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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NOT FOR PUBLICATION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

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|-------------------------|---|-------------------------------|-------------------|
| In re: |) | BAP No. | CC-10-1383-KiSaPa |
| |) | | |
| KEITH GRADY SPEIR and |) | Bk. No. | 09-14394-RR |
| RHONDA LYNN SPEIR, |) | | |
| |) | | |
| Debtors. |) | | |
| _____ |) | | |
| |) | | |
| KEITH GRADY SPEIR; |) | | |
| RHONDA LYNN SPEIR, |) | | |
| |) | | |
| Appellants, |) | | |
| |) | | |
| v. |) | MEMORANDUM¹ | |
| |) | | |
| LAWRENCE COLEMAN NOBLE, |) | | |
| |) | | |
| Appellee. |) | | |
| _____ |) | | |

Argued and Submitted on May 13, 2011,
at Pasadena, California

Filed - September 26, 2011

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

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Appearances: Janet Audrey Lawson, Esq. argued for appellants,
Keith Grady Speir and Rhonda Lynn Speir;
Lawrence Coleman Noble, Esq. appellee, argued pro
se.

Before: KIRSCHER, SARGIS² and PAPPAS, 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. Ronald H. Sargis, Bankruptcy Judge for the Eastern
District of California, sitting by designation.

1 Appellants, chapter 7³ debtors Keith and Rhonda Speir
2 ("Speirs"), appeal an order from the bankruptcy court denying
3 their disgorgement motion against their former bankruptcy
4 attorney, appellee, Lawrence Noble, Esq. ("Noble"). We VACATE the
5 bankruptcy court's order and REMAND this matter with instructions
6 that the bankruptcy court conduct an evidentiary hearing
7 concerning the motion.

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 A. Prepetition Events.

10 In August 2006, Speirs filed a complaint in state court
11 against Steve and Leana Smith ("Smiths") for damages and
12 rescission of a real estate contract. The matter was tried before
13 an arbitrator in January 2009. An interim award in favor of
14 Smiths was issued on March 19, 2009. In April 2009, Smiths moved
15 for attorney's fees and costs from Speirs. Speirs opposed the
16 motion. In July 2009, the arbitrator issued a revised award
17 determining Smiths to be the prevailing party and awarding them a
18 total of \$203,412.57 for attorney's fees, costs, and interest.

19 Smiths subsequently learned that shortly after the interim
20 award was issued on March 19, Speirs had engaged in what Smiths
21 thought were fraudulent transfers of real property. On July 31,
22 2009, Smiths sued Speirs in state court to set the transfers
23 aside.

24 On August 24, 2009, Smiths's revised award of \$203,412.57 for
25 attorney's fees and costs against Speirs became a judgment for

27 ³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 \$206,327.57, plus interest. In September 2009, Smiths attempted
2 to conduct judgment debtor examinations of Speirs in aid of
3 enforcement of the state court judgment. Ms. Speir allegedly
4 evaded service of the examination order. On October 21, 2009, the
5 day before Mr. Speir's scheduled debtor's examination, Speirs
6 filed a chapter 7 bankruptcy petition, thereby staying the
7 fraudulent transfer action.

8 **B. Postpetition Events.**

9 **1. Events leading up to Smiths's Rule 2004 motion.**

10 On February 2, 2010, Smiths moved for an order directing
11 Speirs to submit to a Rule 2004 examination due to their inability
12 to get Speirs to submit to one voluntarily. To support their
13 motion, Smiths submitted various letter and email correspondence
14 between their counsel, Matt Guasco ("Guasco"), and Noble. For the
15 greater part of December 2009 and early January 2010, the parties
16 argued over whether Speirs could appear by stipulation and notice
17 rather than court order, whether Speirs had to produce documents
18 going back one year or two years, and whether Speirs had to
19 disclose their tax returns.

20 On January 6, 2010, Noble sent Guasco a letter again
21 asserting that Speirs would not appear pursuant to a court order,
22 but that his clients wished to "get on with the Rule 2004
23 examinations." On January 8, 2010, Smiths agreed that Speirs
24 could appear at their examinations and produce documents without a
25 court order, provided that objections to production of documents
26 were made in writing before the examinations. Noble was receptive
27 to the arrangement. Accordingly, Guasco mailed Noble a revised,
28 proposed stipulation for Noble's review.

1 On January 12, 2010, Guasco forwarded Noble a draft Rule 2004
2 notice of examination and production of documents for Noble's
3 review, which proposed examination dates of January 21 and 29,
4 2010. Noble responded by letter dated January 14, 2010, stating
5 that the proposed dates were "impracticable," and that Speirs
6 refused to provide Smiths with copies of tax returns because their
7 request was untimely. However, that same day, Noble told Guasco
8 in a telephone conversation that the draft stipulation was
9 acceptable, so Guasco emailed Noble a final version for Noble's
10 signature.

11 Guasco sent emails to Noble on January 15, 18, and 19, 2010,
12 because he had not yet received Noble's signature on the
13 stipulation. Finally, on January 20, Noble called Guasco and
14 stated, for the first time, that he had "several problems with the
15 stipulation," that he needed "instructions" from Speirs, and that
16 he would "get back" to Guasco. Guasco emailed Noble on
17 January 21, asking Noble if he was going to sign the stipulation
18 that day, to which Noble replied that he would not be hearing from
19 his clients until the following day, January 22, and, in any
20 event, the stipulation contained "many objectionable items."
21 Guasco responded by email that same day demanding that Noble stop
22 engaging in "purposeful delay" and sign the stipulation he had
23 previously approved.

24 On January 22, 2010, Noble advised Guasco that he would not
25 be representing Speirs at their Rule 2004 examinations, and that
26 Guasco could now deal directly with Speirs in that regard.
27 Smiths's Rule 2004 motion immediately followed. The bankruptcy
28 court entered an order granting Smiths's Rule 2004 motion on

1 February 12, 2010.

2 **2. Speirs's motion to disgorge Noble's fee.**

3 On March 17, 2010, Speirs, with new bankruptcy counsel Janet
4 Lawson, Esq. ("Lawson"), filed a motion seeking to disgorge monies
5 paid to Noble postpetition ("Disgorgement Motion"). According to
6 the motion and a declaration from Ms. Speir, Speirs had paid Noble
7 \$4,201 prepetition to represent them in their chapter 7 case, for
8 which Noble had filed a Rule 2016(b) statement. After the filing,
9 Speirs paid Noble an additional \$5,500 for which they alleged he
10 provided no services and for which they received no bill. Speirs
11 argued that they should not be billed for Noble delaying the Rule
12 2004 examinations as they "were always ready, able, and willing to
13 attend the exam and produce the requested documents." Speirs
14 further alleged that any amended schedules were filed only because
15 of Noble's mistakes. Therefore, they demanded a refund of the
16 allegedly unearned \$5,500 fee.

17 Noble opposed the Disgorgement Motion. He explained that
18 Speirs sought out his legal advice in response to Smiths's
19 impending Rule 2004 examination, and that he provided postpetition
20 services of at least \$13,381 while advising Speirs about their
21 disclosure obligations in the examination. Noble alleged that
22 Speirs had made partial postpetition payments⁴ to induce him to
23 continue representing them while they considered their response to
24 the Rule 2004 examination. According to Noble, Speirs's

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26 ⁴ The record reflects that Noble received the \$5,500 in
27 several payments over a period of about one month. He received
28 three \$1,000 money orders and one \$500 money order on December 22,
2009; he received two \$1,000 money orders on January 20, 2010,
which was just a few days before Speirs terminated him.

1 "obstinacy" caused him to spend an inordinate amount of time
2 advising them to disclose information, to produce documents for
3 the exam, and to get them to deliver rental income payments to the
4 trustee. Noble further asserted that it was Speirs, not he, who
5 insisted on appearing at the Rule 2004 examination only by
6 stipulation and not a court order, which resulted in time
7 consuming and costly negotiations with Guasco. Apparently, Speirs
8 were concerned about being found in contempt of a court order if
9 they provided unsatisfactory or incredible answers to Smiths's
10 questions, thus providing Smiths a greater basis for potential
11 litigation against them. Noble denied that amended schedules had
12 to be filed because of his mistakes; he alleged any mistakes made
13 were the fault of Speirs.

14 Attached to Noble's opposition was his declaration and three
15 exhibits. Exhibit C was an email dated January 21, 2010, from
16 Noble to Speirs, which Noble reluctantly submitted due to its
17 privileged content. This was Noble's last contact with Speirs
18 before they terminated him. In the email, Noble expressed his
19 concern about Speirs's "contentious" behavior with him and that it
20 appeared his advice was being "undermined" by Ms. Speirs's father,
21 Rich Coleman. Noble also expressed his concern about the
22 trustee's skeptical attitude regarding Speirs's conduct and her
23 questioning of the "dubious 'legal' documents and explanations"
24 Speirs had provided. Finally, Noble stated that the best way to
25 discourage Smiths from litigation was by making a good showing at
26 their Rule 2004 examinations, which would require an extensive
27 document production and preparation for questioning.

28 Noble's Exhibit B was an email exchange between Lawson and

1 Noble dated March 30, 2010. This exchange was Lawson's response
2 to Noble's prior email (see Exhibit A) to her about obtaining a
3 protective order. Shortly after Speirs filed the Disgorgement
4 Motion, Noble asked Lawson to enter into a protective order so
5 that his opposition (which would include privileged emails and a
6 detailed fee statement) would not aid creditors or the trustee in
7 collecting assets from Speirs. Lawson rejected Noble's request,
8 stating that Speirs needed no "protection" from him; they had
9 disclosed all of their assets and had nothing to hide. Lawson
10 alleged that it was Noble, not Speirs, that "made a mess of this"
11 case; there were "no legitimate grounds to oppose the Rule 2004
12 examination."

13 Noble did not attach his fee statement to his opposition,
14 which he contended contained information that could undermine
15 Speirs's ability to obtain a discharge. However, Noble proposed
16 producing it in camera at the hearing.

17 In their reply, Speirs contended that despite their requests
18 for a copy of the fee statement, Noble had not yet provided one.
19 Speirs objected to Noble's offer to produce it for the first time
20 at the hearing because: (1) it would prevent them from having any
21 meaningful opportunity to refute it; and (2) it violated the
22 court's order setting hearing which stated that "no late filed
23 pleadings will be considered."

24 In her second declaration, Ms. Speir complained extensively
25 of Noble's incompetence. Particularly, she stated that his
26 ignorance of bankruptcy law and his need to "research" everything
27 unnecessarily prolonged the Rule 2004 examination process, not the
28 Speirs's alleged "resistance." She further stated that Noble had

1 "pressured and scared" Speirs into filing bankruptcy in order to
2 avoid Smiths's judgment debtor exams. However, Smiths
3 accomplished the exact same thing with the Rule 2004 examinations,
4 which Ms. Speir described as "no big deal." Finally, Ms. Speir
5 alleged that prior to the second section 341 meeting of creditors
6 Noble had told Speirs to not tell the trustee about monies they
7 had paid him postpetition. Lawson also filed a declaration. She
8 stated that she had no problems with Speirs, and that they
9 produced all documents at the Rule 2004 examinations without
10 complaint.

11 Despite his proposal to only submit the fee statement in
12 camera, on June 2, 2010, the day before the Disgorgement Motion
13 hearing, Noble filed his fee statement. It reflected that between
14 December 16, 2009, and March 23, 2010, Noble had spent 38.9 hours
15 in Speirs's case, including 3.2 hours on the disgorgement matter,
16 for a total of \$13,381 in fees. Noble did not serve Speirs with
17 the fee statement.

18 The bankruptcy court held a hearing on the Disgorgement
19 Motion on June 3, 2010. Noble finally provided Lawson with a copy
20 of the fee statement just moments before the hearing. After Noble
21 argued about his relationship with Speirs and the circumstances
22 surrounding the Rule 2004 examinations which led to the January 21
23 email, the following colloquy ensued between Lawson and the court:

24 LAWSON: If you look at the e-mail he's referring to,
25 it says nothing about refusing to turn over
26 documents. It's a demand for more money in
27 the third paragraph. Things that don't make
28 sense. There's nothing in here asking Speirs
to turn over documents. Nothing he's
attached supports what he's saying here
today.

1 COURT: But I don't have any evidence to the contrary
do I, Ms. Lawson?

2 LAWSON: Because this is the first point of raising
3 it. His January 21 letter does not address--

4 COURT: You have a witness. Are you not going to put
your witness on?

5 LAWSON: I wasn't aware this was an evidentiary
6 hearing, your Honor.

7 COURT: I don't see a room full of lawyers waiting
their chance to have a hearing.

8 LAWSON: I wasn't aware this was an evidentiary
9 hearing, your Honor.

10 Hr'g Tr. (June 3, 2010) at 15:1-13. The court then proceeded to
11 issue its oral ruling in favor of Noble, but limiting the allowed
12 fees to the \$5,500 he had already received.

13 The bankruptcy court entered an order denying the
14 Disgorgement Motion on September 28, 2010. This appeal followed.

15 II. JURISDICTION

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

18 III. ISSUE

19 Did the bankruptcy court abuse its discretion by accepting
20 the late-filed fee statement into evidence?

21 IV. STANDARDS OF REVIEW

22 A court's interpretation and application of a local rule is
23 reviewed for abuse of discretion. United States v. Heller,
24 551 F.3d 1108, 1111 (9th Cir. 2009). To determine whether the
25 bankruptcy court abused its discretion, we conduct a two-step
26 inquiry: (1) we review de novo whether the bankruptcy court
27 "identified the correct legal rule to apply to the relief
28 requested" and (2) if it did, whether the bankruptcy court's

1 application of the legal standard was illogical, implausible or
2 "without support in inferences that may be drawn from the facts in
3 the record." United States v. Hinkson, 585 F.3d 1247, 1261-62
4 (9th Cir. 2009)(en banc).

5 V. DISCUSSION

6 **The bankruptcy court abused its discretion by accepting the**
7 **late-filed fee statement into evidence without giving Speirs**
8 **a reasonable opportunity to refute it.**

9 Speirs argue that accepting Noble's late-filed fee statement
10 into evidence was prejudicial, a fundamental violation of due
11 process, and it violated several local rules and the court's
12 order. Speirs contend that had they been given an opportunity to
13 review the fee statement prior to the hearing, they could have
14 impeached Noble's statements that they were the cause of all of
15 Noble's extra work, and they could have challenged many of Noble's
16 time entries. Noble did not address this issue on appeal. We
17 agree with Speirs.

18 Under the Central District's Local Bankruptcy Rule ("LBR")
19 9013-1(f)(1), opposition to a motion should contain "a complete
20 written statement of all reasons in opposition thereto," and any
21 "documentary evidence on which the responding party intends to
22 rely." Any opposition papers must be filed and served on the
23 moving party no later than 14 days prior to the hearing.
24 LBR 9013-1(f)(1). A proof of service must also accompany every
25 paper filed. LBR 9013-1(e).

26 Clearly, Noble did not comply with any of these local rules.
27 Despite his reluctance to file the fee statement and his offer to
28 provide it in camera, Noble filed the fee statement just one day
prior to the hearing on the Disgorgement Motion, and he did not

1 serve it on Speirs or file a proof of service.⁵ Noble finally
2 provided Lawson a copy of it just moments before the hearing.
3 Speirs never had an opportunity to review the fee statement as
4 they did not attend the hearing. The bankruptcy court said
5 nothing about Noble's untimeliness or its order prohibiting any
6 late-filed pleadings and proceeded to consider the fee statement,
7 despite Speirs's objection to do so in their reply. Although
8 Lawson did not expressly object at the hearing when the court
9 accepted the fee statement into evidence, she did respond, twice,
10 that she was unaware the court was conducting an evidentiary
11 hearing.⁶

13 ⁵ Noble has never explained why he decided to file the fee
14 statement and, even more importantly, why he filed it just one day
15 before the hearing.

16 ⁶ Speirs also argue that the bankruptcy court's failure to
17 advise them of its intent to take oral testimony was prejudicial
18 because they were not there to refute the allegations Noble raised
19 for the first time at the hearing. LBR 9013-1(i)(1) gives the
20 bankruptcy court discretion to take oral testimony. It provides:

21 The court may, at its discretion, in addition to or in
22 lieu of declaratory evidence, require or allow oral
23 examination of any declarant or any other witness in
24 accordance with FRBP 9017. When the court intends to
25 take such testimony, it will give the parties 2 days
26 notice of its intention, if possible, or may grant such
27 a continuance as it may deem appropriate (emphasis
28 added).

23 The qualifying language in LBR 9013-1(i)(1) of "if possible"
24 and controlling case law provides the bankruptcy court with broad
25 discretion in applying its local rules. See Katz v. Pike (In re
26 Pike), 243 B.R. 66, 69 (9th Cir. BAP 1999)(bankruptcy court has
27 broad discretion to apply its local rules); Qualls, By and Through
28 Qualls, v. Blue Cross of Cal., Inc., 22 F.3d 839, 842 (9th Cir.
1994)(appellate court rarely questions the lower court's exercise
of discretion in connection with its application of the local
rules).

Here, we cannot conclude that the bankruptcy abused its
discretion in not providing two days notice of its intent to take
oral testimony because it is unclear on this record whether any
such intent existed.

1 The bankruptcy court has broad discretion to overlook
 2 transgressions of its local rules (Nunez v. Nunez (In re Nunez),
 3 196 B.R. 150, 157 (9th Cir. BAP 1996)), as long as a departure
 4 from the local rules does not affect substantial rights. Prof'l
 5 Programs Group v. Dep't of Commerce, 29 F.3d 1349, 1353 (9th Cir.
 6 1994). The bankruptcy court also has the power to vacate or
 7 modify its orders, as long as it is equitable to do so. In re
 8 Marcus Hook Dev. Park, Inc., 943 F.2d 261, 265 (3d. Cir. 1991).

9 In this case, the bankruptcy court's departure from the local
 10 rules and its last-minute decision to essentially vacate its
 11 original order prohibiting late-filed pleadings unduly prejudiced
 12 Speirs by depriving them of any reasonable opportunity to review
 13 the fee statement, which was material to their Disgorgement
 14 Motion, and refute it.

15 Accordingly, we believe the bankruptcy court abused its
 16 discretion by accepting the late-filed fee statement into evidence
 17 over Speirs's objection.

VI. CONCLUSION

19 For the reasons stated above, we VACATE the bankruptcy
 20 court's order denying the Disgorgement Motion and REMAND the
 21 matter to the bankruptcy court with instructions that it conduct
 22 an evidentiary hearing concerning the motion.

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