UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT COURT OF APPEALS

BAP No. MB 00-115

IN RE: WILLIAM H. ALLEN,
Debtor.

WILLIAM H. ALLEN,
Appellant,

v.

WAYSIDE TRANS. CORP. and
DOREEN SOLOMON, Chapter 13 Trustee,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)

Before
LAMOUTTE, VAUGHN, CARLO, U.S. Bankruptcy Appellate Panel Judges

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William H. Allen, pro se, for the Appellant.

Joel Jay Rogge and Antonucci & DiGiammarino, for the Appellee Wayside Trans. and Doreen B. Solomon and Maria Carroll Furlong for Appellee Chapter 13 Trustee .

June 15, 2001

PER CURIAM.

The issue before the panel is whether the bankruptcy court erred in dismissing the debtor's chapter 13 case and enjoining him from filing another petition until February 15, 2001.

Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel has jurisdiction to review final decisions of the bankruptcy court pursuant to 28 U.S.C. § 158(a) and (b). The bankruptcy court's findings of fact are reviewed under a clearly erroneous standard, while its legal conclusions are reviewed *de novo*. Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995); In re SPM Mfg. Corp., 984 F.2d 1305 (1st Cir. 1993).

Background

The debtor filed a chapter 13 petition on May 17, 2000. On July 10, 2000, the trustee filed a motion to dismiss the case, based upon debtor's failure to appear at the meeting of creditors and the inability to confirm the plan as filed. The trustee sought dismissal with prejudice pursuant to 11 U.S.C. § 109(g)(1) in light of debtor's failure to appear. The debtor filed an objection on July 20, 2000. A hearing was held on August 14, 2000, at which the debtor did not appear, although the record notes an attorney did appear in representation of the debtor. The court allowed the trustee's motion, as a result of which the debtor was prohibited from filing another petition until February 15, 2001. The debtor did not seek reconsideration, nor appeal

the decision.

The debtor filed another chapter 13 petition on September 12, 2000 which, as noted by the bankruptcy judge in her order of November 9, 2000, was debtor's third chapter 13 filing in 15 months. On September 13, 2000, Wayside Transportation Corp. filed a motion to dismiss based upon debtor's history of serial filings and the § 109(g) prohibition on re-filing included in the dismissal order. Wayside had pending a sheriff's sale of debtor's property in order to satisfy a previous judgment, which was scheduled for September 14, 2000. The debtor filed an opposition on September 27, 2000. A hearing was held on October 16, 2000, at which the trustee supported the motion to dismiss in open court. The debtor failed to appear at the hearing. The court entered an order dismissing the third case and prohibiting any further filing until February 15, 2001. The debtor filed a notice of appeal on October 26, 2000. On November 1, 2000, debtor filed a motion for stay pending appeal, which was denied by the bankruptcy court on November 9, 2000. The debtor then filed an emergency motion for stay pending appeal with the BAP, which was denied on November 15, 2000. The BAP (Vaughn, J.) found that the debtor failed to establish a likelihood of success on appeal.

Discussion

Section 109(g)(1) of the Code provides that an individual may not be a debtor who has been a debtor in a case pending any time in the proceeding 180 days if the case was dismissed for

willful failure of the debtor to abide by court orders, or to prosecute the case.

The debtor alleges that his petition was filed "for protection from two creditors and a non-creditor", that his schedules and plan were timely filed, and that there is no evidence on the record that he willfully disobeyed any court order. Therefore, according to debtor, the bankruptcy court erred in dismissing his case and enjoining further filing because there were no grounds therefore.

The trustee argues that the debtor's actions in failing to appear for examination at the 341 meeting of creditors, without any explanation, constitutes willful disobedience of a court order sufficient to sustain dismissal with prejudice under § 109(g). The trustee also cites debtor's failure to appear at the hearings on dismissal as a failure to properly prosecute the case.

Wayside Transportation Corp. argues that the dismissal of debtor's second case on August 14, 2000, was proper under 11 U.S.C. § 109(g)(1), and that said order was the basis for the dismissal of the third case, now on appeal. Wayside alleges that debtor's ineligibility under § 109(g)(1) constitutes cause for the dismissal of the case. Wayside argues that it has standing because it is a judgment creditor whose judicial sale was stopped by the third filing. According to Wayside, the bankruptcy judge's findings of fact were not clearly erroneous, because the record is devoid of evidence that the debtor's actions were not

willful, and her conclusions of law were correct under § 109(g), as well as her powers under 11 U.S.C. § 105.

In In re Estrella, 257 B.R. 114 (Bankr. D.P.R. 2000), the court addressed the dismissal of a chapter 13 petition pursuant to § 109(g). The court observed that § 109(g) was enacted to prevent abusive tactics by debtors that intend to frustrate creditors' efforts to recover what is owed them, noting that the issue arises when a subsequent petition is filed within 180 days of a prior dismissal. Id. at 117. The court found that [t]here is no need to enter a specific finding of willfulness in order for section 109(g) to become operative. Id. The court further found that dismissal of the subsequent petition is mandatory if the court finds that § 109(g)(1) or (2) is applicable, unless there are legal or extraordinary circumstances which warrant a different conclusion.

The court in Estrella stated that in a motion under § 109(g), a key issue to determine is whether the debtor's actions - failure to appear at the 341 meeting and failure to make payments to the chapter 13 trustee - constitute a "willful" failure to abide by court orders or prosecute a case, as per the language of the statute. 257 B.R. at 117. "This court construes the term willful as conduct which is intentional, knowing and voluntary. A willful failure requires a finding that the person, with notice of the responsibility to act, intentionally disregarded it or demonstrated plain indifference." Id. The court went on to find that a moving party which avers such facts,

which are readily ascertainable from the record or docket, makes a prima facie case, and the burden shifts to the debtor to establish eligibility to file a petition because its actions were not willful. Id. at 117, 118. "A well-plead and supported motion to dismiss under section 109(g)(1) may be granted without an actual hearing if the debtor fails to oppose the same, when the moving party has made a prima facie case, and the court can infer that the failure to appear at a hearing and make the required payment was willful." Id. at 118. However, if the debtor files an opposition, he must be afforded an opportunity to present evidence that his actions were not willful. Id.

Conclusion

The debtor's third filing was clearly prohibited by the bankruptcy court's August 14, 2000 order, as well as the provisions of 11 U.S.C. § 109(g). The bankruptcy judge did not need to make a specific finding of willfulness in dismissing the second petition; the same could be inferred from the record and the docket of the prior case, as well as the prohibition to file a petition before February 15, 2000.[1]

Although the debtor did oppose the dismissal of the petition, he did not appear at the hearing to establish his eligibility by proving that his actions were not willful. The record indicates that "an attorney who said he represented [the

[1]The panel notes that by the time the appeal was heard at oral argument on March 15, 2001, the bar date against filing another petition had already expired.

debtor] did appear." However, the record does not show that any evidence was presented to prove that his actions in the prior case were not willful.

The bankruptcy judge did not abuse her discretion in dismissing the third petition and enjoining the debtor from further filing. Consequently, the bankruptcy court order appealed from is hereby **AFFIRMED**.