

1
2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6
7

8 In re:)
9) Case No. 05-21390-B-7
10 James/Estrella Kincaid) Docket Control No. N/A
11 Debtors.) Date: January 23, 2007
12) Time: 9:30 a.m.
_____)

13 On or after the calendar set forth above, the court issued
14 the following ruling. The official record of the ruling is
appended to the minutes of the hearing.

15 Because the ruling constitutes a "reasoned explanation" of
16 the court's decision under the E-Government Act of 2002 (the
"Act"), a copy of the ruling is hereby posted on the court's
17 Internet site, www.caeb.uscourts.gov, in a text-searchable
format, as required by the Act. However, this posting does not
18 constitute the official record, which is always the ruling
appended to the minutes of the hearing.

19 **DISPOSITION AFTER ORAL ARGUMENT**

20 This matter continued to the above date and time at the
21 request of the debtor Estrella Kincaid. The matter came on for
22 final hearing on January 23, 2007, at 9:30 a.m. Appearances are
23 noted on the record. The following constitutes the court's
24 findings of fact and conclusions of law, pursuant to Federal Rule
25 of Bankruptcy Procedure 7052.

26 Neither the respondent within the time for opposition nor
27 the movant within the time for reply has filed a separate
28 statement identifying each disputed material factual issue

1 relating to the motion. Accordingly, both movant and respondent
2 have consented to the resolution of the motion and all disputed
3 material factual issues pursuant to FRCivP 43(e). LBR 9014-
4 1(f)(1)(ii) and (iii).

5 The declaration filed by debtor Estrella Kincaid on the
6 morning of the continued hearing is disregarded by the court.
7 This matter continued from January 9, 2007 for Mrs. Kincaid to
8 obtain counsel. As is noted on the record, Mrs. Kincaid appeared
9 at the continued hearing without counsel. She attempted to file
10 a supplemental declaration the morning of the hearing. Pursuant
11 to LBR 9014-1(f)(1)(iii), replies must be filed with the court at
12 least seven (7) calendar days before hearing. Mrs. Kincaid has
13 been admonished on more than one prior occasion not to file
14 documents the evening before or the morning of hearings. For
15 these reasons, the declaration is disregarded. LBR 9014-1(l).

16 Were the court to consider the declaration filed by debtor
17 Estrella Kincaid on the morning of the hearing, which declaration
18 the court has read, it would not alter the rulings herein. Some
19 of the declaration deals with allegations previously made and
20 considered herein. Other parts of the declaration, such as
21 debtors' allegations that Larry Odbert ("Odbert") owes the
22 government approximately \$2.0 million in back taxes and that
23 Trustee and Cunningham have conspired with Odbert to commit tax
24 evasion, which allegations were raised for the first time on the
25 day of the hearing, are disregarded as unsupported by any
26 competent evidence.

27 The motion is denied as set forth herein. The request to
28

1 continue the chapter 7 trustee's motion to sell real property
2 located in Penryn California, D.C. No. DNL-13, is denied as moot.
3 The request to deny attorney's fees and trustee's fees is denied
4 without prejudice because it is unripe. The request to remove
5 Susan Smith ("Trustee") as trustee is denied for lack of cause.
6 The request to disqualify J. Russell Cunningham ("Cunningham") is
7 denied.

8 As an initial matter, the court notes that the motion
9 violates Local Bankruptcy Rule ("LBR") 9014-1(c)(4). Debtors
10 have improperly used Docket Control Number DNL-13 for this
11 motion. That Docket Control number was originally assigned to
12 the trustee's motion to sell real property in Penryn California.
13 Whether or not the court were to view this motion as a
14 countermotion to the motion to sell, debtors should have used
15 their own Docket Control number. "[M]otions for reconsideration
16 and countermotions shall be treated as separate motions with a
17 new Docket Control Number assigned...." LBR 9014-1(c)(4).
18 Debtors' continued use of other parties' Docket Control Numbers
19 causes confusion in the court's docket.

20 The motion also violates LBR 9014-1(d)(1) and the Guidelines
21 for Preparation of Documents, ¶¶ 1(a). The motion is covered
22 with interlineations. Some pages are almost entirely underlined.
23 This has the effect of making debtors' pleadings difficult to
24 read.

25 Continuation of Trustee's Motion to Sell

26 This request is denied as moot because Trustee's motion was
27 granted by order entered November 14, 2006 (Dkt. No. 568).

1 Debtors put forth an alternate basis for the request which is to
2 allow them "to find competent and affordable legal counsel."
3 Motion, p. 2, Lns. 18 - 19. This latter reason is not
4 persuasive. This motion was originally filed October 30, 2005.
5 Debtors have had ample time to obtain counsel between then and
6 now. Furthermore, debtors have made similar requests in nearly
7 every motion and at most hearings in this bankruptcy case since
8 July, 2005 when this judge assumed responsibility for Department
9 B.

10 Denial of Chapter 7 Trustee's and Counsel for Trustee's
11 Fees.

12 This request is denied without prejudice as unripe. Neither
13 the Trustee nor Cunningham have yet applied for approval of their
14 fees. Until such a motion is presented, debtors' objections to
15 payment of those fees are unripe. Debtors may present their
16 opposition when Trustee and Cunningham seek approval of their
17 fees and costs.

18 Removal of Susan Smith as Chapter 7 Trustee

19 This request is denied for lack of cause. The court may
20 remove a trustee for cause after notice and a hearing. 11 U.S.C.
21 § 324(a); Brooks v. United States, 127 F.3d 1192, 1193 (9th Cir.
22 1997). Cause is not defined and is determined on a case by case
23 basis. Cause may include trustee incompetence, violation of the
24 trustee's fiduciary duties, misconduct or failure to perform the
25 trustee's duties, lack of disinterestedness, or holding an
26 interest adverse to the estate. In re AFI Holding, Inc., ____
27 B.R. ____, 2006 WL 3298337, *6 (9th Cir. BAP Oct. 25, 2006).

1 Code § 324(a) provides that "[t]he court, after notice
2 and a hearing, may remove a trustee ... for cause."

3 Cause, which is not defined by the Code, must be
4 determined by courts on an *ad hoc* basis. In re Haugen
5 Constr. Serv., Inc., 104 B.R. 233, 240

6 (Bankr.D.N.D.1989). Cause has been found to exist,
7 *inter alia*, where the trustee is not disinterested, In
8 re BH & P, Inc., 103 B.R. 556, 561 (Bankr.D.N.J.1989);

9 In re Paolino, 80 B.R. 341, 344 (Bankr.E.D.Pa.1987), and where th

10 trustee fails to perform his or her duties, Matter
11 of Schoen Enter., Inc., 76 B.R. 203, 206

12 (Bankr.M.D.Fla.1987), or unreasonably delays in the
13 performance of those duties. Matter of Island

14 Amusement, Inc., 74 B.R. 18, 19 (Bankr. D. P.R.
15 1987); In re Mira-Pak, Inc., 72 B.R. 430, 431

16 (Bankr. S.D. Tex. 1987). In general, a party

17 seeking the removal of a trustee must prove that

18 there has been some actual injury or fraud. In re

19 Acadiana Electrical Serv., 66 B.R. 164, 165

20 (Bankr.W.D.La.1986); United States ex rel. People's

21 Banking Co. v. Derryberry (In re Hartley), 50 B.R.

22 852, 859 (Bankr.N.D.Ohio 1985). See also Matter of

23 Freeport Italian Bakery, Inc., 340 F.2d 50, 54 (2d

24 Cir.1965). A trustee should not be removed for

25 mistakes in judgment where that judgment was

26 discretionary and reasonable under the

27 circumstances, In re Haugen Constr. Serv., Inc.,

1 *supra*, 104 B.R. at 240, and courts should consider
2 the best interests of the estate, rather than those
3 of a single movant-creditor, when determining
4 whether to remove a trustee. Baker v. Seeber (In re
5 Baker), 38 B.R. 705, 708 (D. Md. 1983); Gross v.
6 Russo (Matter of Russo), 18 B.R. 257, 273 (Bankr.
7 E.D. N.Y. 1982).

8
9 In re Lundborg, 110 B.R. 106, 108 (Bankr. D. Conn. 1990).

10 In this instance, the debtor has failed to present facts to
11 support a finding of cause. This portion of the motion revolves
12 around the unsupported allegation of a "questionable
13 relationship" between Trustee, Cunningham, John Odbert, trustee
14 of the C&J Family Trust, and Larry Odbert. Debtors' evidence
15 consists of hearsay and innuendo. It does not show cause to
16 remove a trustee. "[H]orrible imaginings alone cannot be allowed
17 to carry the day." In re Martin, 817 F.2d 175, 183 (1st Cir.
18 1987); 3 Lawrence P. King, et al., COLLIER ON BANKRUPTCY, ¶ 324.02
19 (15th ed. rev. 2006).

20 Disqualification of J. Russell Cunningham as Counsel for the
21 Trustee

22 This request is denied for lack of standing and lack of
23 cause. Debtors generally have standing to object to the
24 employment of professionals by a chapter 7 trustee. However,
25 debtors have made no showing that Cunningham fails to meet the
26 requirements of 11 U.S.C. § 327. Rather, they make arguments
27 under State law for Cunningham's disqualification. Debtors lack
28

1 standing to raise the specific disqualification arguments made
2 against Cunningham in this instance.

3
4 It seems clear to this Court that a non client
5 litigant must establish a personal stake in the
6 motion to disqualify sufficient to satisfy the
7 "irreducible constitutional minimum" of Article III.
8 Generally, only the former or current client will
9 have such a stake in a conflict of interest dispute.
10 However, as the Delaware Supreme Court noted in In
11 re Appeal of Infotechnology Inc., in a case where
12 the ethical breach so infects the litigation in
13 which disqualification is sought that it impacts the
14 moving party's interest in a just and lawful
15 determination of her claims, she may have the
16 constitutional standing needed to bring a motion to
17 disqualify based on a third-party conflict of
18 interest or other ethical violation. In such a
19 case, moreover, the prudential barrier to litigating
20 the rights and claims of third parties should not
21 stop a district court from determining the motion,
22 because such a limitation would be overcome by the
23 court's inherent obligation to manage the conduct of
24 attorneys who appear before it and to ensure the
25 fair administration of justice. See Chambers v.
26 NASCO, Inc., 501 U.S. 32, 43-44, 111 S.Ct. 2123,
27 2132, 115 L.Ed.2d 27 (1991). This is undoubtedly
28

1 what the Yarn Processing court had in mind when it
2 indicated that a "manifest and glaring" ethical
3 breach which "confronted the court with a plain duty
4 to act" could be addressed on the motion of a non-
5 client litigant. Where the ethical breach is so
6 severe that it "obstructs the orderly administration
7 of justice," the party who finds his claims
8 obstructed has standing. *Cf. Doe v. Madison Sch.*
9 Dist. No. 321, 177 F.3d 789, 790 (9th Cir.1999)
10 ("Ordinarily, to prove an injury in fact under
11 Article III of the Constitution, the plaintiff need
12 only allege an injury that is 'fairly traceable' to
13 the wrongful conduct; the injury need not be
14 financial.") (quoting Kane v. Johns-Manville Corp.,
15 843 F.2d 636, 642 n. 2 (2d Cir.1988)).

16
17 Coyler v. Smith, 50 F.Supp.2d 966, 971-72 (C.D. Cal. 1999).

18 The debtors are not Cunningham's former or present clients.
19 Therefore they are required to show either (1) the "ethical
20 breach so infects the litigation in which disqualification is
21 sought that it impacts the moving party's interest in a just and
22 lawful determination of [their] claims" or (2) that the ethical
23 breach is so "manifest and glaring" that the court would
24 otherwise sua sponte move to address it. The debtors have failed
25 to show that either situation is present. As is discussed more
26 fully below, the debtors have failed to show the existence of a
27 conflict, let alone one that would be grounds for

1 disqualification under the California Rules for Professional
2 Conduct. Furthermore, debtors' allegations of contempt of this
3 court by Cunningham are belied by the facts.

4 Even if debtors had standing to raise this issue, they have
5 failed to meet their burden of establishing grounds to remove
6 Cunningham as Trustee's counsel. "When deciding whether
7 disqualification is warranted, [t]he court must weigh the
8 combined effect of a party's right to counsel of choice, an
9 attorney's interest in representing a client, the financial
10 burden on a client of replacing disqualified counsel and any
11 tactical abuse underlying a disqualification proceeding against
12 the fundamental principle that the fair resolution of disputes
13 within our adversary system requires vigorous representation of
14 parties by independent counsel unencumbered by conflicts of
15 interest." Concat LP v. Unilever, PLC, 350 F.Supp.2d 796, 814
16 (N.D. Cal. 2004) (Citation and internal quotes omitted).

17 The first theory under which debtors seek Cunningham's
18 disqualification appears to be that he has a conflict in his
19 representation. California Rule of Professional Conduct 3-310(e)
20 provides "A member shall not, without the informed written
21 consent of the client or former client, accept employment adverse
22 to the client or former client where, by reason of the
23 representation of the client or former client, the member has
24 obtained confidential information material to the employment."
25 (Emphasis added). The facts of this case show no such conflict
26 exists. Cunningham's employment was approved by order entered
27 April 22, 2005. Neither the C&J Family Trust (the "Trust") nor
28

1 Odbert was listed as a creditor or party in interest by debtors.
2 They became involved in this bankruptcy case when the Trust
3 purchased the debtors' former residence on F Street in
4 Sacramento, California. Trustee filed her initial motion to sell
5 the F Street property on April 29, 2005. Odbert negotiated the
6 sale for the Trust. No evidence has been presented to show that
7 Odbert is either a beneficiary or a trustee for the trust.
8 Debtors have made numerous allegations to that effect, but those
9 allegations are not supported by competent, admissible evidence.
10 Nevertheless, assuming that Odbert is a settlor, a trustee and a
11 beneficiary of the Trust, Cunningham filed at least two
12 declarations disclosing his firm's previous representation of
13 Odbert and the Trust. Those declarations also disclosed that at
14 the time of the sale, Cunningham's firm no longer had a attorney-
15 client relationship with Odbert or the Trust. The same
16 disclosures were made in relation to the amended motion to sell.
17 Ultimately the motion to sell was approved July 22, 2005. The
18 prior connection between counsel and Odbert and the Trust has no
19 bearing whatsoever on this chapter 7 case. Rule 3-310(e) is not
20 implicated.

21

22 Debtors' second theory - that Cunningham has been
23 contemptuous of this court by misleading it - is unsupported.
24 This allegation has been made before by debtors and is no more
25 persuasive now than it was then. There is no competent evidence
26 presented that Cunningham has misled this court. Once the
27 proposed buyer of the F Street property was known, Cunningham
28

1 disclosed his connections to this court as required by his
2 continuing obligation under the Bankruptcy Code. See 11 U.S.C. §
3 327 and Fed. R. Bankr. P. 2014. There was no reason for him to
4 do so prior to that time because, as noted above, neither Odbert
5 nor the trust was previously involved in the case. Furthermore,
6 the fact that the trust has purchased other assets from other
7 estates administered by Trustee is irrelevant to this motion.
8 The Trust may have a practice of offering to purchase properties
9 from bankruptcy estates. It may do so because it believes that
10 the properties can be obtained for below market prices, i.e.
11 liquidation values. If the Trust has such a practice, there is
12 nothing illegal or improper about it.