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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NV-13-1325-JuKiTa
6	DIAN L. GROSSMAN,)	Bk. No.	13-13792-LBR
7	Debtor.)		
8	_____)		
9	BRIAN D. SHAPIRO,)		
10	Chapter 7 Trustee)		
11	Appellant,)		
12	v.)	M E M O R A N D U M*	
13	DIAN L. GROSSMAN,)		
14	Appellee.)		
	_____)		

Argued and Submitted on January 24, 2014
at Las Vegas, Nevada

Filed - February 4, 2014

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

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: Brian D. Shapiro, Esq., argued pro se,
Christopher Burke, Esq. argued for appellee
Dian L. Grossman.

Before: JURY, KIRSCHER, and TAYLOR, 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 Debtor Dian L. Grossman filed a motion to dismiss her
2 bankruptcy case under § 707(a)¹ after chapter 7 trustee, Brian
3 D. Shapiro, asserted that \$2,500 of the \$5,000 monthly payment
4 that debtor received from her former spouse pursuant to a
5 divorce decree was nonexempt and could be used to pay her
6 creditors. The bankruptcy court granted debtor's motion, and
7 trustee appealed. For the reasons set forth below, we REVERSE
8 the bankruptcy court's decision, VACATE the dismissal order and
9 REMAND this case to the bankruptcy court with instructions to
10 reinstate the case on its docket.

11 I. FACTS

12 Prior to her bankruptcy filing, debtor went through a
13 divorce. Under the divorce decree, debtor is entitled to
14 \$390,000 from her former spouse, which was characterized as an
15 equalization payment. Debtor's former spouse agreed to pay her
16 \$30,000 upon execution of the Marital Settlement Agreement,
17 followed by monthly payments of \$2,500 commencing February 1,
18 2005, and continuing until paid in full, for a period of
19 approximately twelve years. A copy of the divorce decree is not
20 included in the record.

21 On April 30, 2013, debtor filed her chapter 7 petition.
22 Shapiro was appointed the trustee. Debtor listed no real
23 property in Schedule A and listed minimal personal property in
24 Schedule B. Debtor did not include the equalization payment as
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 an asset in Schedule B, but listed a \$5,000 monthly payment from
2 her former spouse as her only source of income under
3 alimony/maintenance in Schedule I. In her Statement of
4 Financial Affairs, debtor showed under the heading "[i]ncome
5 other than from employment or operation of business" that she
6 had received \$60,000 in alimony/maintenance payments for the
7 years 2011 and 2012 and \$15,000 in 2013. Debtor did not claim
8 any portion of the payments exempt. Debtor listed \$111,589.30
9 in unsecured debt, almost all of which is attributable to
10 medical debt.

11 Prior to the § 341(a) meeting of creditors, debtor's
12 counsel provided trustee with a copy of debtor's divorce decree
13 showing that she was entitled to \$390,000 from her former
14 spouse. At the creditors' meeting, debtor testified under oath
15 that she receives and has been receiving \$5,000 monthly payments
16 from her former spouse and that she estimated that the
17 equalization payments would continue until the year 2017.
18 Trustee acknowledged that \$2,500 of the \$5,000 monthly payment
19 was exempt as spousal support.²

20 On June 7, 2013, debtor moved to have her case dismissed
21 under § 707(a). Debtor alleged that she had severe health
22 problems prior to her bankruptcy filing and that her condition
23 was chronic.³ She therefore expected to incur significant
24

25 ² Apparently the divorce decree provided for spousal support
26 at \$2500 per month in addition to the equalization payment.

27 ³ Debtor declared that she had been diagnosed with
28 cardiomyopathy (literally heart muscle disease) and that her
heart was working at thirty-five percent.

1 medical debt in the future. Debtor also wanted to avoid any
2 litigation regarding the nonexempt assets and to use any
3 additional income or assets to pay her creditors outside of a
4 bankruptcy proceeding.

5 Trustee opposed, arguing that dismissal would not be
6 equitable under the circumstances. Trustee maintained that
7 (1) debtor had failed to disclose the equalization payment she
8 was owed under the divorce decree in Schedule B; (2) debtor's
9 reasons for dismissal, i.e., the risk of incurring large medical
10 bills in the future and wanting to pay her creditors outside of
11 bankruptcy, were the result of her failure to investigate her
12 true financial picture; and (3) dismissal was prejudicial to the
13 creditors of debtor's bankruptcy estate.⁴

14 On July 10, 2013, the bankruptcy court orally granted
15 debtor's motion. The court took note of debtor's medical
16 condition and her bills. The court further stated:

17 So I just don't get what good it does to put somebody
18 more deeply in debt under the possibility of trying to
19 collect this amount of money. And for that matter, I
20 don't know why she just doesn't go back in and get it
21 recharacterized as support . . . if she's ill.

22 They probably did it for tax reasons. I'm going to
23 grant the motion to dismiss. I just don't think it
24 makes sense to put somebody deeper in debt, to incur
25 more medical bills, on the possibility of collecting
26 \$2,500 a month for four years to keep this estate

27 ⁴ Trustee filed a declaration in support of his opposition
28 which characterized the equalization payment as an asset of the
estate which he could administer for the benefit of the
creditors. He based this characterization on his review of the
divorce decree.

1 open. The administrative assets⁵ would eat up
2 anything that goes to creditors, so I'll grant the
motion to dismiss.

3 The bankruptcy court entered the order dismissing the case
4 two days later. Trustee timely filed a notice of appeal.

5 II. JURISDICTION

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

9 III. ISSUE

10 Whether the bankruptcy court abused its discretion in
11 dismissing debtor's case under § 707(a).

12 IV. STANDARD OF REVIEW

13 We review the bankruptcy court's grant of a voluntary
14 motion to dismiss for an abuse of discretion. Hickman v. Hana
15 (In re Hickman), 384 B.R. 832, 840 (9th Cir. BAP 2008). The
16 bankruptcy court abuses its discretion when it fails to identify
17 and apply "the correct legal rule to the relief requested,"
18 United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009)
19 (en banc), or if its application of the correct legal standard
20 was "(1) 'illogical,' (2) 'implausible,' or (3) without 'support
21 in inferences that may be drawn from the facts in the record,'" id.
22 at 1262.

23 V. DISCUSSION

24 Section 707(a) states that a court may dismiss a chapter 7
25 case "only for cause[.]" In the Ninth Circuit, a case will not
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27 ⁵ We assume the court was referring to administrative
28 expenses.

1 be dismissed on the motion of a debtor if such dismissal would
2 cause some prejudice to a creditor. Leach v. United States
3 (In re Leach), 130 B.R. 855, 857-58 (9th Cir. BAP 1991). The
4 question of prejudice resulting from dismissal may be evaluated
5 using both legal and equitable considerations. Id. at 856; see
6 also In re Hickman, 384 B.R. at 841 (the totality of the
7 circumstances should be considered in evaluating cause for
8 dismissal and plain legal prejudice). Debtor had the burden of
9 proving that dismissal would not prejudice her creditors.
10 Bartee v. Ainsworth (In re Bartee), 317 B.R. 362, 365 (9th Cir.
11 BAP 2004).

12 There is no evidence in the record to show that dismissal
13 of debtor's case would not prejudice her creditors and nowhere
14 does the bankruptcy court mention prejudice to creditors in its
15 ruling. Although debtor stated that she wanted to use any
16 additional income or assets she had to pay her creditors outside
17 of bankruptcy, her Schedule F shows over \$111,000 in unsecured
18 debt, her Schedule I shows that she is unemployed and that the
19 \$5,000 payment from her former spouse is her only income, and
20 her Schedule J shows that her expenses exceed her income. See
21 In re Hopkins, 261 B.R. 822, 823 (Bankr. E.D. Pa. 2001)
22 (debtor's own testimony and schedules cast doubt on her ability
23 to pay creditors). Further, debtor's medical condition and her
24 asserted risk of incurring future medical debt⁶ reflect that she
25 proposed to use some or all of her income from her former spouse

26 _____
27 ⁶ Other than debtor's past medical bills, there was no
28 evidence that she would continue to amass a large amount of
medical debt.

1 to pay her postpetition bills. Accordingly, it may be that the
2 asset trustee seeks to recover presents the unsecured creditors
3 with the best opportunity for satisfaction of their claims. On
4 this record, debtor failed to carry her burden of proving that
5 dismissal of her bankruptcy petition would not prejudice her
6 creditors.

7 In addition, trustee asserted at least two reasons why it
8 would be inequitable to dismiss debtor's case: her failure to
9 list the equalization payment in Schedule B and her
10 "carelessness" in failing to evaluate her true financial picture
11 before filing. Nowhere does the court mention these equitable
12 considerations. Further, the bankruptcy court implied that
13 trustee would not be able to administer the asset because debtor
14 could request the state court to recharacterize the equalization
15 payment as support. There is no evidence in the record to
16 suggest that this could be accomplished; this statement by the
17 court was pure speculation. Finally, the court concluded that
18 trustee could not efficiently administer the stream of payments
19 since they would come in over a four year period. However, the
20 record reflects that trustee contemplated selling the asset.

21 In the end, we surmise that the bankruptcy court
22 considered, as a matter of equity, only debtor's medical
23 condition. While debtor's situation appropriately arouses
24 sympathy, the court applied the wrong criteria for a voluntary
25 dismissal under § 707(a).

26 VI. CONCLUSION

27 For the reasons stated, we REVERSE the bankruptcy court's
28 decision, VACATE the dismissal order and REMAND this case to the

1 bankruptcy court with instructions to reinstate the case on its
2 docket.

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