

DEC 16 2011

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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NOT FOR PUBLICATION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

1 In re:) BAP No. ID-11-1175-MkJu
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3 MAC R. MAYER AND DIANNE H.) Bk. No. 10-02238
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MEMORANDUM*

Argued and Submitted by Video Conference
on November 17, 2011

Filed - December 16, 2011

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

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

Appearances: Randal Jay French, Esq. of Bauer & French appeared
on behalf of Appellant Bauer & French; no Appellee
filed a brief or appeared at oral argument.

Before: MARKELL, DUNN and JURY, 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.

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INTRODUCTION

Randal J. French¹ appeals the bankruptcy court's order authorizing his employment ("Employment Order") as counsel for former chapter 11² debtors Mac and Diane Mayer. French also appeals the bankruptcy court's order denying his motion to alter or amend the Employment Order and the order granting in part French's final application for professional compensation for services he rendered while serving as chapter 11 counsel for the debtors ("Compensation Order"). Because French's appeal does not present a live case or controversy, we must DISMISS it as moot.

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FACTS

On July 14, 2010, the Mayers (with French's assistance) commenced their chapter 11 bankruptcy case, and French filed an employment application pursuant to § 327 ("Employment Application"). In the Employment Application and in the accompanying disclosures and affidavits, French disclosed that he had received funds from the Mayers two days before the bankruptcy filing. In relevant part, the funds received included a payment of \$7,500, which French stated he already had applied "as a

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¹While the notice of appeal identified "Bauer & French" as the appellant, two of the three orders on appeal refer to "Randal J. French" as "Counsel" for purposes of the order, and the third order generically refers to "Counsel" without identifying to whom it was referring. We need not decide this issue because any distinction between Randal J. French and Bauer & French is not material to the resolution of this appeal. For the sake of convenience, we use the term "French" as the appellant throughout this Memorandum.

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

1 minimum fee for my services in this chapter 11." Affidavit of
2 Proposed Attorney and Disclosure of Compensation (July 14, 2010)
3 at ¶ 6. In subsequent filings, French shed more light on the
4 \$7,500 minimum fee. According to French, he and the Mayers had
5 agreed that the \$7,500 ("Retainer") was a non-refundable advance
6 payment for services to be rendered in the chapter 11, and that
7 French could credit services performed both before and after the
8 Mayers' bankruptcy filing against the Retainer.

9 At the first hearing on the Employment Application, the
10 court raised a number of concerns, one of which was the nature of
11 the Retainer. In particular, the court expressed concern that
12 the Retainer might not be subject to review under § 330, and thus
13 could not be approved for that reason.

14 After a series of additional disclosures and continued
15 hearings at which the nature of the Retainer was further
16 discussed, the court ruled that it would not authorize the
17 Retainer as French had proposed. According to the court, the
18 Retainer as proposed was neither an advance payment retainer
19 (which should be a flat fee for the services to be performed and
20 remains subject to review under § 329) nor a security retainer
21 (which remains property of the estate, and which only can be
22 drawn upon to the extent compensation has been awarded and
23 authorized for payment pursuant to §§ 330 and 331). Ultimately,
24 the court concluded that the Retainer looked more like a security
25 retainer and should be treated as a security retainer. It
26 further concluded that the \$7,500 should be held in trust pending
27 the issuance of orders approving compensation under either § 330
28 or § 331. On January 24, 2011, roughly six months after the

1 filing of the Employment Application, the court entered its
2 Employment Order, which granted the Employment Application,
3 except it provided that the Retainer would be treated as a
4 security retainer and that the \$7,500 would be held in trust
5 "pending orders entered under § 331 or § 330." Shortly
6 thereafter, on February 3, 2011, the court granted the
7 U.S. Trustee's motion to convert the case from chapter 11 to
8 chapter 7.

9 French then filed a motion to alter or amend the Employment
10 Order. The target of that motion was the court's treatment of
11 the Retainer. Specifically, French argued that the court erred
12 by treating the Retainer as a security retainer and by directing
13 that the \$7,500 must be held in trust. The only relief French
14 sought in the motion was the alteration of the treatment of the
15 Retainer to what he originally had proposed.

16 Around the same time, French also filed his first and final
17 application for compensation as counsel for the chapter 11
18 debtors ("Fee Application"). In the Fee Application, French
19 represented that he previously had drawn against the Retainer for
20 prepetition chapter 11-related services in the amount \$1,642.50.
21 He further represented that he had incurred \$21,270.00 in fees
22 for postpetition services, and he sought the court's approval of
23 this entire amount and a court order authorizing the chapter 7
24 trustee to pay from the estate \$15,412.50. According to French,
25 the first \$5,857.50 in postpetition fees already had been "paid"
26 by his exhausting the remaining balance of the Retainer.
27 French's Fee Application did not seek approval of his crediting
28 of prepetition and postpetition fees against the Retainer. In

1 essence, the Fee Application was premised on French's concept of
2 the Retainer as he originally had proposed it to the court,
3 rather than on the treatment of the Retainer provided for in the
4 Employment Order.

5 The court denied the motion to amend, but the court granted
6 in part the Fee Application. When the court orally ruled on the
7 Fee Application, the court noted that its prior Employment Order
8 did not account for the fact that French already had applied the
9 Retainer to pay prepetition and postpetition fees, French
10 apparently taking on faith that the court ultimately would accept
11 his view of the Retainer (which it did not). After recounting
12 what the court had intended in treating the Retainer as a
13 security retainer, the court orally modified its prior employment
14 order to only require \$5,857.50 to be held in trust (deducting
15 the \$1,642.50 applied to pay prepetition fees). The court then
16 allowed \$19,312.50 in fees (of the total \$21,270.00 sought) and
17 authorized the exhaustion of the balance of the retainer (even
18 though French had not asked for such authorization and already
19 had applied the remainder of the retainer to his postpetition
20 fees), thereby leaving a balance owed for fees of \$13,455.00, to
21 be paid if or when the chapter 7 trustee determined that the
22 estate had sufficient funds to pay the balance.

23 French appealed the Employment Order, the Compensation Order
24 and the order denying the motion to alter or amend the Employment
25 Order.

26 **JURISDICTION**

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
28 §§ 1334 and 157(b)(2)(A). We discuss our jurisdiction below.

1 Veal), 450 B.R. 897, 906 (9th Cir. BAP 2011). Article III
2 standing is measured based on circumstances as they existed at
3 the time the action was commenced. Lomax, 471 F.3d at 1015; Clark
4 v. City of Lakewood, 259 F.3d 996, 1006 (9th Cir. 2001).³

5 French appears to have met the requirements for Article III
6 standing. French had a concrete and particularized stake in the
7 resolution of his Employment Application. Absent court approval,
8 French would not have been eligible for an award of compensation
9 under § 330. See 11 U.S.C. 330(a). Nor do we doubt that the
10 court's action on the Employment Application "injured" French for
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14 ³The minimum standing requirements arising from Article III
15 of the Constitution are distinct from the prudential standing
16 concerns that we also need to consider even if the minimum
17 standards are satisfied. See, e.g., In re Palmdale Hills Prop.,
18 LLC, 654 F.3d at 873-74; In re Veal, 450 B.R. at 906 (finding
19 constitutional standing but then examining one aspect of
20 prudential standing - whether the movant was pursuing its own
21 legal rights rather than pursuing rights belonging to others).
22 The prudential standing concern most relevant here is whether
23 French had standing to appeal the bankruptcy court's orders.
24 Bankruptcy appellate standing is narrower than Article III
25 standing, in that it requires the appellant to show that he or
26 she has been "directly and adversely affected pecuniarily" by the
27 order(s) on appeal. See In re Palmdale Hills Prop., LLC,
28 654 F.3d at 874. In light of our ultimate ruling here based on
Article III mootness grounds, we do not reach any prudential
standing or mootness issues. However, for essentially the same
reasons that we find this appeal constitutionally moot, we
arguably could have found that French lacked standing to appeal
the bankruptcy court's orders. But see id. (stating that the
Ninth Circuit Court of Appeals generally does not invoke the
prudential doctrine of bankruptcy appellate standing when the
appellant is the same party who sought relief in the bankruptcy
court leading to the order appealed); Sherman v. SEC (In re
Sherman), 491 F.3d 948, 957 n.8 (9th Cir. 2007) (same).

1 purposes of Article III standing.⁴ By requiring French to hold
2 the Retainer in trust (instead of accepting French's immediate
3 exhaustion of the entire retainer), the trust funds would become
4 property of the estate under § 541 and would be subject to the
5 potential restrictions and infirmities associated with property
6 of the estate under the Bankruptcy Code. See, e.g., 11 U.S.C.
7 §§ 363, 542. In addition, once the court ordered the Retainer to
8 be treated as a security retainer, French could not legally
9 exhaust the retainer to pay postpetition fees absent a court
10 order pursuant to § 330 or § 331. Finally, if the court had
11 ruled entirely in French's favor, the Retainer immediately would
12 have been considered fully exhausted and would not have been
13 subject to the limitations associated with property of the
14 estate. Thus, the above-referenced circumstances establish that
15 French had Article III standing.

16 Having concluded that French had Article III standing, we
17 next must consider whether this matter became moot. Whereas an
18 Article III standing issue calls into question whether a live
19 case or controversy existed at the time the action was commenced,
20 an Article III mootness issue focuses on whether subsequent
21 events have deprived the dispute of its "live" character. Lomax,
22 471 F.3d at 1015. In this sense, "[m]ootness can be
23 characterized as the doctrine of standing set in a time frame:
24 The requisite personal interest that must exist at the

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26 ⁴In bankruptcy cases, either a defendant's actions or the
27 court's actions can be the source of the injury for purposes of
28 establishing Article III standing. See In re Palmdale Hills
Prop., LLC, 654 F.3d at 873 n.4 (citing In re Sherman, 491 F.3d at
965).

1 commencement of the litigation (standing) must continue
2 throughout its existence (mootness)." Dittman v. California,
3 191 F.3d 1020, 1025 (9th Cir. 1999)(internal quotations and
4 citation omitted).

5 A dispute can lose its live character when a party ceases to
6 have a legally cognizable interest, in other words an actual
7 stake, in its outcome. City News & Novelty, Inc. v. City of
8 Waukesha, 531 U.S. 278, 282-83 (2001). In this context, "legally
9 cognizable interest" means essentially the same thing as "injury
10 in fact," which is the term typically used when examining
11 standing issues. Clark, 259 F.3d at 1011 n.7.

12 Here, French lost any legally cognizable interest in the
13 outcome of this matter when the court entered the Compensation
14 Order. The Compensation Order approved (after the fact) French's
15 exhaustion of the Retainer. Thus, upon the entry of the
16 Compensation Order, the legal characterization of the nature of
17 the Retainer ceased to have any continuing significance to
18 French's rights or duties. By way of this appeal, French only
19 seeks to have the bankruptcy court's prior rulings and orders
20 modified concerning the nature of the Retainer. According to
21 French, the court's characterization of the Retainer as a
22 security retainer should be deleted, and instead the Retainer
23 should be validated as an advance payment retainer as French had
24 proposed. However, as indicated above, the Retainer no longer
25 exists; French has exhausted it with the bankruptcy court's
26 blessing. The Compensation Order is a final order that no one
27 but French has appealed. Consequently, regardless of whether we
28 were to grant the relief that French seeks on appeal, French's

1 rights in the funds that he received from the Retainer would not
2 change.⁵

3 French claimed at oral argument that he is concerned that
4 the chapter 7 trustee at some future time may seek disgorgement
5 of the Retainer funds. But French could not identify any legal
6 theory that would support such action by the trustee, nor are we
7 aware of any. To the contrary, we have held that prepetition
8 security retainers are not subject to disgorgement for the
9 purpose of facilitating equality of distribution among creditors
10 under § 726(b). See Rus, Miliband & Smith, APC v. Yoo (In re
11 Dick Cepek, Inc.), 339 B.R. 730, 739 (9th Cir. BAP 2006).
12 Moreover, any attempt by the trustee to seek disgorgement of such
13 funds from French likely would amount to an impermissible
14 collateral attack on the bankruptcy court's Employment Order and
15 its Compensation Order.

16 We further note that the issue raised in French's appeal
17 does not fall within the exception to the mootness doctrine for
18 injuries capable of repetition but evading review. "The 'capable
19 of repetition, yet evading review' exception applies when (1) the
20 challenged action is too short in duration to allow full
21 litigation before it ceases, and (2) there is a reasonable
22 expectation that the plaintiffs will again be subject to the same
23 action." Lomax, 471 F.3d at 1017 (citing First Nat'l Bank of
24 Boston v. Bellotti, 435 U.S. 765, 774, (1978)); see also

26 ⁵French has not argued, either on appeal or in the
27 bankruptcy court, that the ruling he challenges has had or might
28 have collateral consequences concerning the potential violation
of state ethics or professional responsibility rules.

1 Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (applying the
2 same standards and holding that circumstances demonstrated an
3 absence of an expectation that the plaintiff subsequently would
4 be subjected to the same challenged action).

5 French has pending two subsequent appeals, both arising in
6 unrelated bankruptcy cases, in which French raises essentially
7 the same issue. See In re Danner, BAP No. ID-11-1315, and In re
8 Ridgerunner, LLC, BAP No. ID-11-1316.⁶ Danner and Ridgerunner
9 demonstrate that the court action French challenges is capable of
10 repetition. However, they also tend to demonstrate that the
11 challenged court action will not evade review. The procedural
12 posture of Danner and Ridgerunner is significantly different from
13 what we have here. In each, the court outright denied French's
14 employment application based on French having included an advance
15 payment retainer as one of the terms of employment - the same
16 type of advance payment retainer French proposed herein.

17 Having not been approved for employment under § 327 in
18 either Danner or Ridgerunner, French cannot be awarded
19 professional compensation under either § 330 or § 331, so the
20 issue on appeal in Danner and Ridgerunner cannot be mooted out as
21 it was here by a subsequent professional compensation order.

22 Accordingly, we conclude that this appeal is moot and should
23 be dismissed.

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25 ⁶We can and hereby do take judicial notice of the filing and
26 contents of French's opening briefs filed in Danner and
27 Ridgerunner. See Atwood v. Chase Manhattan Mortg. Co. (In re
28 Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003)(citing
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989)).

CONCLUSION

For all of the reasons set forth above, this appeal is
DISMISSED as moot.

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