

2/4/2014

NOT FOR PUBLICATION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,	)	
	Chapter 7 Trustee	)	
10	Appellant,	)	
		)	
11	v.	)	M E M O R A N D U M*
		)	
12	DIAN L. GROSSMAN,	)	
		)	
13	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)<sup>1</sup> 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

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26 <sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> She therefore expected to incur significant  
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25 <sup>2</sup> Apparently the divorce decree provided for spousal support  
26 at \$2500 per month in addition to the equalization payment.

27 <sup>3</sup> 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.<sup>4</sup>

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

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27 <sup>4</sup> 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 assets<sup>5</sup> 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 <sup>5</sup> 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 debt<sup>6</sup> reflect that she  
25 proposed to use some or all of her income from her former spouse

26 \_\_\_\_\_  
27 <sup>6</sup> 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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