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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
July 31, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SHERRON L. LEWIS, JR., Debtor.	BAP No. CO-06-130
SHERRON L. LEWIS, JR., Appellant, v. JENNIFER M. McCALLUM, Trustee, Appellee.	Bankr. No. 05-45913-MER Chapter 7 ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, BOHANON, and CORNISH, Bankruptcy Judges.

McFEELEY, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtor/Appellant, Sherron L. Lewis Jr. appeals an order of the bankruptcy court of the District of Colorado arguing that the bankruptcy court erred when it approved a compromise ("Compromise") proposed by the trustee and denied

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Lewis' motion to remove the trustee on the grounds that the trustee had failed in her statutory obligations in proposing the Compromise. We conclude that the bankruptcy court did not abuse its discretion when it approved the Compromise and denied Lewis' motion to remove the trustee and so affirm.[1]

I. Background

Lewis filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 14, 2005. At the time of the filing, Lewis was a party in a number of state court cases in which he had intervened and asserted claims in foreclosure proceedings or in which he had pursued Forcible Entry and Detainer actions ("FED") following a completed foreclosure sale. Appearing pro se in state court, Lewis asserted an interest in these foreclosure cases through deeds he had obtained from owners.[2]

In every state court lawsuit in which Lewis's claims and defenses were fully litigated and decided by a state court, Lewis lost.[3] Some courts also awarded attorney's fees and costs against Lewis on the grounds that he had no

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[1] Accordingly, Lewis' Motion for Stay of the Bankruptcy Court's November 14, 2007 [sic] Order in Case Number 05-45913 Pending Final Decision on Appeal Pursuant to Rule 8005, filed July 30, 2007, is DENIED as MOOT.

[2] In each of these foreclosure proceedings, the foreclosing party was not the original mortgage lender but an assignee of the original promissory note and deed of trust. In the state court cases Lewis asserted among other things that the foreclosure proceedings were invalid when there had been an assignment of the promissory note and deed of trust, unless and until the endorsement of the promissory note and the assignment of the deed of trust had been recorded in the clerk and recorder's office. In the absence of such an endorsement, Lewis claimed that the foreclosing party was not the real party in interest, that there was no valid deed of trust on which to foreclose, and that he owned the relevant property free and clear. In the incomplete foreclosure cases, Lewis received a quitclaim deed or a warranty deed from the borrowers after a foreclosure proceeding had been initiated against them. In the completed foreclosures, Lewis asserted counterclaims on the same basis and sought to invalidate the foreclosures.

[3] The record indicates that some state courts found that Lewis never had valid title under Colorado state law because the record titleholders attempted to pass title to Lewis after the initiation of foreclosure proceedings and the expiration of the redemption period.

substantial justification for bringing the suit under Colorado law or because, as in the FED cases, the award was permitted under the relevant statute. As of the petition date, there were some state court lawsuits pending and some on appeal. At the filing of the petition, all of the cases in which Lewis was a defendant were stayed.

Also pending as of the petition date was a federal court case entitled "Sherron Lewis et al., Plaintiffs v. All Public Trustees Failing to Act Under the Laws of the State of Colorado." In this case, Lewis sought a declaration of his rights in some twenty-two properties, including some of the same properties involved in the state court proceedings. In the federal case Lewis filed a lis pendens against many of the properties. After many amendments, his final federal complaint alleged that the Public Trustee, the holder of the deed of trust, and others had violated RICO laws, and had engaged in unlawful debt collection practices and racketeering.

Lewis listed twelve properties on his Schedule A, Real Property. At least ten of the properties were involved in the state court and/or federal court litigation. Lewis indicates that the current market value of his interest in the properties without deducting any secured claims or exemptions were in the amount of $1,890,000.[4] Lewis lists the amount of the secured claims as $1,687,000. On Lewis's Schedule F, Creditors Holding Unsecured Nonpriority Claims, Lewis listed claims in the amount of $100,000 and listed one "as of yet undetermined claim." Most of these claims were held by attorneys.

Appellee Jennifer M. McCallum was appointed Chapter 7 Trustee

[4] The ten properties at issue were valued as follows: $170,000, $200,000, $165,000, $300,000, $195,000, $140,000, $170,000, $240,000, $155,000, $155,000. On the schedules, Lewis arrives at a different total, specifically $11,332,000. This number includes two properties he claims to owe in fee simple in the respective amounts of $370,000 and $160,000.

("Trustee"). Pursuant to 11 U.S.C. § 541,[5] the Trustee "stepped into the shoes of the debtor" in Lewis's proceedings in both federal and state cases. The Trustee began to negotiate with several parties involved in the various court proceedings. Subsequently, in the bankruptcy case, Lewis filed a Motion to Suspend, or, in the Alternative, to Dismiss Case.[6]

In March 2006, the Trustee filed the Trustee's Motion for Approval of Compromise of Controversies ("Settlement Motion"). The Compromise proposed to settle all of the litigation involving some sixty-two properties for a total of $36,500. In response, Lewis filed an Answer and thereafter a Motion to Remove Trustee Pursuant to Title 11 U.S.C. § 324(a) ("Motion to Remove Trustee"), alleging that the Trustee had not complied with her duty to maximize the property of the estate.[7]

The court heard both motions on October 6, 2006. At trial, the Trustee testified that after reviewing the federal and state court proceedings with her counsel, she determined that the state court and federal proceedings were without merit. Because pursuing the cases would require extensive time and money, the Trustee testified that she determined that it was best to settle the cases. Additionally, the Trustee testified that she decided not to abandon the claims to Lewis because in the vast majority of cases the state court was assessing Lewis attorney's fees and costs and the Trustee was concerned that these assessments as administrative claims would deplete the estate. Finally, the Trustee stated that the settlement did not include any exempt property.

On November 14, 2006 the court entered an Order granting the Settlement

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[5] All future statutory references are to Chapter 11 of the United States Code unless otherwise noted.

[6] This motion was later withdrawn.

[7] Our record indicates that Lewis has represented himself at all times during the pendency of his bankruptcy case

Motion in favor of the Trustee, and denying the Motion to Remove Trustee (the "Compromise Order"). In the Compromise Order the court found that Lewis did not have standing to challenge the Settlement Motion because upon the court's request Lewis had failed to offer any evidence that successful litigation of the federal and state court litigation would result in payment in full to all creditors as well as a surplus to him. The court also reviewed the merits of the Settlement Motion and found that the evidence supported granting that motion.

On November 24, 2006, Lewis filed a Motion to Alter or Amend and Request for Finding of Fact Pursuant to Rule 52. This motion reiterated Lewis's previous claims and further asserted that the court had not complied with its duties to make specific findings of facts under Fed. R. Civ. P. 52.

The court addressed Lewis's arguments in an Order entered December 1, 2006 (the "Reconsideration Order"). Lewis timely filed a notice of appeal of the Compromise Order and the Reconsideration Order on December 8, 2006. The parties have consented to this Court's jurisdiction because they did not elect to have the appeal heard by the United States District Court for the District of Colorado. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.[8]

II. Discussion

As an initial matter, the Trustee argues that in the absence of a complete transcript, we cannot adequately review this appeal and so should dismiss it. The burden of providing an appellate court with an adequate record for review is on the appellant. Fed. R. App. P. 10(b)(2). Such a record will include "all transcripts, or portions of transcripts, necessary for the court's review." 10th Cir. BAP L.R. 8009-1(b)(5). The pertinent inquiry is whether the record provided

[8] Appellant's Motion for Enlargement of Time, filed March 29, 2007, is HEREBY GRANTED.

"discloses the factual and legal basis of the order under review." *Knowles Bldg. Co. v. Zinni (In re Zinni)*, 261 B.R. 196, 202 (6th Cir. BAP 2001)*; In re Armstrong*, 294 B.R. 344, 361-62 (10th Cir. BAP 2003). As a general rule, the United States Court of Appeals for the Tenth Circuit and this Court have held that the failure to provide a trial transcript on appeal warrants affirming the trial court when the issue on appeal requires the appellate court to review the record in the trial court. *McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir.1992); *see also Armstrong*, 294 B.R. at 362.

Here, Lewis submitted an incomplete transcript. However, the absence of the complete transcript does not preclude our review. The record before us provides enough documentation for this Court to adequately review the bankruptcy judge's findings and conclusions.

Next, the Trustee argues that Lewis did not have standing to object to the proposed Compromise. Standing to object in a bankruptcy proceeding is narrower than that conferred by Article III. *In re Cult Awareness Network, Inc.*, 151 F.3d 605, 607 (7th Cir. 1998). Before a party may object to a bankruptcy court order, a party must demonstrate a pecuniary interest in the outcome of a bankruptcy proceeding. *Id.* Seldom can Chapter 7 debtors demonstrate a pecuniary interest because generally all estate assets are disbursed with no remainder for the debtor. *Id.*

The bankruptcy court found that Lewis had no standing to object to the Compromise because on the court's request, Lewis failed to introduce any evidence that he had standing. Specifically, Lewis did not proffer any evidence that if all or some of the litigation were successfully litigated to conclusion, all creditors would be paid in full with a surplus for Lewis. We see no error in the court's conclusion.

It was Lewis's burden to demonstrate standing. There is nothing in the record indicating that he ever attempted to do so. In fact, the record has contrary

evidence. At the hearing the Trustee testified that her research indicated that none of the cases had merit. The record indicates that most state courts that have addressed Lewis's claims have found that he had no legal interest in the properties at issue and so found against him. Moreover, Lewis had been assessed attorney's fees in many of these cases.

Although we agree with the bankruptcy court's conclusion that Lewis had no standing to object to the Compromise, the bankruptcy court does not appear to have based its opinion solely on this finding because the court reached the merits of Lewis's objection. For this reason, we will also discuss the merits of the objection.

In this appeal, Lewis makes two arguments. First, Lewis argues that the bankruptcy court erred when it approved the Compromise because the Compromise was not in the best interest of the estate. Second, Lewis contends that the Trustee breached her fiduciary duty to the estate, and therefore, the bankruptcy court erred when it denied his motion to remove the Trustee. We will address each argument in turn.

When a bankruptcy case is filed, all of a debtor's legal and equitable interests in property become property of the estate. 11 U.S.C. § 541(a)(1). Included in the estate are any causes of action or pending litigation held by the debtor at the time of the filing. *In re Stat-Tech Int'l Corp.*, 47 F.3d 1054, 1057 (10th Cir. 1995). The appointed Chapter 7 trustee has certain enumerated duties with respect to the estate. Specifically, in pertinent part, a trustee shall:

> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest; [and]
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper.

11 U.S.C. § 704(a)(1), (5). Neither party disputes that all of the litigation claims asserted by Lewis in state and federal court became property of the estate.

As the custodian of the estate, a trustee has the authority to enter into

settlement under Federal Rule of Bankruptcy Procedure 9019(a). After notice and a hearing, the court may approve a compromise. The standard of review for the approval of a settlement by the bankruptcy court is abuse of discretion. *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997). "A bankruptcy court's approval of a compromise may be disturbed only when it achieves an unjust result amounting to a clear abuse of discretion." *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989). "In considering the propriety of the settlement it is appropriate for the court to consider the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation and the interests of creditors in deference to their reasonable views." *Kopexa*, 213 B.R. at 1022. We must accept the bankruptcy court's findings as true unless they are clearly erroneous. *Yukon Self Storage Fund v. Green (In re Green)*, 876 F.2d 854, 856 (10th Cir. 1989); Fed. R. Bankr. P. 8013.

This Court adopted the following four-prong test derived from the pre-code case *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968), for evaluating the factual circumstances of a compromise: (1) the chance of success on the litigation on the merits; (2) possible problems in collecting the judgment; (3) the expense and complexity of the litigation; and (4) the interest of the creditors. *Kopexa*, 213 B.R. at 1022.

The bankruptcy court considered each of the *Kopexa* factors. First the bankruptcy court found the Trustee's testimony credible regarding her extensive research on the status of each of the properties involved in the litigation and the chance for success in the litigation on the merits. Next, the court observed that the Trustee had reviewed relevant Colorado law, considered the outcome of previous litigation, and arrived at a fair settlement amount. The court further found that the creditors supported the settlement and that the settlement terms did not include or impact Lewis's residence or any exempt property. The court

concluded that the Compromise was fair and equitable and in the best interests of the creditors and the estate.

Lewis argues that the bankruptcy judge erred because the Trustee should have avoided the creditors' secured claims, not settled them. This argument is based on the premise that these claims were not properly filed in the bankruptcy case under 11 U.S.C. § 501. According to Lewis, these claims were unsubstantiated secured claims that could have and should have been avoided under 11 U.S.C. § 544.

Under § 501, all creditors asserting secured claims must attach proof of their secured status to their claim. "A bankruptcy trustee has general authority to avoid certain transfers for the benefit of the estate." *In re MS55, Inc.*, 477 F.3d 1131, 1134 (10th Cir. 2007) (internal quotation marks omitted). Section 544 "gives the trustee priority over claims, liens or interests which are not fully perfected at the time the bankruptcy petition is filed[.]" *Gen. Motors Acceptance Corp. v. Rupp*, 951 F.2d 283, 284 (10th Cir. 1991). None of the parties in the state or federal litigation filed claims with respect to the litigation with proof of secured status. In the absence of proof of secured status, Lewis contends, the litigant claimants did not have allowed secured claims. Therefore, he concludes, the Trustee had an obligation to avoid the claims under § 544.

The bankruptcy court concluded that § 544 was not applicable here because there is nothing in the record indicating that there are any secured claims at issue. We agree. The claims at issue are contingent claims of the estate based on a possible positive outcome in litigation, not secured claims of the creditors.[9] The

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[9] Much of Lewis's argument here is premised on his assertion that the foreclosures were an illegal taking of his property through the Colorado courts. Because the foreclosures were invalid, argues Lewis, the title holders have invalid, unperfected liens on his properties. Essentially, Lewis is asking us to overturn a state court judgment. That we cannot do. The *Rooker-Feldman* doctrine bars "a party losing in state court . . . from seeking what in substance

(continued...)

bankruptcy court correctly concluded that § 544 was not applicable.

Alternatively, Lewis argues that he had an independent right under § 522(h) to avoid the claims at issue in the Compromise. Section 522(h) provides that a "debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under section (g)(1) of this section if the trustee had avoided such transfer. . . ." 11 U.S.C. § 522(h). In essence, § 522(h) enables a debtor to exercise the § 544 strong arm powers of a trustee.

In the Reconsideration Order, the bankruptcy court observed that a debtor does not have an unfettered right under § 522(h) to step into the trustee's shoes and exercise an avoidance power. This is a correct analysis of the law. Section 522(h) is textually limited by subsection (g)(1). This subsection refers to a debtor's statutory right to exempt certain property; a right that under the Bankruptcy Code continues with respect to property that has been involuntarily transferred and subsequently recovered by a trustee. For this reason, courts have consistently interpreted § 522(h) as being confined to situations where the debtor could claim entitlement to exempt property. *See, e.g., DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250 (9th Cir. 1995) (enunciating a five part test for evaluating when a debtor may avoid a transfer). As we have previously observed, the litigation claims are Lewis's non-exempt, unsecured contingent claims and do not fall under the avoidance provisions articulated in § 544. Even if they did, Lewis has not claimed an exemption in any of the property at issue in the litigation. In the absence of a claimed exemption, Lewis could not have a § 522(h) right to exercise an avoidance power.

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[9] (...continued)
would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994).

Next, Lewis argues that the bankruptcy court erred when it denied his motion to remove the Trustee. The denial of a motion to remove a trustee is reviewed for abuse of discretion. *In re Miller*, 302 B.R. 705, 708 (10th Cir. BAP 2003). Under § 324 of the Bankruptcy Code, after notice and a hearing, a court "may remove a trustee . . . for cause. 11 U.S.C. § 324(a). Cause is not defined in the Code; bankruptcy courts make that determination on a case-by-case basis. *Miller*, 302 B.R. at 709.

Lewis argues that the Trustee breached her fiduciary duty to the estate by failing to exercise her avoidance powers. There is no merit to this argument. As we have already observed, the bankruptcy court did not err when it concluded that the Trustee met her fiduciary obligations to the estate.

III. Conclusion

For the reasons set forth above, both the Compromise Order and Reconsideration Order are affirmed.