

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE TWIN LAKES REAL ESTATE,
LLC,

Debtor.

BAP No. UT-07-055

THE VICTORIA FRY CHILDREN'S
TRUST, as Successor Trustee of the
Victoria Fry Children's Trust, PHILLIP
FRY, as Successor Trustee of the
Victoria Fry Children's Trust,
HEATHER FRY, as individuals and as
beneficiaries of the Jelem Trust, the
Glen J. Fry Trust, and the Victoria Fry
Children's Trust, NICOLE FRY, as
individuals and as beneficiaries of the
Jelem Trust, the Glen J. Fry Trust, and
the Victoria Fry Children's Trust, and
VALERIE FRY, as individuals and as
beneficiaries of the Jelem Trust, the
Glen J. Fry Trust, and the Victoria Fry
Children's Trust,

Plaintiffs – Appellants,

v.

UNITED STATES OF AMERICA,

Defendant –
Cross-Defendant –
Appellee,

and

TWIN LAKES REAL ESTATE, LLC,
a Utah limited liability company,

Defendant –
Cross-Claimant –

Bankr. No. 05-29651
Adv. No. 05-02654
Chapter 11

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Appellee.

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

Before McFEELEY, Chief Judge, BOHANON, and NUGENT, Bankruptcy
Judges.¹

NUGENT, Bankruptcy Judge.

Appellants appeal the bankruptcy court's order granting the United States of America's (the "Government") Motion to Dismiss their action to avoid certain tax liens on property owned by the debtor, but allegedly as a "nominee" for them (the "Quiet Title Action"). The bankruptcy court dismissed the Quiet Title Action on two grounds: (1) Appellants' invocation of bankruptcy jurisdiction did not withstand a facial challenge and (2) even if it was facially valid, there is no factual basis upon which to predicate jurisdiction. We AFFIRM.

I. Appellate Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.² A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"³ Prior to the entry of the appealed order, this adversary proceeding involved more than one claim for relief and had multiple parties involved. The appealed order terminated Appellants as

¹ 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.

² 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

³ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

parties to the adversary proceeding and their claims were dismissed, but Debtor's cross-claim remains outstanding, calling into question the finality of the appealed order.

There are limited exceptions to the general rule of finality. Rule 54(b) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7054, provides that in cases involving multiple claims or multiple parties, trial courts "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The bankruptcy court has entered a compliant Rule 54(b) Order certifying that the dismissal order is a final judgment of dismissal of all Appellants' claims.⁴ Thus, the order appealed from is final for purposes of appeal; and since no party to this appeal has elected to have the district court hear the appeal, we have jurisdiction over this appeal.

II. Standard of Review

We review an order granting a motion to dismiss for lack of subject matter jurisdiction and lack of standing *de novo*.⁵ Any jurisdictional findings of fact are reviewed for clear error.⁶

⁴ This is the second Rule 54(b) Order issued by the bankruptcy court. The first Rule 54(b) Order lacked the necessary findings to vest this Court with appellate jurisdiction, so we issued an order requiring the bankruptcy court to articulate its reasons for determining that the appealed matter is "final" and that there is "no just reason for delay" in accordance with prevailing Tenth Circuit authority. This second Rule 54(b) Order is compliant and vests us with appellate jurisdiction.

⁵ See *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 364 F.3d 1072, 1074 (10th Cir. 2004) (*de novo* review of dismissal for lack of subject matter jurisdiction) and *Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593 (10th Cir. 1996) (standing is question of law reviewed *de novo*).

⁶ *Nudell*, 364 F.3d at 1074 (clear error review for any jurisdictional findings of fact).

III. Factual Background

Because the issues on appeal are, for the most part, legal in nature, we limit our description of the facts to those relevant to disposition of this appeal.

At the center of this controversy are three tracts of land: (1) a tract commonly referred as the “28 acre property,” (2) another commonly referred as the “7.75 acre property,” and (3) a third commonly referred as “the Fun Center.” While Appellants often mention the “28.24 acre property,” it is not at issue in the dismissed Complaint.

Glen J. Fry was the initial owner of the three tracts and he created several trusts: the Glen J. Fry Trust,⁷ the Glen J. Fry Annuity Trust,⁸ and the Jelem Trust.⁹ Upon his death, the three tracts passed to the Jelem Trust.

In May 1998, the Victoria Fry Children’s Trust (“VFCT”) was established by Phillip and Victoria Fry. The beneficiaries of this trust are Phillip’s three minor children, Heather, Nicole, and Valerie, by his current wife, Victoria. Pursuant to a settlement agreement entered into with Phillip’s three adult children from his first marriage, the Glen Fry Trust, and the Jelem Trust, the three tracts were transferred to the VFCT.¹⁰ The VFCT’s declaration and the quitclaim deeds state that the transfer of these tracts to the VFCT are as nominees for the Jelem

⁷ The Glen J. Fry Trust was created in 1974.

⁸ The Glen J. Fry Annuity Trust was created in 1988 to hold and manage assets received from Glen Fry in consideration of the obligation of the Glen J. Fry Trust to pay an annuity income to Glen J. Fry for his life.

⁹ The Jelem Trust arose by operation of the Glen J. Fry Trust following the death of Glen and his wife. The Jelem Trust was formed for the benefit of the surviving children of Phillip, with Phillip receiving a life income of the trust, the remainder for his children. The Jelem Trust provided that Phillip would never receive any trust principal.

¹⁰ In 1996, Phillip Fry, on behalf of his minor children, filed a lawsuit in Arizona against, among others, his adult children, the Jelem Trust, and the Glen J. Fry Annuity Trust. In 1998, the parties entered into a settlement agreement.

Trust and/or the Glen J. Fry Annuity Trust.¹¹

In August 2002, the VFCT conveyed the tracts to the Debtor, Twin Lakes Real Estate, LLC (“Twin Lakes”), in exchange for 100% ownership interest in the company. Phillip Fry established Twin Lakes and is currently the trustee for the VFCT. The VFCT is listed as Twin Lakes’ only member and Phillip Fry as its chief operating officer.

In 1994, well prior to the establishment of Twin Lakes and its acquisition of the tracts, the Government filed Notices of Federal Tax Lien against these tracts while they were still in the hands of the Jelem Trust. These liens were recorded in an attempt to enforce a tax debt owed by Phillip Fry, whom the IRS contends is the true owner of these properties because Twin Lakes, the VFCT, and the Jelem Trust are his “alter egos.”

Twin Lakes filed for Chapter 7 relief on June 20, 2005. Thereafter, Twin Lakes sold the 28 acre property and the 7.75 acre property and the proceeds were paid into the registry of the bankruptcy court. The checks bore a legend “on behalf of” the children beneficiaries.¹²

On October 21, 2005, the VFCT, Phillip Fry as Successor Trustee of the VFCT, and his daughters Heather, Nicole and Valerie Fry, the beneficiaries of the VFCT (collectively “Appellants”), commenced an adversary proceeding against the Government and Twin Lakes, seeking declaratory relief that the tax liens filed against the 7.75 acre property and the Fun Center are wrongful and should be removed. Appellants contend that the beneficiaries of the VFCT are entitled to the properties and/or the proceeds from their sale because they are the equitable owners of the properties in their capacities as individuals and beneficiaries.

¹¹ Irrevocable Declaration of Trust for the VFCT, *in* Appellants’ Appendix at 60; Quitclaim Deeds, *in* Appellants’ Appendix at 68-71.

¹² Sales Proceeds Checks *in* Appellants’ Appendix at 318 and 324.

Appellants seek release of the tax liens, damages, and a declaration that the liens were invalid and that the children were “beneficial owners” of the land. In their complaint, Appellants allege, in pertinent part:

9. The Debtor, Twin Lakes, is the nominee owner (as the nominee for the Jelem Trust, the Glen J. Fry Annuity Trust, and Hurricane R.V. Park, Inc., for the benefit of Heather Fry, Nicole Fry, and Valerie Fry, as both trust beneficiaries and individuals) of two parcels of real property, the first known as the “Fun Center” property . . . and another of approximately 7.75 acres[.]¹³
 . . .
26. Consequently, Twin Lakes is not the beneficial owner of the property, but is solely and only a nominee on behalf of the Jelem Trust and the Annuity Trust, for the exclusive benefit of equitable owner beneficiaries Heather Fry, Nicole Fry, and Valerie Fry, as trust beneficiaries and as individuals.¹⁴

Twin Lakes in turn filed a cross-claim against the Government for an order determining that the tax liens against Phillip Fry do not attach to any property in Twin Lakes’ bankruptcy estate because the property belongs to the Jelem Trust.

On February 27, 2007, the Government filed a motion to dismiss Appellants’ quiet title action based on lack of subject matter jurisdiction, lack of standing, and the statute of limitations pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).¹⁵ On April 27, 2007, the bankruptcy court granted the Government’s motion to dismiss.¹⁶ In its analysis, the bankruptcy court accepted the allegations in Appellants’ complaint as true, but determined that because Appellants allege that the tracts at issue were owned by the Jelem Trust and not the Debtor, it lacked subject matter jurisdiction because the adversary proceeding

¹³ Complaint to Remove Wrongful Liens From Properties at 3-4, ¶ 9, *in* Appellants’ Appendix at 20-21.

¹⁴ *Id.* at 17, ¶26, *in* Appellants’ Appendix at 34.

¹⁵ Appellants’ Appendix at 278.

¹⁶ Memorandum Decision Granting Defendant United States’ Motion to Dismiss Complaint, *in* Appellants’ Appendix at 266-277.

was neither a core nor a related proceeding under 28 U.S.C. § 1334. The bankruptcy court further determined that even if this was a related proceeding, Appellants could not meet the prudential requirements for standing because only a debtor's bankruptcy estate can assert the claims raised by Appellants.¹⁷ This appeal follows.

IV. Discussion

A. Bankruptcy Court Jurisdiction.

Appellants contend the bankruptcy court erred in determining (1) that it lacked subject matter jurisdiction over their claims because their adversary proceeding was neither a core nor a related proceeding and (2) that even if this was a related proceeding, they lacked standing to bring their claims. Appellants claim the bankruptcy court has jurisdiction under 28 U.S.C. §§ 1334(e), 157(b)(2)(B), and 157(b)(2)(K).¹⁸ They contend that §1334(e) vests the bankruptcy court with jurisdiction to determine what is property of the estate and to decide competing interests in property that is alleged to be property of the estate. Appellants argue that identifying, administering, and resolving competing claims to property of the estate is an essential core function of a bankruptcy court. In addition, they assert that the bankruptcy court has jurisdiction because their complaint directly rebuts the Government's proof of claim and the allowance or disallowance of a claim is a core proceeding under §157(b)(2)(B).¹⁹ Further, since their quiet title action seeks to enforce the Fry children's creditor lien and

¹⁷ The bankruptcy court did not address the Government's statute of limitations argument below and we need not do so here, other than to say that it appears that the quiet title cause of action asserted by the Appellants accrued well before the requisite 6 years provided for in 28 U.S.C. § 2401(a). The first liens were filed in 1998. This adversary was filed in 2005, seven years later.

¹⁸ All future references to "Section" or "§" refer to Title 28 of the United States Code, unless otherwise noted.

¹⁹ Appellants' Brief at 19.

to remove the Government's tax lien, it is a core proceeding within the meaning of § 157(b)(2)(K), which provides that core proceedings include determinations of the validity, extent, or priority of liens.²⁰

Bankruptcy courts have only the jurisdiction and powers expressly or by necessary implication granted by Congress.²¹ Section 1334 grants district courts original jurisdiction over bankruptcy cases and core proceedings arising in, arising under, or related to bankruptcy cases. District courts are empowered by § 157(a) to refer such cases and proceedings to bankruptcy judges. On reference, § 157(b) enables bankruptcy courts to “hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11[,]” and to hear, enter interlocutory orders, and submit findings of fact and conclusions of law with respect to non-core proceedings that are related to a bankruptcy case. Thus, bankruptcy courts have jurisdiction over core proceedings and related proceedings. Appellants' action is not a core proceeding or a related proceeding.

B. The bankruptcy court correctly determined that Appellants' quiet title action is a non-core proceeding.

Section 157(b)(2) enumerates a non-exhaustive list of core proceedings. By those examples, core proceedings are proceedings which have no existence outside of bankruptcy.²² The most helpful explanation of what is a core proceeding, accepted almost universally by the courts, is found in the Fifth Circuit's decision in *Wood v. Wood (In re Wood)*:

²⁰ 28 U.S.C. § 157(b)(2)(K) provides that core proceedings include, but are not limited to determinations of the validity, extent, or priority of liens.

²¹ *Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 273 (8th Cir.1983).

²² *Holland Indus., Inc. v. United States (In re Holland Indus., Inc.)*, 103 B.R. 461, 465 (Bankr. S.D.N.Y. 1989).

If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding; for example, an action by the trustee to avoid a preference. If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt. If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an “otherwise related” or non-core proceeding.²³

A core proceeding, however, must always implicate property of the bankrupt estate.²⁴

When we analyze Appellants’ complaint in these terms, we conclude, as the bankruptcy court did, that the dismissed complaint does not constitute a “core proceeding” under § 157(b). As the bankruptcy court rightly states, the averments of the complaint must be taken as true.²⁵ Appellants’ complaint clearly avers that the subject properties are not property of Twin Lakes’ estate; rather they are supposedly held by Twin Lakes as a “nominee” for the VFCT and the Jelem Trust. If the tracts are not property of the estate and the Debtor has no legally recognizable claim, then there is no basis for the bankruptcy court’s core jurisdiction. Additionally, the Appellants’ complaint fails to satisfy the test of whether a claim could only arise within the context of a bankruptcy proceeding. Appellants’ arguments are rife with contradictions. If, as they argue, the land is

²³ 825 F.2d 90, 97 (5th Cir. 1987).

²⁴ *Cont’l Nat’l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1347-48 (11th Cir. 1999). *See also In re Holland Indus., Inc.*, 103 B.R. at 465 (In referring to determinations of the validity, priority, and extent of liens, § 157(b)(2)(K) is to be construed to refer to liens on property of the estate.).

²⁵ *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms: (1) a facial attack on the sufficiency of the allegations as to subject matter jurisdiction; and (2) a challenge to the facts upon which subject matter jurisdiction depends. In reviewing a facial attack, the court must accept the allegations in the complaint as true. But, when reviewing a factual attack on subject matter jurisdiction, the court need not accept the allegations as true and has wide discretion to consider evidence outside of the pleadings.).

property of the estate, owned by Twin Lakes and, therefore, appropriate subject matter for bankruptcy jurisdiction, how can its proceeds be payable to the heirs, as opposed to the legitimate creditors of the debtor?

C. The bankruptcy court correctly determined that Appellants' quiet title action is not a related proceeding.

Related proceedings are civil proceedings that, in the absence of a bankruptcy petition, could have been brought in a district court or state court.²⁶ “[T]he test for determining whether a civil proceeding is related in bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.”²⁷ Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action in any way that impacts the handling and administration of the bankruptcy estate.²⁸

When we subject Appellants’ dismissed complaint to this test, we conclude, just as the bankruptcy court did, that it fails to satisfy the requirements for “related to” jurisdiction. If the subject properties are not part of Twin Lakes’ bankruptcy estate, the relief that Appellants seek does not alter Twin Lakes’ rights, liabilities, or impact the administration of its estate in any way.²⁹

²⁶ *In re Colo. Energy Supply, Inc.*, 728 F.2d 1283, 1286 (10th Cir. 1984).

²⁷ *See Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

²⁸ *Gardner*, 913 F.2d at 1518; *see also Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987).

²⁹ *See In re Holland Indus., Inc.*, 103 B.R. at 470 (court found that it lacked subject matter jurisdiction over a proceeding to determine the validity of tax liens on non-debtor property because the proceeding was too remotely related to the bankruptcy case to confer “related to” jurisdiction).

D. The bankruptcy court correctly determined that it lacked jurisdiction because Appellants lacked standing to assert their claims.

Even if the complaint withstood the facial challenges discussed above, a factual analysis that considers both constitutional and prudential standing makes clear that the bankruptcy court lacks the requisite jurisdiction. The constitutional minimum of standing contains three elements known as the “*Lujan* factors”: (1) ‘injury in fact’ which must be both concrete and particularized and actual or imminent, (2) a causal connection linking defendant’s action to the injury, and (3) it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.³⁰ Here, Appellants are unable to show a concrete and actual harm – their claim is based on their position as beneficiaries of the VFCT which is the owning member of the Debtor. Their claim is therefore strictly derivative of a claim rightly belonging to the Debtor. If the liens were deemed wrongly filed, the relief that would confer would accrue to Twin Lakes, not to the beneficiaries. Neither are the Appellants able to demonstrate that they have been harmed by the Government’s actions because the realty is no longer held by the Trust through which the individuals might obtain a benefit. By failing to show two of the three *Lujan* factors, Appellants fail to show the existence of a case or controversy in which they have a stake.

Nor do Appellants have prudential standing. They may only raise their own rights, not those of Twin Lakes. Shareholders may not enforce the rights of a corporation unless management has refused to do so for reasons other than business judgment.³¹ The basis of their claim of independent harm consists of

³⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

³¹ *Franchise Tax Board of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (discussion regarding the shareholder standing rule which generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation’s management has refused to pursue the same action for reasons other than good-faith business judgment); *Grubbs v. Bailes*,
(continued...)

their filing Notices of Beneficial Interest as to the properties, the notation on the proceeds checks that they were made on behalf of the beneficiaries, and their having filed a proof of claim. Yet all of the “harm” emanates from the fact that tax liens to collect the debts of Phillip Fry impair the rights of the Debtor in the property. Twin Lakes, as titleholder of the property, is the proper party to assert this relief and doing so in bankruptcy court would be entirely appropriate. The beneficiaries are not proper parties here.

V. Conclusion

For the foregoing reasons, the bankruptcy court’s decision is affirmed. Having decided that the bankruptcy court lacks subject matter jurisdiction, we need not consider the arguments regarding the doctrine of sovereign immunity.

³¹ (...continued)
445 F.3d 1275, 1280 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 384 (2006).