

DEC 9 2013

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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NOT FOR PUBLICATION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-12-1646-DPaTa
)	
6	MELVA ATAYDE,)	Bk. No. 10-18117-MT
)	
7	Debtor.)	Adv. Proc. No. 11-01003-MT
)	
8	_____)	
)	
9	MELVA ATAYDE,)	
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M ¹
)	
12	D. BRANDON FECO;)	
	LANE SCOTT YUDELL)	
)	
13	Appellees.)	
)	

Argued and Submitted on November 22, 2013
at Pasadena, California

Filed - December 9, 2013

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

Honorable Charles E. Rendlen III, [Visiting] Bankruptcy Judge,
and Honorable Maureen Tighe, Bankruptcy Judge, Presiding

Appearances: Jerome Zamos of the Law Offices of Jerome Zamos argued
for Appellant Melva Atayde; Russ W. Ercolani of the
Ercolani Law Group argued for Appellees D. Brandon Feco
and Lane Scott Yudell.

Before: DUNN, PAPPAS and TAYLOR, 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.

1 Unhappy with the bankruptcy court's refusal to impute
2 liability to one Appellee and the amount of damages, attorneys' fees
3 and costs awarded in her favor based upon the other Appellee's
4 violation of § 110,² debtor appealed. We AFFIRM.

5 I. FACTS

6 Sometime near the turn of the present century, Melva Atayde
7 acquired real property in Granada Hills, California, which she used
8 as her personal residence ("Residence"). On January 4, 2010, after
9 Ms. Atayde had become delinquent on her payments on the Residence,
10 the servicer of the loan secured by a First Deed of Trust on the
11 Residence filed a Notice of Default. Ms. Atayde failed to cure the
12 default, and the servicer filed a Notice of Sale on April 13, 2010.
13 The sale was scheduled to take place on July 6, 2010 ("Initial Sale
14 Date"). Between April 13, 2010 and the Initial Sale Date,
15 Ms. Atayde attempted unsuccessfully to negotiate with the secured
16 lender to retain ownership and possession of the Residence by
17 obtaining a further loan.

18 Prior to the Initial Sale Date, Ms. Atayde contacted her
19 friend, Andrew Rowe, who claimed to be a short sale expert.
20 Mr. Rowe referred Ms. Atayde to Lane Scott Yudell, a real estate
21 agent who was an employee of KNB Capital, Inc. dba So. Cal.
22 Properties ("KNB"). On July 3, 2010, the Saturday of the
23 Independence Day weekend, Ms. Atayde and Mr. Yudell commenced
24

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

1 telephone communications. At that time, Mr. Yudell suggested that
2 Ms. Atayde could file a bankruptcy case to avoid the imminent
3 foreclosure sale. At Ms. Atayde's insistence, Mr. Yudell sent
4 Ms. Atayde the necessary bankruptcy petition forms which she
5 completed and which Mr. Yudell's assistant, Kate Templeton, filed on
6 Ms. Atayde's behalf³ on Tuesday, July 6, 2010, the first business
7 day after the holiday weekend.

8 The bankruptcy documents filed by or on behalf of Ms. Atayde
9 were incomplete. The bankruptcy court sent Ms. Atayde several
10 notices of the need to correct the deficient filing to avoid
11 dismissal of her case. When no further documents were filed, the
12 bankruptcy case was dismissed on July 23, 2010.

13 Thereafter, the Residence was foreclosed upon and sold. The
14 sale price was \$143,000, which was applied against the outstanding
15 liens on the Residence. Those liens included two trust deeds,
16 unreleased liens, and taxes aggregating more than the \$143,000
17 foreclosure sale price.

18 On January 4, 2011, Ms. Atayde commenced an adversary
19 proceeding in the bankruptcy court, seeking damages in the amount of
20 \$300,000, representing statutory damages and alleged actual damages
21 for her loss of the Residence, pursuant to § 110 and pursuant to

22

23 ³ Mr. Yudell and Ms. Templeton testified that Ms. Templeton
24 delivered the forms to the bankruptcy court on behalf of Ms. Atayde
25 because Ms. Atayde claimed to be incapable of delivering them
26 herself. Ms. Atayde testified that Mr. Yudell not only sent her the
forms, but informed her that his office would ensure the completed
forms were filed with the bankruptcy court.

1 Cal. Bus. & Prof. Code § 10159.2.⁴

2 In addition to Mr. Yudell, Ms. Atayde named D. Brandon Feco
3 as a defendant in the adversary proceeding. Mr. Feco is the owner
4 of KNB and was Mr. Yudell's supervising real estate broker. At the
5 conclusion of the two-day trial, the bankruptcy court found that
6 Mr. Feco did not prepare any portion of the bankruptcy documents,
7 that he never advised Ms. Atayde to file a bankruptcy case, that he
8 never spoke to Mr. Yudell or any other person about Ms. Atayde, her
9 Residence, or the bankruptcy case until he received the summons for
10 the adversary proceeding, that KNB does not prepare bankruptcy
11 petition forms, and that Mr. Feco never authorized or instructed any
12 agent working for KNB to advise any client to file a bankruptcy
13 case. Based on those findings, the bankruptcy court concluded that
14 Mr. Feco was not a petition preparer for purposes of liability under
15 11 U.S.C. § 110 and awarded judgment in his favor on the complaint.

16 By contrast, the bankruptcy court found that Mr. Yudell
17 helped prepare Ms. Atayde's bankruptcy petition papers by
18 (1) advising her to file a bankruptcy case, (2) maintaining
19 correspondence with her throughout the bankruptcy process, and
20 (3) instructing Ms. Templeton to deliver the completed bankruptcy
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22 ⁴ Cal. Bus. & Prof. Code § 10159.2 was alleged as the basis
23 upon which to impute liability to Mr. Yudell's employer. Because
24 Mr. Yudell has paid Ms. Atayde all amounts awarded by the bankruptcy
25 court, we do not address Ms. Atayde's asserted error based on the
26 bankruptcy court's failure to find that employer liable for damages
under § 110, other than to comment that any related issues are moot.
See Discussion, infra at paragraph B. No further reference to this
statute is made in this Memorandum.

1 petition forms to the bankruptcy court for filing. The bankruptcy
2 court further found that the opportunity to earn a commission by
3 executing a short sale of the Residence constituted compensation
4 within the contemplation of § 110(a)(1). Based on those findings,
5 the bankruptcy court determined that Mr. Yudell met the statutory
6 definition for a bankruptcy petition preparer, that he had violated
7 § 110(e) and (g), and that he had engaged in the unauthorized
8 practice of law, a fraudulent act under § 110.

9 Notwithstanding its determination that Mr. Yudell had
10 violated § 110, the bankruptcy court concluded that Mr. Yudell's
11 conduct did not cause Ms. Atayde to lose the Residence, where it was
12 not clear that Ms. Atayde could have kept the Residence had her case
13 not been dismissed. Ms. Atadye lacked funds to cure the default if
14 she proceeded in a chapter 7 case, she had failed to qualify for a
15 modification of the mortgage loan, and because her job was ending,
16 she had no way to fund a chapter 13 plan to cure the arrears.
17 Further, no evidence, other than Ms. Atayde's testimony, was
18 presented to establish that the value of the property exceeded the
19 obligations against it for purposes of showing damages through a
20 loss of equity. The bankruptcy court expressly found Ms. Atayde's
21 testimony not credible on that issue. The bankruptcy court
22 determined that the only damages Ms. Atayde had proven were the loss
23 of \$299.00 she paid as a filing fee and \$1.00 for the cost of
24 copies. Finally, because Ms. Atayde did not prove that Mr. Yudell
25 had acted as a petition preparer in any other instance, more global
26 damages were not warranted.

1 The bankruptcy court ordered Mr. Yudell to pay Ms. Atayde
2 the amount of \$300 actual damages and \$2,000 in statutory damages.

3 The order that awarded judgment against Mr. Yudell also
4 authorized Ms. Atayde to file a motion for an award of attorneys'
5 fees and costs. That motion was heard by a bankruptcy judge who did
6 not try the adversary proceeding, but to whom the adversary
7 proceeding was assigned and who had conducted the majority of the
8 pretrial proceedings.⁵

9 After admonishing counsel for Ms. Atayde for prosecuting "the
10 most over-tried matter I've ever seen on a 110 violation,"
11 recounting the days of proceedings involving both bankruptcy judges
12 involved in the adversary proceeding, reciting that there was no
13 evidence of causation for the "phenomenal" amount of damages that
14 were sought and that a wrong defendant was named, the bankruptcy
15 court awarded \$3,000 in attorneys' fees and \$390 in costs to
16 Ms. Atayde.

17 Ms. Atayde timely appealed both the judgment of the trial
18 court and the subsequent order awarding attorneys' fees and costs.

19 II. JURISDICTION

20 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
21 and 157(b)(1) and (b)(2)(O). We have jurisdiction under
22 28 U.S.C. § 158.

25 ⁵ Trial of the adversary proceeding was conducted by a
26 visiting judge.

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III. ISSUES

Whether the bankruptcy court erred in its award of damages resulting from Mr. Yudell's violation of § 110.

Whether the bankruptcy court erred when it concluded that Mr. Feco had no liability for his employee's actions.

Whether the appeal is moot as to Mr. Feco.

IV. STANDARDS OF REVIEW

We review an award of damages for an abuse of discretion. See Eskanos & Alder, P.C. v. Leetin, 309 F.3d 1210, 1215-16 (9th Cir. 2002). Similarly, a bankruptcy court's award of attorney fees is reviewed for abuse of discretion. Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996).

We must affirm the bankruptcy court's fact findings unless we conclude that they are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" United States v. Hinkson, 585 F.3d 1247, 1262 & n.20 (9th Cir. 2009)(en banc). "Under the 'clear error' standard, we accept findings of fact unless the findings leave 'the definite and firm conviction that a mistake has been committed by the trial judge.'" Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230, aff'd in part & dismissed in part, 551 F.3d 1092 (9th Cir. 2008), citing Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004). We review de novo the bankruptcy court's conclusions of law and its interpretations of statutes and rules. Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008).

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V. DISCUSSION

The Bankruptcy Code defines the term "bankruptcy petition preparer" at § 110(a)(1) to mean "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing. . . ." The term "'document for filing' means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court . . . in connection with a case under this title." Section 110(a)(2).

The bankruptcy court ruled that Mr. Yudell was a bankruptcy petition preparer within the definition of the statute. Mr. Yudell did not appeal that determination by the bankruptcy court; in fact, he concedes it for the purposes of this appeal. See Appellee's Opening Brief at 5:24-26. Accordingly, we do not address whether the limited actions of Mr. Yudell in the circumstances of this case satisfy the provisions of § 110(a).

A. Section 110(i)(1)

This appeal is before us because Ms. Atayde is not satisfied with the damages the bankruptcy court awarded to her. Our focus, therefore, is on § 110(i)(1) and its application to the record on appeal.

Section 110(i)(1) provides:

If a bankruptcy petition preparer violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor . . . , and after notice and a hearing, the court shall order the bankruptcy petition preparer to pay to the debtor -
(A) the debtor's actual damages;

1 (B) the greater of -
2 (i) \$2,000; or
3 (ii) twice the amount paid by the debtor to the
4 bankruptcy petition preparer for the preparer's services;
and
(C) reasonable attorneys' fees and costs in moving for
damages under this subsection.

5 The bankruptcy court found Ms. Atadye had incurred actual
6 damages in the amount of \$300 and ordered Mr. Yudell to pay her that
7 amount pursuant to § 110(i)(1)(A). Ms. Atadye did not pay
8 Mr. Yudell for his services as a bankruptcy petition preparer.
9 Accordingly, the bankruptcy court awarded Ms. Atayde the \$2,000
10 maximum statutory damages provided for in § 110(i)(1)(B)(i).
11 Finally, the bankruptcy court determined that \$3,000 was a
12 reasonable attorneys' fee for seeking damages under § 110(i)(1), and
13 ordered Mr. Yudell to pay that amount to Ms. Atayde pursuant to
14 § 110(i)(1)(C). The aggregate amount Mr. Yudell was ordered to pay
15 to Ms. Atayde for his violation of § 110 was \$5,300. That amount
16 has been fully paid.

17 Ms. Atayde asserts on appeal that the damages awarded to her
18 pursuant to §§ 110(i)(1)(A) and (C) are inadequate.

19 1. Actual Damages

20 In the complaint, Ms. Atayde asserted the right to recover
21 actual damages. This right was also asserted in Ms. Atayde's Motion
22 to Recover Damages. As the party seeking relief she bore the burden
23 to prove the amount of her actual damages. Generally speaking, an
24 award of actual damages is intended as compensation for an actual
25 injury. Further, as noted by the bankruptcy court, the "actual
26 damages must be reasonably certain to have been caused in fact by

1 the conduct of the party from whom they are sought." Memorandum at
2 9:11-13 (citing In re JTS Corp., 305 B.R. 529, 555 (Bankr. N.D. Cal.
3 2003)).

4 Ms. Atayde asserted that her actual damages included the loss
5 of equity in the Residence. To establish a loss of equity,
6 Ms. Atayde was required to establish that the Residence was worth
7 more than what she owed against the Residence. The only evidence of
8 value presented by Ms. Atayde was her opinion that the Residence was
9 worth \$300,000. Ms. Atayde asserts that her opinion was admissible
10 pursuant to Rule 701 of the Federal Rules of Evidence.⁶ She is
11 correct, however, Rule 701 and her opinion do not deprive the
12 bankruptcy court of the ability to evaluate and weigh the evidence.

13 Contrary to Ms. Atayde's position on appeal, it is not
14 evident in the record that the bankruptcy court rejected her opinion
15 of value, although it certainly could have in light of the fact that
16 within days of filing the bankruptcy petition, she executed a
17 listing agreement for the purpose of selling the Residence for
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19 ⁶ Fed. R. Evid. 701 provides:

20 Opinion Testimony by Lay Witnesses

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22 If the witness is not testifying as an expert, the
23 witness' testimony in the form of opinions or inferences
24 is limited to those opinions or inferences which are
25 (a) rationally based on the perception of the witness,
26 (b) helpful to a clear understanding of the witness'
testimony or the determination of a fact in issue, and
(c) not based on scientific, technical, or other
specialized knowledge within the scope of Rule 702.

1 \$180,000. Rather than value, however, the bankruptcy court focused
2 on the lack of evidence regarding the encumbrances recorded against
3 the Residence, finding that the real estate mortgage was \$143,000,
4 the amount bid at the foreclosure sale, and that the "legal title
5 report showed additional liens outstanding and taxes which were not
6 released." The bankruptcy court found Ms. Atayde's testimony that
7 these encumbrances had been released not credible in the absence of
8 documentary evidence. The mere fact that Ms. Atayde sought out and
9 was working with a short sale expert belies the notion that she had
10 equity in the Residence. In the absence of evidence establishing
11 the amount of the encumbrances against the Residence, the bankruptcy
12 court did not err when it determined that Ms. Atayde had not met her
13 burden to prove loss of equity as actual damages.

14 Ms. Atayde also alleged "general damages that flowed out of
15 her pre-Christmas eviction." The bankruptcy court determined that
16 Ms. Atayde had not established a causal link between the defective
17 bankruptcy petition and the foreclosure of the Residence. It is
18 true that Ms. Atayde lost the benefit of the automatic stay when her
19 bankruptcy case was dismissed. However, an automatic stay is not
20 permanent. On the record before the bankruptcy court, Ms. Atayde
21 would not have been able to withstand a motion for relief from the
22 automatic stay. She had no funds to cure her mortgage default, such
23 that her reprieve in chapter 7 was limited in any event. She had no
24 permanent employment which would have enabled her to qualify either
25 for a modification of her mortgage or to fund a chapter 13 plan.
26 Ms. Atayde simply did not have the resources to save her Residence.

1 An incomplete bankruptcy filing and the resulting dismissal do not
2 change that fact. Without a causal link between the dismissal of
3 her bankruptcy case and the foreclosure of her Residence, Ms. Atayde
4 is not entitled to damages for the inconvenience, embarrassment, or
5 emotional distress of an eviction during the Christmas holiday
6 season or at any other time.

7 2. Reasonable Attorneys' Fees and Costs

8 Ms. Atayde sought \$14,590 in attorneys' fees and costs
9 incurred in seeking an award of damages under § 110(i)(1). In light
10 of the fact that her proven actual damages were \$300, and her
11 statutory damage award was \$2,000, an attorney fee award of more
12 than forty-eight times her actual damages could not be considered
13 reasonable, especially in light of the court's repeated admonitions
14 that an award of actual damages would require causal connection to
15 Mr. Yudell's actions.

16 "Substantively, both the Supreme Court and our cases have
17 emphasized the discretionary nature of the court's determination of
18 the number of hours reasonably expended." Dawson v. Washington Mut.
19 Bank, F.A. (In re Dawson), 390 F.3d 1139, 1152 (9th Cir. 2004),
20 quoting Cunningham v. Cnty. of L.A., 879 F.2d 481, 484 (9th Cir.
21 1988). In Dawson, the plaintiffs claimed more than \$50,000 in
22 attorneys' fees, yet prevailed on only one of the twenty issues they
23 litigated. They ultimately were awarded \$200 in total damages. The
24 bankruptcy court determined that plaintiffs' attorney fee request
25 was "grossly disproportionate to the cost of litigating the issue in
26 question." In re Dawson, 390 F.3d at 1152. On appeal, the Ninth

1 Circuit affirmed the bankruptcy court's exercise of discretion in
2 awarding only 5% of the fees requested.

3 The Dawson analysis supports the bankruptcy court's exercise
4 of discretion to award \$3,000 of the \$14,590 attorneys' fees
5 requested in this case. See also Unsecured Creditors' Committee v.
6 Puget Sound Plywood, Inc. (In re Puget Sound Plywood, Inc.),
7 924 F.2d 955, 958-59 (9th Cir. 1991)(affirming limitation of
8 attorneys' fees to one-third of the ultimate recovery, noting the
9 obligation of counsel to "exercise billing judgment," and further
10 noting that attorneys do not have "freereign to run up a tab
11 without considering the maximum probable recovery").

12 B. The Appeal is Moot as to the Liability of Mr. Feco.

13 In addition to her assertions that the bankruptcy court erred
14 in its award of damages, Ms. Atayde asserted that the bankruptcy
15 court erred when it determined that Mr. Feco's status as KNB's owner
16 did not make him liable for the conduct of KNB's employee,
17 Mr. Yudell. We need not reach that issue, because the orders
18 awarding damages and attorneys' fees to Ms. Atayde, as we are
19 affirming them here, have been satisfied in full by Mr. Yudell's
20 payment on or about March 18, 2013. Because no greater judgment
21 will be entered in this matter, it is of no import whether Mr. Feco
22 is named as an obligor.

23 VI. CONCLUSION

24 The bankruptcy court did not abuse its discretion when it
25 determined that Ms. Atayde did not meet her burden of proving that
26 she had equity in the Residence at the time it was foreclosed. The

1 bankruptcy court further did not abuse its discretion when it
2 determined that Ms. Atayde had not established a causal link between
3 Mr. Yudell's actions in assisting her in filing an incomplete
4 bankruptcy case and the actual foreclosure of the Residence and her
5 ultimate eviction. Nor did the bankruptcy court abuse its
6 discretion in making its award of attorneys' fees.

7 Because the bankruptcy court's monetary judgment was
8 satisfied in full by Mr. Yudell, Ms. Atayde's appeal is moot as to
9 the issue of whether Mr. Feco is jointly liable.

10 Based on the foregoing conclusions, we AFFIRM.

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