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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-11-1628-DKiPa
)	
RICHARD E. MARIS and)	Bk. No. 09-12172-MKN
DEBORAH HARRIS,)	
)	
Debtors.)	
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BARRY LEVINSON, Esq.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
PENGILLY, ROBBINS, SLATER &)	
BELL; JAMES F. LISOWSKI,)	
Chapter 7 Trustee; UNITED STATES)	
TRUSTEE,)	
)	
Appellees.)	
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Argued and Submitted on June 15, 2012
at Las Vegas, Nevada

Filed - June 20, 2012

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Mike K. Nakagawa, Bankruptcy Judge, Presiding

Appearances: Appellant, Barry Levinson, Esq., in pro per;
Robert T. Robbins, Esq. of Pengilly, Robbins, Slater &
Bell, for the Appellee, Pengilly, Robbins, Slater &
Bell.

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.

1 Before: DUNN, KIRSCHER, and PAPPAS, Bankruptcy Judges.

2
3 After his former employer, Western Pride Construction, LLC
4 ("WPC"), obtained a state court judgment ("Judgment") in excess of
5 \$1,000,000 against him, Richard Maris filed a chapter 7² bankruptcy
6 petition ("Bankruptcy Case") and stipulated that the Judgment was
7 nondischargeable pursuant to § 523(a)(9). Thereafter, the
8 bankruptcy court approved the chapter 7 trustee's ("Trustee")
9 application to employ WPC's counsel, the law firm of Pengilly
10 Robbins Slater & Bell ("Pengilly"), pursuant to § 327(e), as special
11 counsel to file and prosecute a malpractice claim ("Malpractice
12 Claim") against Barry Levinson, the attorney who had represented
13 Mr. Maris in the litigation which led to the entry of the Judgment.
14 On Mr. Levinson's motion, the bankruptcy court vacated the order
15 authorizing the trustee's employment of Pengilly under § 327(e),
16 with leave to reapply under § 327(c). Because the bankruptcy court
17 denied Mr. Levinson's additional request that it impose monetary
18 sanctions on Pengilly, Mr. Levinson appealed.

19 We AFFIRM.

20 I. FACTS

21 Until 2005, Mr. Maris owned an electrical contracting
22 business, Regency Electric, Inc. ("Regency"). On March 25, 2005,

23
24 ² Unless otherwise specified, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure
are referred to as "Civil Rules."

1 Mr. Maris entered into a purchase agreement and employment agreement
2 ("Employment Agreement") with WPC, pursuant to which WPC purchased
3 Regency from Mr. Maris and hired Mr. Maris as the Vice President of
4 WPC's electrical division for an initial period of three years.
5 Under the Employment Agreement, Mr. Maris was provided a vehicle
6 ("Vehicle") for use in performing his services for WPC. The
7 Employment Agreement authorized WPC to terminate Mr. Maris'
8 employment during the first year of employment without full
9 severance pay for the remaining term "only in the event of a serious
10 moral, ethical, criminal or libelous act."

11 Mr. Maris' employment with WPC commenced on April 4, 2005.
12 On July 8, 2005, while driving WPC's Vehicle, Mr. Maris was involved
13 in an automobile accident ("Collision") which resulted in the death
14 of Monica Meily, the driver of the vehicle with which he collided.
15 At the time of the Collision, which occurred at 11:40 p.m.,
16 Mr. Maris was intoxicated, having just left a bar where he had been
17 drinking.

18 On September 5, 2005, Mr. Maris was charged with Involuntary
19 Manslaughter in connection with Ms. Meily's death in the Collision.
20 Mr. Maris signed an "Agreement to Appear in Court and to Waive
21 Extradition After Admission to Bail" in the criminal matter on
22 September 10, 2005. Mr. Maris pled guilty to the Involuntary
23 Manslaughter charge on April 11, 2007.

24 When he returned to work at WPC after the Collision,
25 Mr. Maris reported to WPC that he was not at fault for the
26 Collision. At no time did Mr. Maris inform WPC of the true facts of

1 the Collision.

2 Following the Collision, Mr. Maris' job performance declined.
3 In an effort to get pending electrical contracts "back on track,"
4 WPC required Mr. Maris to supervise from the field rather than from
5 his desk.

6 On September 12, 2005, Mr. Maris requested a meeting
7 ("September 12 Meeting") with Romy Pantea, the Managing Member of
8 WPC, to discuss the Employment Agreement. In the week prior to the
9 request, Mr. Maris had consulted with Mr. Levinson for advice on
10 enforcing the Employment Agreement. At the September 12 Meeting,
11 Mr. Maris told Mr. Pantea he no longer would supervise the pending
12 electrical jobs except from his desk. Because WPC refused to
13 authorize Mr. Maris to perform his supervisory role other than in
14 the field, Mr. Maris resigned. On September 22, 2005, Mr. Maris
15 sued WPC in state court ("State Court Litigation") for breach of the
16 Employment Agreement. Mr. Levinson represented Mr. Maris in the
17 State Court Litigation.

18 WPC, represented by Pengilly, filed counterclaims against
19 Mr. Maris in the State Court Litigation for implied and equitable
20 indemnity with respect to its potential liability to Ms. Meily's
21 estate, and for other damages it incurred as a result of the
22 Collision. WPC had been notified on July 26, 2005, that Ms. Meily's
23 heirs intended to bring legal action against WPC and its principals,
24 based upon their alleged liability with respect to the Collision.
25 WPC settled the threatened litigation in August of 2006, by paying,
26 with funds provided by its insurance carrier, \$1 million to

1 Ms. Meily's estate and her heirs. In addition, after the Vehicle
2 was determined to be a total loss and not repairable as a result of
3 the Collision, WPC also paid \$25,394.03 to satisfy the secured
4 obligation on the Vehicle.

5 A nonjury trial was held in the State Court Litigation on
6 February 8, 2008, following which the state court, on April 8, 2008,
7 issued its findings of fact and conclusions of law, as part of the
8 Judgment. The state court found that Mr. Maris, not WPC, had
9 breached the Employment Agreement, (1) when he took the Vehicle,
10 "went drinking at a bar," and thereafter drove the Vehicle and
11 caused the Collision that resulted in Ms. Meily's death; and
12 (2) when he became incapable of performing his job duties because he
13 entered a state of depression following the Collision.

14 The state court also determined that WPC had an absolute
15 right to indemnity from Mr. Maris as a result of his tortious
16 conduct in relation to the Collision, and entered the Judgment in
17 favor of WPC in the amount of \$1,034,738.30, which represented the
18 \$1 million WPC paid (through its insurer) to Ms. Meily's heirs,
19 \$25,394.03 to pay off the Vehicle Mr. Maris had wrongfully converted
20 to his own use, and \$9,344.27 to reimburse WPC for attorneys fees
21 incurred to the law firm that had defended WPC against the claims of
22 Ms. Meily's heirs.

23 On behalf of Mr. Maris, Mr. Levinson filed an appeal ("State
24 Court Appeal") from the Judgment on May 7, 2008. However, after
25 Mr. Maris filed his Bankruptcy Case on February 19, 2009,
26 Mr. Levinson withdrew from his representation of Mr. Maris in the

1 State Court Appeal. The State Court Appeal thereafter was
2 dismissed, without prejudice, on May 20, 2009.

3 On May 21, 2009, Pengilly filed a complaint in the Bankruptcy
4 Case ("Adversary Proceeding") seeking a determination that
5 Mr. Maris' debt to WPC represented by the Judgment was
6 nondischargeable pursuant to § 523(a)(9) and/or § 523(a)(6). The
7 Adversary Proceeding was dismissed February 10, 2010, on the
8 stipulation of WPC and Mr. Maris ("Stipulation").

9 In the course of negotiating the Stipulation, Mr. Maris
10 became aware for the first time that he held the Malpractice Claim
11 against Mr. Levinson in connection with the Judgment. On
12 December 10, 2009, Mr. Maris filed an amended Schedule B to include
13 the Malpractice Claim, with an unknown value, as an asset of his
14 bankruptcy estate. The Stipulation provided that Mr. Maris' debt to
15 WPC was nondischargeable pursuant to § 523(a)(9), but that WPC
16 agreed to dismiss the Adversary Proceeding with prejudice based upon
17 "a settlement agreement heretofore reached between the parties"
18 ("Settlement Agreement").

19 The Settlement Agreement was not attached to the Stipulation,
20 nor was it ever filed in the Adversary Proceeding. In fact, the
21 Settlement Agreement never was reduced to writing:

22 [Mr. Maris] agreed that if the [Malpractice Claim]
23 reverted to him, he would pursue it and pay an unspecified
24 portion of any proceeds to [WPC]. [Mr. Maris] also agreed
25 that he would consider employing [Pengilly] to pursue the
26 [Malpractice Claim]. However, this agreement was never
memorialized in writing. In the [Stipulation],
[Mr. Maris] stipulated that the debt was nondischargeable.
The [adversary proceeding] was dismissed with prejudice
and no judgment of nondischargeability was entered.

1 Pengilly Opposition to the Levinson Motion at 4:4-9.

2 On March 24, 2010, Pengilly filed a motion to compel the
3 Trustee to abandon the Malpractice Claim ("Abandonment Motion"),
4 which the Trustee opposed. The bankruptcy court denied the
5 Abandonment Motion by its order entered on April 12, 2010; however,
6 that order permitted the Trustee to file an application to employ
7 Pengilly to pursue the Malpractice Claim.

8 On behalf of Mr. Maris and the Trustee, Pengilly commenced
9 litigation against Mr. Levinson on the Malpractice Claim on April 7,
10 2010, immediately prior to the expiration of the limitations period,
11 without having obtained the approval of the bankruptcy court for its
12 employment. On September 18, 2010, the Trustee filed, pursuant to
13 § 327(e), his ex parte application to employ ("Employment
14 Application") Pengilly as special counsel, nunc pro tunc as of
15 April 6, 2010. No disclosure was made in the Employment Application
16 that the litigation on the Malpractice Claim had been commenced. On
17 September 22, 2010, the bankruptcy court authorized the employment
18 of Pengilly as requested ("Employment Order"). Under the fee
19 agreement approved in the Employment Order, any recovery in the
20 litigation on the Malpractice Claim was to be divided: 3% to the
21 Trustee, 33-40% to Pengilly, and the balance to WPC on account of
22 its nondischargeable unsecured claim.³

23 On April 20, 2011, Mr. Levinson filed a motion ("Levinson
24

25 ³ WPC's Judgment represents approximately 89% of the
26 unsecured claims Mr. Maris scheduled in the Bankruptcy Case.

1 Motion") to disqualify Pengilly as special counsel on the basis that
2 Pengilly was not eligible for employment pursuant to § 327(e) as
3 provided in the Employment Order, because Pengilly never had
4 represented Mr. Maris as is required by the express terms of
5 § 327(e). In the Levinson Motion, Mr. Levinson also preemptively
6 asserted there was no basis upon which the bankruptcy court could
7 approve the employment of Pengilly as special counsel under either
8 § 327(a) or § 327(c). Finally, the Levinson Motion requested that
9 the bankruptcy court impose monetary sanctions pursuant to Rule 9011
10 against Pengilly and the Trustee based upon their alleged bad faith
11 in connection with the Employment Application, and on the basis that
12 Pengilly had violated several ethical rules, including those
13 relating to honesty and as to conflicts of interest, in connection
14 with the request for entry of the Employment Order.

15 Following extensive briefing by the partes, the Levinson
16 Motion was heard on July 20, 2011. On October 25, 2011, the
17 bankruptcy court entered its order ("October 25 Order") vacating the
18 Employment Order. However, the October 25 Order authorized the
19 Trustee to seek approval of the employment of Pengilly, nunc pro
20 tunc as of April 6, 2010, as special counsel pursuant to § 327(c).
21 Finally, the October 25 Order provided that no sanctions against
22 Pengilly or the Trustee were awarded to Mr. Levinson. In support of
23 its determination to deny a sanctions award to Mr. Levinson, the
24 bankruptcy court stated that "sanctions against Pengilly or the
25 Trustee are not appropriate as the record does not sufficiently
26 establish that their prior efforts to employ Pengilly was [sic] in

1 bad faith."

2 Mr. Levinson timely filed his Notice of Appeal on
3 November 4, 2011.

4 II. JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
6 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

7 III. ISSUE

8 Whether the bankruptcy court abused its discretion when it
9 denied Mr. Levinson's motion for the imposition of monetary
10 sanctions against Pengilly.⁴

11 IV. STANDARDS OF REVIEW

12 We review the bankruptcy court's refusal to impose sanctions
13

14 ⁴ In his Opening Brief on Appeal, Mr. Levinson asserted
15 seven issues on appeal. The first six issues relate to the alleged
16 error or abuse of discretion by the bankruptcy court in allowing the
17 Trustee to continue to seek to employ Pengilly, rather than
18 disqualifying Pengilly as ineligible for employment outright. As
19 contemplated by the October 25 Order, the Trustee filed an
20 application for the nunc pro tunc employment of Pengilly pursuant to
21 § 327(c). On January 30, 2012 ("January 30 Order"), the bankruptcy
22 court denied the Trustee's subsequent application to employ Pengilly
23 and directed the Trustee to hire alternate counsel. Thereafter, on
24 April 3, 2012, our motions panel entered an order which provided
25 that any issue relating to further efforts to employ Pengilly was
26 moot, and limiting the issue on appeal to the denial of
Mr. Levinson's request for sanctions only.

22 In his Reply Brief on Appeal, Mr. Levinson concedes that the
23 only remaining issue on appeal is "Whether the Bankruptcy Court
24 committed an error of law or an abuse of discretion in not awarding
25 sanctions against [Pengilly] for entering into an obviously
26 conflicted and unethical relationship." It thus appears that
Mr. Levinson is not appealing the bankruptcy court's failure to
enter a sanctions award against the Trustee, as requested in the
Levinson Motion.

1 for an abuse of discretion. See Classic Auto Refinishing v. Marino
2 (In re Marino), 37 F.3d 1354, 1358 (9th Cir. 1994)(reviewing denial
3 of sanctions under Rule 9011). We apply a two-part test to
4 determine whether the bankruptcy court abused its discretion.
5 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
6 (en banc). First, we consider de novo whether the bankruptcy court
7 applied the correct legal standard to the relief requested. Id.
8 Then, we review the bankruptcy court's fact findings for clear
9 error. Id. at 1262 & n.20. We must affirm the bankruptcy court's
10 fact findings unless we conclude that they are "(1) 'illogical,'
11 (2) 'implausible,' or (3) without 'support in inferences that may be
12 drawn from the facts in the record.'" Id. at 1262. The bankruptcy
13 court has "broad fact-finding powers with respect to sanctions, and
14 its findings warrant great deference" Primus Auto. Fin.
15 Serv., Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir. 1997)(quoting
16 Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1366 (9th Cir.
17 1990)(en banc))(internal quotation marks omitted).

18 We review for clear error the bankruptcy court's fact
19 findings related to the existence of bad faith. Leavitt v. Soto
20 (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999).

21 V. DISCUSSION

22 In the Levinson Motion, Mr. Levinson requested that the
23 bankruptcy court impose monetary sanctions against Pengilly, either
24 pursuant to Rule 9011 (the Civil Rule 11 analog applicable in
25 bankruptcy contested matters), or pursuant to the bankruptcy court's
26 equitable powers under § 105(a).

1 A. Mr. Levinson is not entitled to an award of sanctions under
2 Rule 9011.

3 Rule 9011(b) provides:

4 By presenting to the court (whether by signing, filing,
5 submitting, or later advocating) a . . . pleading, written
6 motion, or other paper, an attorney . . . is certifying
7 that to the best of the person's knowledge, information,
8 and belief, formed after an inquiry reasonable under the
9 circumstances, --

10 (1) it is not being presented for any improper purpose,
11 such as to harass or to cause unnecessary delay or
12 needless increase in the cost of litigation;

13 (2) the claims, defenses, and other legal contentions
14 therein are warranted by existing law or by a nonfrivolous
15 argument for the extension, modification, or reversal of
16 existing law or the establishment of new law;

17 (3) the allegations and other factual contentions have
18 evidentiary support or, if specifically so identified, are
19 likely to have evidentiary support after a reasonable
20 opportunity for further investigation or discovery; and

21 (4) the denials of factual contentions are warranted on
22 the evidence or, if specifically so identified, are
23 reasonably based on a lack of information or belief.

24 On the record before us, we are unable to conclude that the
25 bankruptcy court erred when it did not find a basis to impose
26 sanctions under Rule 9011(b). First, nothing in the record reflects
that the Employment Application was presented for an "improper
purpose." The Trustee merely was seeking to hire counsel to
prosecute the Malpractice Claim. Second, the bankruptcy court
approved the Employment Application in the first instance, arguably
precluding a determination that the legal contention presented in
the Employment Application, i.e., that Pengilly met the requirements
for employment pursuant to § 327(e), was not warranted by existing

1 law or by a non-frivolous extension of existing law. The simple
2 reality is that the Trustee, Pengilly, and the bankruptcy court each
3 omitted from their reading of § 327(e) the requirement that the
4 proposed special counsel previously must have represented Mr. Maris.
5 Third, the Declaration of Robert T. Robbins, a Pengilly partner,
6 filed in support of the Employment Application, (1) disclosed
7 Pengilly's prior representation of WPC both in the State Court
8 Litigation and in the Adversary Proceeding; (2) disclosed that
9 Pengilly "appears on Schedule F as a representative of [WPC] holding
10 a claim totaling \$1,037,738.30"; (3) affirmatively acknowledged that
11 Pengilly represented an interest adverse to Mr. Maris in the State
12 Court Litigation; and (4) stated the belief that in the proposed
13 representation, Pengilly did not hold an interest adverse to
14 Mr. Maris or the bankruptcy estate "with respect to the matter on
15 which [Pengilly] is to be employed." Thus, Pengilly's connection
16 with WPC was substantially disclosed to the bankruptcy court.

17 The bankruptcy court acknowledged in the October 25 Order
18 that the Employment Order had been entered in error and vacated that
19 order. The bankruptcy court, right or wrong, made a further finding
20 that Pengilly's concurrent representation of WPC did not appear to
21 create an actual conflict of interest with the bankruptcy estate,
22 and further determined, that "Pengilly's employment as special
23 counsel to represent the bankruptcy estate for the limited purpose
24 of prosecuting the [Malpractice Claim] likely would be permitted by
25 Section 327(c)." Ultimately, however, after this appeal was filed,
26 the bankruptcy court denied the employment of Pengilly altogether

1 and directed the Trustee to find other counsel to prosecute the
2 Malpractice Claim. Under these facts, where the bankruptcy court,
3 once explicitly and once implicitly, determined that it had erred in
4 its interpretation of § 327, we cannot see a basis under
5 Rule 9011(b) to impose sanctions against Pengilly.

6 In addition, in the Rule 9011 context, precise procedures
7 must be followed. Polo Bldg. Grp., Inc. v. Rakita (In re Shubov),
8 253 B.R. 540, 545 (9th Cir. BAP 2000). Specifically and primarily
9 relevant in this appeal, the "safe harbor" provision of
10 Rule 9011(c)(1)(A) required Mr. Levinson to provide Pengilly with an
11 opportunity to withdraw or correct the alleged improper Employment
12 Application before submitting his motion for sanctions to the
13 bankruptcy court. Nothing in the record reflects that Mr. Levinson
14 complied with Rule 9011(c)(1)(A) prior to filing the Levinson
15 Motion.

16 B. Mr. Levinson is not entitled to an award of sanctions under
17 § 105(a).

18 The bankruptcy court had the inherent authority, implicitly
19 recognized in § 105(a),⁵ to impose sanctions for any bad faith
20

21 ⁵ Section 105(a) provides:

22 The court may issue any order, process, or judgment that
23 is necessary or appropriate to carry out the provisions of
24 this title. No provision of this title providing for the
25 raising of an issue by a party in interest shall be
26 construed to preclude the court from, sua sponte, taking
any action or making any determination necessary or
appropriate to enforce or implement court orders or rules,
or to prevent an abuse of process.

1 conduct engaged in by Pengilly. Caldwell v. Unified Capital Corp.
2 (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996).
3 In order to do so, however, the bankruptcy court was required to
4 make an explicit finding that Pengilly had engaged in conduct
5 tantamount to bad faith. Knupfer v. Lindblade (In re Dyer),
6 332 F.3d 1178, 1196 (9th Cir. 2003). Bad faith includes a broad
7 range of willful, improper conduct, but requires something more
8 egregious than mere negligence or recklessness. Fink v. Gomez,
9 239 F.3d 989, 992-94 (9th Cir. 2001).

10 It is clear that the bankruptcy court understood and applied
11 the correct legal standard in ruling on Mr. Levinson's request that
12 monetary sanctions be imposed against Pengilly. As we noted
13 previously, the bankruptcy court made an express finding that the
14 record did not sufficiently establish that Pengilly's prior efforts
15 to obtain the Employment Order were in bad faith. Where the
16 bankruptcy court has applied the correct legal standard, we must
17 affirm the bankruptcy court's finding with respect to the bad faith
18 issue unless we conclude that finding is "(1) 'illogical,'
19 (2) 'implausible,' or (3) without 'support in inferences that may be
20 drawn from the facts in the record.'" United States v. Hinkson,
21 585 at 1262. For the reasons set forth above in our discussion of
22 sanctions under Rule 9011(b), we conclude that the bankruptcy court
23 did not clearly err when it found that Pengilly did not act in bad
24 faith in seeking court-authorized employment to prosecute the
25 Malpractice Claim.

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VI. CONCLUSION

The bankruptcy court did not abuse its discretion when it denied Mr. Levinson's request that monetary sanctions be awarded against Pengilly. We AFFIRM.