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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-14-1531-TaKuKi
)		
EDWARD P. GUIDRY,)	Bk. No.	6:14-bk-12490-SY
)		
Debtor.)		
<hr/>			
HUDENA JAMES, SR.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
EDWARD P. GUIDRY; UNITED)		
STATES TRUSTEE,)		
)		
Appellees.**)		
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Submitted Without Oral Argument***
on November 19, 2015

Filed - December 9, 2015

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

Honorable Scott H. Yun, Bankruptcy Judge, Presiding

* 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 8024-1(c)(2).

** Although the Appellant named these parties as Appellees, neither filed a brief nor otherwise appeared in this appeal.

*** After examination of the briefs and record, and after notice, in an order entered September 16, 2015, the Panel unanimously determined that oral argument was not needed for this appeal. See Fed. R. Bankr. P. 8019(b); 9th Cir. BAP Rule 8019-1.

1
2 Appearances: Hudena James, Sr., pro se, on brief.

3 Before: TAYLOR, KURTZ, and KIRSCHER, Bankruptcy Judges.
4

5 **INTRODUCTION**

6 Hudena James, Sr. appeals from an order finding that he
7 violated § 110(b) and (c)¹ and ordering fee forfeiture under
8 § 110(h) (3) (B) and payment of sanctions under § 110(1) (1). We
9 REVERSE.

10 **FACTS²**

11 Mr. James assisted Edward P. Guidry with his chapter 7
12 petition. In compliance with § 110, Mr. James identified
13 himself as a bankruptcy petition preparer on the petition and
14 signed it. Mr. James received \$200 in exchange for his
15 assistance; he properly disclosed this payment to the bankruptcy
16 court.

17 The debtor's scheduled assets included real property
18 located in Moreno Valley, California (the "Property"). The
19 debtor did not claim an exemption in the Property initially and
20 this became problematic for him; his estranged wife and her
21 mother resided at the Property, and the chapter 7 trustee
22 commenced an effort to sell it.

23
24

25 ¹ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 ² We exercise our discretion to take judicial notice of
28 documents electronically filed in the bankruptcy case. See
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 The debtor's initial response was an attempt to convert to
2 chapter 13. The chapter 7 trustee opposed this motion, and the
3 debtor filed a reply, without a supporting declaration, stating
4 his intent to withdraw the conversion motion. He later filed
5 amended schedules A and C with the result that he claimed all
6 equity in the Property as exempt.

7 The debtor's reply also raised a problem involving
8 Mr. James. He stated that he had been "ill-advised by a
9 bankruptcy petition preparer who suggested that I convert my
10 case to Chapter 13." Dkt. No. 32 at 1. He apparently
11 reiterated this statement to the bankruptcy court at the hearing
12 on the conversion motion.³

13 Based on these assertions, the bankruptcy court issued an
14 order to show cause ("OSC") as to why Mr. James should not be
15 ordered to disgorge fees received because he offered legal
16 advice to the debtor and, thus, violated § 110(e). The OSC
17 provided for written response by Mr. James and allowed the
18 United States Trustee to request additional relief or sanctions
19 against Mr. James on his own motion pursuant to § 110(i), (j),
20 or (l). The United States Trustee did not file either a
21 supportive response or its own motion.

22 Mr. James responded but without a supporting declaration.
23 He asserted generally that he had not offered any legal advice
24 to the debtor and specifically that he had not advised the
25 debtor to convert to chapter 13. He acknowledged that the
26

27 ³ A transcript of the hearing on the conversion motion is
28 not in the record.

1 threatened sale of the Property upset the debtor and that the
2 debtor blamed him for the problem. Mr. James stated that he
3 only helped prepare chapter 7 petitions and that if an
4 individual wanted to file under another chapter, he referred
5 those individuals to attorneys for assistance or legal advice
6 "or to the Court Clinic." Dkt. No. 40 at 5.

7 But Mr. James also stated that he had "helped [the] Debtor
8 prepare the motion to convert his Chapter Debtor's [sic]
9 Chapter 7 to one under Chapter 13 pursuant to 11 U.S.C. § 706"
10 and referred to the docket number for the conversion motion.
11 Id. He did not detail the type of help provided, and he did not
12 state that he charged the debtor for these services. He
13 concluded his response by reiterating that he had "not provided
14 any legal advice to Debtor, ha[d] not made a choice, or advised
15 him to convert to Chapter 13" and by stating that he thereby
16 complied with § 110(e) (2) (B) (i) (II) and that he had "been a
17 bankruptcy petition preparer for many years and [was] well aware
18 of the conduct and practice of a petition preparer." Id. at 6.

19 At the hearing on the OSC, the bankruptcy court focused on
20 Mr. James' statement in his response, that he helped the debtor
21 prepare the conversion motion. Mr. James responded that the
22 statement was incorrect; his wife had typed up the response, and
23 it should have stated that Mr. James had prepared the chapter 7
24 petition - not the conversion motion. Mr. James also asserted
25 that he had advised the debtor to see an attorney: "That's what
26 I tell anyone that if I prepare a Chapter 7 and if you want a
27 Chapter 13 done, I tell them to go see an attorney, and I told
28 him to go see an attorney, which he did. He went and saw an

1 attorney downstairs." Hr'g Tr. (Oct. 23, 2014) at 3:16-21. He
2 reiterated in conclusion that his wife had "obviously
3 misunderstood" what she typed up in the OSC response, and that
4 he had only prepared chapter 7 petitions for 34 years, not
5 chapter 13 petitions; he knew his limitations.

6 The bankruptcy court stated that it found the debtor's
7 statements in the reply to the chapter 7 trustee's opposition
8 and at the hearing on the conversion motion "more credible than
9 [Mr. James'] self-serving statements." Id. at 4:9-12. Further,
10 the bankruptcy court made clear that it did not find Mr. James'
11 claim of mistake in his OSC response credible. It then stated
12 that its main concern was compliance with § 110(b):

13 [I]f you assisted in any way with the Debtor's motion
14 to convert from 7 to 13, which the Debtor, one, stated
15 in his pleadings filed with this Court and at the
16 hearing on the motion to convert, he testified that
17 that's what occurred, and in your initial pleading
18 filed with the Court in response to the order to show
19 cause, you acknowledge that that's what happened,
which you are trying to retract now at this
hearing. . . . If you assisted in the Debtor preparing
the motion to convert the case from 7 to 13, that
motion did not -- was not signed by you, did not have
your address, did not have your Social Security Number
as required by Bankruptcy Code Section 110(b), (c).

20 Id. at 4:18-25; 5:1, 3-7. Based on the debtor's prior
21 statements and the OSC response, the bankruptcy court found that
22 Mr. James helped prepare the conversion motion and,
23 consequently, that he violated § 110(b) and (c) by failing to
24 list his name, address, and social security number on the
25 motion.

26 The bankruptcy court ordered Mr. James to disgorge the \$200
27 fee he previously received in connection with the petition
28 preparation. And, pursuant to § 110(1), it fined Mr. James

1 \$500.

2 The bankruptcy court subsequently entered an order
3 discharging the OSC. It stated that Mr. James' "representation
4 that he did not assist the Debtor with the motion [was] further
5 refuted by the fact that Mr. James himself signed the proof of
6 service on the motion to convert." Dkt. No. 42 at 2.

7 Mr. James timely appealed.

8 **JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **ISSUES**

13 Whether the bankruptcy court erred in finding that
14 Mr. James violated § 110(b) and (c), or abused its discretion in
15 ordering disgorgement of the fee paid to Mr. James and imposing
16 a fine under § 110(l).

17 **STANDARDS OF REVIEW**

18 We review an order imposing penalties for violation of
19 § 110 for an abuse of discretion. Frankfort Digital Servs.,
20 Ltd. v. U.S. Trustee (In re Reynoso), 315 B.R. 544, 550 (9th
21 Cir. BAP 2004), aff'd, 477 F.3d 1117 (9th Cir. 2007). A
22 bankruptcy court abuses its discretion if it applies the wrong
23 legal standard, misapplies the correct legal standard, or if its
24 factual findings are clearly erroneous. See TrafficSchool.com,
25 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011). A
26 factual finding is clearly erroneous if illogical, implausible,
27 or without support in inferences that may be drawn from the
28 facts in the record. Id.

- 1 • Violating Federal Rule of Civil Procedure 43(a), based on
2 its failure to require the debtor's testimony in "open
3 court";
- 4 • Admitting the debtor's hearsay statements into evidence;
- 5 • Violating his rights to equal protection under the
6 14th Amendment, based on alleged preferential treatment of
7 another debtor of a different race at the same hearing;⁴
8 and
- 9 • Imposing the fine when the United States Trustee did not
10 file a response.

11 Certain of these arguments are raised for the first time on
12 appeal or are not directly on point in a bankruptcy case.

13 Nonetheless, based on the review appropriate given Mr. James'
14 pro se status and the seriousness of the issues implicated, we
15 conclude that the bankruptcy court did not afford Mr. James with
16 procedural due process. Moreover, in finding that Mr. James
17 violated § 110(b) and (c), the bankruptcy court erred by relying
18 on inadmissible and incomplete evidence.

19 **Due Process.** The bankruptcy court based the OSC on an
20 alleged violation of § 110(e), that Mr. James offered the debtor
21 legal advice in connection with the conversion motion. The
22 order discharging the OSC, however, was based on Mr. James'
23 alleged violation of § 110(b) and (c) and the bankruptcy court's
24 conclusion that he failed to list his name, address, and social
25 security number on the conversion motion and failed to sign it.

26
27 ⁴ Mr. James also includes text relating to judicial
28 recusal. It does not appear, however, that he requests the
bankruptcy judge's recusal.

1 The bankruptcy court based its determination on findings that
2 the debtor was credible and Mr. James was not, a partial
3 admission by Mr. James, and the fact that Mr. James signed the
4 proof of service for the conversion motion.

5 We see problems; in particular, Mr. James was not afforded
6 procedural due process in two areas. First, the OSC only
7 identified § 110(e) as the basis for potential violation and
8 sanction. There was no reservation as to alternate grounds,
9 theories, or sanctions. Thus, Mr. James, a pro se litigant, was
10 confronted at the OSC hearing with a total change in the basis
11 for his alleged misconduct. Due process required more.

12 Second, Mr. James was not provided with the opportunity to
13 cross-examine the debtor. Thus, even if the bankruptcy court's
14 determinations under § 110(b), (c), and (1) were harmless error,
15 a determination we do not make, the inability to cross-examine
16 the debtor on a disputed and material issue of fact was not.
17 This is particularly problematic given that Mr. James was not
18 even present at the conversion motion hearing where the debtor
19 apparently reiterated the statement on which the bankruptcy
20 court relied.

21 **Evidence.** The due process violations in turn lead to other
22 issues on this record.

23 First, the bankruptcy court lacked essential evidence on a
24 critical point. There is no question that Mr. James is a
25 petition preparer by profession. And there is no question that
26 Mr. James acted as a petition preparer, within the meaning of
27 § 110(a)(1), in connection with the debtor's case initiation
28 filings. Mr. James properly disclosed this involvement and that

1 he received \$200 for this assistance. But there is no evidence
2 in the record that Mr. James took any fee beyond the \$200 or
3 that his agreement with the debtor in relation to receipt of the
4 \$200 required services beyond those related to the petition and
5 related case initiation documents.

6 The bankruptcy court noted that if Mr. James gave advice or
7 assistance in connection with the conversion motion he was
8 engaged in the unauthorized practice of law. That may be true.
9 If Mr. James did not charge a fee for these services, however,
10 he was not a petition preparer in connection with the conversion
11 motion within the meaning of § 110, and he was not subject to
12 sanction under that Code section.

13 Second, the bankruptcy court relied on statements that were
14 not evidence to determine facts and to assess credibility. Key
15 to the OSC and the bankruptcy court's finding that Mr. James
16 violated § 110 was the debtor's statement that Mr. James
17 suggested that he convert to chapter 13. The debtor's
18 statement, however, was not in a declaration under penalty of
19 perjury. See 28 U.S.C. § 1746. And, we assume that the debtor
20 was not sworn under oath to testify at the conversion motion
21 hearing. Thus, the debtor's statement was just that - a
22 statement, not testimonial evidence.

23 We also question the bankruptcy court's credibility
24 findings. We acknowledge that Mr. James, similarly, did not
25 attach a declaration to the OSC response; nor was he sworn in to
26 testify at the OSC hearing. Thus, there was no evidence on the
27 issue of what Mr. James said in connection with the conversion
28 motion. Nonetheless, the bankruptcy court relied on the

1 debtor's non-evidentiary statement in assessing Mr. James'
2 credibility. This, again, was error and coupled with the due
3 process violations and other evidentiary issues already
4 discussed, it was not harmless.

5 **Other issues.** Facts often shift during an order to show
6 cause proceeding. In such a case, the bankruptcy court is not
7 required to issue a new order to show cause, but must make sure
8 that it affords due process to the contemnor prior to sanction.
9 The bankruptcy court here should have provided Mr. James with a
10 meaningful opportunity to address the issues it ultimately
11 decided - which were not the issue noticed in the OSC.

12 Further, where material evidentiary disputes arise, the
13 bankruptcy court must provide an appropriate opportunity for an
14 evidentiary hearing. Such a hearing should allow the alleged
15 contemnor to cross examine the party alleging misconduct, if
16 applicable. The need for an evidentiary hearing here is
17 underscored by the bankruptcy court's additional finding in the
18 order discharging OSC, that Mr. James signed the proof of
19 service for the conversion motion. Mr. James asserted in his
20 OSC response that he was President of James and Associates, a
21 paralegal services firm. It is not beyond the realm of
22 possibility that Mr. James served the conversion motion but was
23 not involved in preparing the motion itself. Paralegal services
24 include serving motions and other legal documents and, thus,
25 filling out and signing a proof of service. Section 110 does
26 not appear to extend to a proof of service; the document is
27 proof in and of itself.

28 Given our determination, except for two brief points, we

1 need not and do not address Mr. James' remaining arguments.
2 First, a bankruptcy proceeding is never criminal in nature;
3 contrary to Mr. James' argument, it is not even quasi-criminal.
4 Thus, the confrontation clause of the 6th Amendment is
5 inapplicable. Second, a bankruptcy court may impose a fine
6 under § 110(1) that is payable to the United States Trustee,
7 even if the trustee does not move for an order imposing the
8 fine.

9 **CONCLUSION**

10 Based on the foregoing, we REVERSE.