleged
6 bad faith. See Nicholson, 435 B.R. at 635. Furthermore, a
7 court's consideration of a litigant's state mind, for purposes of
8 determining intent, largely turns on the court's assessment of
9 that litigant's credibility. See, e.g., Hernandez v. New York,
10 500 U.S. 352, 364 (1991); Batson v. Kentucky, 476 U.S. 79, 98 &
11 n.21 (1986). In turn, a bankruptcy court abuses its discretion
12 when it refuses to hold an evidentiary hearing on disputed
13 questions of fact that hinge on the credibility of a witness.
14 See Svob v. Bryan (In re Bryan), 261 B.R. 240, 247-48 (9th Cir.
15 BAP 2001) (citing United Commercial Ins. Serv. v. Paymaster
16 Corp., 962 F.2d 853, 858 (9th Cir. 1992)). Similarly, a trial
17 court cannot make credibility determinations as part of summary
18 judgment proceedings. See Hauk v. JP Morgan Chase Bank USA, 552
19 F.3d 1114, 1118 (9th Cir. 2009).

20 Here, Cregar raised a disputed material issue of fact
21 regarding her intent. She asserted in her declaration testimony
22 that she initially filed inaccurate schedules by mistake or
23 inadvertence. Moreover, she did not consent to resolution of the
24 intent issue without an evidentiary hearing. To the contrary, at
25 every conceivable point she asserted her right to offer live
26 testimony: she requested an evidentiary hearing in her
27 responsive papers, and she reiterated that request at the
28 bankruptcy court's non-evidentiary hearing. She also asserted

1 the need for an evidentiary hearing in correspondence to the
2 Trustee. Under these circumstances, the court abused its
3 discretion by not holding an evidentiary hearing.⁷

4 We are not holding that questions of intent always turn on
5 the court's direct assessment of witness credibility. Sometimes,
6 the written record can fully resolve the issue of intent, and
7 contrary statements of the witness are wholly not credible on
8 their face. For instance, if a debtor neglected to list on her
9 schedules a two million dollar house in which she lived, and
10 later claimed she forgot she owned it, an evidentiary hearing to
11 determine her credibility would not be necessary, absent some
12 relevancy of mental defect. But the circumstances here presented
13 a much closer factual issue, and one in which Cregar should have
14 had the opportunity to present live testimony.

15 Accordingly, we hold that the bankruptcy court abused its
16 discretion when it declined to hold an evidentiary hearing on the
17 Trustee's exemption claim objection.

18 CONCLUSION

19 For the reasons set forth above, we VACATE the bankruptcy
20

21 ⁷In re Nicholson, 435 B.R. at 635-37, makes a number of
22 pronouncements on the discretion of the bankruptcy court to not
23 hold an evidentiary hearing to determine the debtors' alleged bad
24 faith. However, Nicholson is distinguishable because, unlike
25 Cregar, the debtor in Nicholson did not request an evidentiary
26 hearing in a manner that complied with the requirements of the
27 applicable local bankruptcy rules. Furthermore, all of
28 Nicholson's statements on this topic are dicta. Nicholson
already had determined that the order on appeal had to be vacated
because the bankruptcy court had applied the wrong standard of
proof. Consequently, it was unnecessary for Nicholson to address
the evidentiary hearing issue, and we decline to follow its
statements on this issue.

1 court's order sustaining the Trustee's objection to Cregar's
2 amended exemption claims, and REMAND for further proceedings.

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