FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
February 4, 2004
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD E. ARMSTRONG, Debtor.	BAP No. UT-03-001
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee, and STEPPES APARTMENTS, LTD., Appellees.	Bankr. No. 00-26592 Chapter 11 ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, NUGENT, and McNIFF, Bankruptcy Judges.

McFEELEY, Chief Judge.

Donald E. Armstrong ("Armstrong") appeals an order of the United States Bankruptcy Court for the District of Utah ("bankruptcy court") that denied his Ex Parte Motion for the Court to Give Effect to the Provisions of the Texas Modified Judgment Excluding Liability Against the Debtor ("Ex Parte Motion"). Armstrong offers numerous arguments to support his contention that the bankruptcy court erred in denying the Ex Parte Motion, but offers no legal or factual basis to contradict the bankruptcy court's finding that it was without

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

jurisdiction to consider the elements of the Ex Parte Motion. We agree with the bankruptcy court and AFFIRM.

I. Background

The background of this case is extensive and has been documented at length in an appeal to this Court of a Temporary Allowance Order. *Armstrong v. Rushton (In re Armstrong)*, 294 B.R. 344 (10th Cir. BAP 2003). In brief, Armstrong filed a petition under Chapter 11 of the bankruptcy code and in September 2000, Kenneth A. Rushton was appointed Chapter 11 trustee of the estate ("Rushton").

At issue here is a settlement that Steppes Apartments, Ltd. ("Steppes") entered into with Rushton, which resolved Steppes's claims against the Armstrong estate ("Settlement Agreement"). These claims arose out of state court judgment in Texas ("Texas Modified Judgment") and a federal court default ruling ("Utah default ruling").

The confirmation hearings for Armstrong's Chapter 11 case began on December 20, 2001. One of the issues during the confirmation hearings was approval of the Steppes Settlement. On January 31, 2002, the bankruptcy court entered Findings of Fact, Conclusions of Law and Order Confirming and Approving Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 and Granting Related Motion ("Confirmation Order"). The Confirmation Order approves the Steppes Settlement.

Armstrong appealed the Confirmation Order to this Court. He also filed a motion asking the bankruptcy court to enlarge the time for filing a notice of appeal of the Confirmation Order. The bankruptcy court denied that motion, and he appealed. Both appeals were dismissed by panels of this Court, *see* BAP Nos. UT-02-011, UT-02-038, and have been further appealed to the Tenth Circuit where they are pending. However, the Confirmation Order has not been stayed pending appeal.

On December 13, 2002, Armstrong filed an Ex Parte Motion for the Court to Give Effect to the Provisions of the Texas Modified Judgment Excluding Liability Against the Debtor ("Ex Parte Motion"). After hearing the Ex Parte Motion on December 20, 2003, the bankruptcy court entered an Order that denied it on December 24, 2002 ("Order"). This appeal timely followed.

II. Appellate Jurisdiction

The bankruptcy court's order is a final order subject to appeal under 28 U.S.C. § 158(a)(1). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). Armstrong timely filed his notice of appeal pursuant to Federal Rule of Bankruptcy Procedure 8002. All parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001.[1]

III. Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); see Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d

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[1] Both Rushton and Steppes question this court's jurisdiction, arguing that we do not have the jurisdiction to consider this appeal because is in essence a collateral attack on the Confirmation Order. This argument fails.

As we observed in *Armstrong*:

> A reference to a previous order cannot turn two separate orders into one. While Rushton may be correct in asserting that one of the reasons for this appeal is to overturn the Confirmation Order, the purpose behind an appeal cannot alone defeat it. The [Ex Parte] Order was a separate order from the Confirmation Order. Armstrong timely appealed it. We have the jurisdiction to consider it.

Armstrong v. Rushton (In re Armstrong), 294 B.R. 344, 353-54 (10th Cir. BAP 2003).

1367, 1370 (10th Cir. 1996).

Orders determining that a bankruptcy court is without the jurisdiction to consider the substantive merits of a motion are reviewed under the de novo standard. *Cf. Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021 (10th Cir. 1992) (holding "[w]e review de novo issues such as standing that are prerequisites to this court's jurisdiction.").

IV. Discussion

The bankruptcy court determined that Armstrong sought the following relief in the Ex Parte Motion: (1) an order giving effect to the finding in the Texas Modified Judgment that Armstrong was not personally liable on the judgment; or (2) an order that the Texas Modified Judgment has no effect in Armstrong's Chapter 11 case or any other related cases; or (3) any other appropriate relief. The bankruptcy court found that, in essence, the Ex Parte Motion asked for reconsideration of the Steppes Settlement, which had been approved by the Confirmation Order. Because the Confirmation Order is a final order on appeal in the Tenth Circuit, the bankruptcy court concluded that it was without the jurisdiction to address the substance of the motion and so denied the Ex Parte Motion. As we have indicated in previous appeals by Armstrong where this same issue has been raised, we agree with the bankruptcy court. *Armstrong*, 294 B.R. at 355.

Although Armstrong offers various constitutional and legal theories in support of his argument that the bankruptcy court erred in denying the Ex Parte Motion, none of these arguments address the bankruptcy court's determination that the Confirmation Order resolved all issues with respect to the Texas Modified Judgment. Because the arguments Armstrong presents are irrelevant, and have been explored at length in other Armstrong appeals before this Court, *see, e.g., id.* at 356-62, we decline to consider them here.

Finally, we note that even had Armstrong offered some legal support for his

argument, we would be unable to adequately review this appeal because of the deficient record. While the record before us is voluminous, it does not include either the Ex Parte Motion or a transcript of the hearing conducted by the bankruptcy court. As we have previously observed, the burden for providing an adequate record for review is on the appellant. *Id.* at 361; *cf.* Fed. R. App. P. 10(b)(2).[2]

V. Conclusion

For the reasons indicated herein, we AFFIRM the bankruptcy court.

[2] Before the Court is the Appellant's Motion to File Exhibits on Compact Disk and Motion for Extension of Time, filed February 5, 2003. The Motion's request that the Appellant be excused from the rule that an appendix be consecutively paginated is GRANTED.