NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DAVID BRIAN DERRINGER, Debtor.	BAP No. NM-05-068
DAVID BRIAN DERRINGER, Appellant, v. MICK CHAPEL and JENNIFER CHAPEL, Appellees.	Bankr. No. 13-04-17330-MA Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before BOHANON, MICHAEL, and THURMAN, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.[1]

David Brian Derringer ("Derringer") appeals several orders of the United States Bankruptcy Court for the District of New Mexico, culminating in the termination of the automatic stay as to Mick Chapel and Jennifer Chapel (the "Chapels"). Finding no error, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[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.

I. Background

This Court has previously detailed the dispute between Derringer and the Chapels.[2] We limit our recital of the facts to those that are relevant to our decision today.

The Chapels hold judgment liens on real property owned by Derringer. On October 6, 2004, Derringer filed a petition for relief under Chapter 13 of the Bankruptcy Code. Shortly thereafter, the Chapels filed a motion for relief from the automatic stay, seeking to execute on their judgment liens. By order entered December 27, 2004 ("December 27 Order"),[3] the bankruptcy court found that the Chapels had not met their burden of showing lack of equity in the property. But, the court further found that Derringer had made little progress toward confirmation of a Chapter 13 plan of reorganization that addressed repayment of the Chapels' judgments. Accordingly, the court imposed the following conditions on the continued application of the automatic stay:

> A) that [Derringer] file and notice to all creditors, an amended plan of reorganization no later than January 10, 2005;
> B) that [Derringer] file an application to employ a real estate broker no later than January 10, 2005;
> C) that [Derringer] obtain a preliminary hearing to consider the objections, if any, to the amended plan immediately upon the expiration of the time for filing objections;
> D) that a plan of reorganization be confirmed no later than May 20, 2005;
> E) that [Derringer] file amended schedules carefully describing his assets no later than January 10, 2005; and
> F) that [Derringer] file monthly operating reports as required by Rule 2015, Fed. R. Bankr. P. and the New Mexico Local Bankruptcy Rules. Past due reports are due by January 10,

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[2] A history of the dispute between these parties is contained in *In re Derringer*, No. NM-05-020, 2005 WL 2216327 (10th Cir. BAP Sept. 6, 2005).

[3] *See* Appellant's Appendix at 226-33. The December 27 Order was dated December 23, 2004, and the parties often refer to it as the December 23 Order. However, the order was not entered on the bankruptcy court's docket until December 27, 2004. We therefore refer to the latter date. See Fed. R. Bank. P. 5003, 9021 (an order is effective when it is entered on the docket).

2005, and the reports shall be timely filed thereafter.[4]

The December 27 Order concluded: "If [Derringer] fails to comply with these deadlines, then upon the filing of an affidavit by counsel for the Chapels that [Derringer] has failed to comply, the Court will enter an order terminating the automatic stay."[5] Derringer filed a motion seeking a new trial or relief from the December 27 Order. His motion was denied by order entered January 19, 2005 ("January Order Denying New Trial/Relief"), in which the court held that Derringer had raised no new issues in his motion.[6] Derringer appealed the December 27 Order and January Order Denying New Trial/Relief to this Court, but the appeal was dismissed as interlocutory.[7]

Counsel for the Chapels filed three affidavits notifying the bankruptcy court that Derringer had failed to comply with the December 27 Order.[8] Derringer filed motions to strike each of the affidavits. By orders entered June 28, 2005 ("Affidavit Orders"), the bankruptcy court denied each of Derringer's motions to strike, finding that the affidavits were based on personal knowledge, the affidavits were not filed for an improper purpose, and the affidavits were properly served on Derringer at his address of record.[9]

Also on June 28, 2005, the bankruptcy court entered an order granting the

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4 December 27 Order at 7, *in* Appellant's Appendix at 232.

5 *Id.*

6 January Order Denying New Trial/Relief at 2, *in* Appellant's Appendix at 344.

7 *See In re Derringer*, No. NM-05-007 (10th Cir. BAP Mar. 15, 2005).

8 *See* Appellees' Appendix at 40-52.

9 *See* Debtor/Appellant's Motion for Incorporation of the Appendix of BAP No. NM-05-020 as the Appendix of this Appeal BAP No. NM-05-068 ("Incorporation Motion"), which was granted by order entered October 13, 2005. The Incorporation Motion included the Appendix Orders as an attachment.

Chapels relief from stay ("Order Granting Relief").[10] The court held:

> Based on the Affidavits and the record of this proceeding, the Court finds that [Derringer] has failed to comply with the terms of the Order, and cause therefore exists to lift the automatic stay.
>
> Although [Derringer] filed an amended plan of reorganization that was noticed to all creditors in accordance with the terms of the Order, the deadline for objections has passed, objections were filed, and no preliminary hearing on confirmation has been set. It is well past May 20, 2005, and no plan of reorganization has been confirmed. Nor has [Derringer] filed a motion to extend the time within which to confirm a plan.[11]

Derringer filed a motion seeking an extension of time to comply with the December 27 Order, alleging that matters underlying the December 27 Order were on appeal.[12] Derringer also filed a motion for new trial or relief from the Affidavit Orders and the Order Granting Relief.

By order entered July 20, 2005, the bankruptcy court denied Derringer's motion for extension of time to comply with the December 27 Order ("Order Denying Extension").[13] The court found that the motion was not timely filed, that Derringer had not obtained a stay pending appeal, and that Derringer had not shown any grounds upon which to excuse compliance with the December 27 Order. Also on July 20, 2005, the bankruptcy court entered an order denying Derringer's motion for new trial or relief ("July Order Denying New Trial/ Relief").[14] In the July Order Denying New Trial/Relief, the court analyzed Derringer's motion under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases by Rules 9023 and 9024 of the

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[10] *See* Appellees' Appendix at 53-55.

[11] Order Granting Relief at 1-2, *in* Appellees' Appendix at 54-55.

[12] We assume the pending appeal was NM-05-020. On September 6, 2005, this Court affirmed the bankruptcy court's findings that the Chapels' judgments were binding on Derringer.

[13] *See* Appellees' Appendix at 56-58.

[14] *See* Incorporation Motion (attaching July Order Denying New Trial/Relief).

Federal Rules of Bankruptcy Procedure, and concluded that under either rule, Derringer had shown no grounds for relief.[15] Finally, on that same date, the bankruptcy court entered an unrelated order regarding sanctions ("Sanctions Order").

On August 3, 2005, Derringer filed one notice of appeal, listing each of the three orders entered on July 20. This Court held that the Order Denying Extension and the July Order Denying New Trial/Relief would be construed as one order for purposes of the notice of appeal, but the Sanctions Order was a separate matter requiring a separate notice of appeal. This Court construed Derringer's notice of appeal as two notices of appeal, assigning the appeal of the Sanctions Order case number NM-05-071. The appellees in NM-05-071 timely filed an election to have the appeal heard by the United States District Court for the District of New Mexico, and that matter is not before us. The matters before this Court are (1) the December 27 Order; (2) the January Order Denying New Trial/Relief; (3) the three Affidavit Orders; (4) the Order Granting Relief; (5) the Order Denying Extension; and (6) the July Order Denying New Trial/Relief.

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear this appeal. The Order Granting Relief is a final order, and the bankruptcy court's interlocutory orders, including the December 27 Order, became final with the entry of the Order Granting Relief.[16] Derringer's timely motion for new trial or relief extended the time to file a notice of appeal of the Order Granting Relief,[17] and Derringer timely filed a notice of

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[15] July Order Denying New Trial/Relief at 2.

[16] *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 n.3 (10th Cir. 1994) (order granting relief from stay is a final order); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995) (prior interlocutory orders merge into the final order and become appealable at that time).

[17] *See* Fed. R. Bankr. P. 8002(b).

appeal.[18] No party filed an election to have this appeal heard by the United States District Court for the District of New Mexico; thus, the parties have consented to our review.[19]

We review an order conditioning or terminating the automatic stay for abuse of discretion.[20] Similarly, we review an order denying relief under Rules 59(e) and 60(b) for abuse of discretion.[21] "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[22]

III. Discussion

Section 362(d)(1) of the Bankruptcy Code[23] provides that a bankruptcy court "shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . . ."[24] As this Court has previously noted:

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[18] *See* Fed. R. Bankr. P. 8002(a).

[19] *See* 28 U.S.C. § 158 (b)-(c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

[20] *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987); *In re Busch*, 294 B.R. 137, 140 (10th Cir. BAP 2003).

[21] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (Rule 59 motion); *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000) (Rule 59 motion); *Elsken v. Network Multi-Family Sec. Corp.*, 49 F.3d 1470, 1476 (10th Cir. 1995) (Rule 60 motion); *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991) (Rule 60 motion).

[22] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (further quotation omitted)).

[23] Unless otherwise specified, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

[24] 11 U.S.C. § 362(d)(1).

> While cause under § 362(d)(1) includes "the lack of adequate protection of an interest in property," it is not so limited. 11 U.S.C. § 362(d)(1). Because "cause" is not further defined in the Bankruptcy Code, relief from stay for cause is a discretionary determination made on a case by case basis. *Pursifull*, 814 F.2d at 1506.[25]

The bankruptcy court held that Derringer's failure to obtain confirmation of a Chapter 13 plan that included repayment of the Chapels' judgments constituted "cause" sufficient for conditioning – and ultimately terminating – the automatic stay. We do not have a definite and firm conviction that the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

Derringer argues that the Chapels' judgments are invalid and not binding on him. We have previously considered and rejected these arguments[26] and will not repeat that discussion here. The bankruptcy court did not err in recognizing the validity of the Chapels' judgments.

Derringer further argues that he should not be required to include the Chapels' judgments in his Chapter 13 plan because the bankruptcy court has not determined the amount of the Chapels' claims under § 502(b). But, Derringer has not shown that a § 502(b) determination is needed. The record reflects that the Chapels have filed a proof of claim,[27] which is deemed allowed unless a valid objection is filed.[28] There is nothing in the record before this Court that shows

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[25] *In re Busch*, 294 B.R. at 140-41.

[26] *See In re Derringer*, No. NM-05-020, 2005 WL 2216327, at *4-5 (10th Cir. BAP Sept. 6, 2005) (affirming the bankruptcy court's holding that the Chapels' judgments are binding on Derringer, and the *Rooker-Feldman* doctrine prevents that court – or this Court – from vacating or reversing them).

[27] *See* Appellees' Appendix at 19-39.

[28] *See* Fed. R. Bankr. P. 3001(f); *In re Fullmer*, 962 F.2d 1463, 1466 (10th Cir. 1992), *abrogated on other grounds by Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000).

that Derringer filed a valid objection[29] or offered substantial evidence justifying disallowance of the claim.[30] We therefore cannot conclude that the bankruptcy court erred in requiring Derringer to include the Chapels' judgments in his Chapter 13 Plan.

Finally, we find no abuse of discretion in the bankruptcy court's denial of Derringer's motions to strike the affidavits, motion for extension of time to comply with the December 27 Order, and motions for new trial or relief.[31]

IV. Conclusion

The December 27 Order; the January Order Denying New Trial/Relief; the three Affidavit Orders; the Order Granting Relief; the Order Denying Extension; and the July Order Denying New Trial/Relief are AFFIRMED.

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[29] *See* Fed. R. Bankr. P. 3007 (An objection to a proof of claim must be in writing and must be filed; the objecting party must mail or deliver a copy to the party whose claim is the subject of dispute, together with a notice of the time and the place for the hearing, at least 30 days prior to the hearing date.); Fed. R. Bankr. P. 9004 (An objection must contain a proper caption and the designation that it is an objection to a proof of claim.).

[30] *See In re Hemingway Transp., Inc.*, 993 F.2d 915, 925 (1st Cir. 1993) ("The interposition of an objection does not deprive the proof of claim of presumptive validity unless the objection is supported by substantial evidence.") (citing *Norton Bankruptcy Law & Practice*, Bankruptcy Rules at 191 (1992)).

[31] *See Van Skiver*, 952 F.2d at 1243 ("[R]evisiting the issues already addressed 'is not the purpose of a motion to reconsider,' and 'advanc[ing] new arguments or supporting facts which were otherwise available for presentation when the original . . . motion was briefed' is likewise inappropriate.") (quoting district court opinion at 751 F. Supp. 1522, 1523 (D. Kan. 1990)).