

NOT FOR PUBLICATION

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

IN RE KOPEXA REALTY VENTURE
CO., Kansas General Partnership,

Debtor.

BAP No. KS-02-042

EARL E. KOPP,

Appellant,

v.

CARL R. CLARK, Trustee,

Appellee.

Bankr. No. 95-21261-7
Chapter 7

ORDER AND JUDGMENT*

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

Before BOULDEN, MICHAEL, and BROWN¹, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

Earl E. Kopp (Kopp) appeals an order of the United States Bankruptcy Court for the District of Kansas denying his motion for reconsideration. For the reasons set forth below, the is appeal is DISMISSED for lack of appellate

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).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 Honorable Elizabeth E. Brown, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

jurisdiction.²

I. Background

The debtor is a Kansas general partnership that owned and operated a shopping center located in Lenexa, Kansas. The shopping center's primary tenant was insider, C.K. Williams, Inc. (CK). Kopp and his spouse, Carolyn K. Kopp (Mrs. Kopp) (collectively, "the Koppes"), are the partners of the debtor.

In 1995, the debtor filed a case seeking relief under Chapter 11 of the Bankruptcy Code. Carl R. Clark was appointed as the Chapter 11 trustee. The debtor's Chapter 11 case ultimately was converted to a case under Chapter 7, and Mr. Clark was appointed as the Chapter 7 trustee (Trustee).

After the debtor's Chapter 11 case was converted to Chapter 7, the bankruptcy court approved the Trustee's sale of substantially all of the debtor's assets to All American Life Insurance Company and the United States Life Insurance Company in the City of New York (collectively, "USLIFE"). The court also entered an order approving a "Stipulation for Settlement of Claims" (Claims Stipulation) made by the Koppes, the Trustee and the trustee in CK's Chapter 7 case (CK Trustee). The Trustee and the CK Trustee agreed in the Claims

² Also before the Court is Kopp's Motion for Leave to Amend Notice of Appeal (Amendment Motion). Kopp seeks to include his spouse, Carolyn K. Kopp, as an appellant, and to include as an order appealed the bankruptcy court's underlying order denying his motion to participate in certain claims litigation. The Amendment Motion is not opposed by the Trustee.

We DENY the portion of the Amendment Motion seeking to include Mrs. Kopp as an appellant herein. Kopp admitted at oral argument that Mrs. Kopp's omission as an appellant in his Notice of Appeal was not excusable neglect and, therefore, there are no grounds on which to include her as an appellant.

The second portion of Kopp's Amendment Motion, seeking to include what we have defined below as the "Participation Order" as an order appealed, is DENIED as moot. We need not rule on this portion of the Amendment Motion given our dismissal of this appeal. But, in considering the jurisdictional issues herein, we wish to give Kopp every benefit of the doubt. Accordingly, we will assume, without so ruling, that the Participation Order is an order appealed even though it was not listed in Kopp's Notice of Appeal.

Stipulation to release, discharge and abandon any claims against the Kopps, or persons and entities related to the Kopps. The Kopps, in turn, agreed to release any and all claims against the debtor and CK. They further agreed to “make no claims against any assets of the Estates, make no objection to any other claims in the Estates, and have no further involvement in either of the aforementioned bankruptcy proceedings, themselves or through any third parties.”³

Kopp appeared at a hearing in the debtor’s case in October 2001 (October Hearing) as an equity security holder of the debtor. Citing the Claims Stipulation, the Trustee objected to Kopp’s participation at the October Hearing. The court ruled:

I’m going to allow Mr. Kopp to remain here in the capacity of a shareholder with some remote possibility of obtaining some residue, if there were any, in this estate. But he will not be given any further opportunity to make any input or make any statements. He can merely observe what goes on.⁴

The court noted that Kopp’s waiver of “claims” against the debtor in the Claims Stipulation was ambiguous because it was unclear as to whether he had waived his right to any residual that might exist.

Relying on the October Hearing ruling, the Kopps filed a “Motion by Equity Security Holders to Participate in Discovery and Claims Disposition” (Participation Motion). The Kopps vaguely represented that there were “various motions and objections pending that will affect the distribution and winding up of the estate.”⁵ They requested that they be allowed “to participate in discovery, pretrial, and trial of the claims issues before the Court and for such other relief as

³ Claims Stipulation ¶ 2, *in* Appellee’s Appendix at 4.

⁴ October Hearing Transcript at 7, *in* Appellant’s Appendix at 27.

⁵ Participation Motion ¶ 3, *in* Appellant’s Appendix at 2.

is just and proper.”⁶ The Trustee and USLIFE objected to the Participation Motion.

Kopp appeared on behalf of himself and Mrs. Kopp as equity holders of the debtor at the hearing on the Participation Motion. He stated that he wanted to participate in discovery for a matter scheduled for trial on December 21, 2001. The Trustee elaborated that the trial scheduled for that date involved objections brought by himself and USLIFE to proofs of claim filed by the Kopp Family Trust and Don Kopp (December Claims Litigation). The Trustee argued that the Koppes had no interest in those proofs of claim or the December Claims Litigation, and that the Claims Stipulation barred them from participating in any claims litigation, including the December Claims Litigation. At the conclusion of the hearing, the bankruptcy court stated:

Well, the stipulation . . . is probably broad enough to cover even the idea that – well, it’s a little ambiguous as to whether it’s broad enough to cover the idea of Mr. Kopp not having any rights to residue of this estate. He gave up claims. I’m not sure whether that agreement would cover his right to be – right to payment of residue out of the estate after a hundred percent to all creditors.

But as Mr. Clark points out, everyone who’s involved in this litigation coming up in a short while is represented by counsel. All the required parties have attorneys. And there’s really no reason to allow Mr. Kopp to participate in any discovery in the form of asking questions in the form of interrogatories, and participating in any questioning of any depositions or any anything of that sort. But I have no problem with Mr. Kopp being present, in attendance, at any hearing or pretrial in his . . . capacity as an equity security holder with no right to make any statements whatsoever concerning the matter.⁷

The Trustee was ordered to file an order reflecting the court’s oral ruling.

Several weeks later, the bankruptcy court entered an order submitted by the Trustee denying the Participation Motion (Participation Order). Although the Court did not definitively rule on the scope of the Claims Stipulation in its oral

⁶ *Id.* at 2, *in* Appellant’s Appendix at 3.

⁷ Transcript at 5-6, *in* Appellant’s Appendix at 44-45.

ruling, the Participation Order states that the Claims Stipulation bars the Kopps from participating in claims litigation.⁸ The Participation Order also states: “the parties before the Court on the claim objections in which the Kopps desire to participate, are all represented by counsel. The interests of subject parties are thus adequately represented.”⁹ The court ordered that “the Kopps may attend and observe Court proceedings in [the debtor’s case], but they shall make no statements during said proceedings whatsoever.”¹⁰ Furthermore, the court stated that the Kopps could “not attend any deposition which may be conducted in prosecution of the claim objections[.]”¹¹

Within ten days of the entry of the Participation Order, the Kopps filed a motion for reconsideration of that Order, claiming that they had “new” evidence demonstrating that they should be allowed to participate in the December Claims Litigation (Reconsideration Motion). The primary focus of the Kopps’ Reconsideration Motion, however, was their unrelated objection to USLIFE’s claim against the debtor. The Trustee objected to the Reconsideration Motion.

The bankruptcy court held a hearing on the Reconsideration Motion at which Kopp asserted his right and need to protect the debtor’s residual estate. He argued his objections to USLIFE’s claim, not the claims subject to the December Claims Litigation. At the conclusion of hearing, the bankruptcy court orally refused to reconsider its Participation Order. A written order memorializing this oral ruling was not entered until several weeks later (Reconsideration Order).

In the meantime, on December 21, 2001, the court held the hearing scheduled for the December Claims Litigation (December 21 Hearing). Only

⁸ Participation Order ¶ 3, *in* Appellant’s Appendix at 7.

⁹ *Id.* ¶ 4.

¹⁰ *Id.* at 1-2, *in* Appellant’s Appendix at 7-8.

¹¹ *Id.*

Kopp entered an appearance at the December 21 Hearing. The court informed Kopp that all of the parties to the December Claims Litigation had resolved the matter and that journal orders had been executed. Despite this fact, it allowed Kopp to make any further record that he desired. Kopp stated that he did not know the terms of the settlement that had been reached, but that he hoped that the court was informed about USLIFE's actions in the case. He further indicated his dissatisfaction with the Trustee's sale of the debtor's property. Finally, Kopp alluded to the Trustee's alleged failure to collect approximately \$200,000, and complained that the administrative expenses of the estate were high. At the conclusion of Kopp's comments, the bankruptcy court thanked him, and stated:

As you know, the trustee is the party in charge of taking care of the estate. And the trustee operates under the best judgment rule. And matters come before me because some interested party brings them before me. And I realize there's some dispute about your standing in light of the agreement that you entered into. And as far as the Home Furnishings taking over a claim, apparently they decided not to press it. So all I'm saying is that all that I know seems regular. It's been presented by the trustee, who has a discretion to deal with these things. And apparently no one else objected, other than yourself. And certainly you have the right to do that and you have the right to appeal if you feel there's been some improper thing done.¹²

As noted by the court at the December 21 Hearing, it entered orders on that date fully resolving the December Claims Litigation by settlement (Claim Orders). In the Claim Orders, the proofs of claim of Don Kopp and the Kopp Family Trust were disallowed in full. The Claim Orders were not appealed.

Prior to the bankruptcy court's entry of its written Reconsideration Order, Kopp appealed the oral ruling that resulted in the Reconsideration Order to this Court.¹³ We assume for purposes of the disposition below that Kopp also

¹² December 21 Hearing Transcript at 3-4, *in* Appellant's Appendix at 56-57.

¹³ Kopp's Notice of Appeal from the Reconsideration Order was "filed after the announcement of a decision or order but before entry of the . . . order . . ." appealed. Fed. R. Bank. P. 8002(a). Under Rule 8002(a), the Notice of Appeal was deemed filed as of January 3, 2002, the date that the Reconsideration Order

(continued...)

appealed the Participation Order.¹⁴

II. Discussion

This appeal must be dismissed for lack of appellate jurisdiction because it is moot, Kopp lacks standing to bring it, and certain relief sought by Kopp is not appropriate for appellate review.¹⁵ These points are detailed below.

A. The Court lacks jurisdiction to consider this appeal because the relief requested is moot.

This Court only has jurisdiction over “final” orders and certain interlocutory orders of the bankruptcy court for which a timely notice of appeal has been filed.¹⁶ Here, the Claim Orders made the otherwise non-appealable interlocutory Participation Order “final” and appealable as a matter of right, and we assume that Kopp timely appealed the Participation Order by filing a Notice of Appeal when his Reconsideration Motion was denied.¹⁷ Also, the Reconsideration Order, entered after the entry of the Claim Orders, is a “final” order and there is no dispute that it was timely appealed by Kopp.

¹³ (...continued)
was entered. Federal Rule of Bankruptcy Procedure 8002(b) does not apply because the Reconsideration Order is the order appealed.

¹⁴ *See supra* n.2.

¹⁵ *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (courts have an independent duty to examine their jurisdiction even if it is not questioned by the parties, and they may not entertain matters over which they lack jurisdiction); *accord Utah v. United States Dept. of the Interior*, 210 F.3d 1193, 1196 n.1 (10th Cir. 2000); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 492 (10th Cir. 1998); *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1499 (10th Cir. 1994); *In re Petroleum Prod. Mgmt, Inc.*, 282 B.R. 9, 13 (10th Cir. BAP 2002).

¹⁶ 28 U.S.C. § 158(a); Fed. R. Bankr. P. 8001-8002.

¹⁷ *See supra* n.2 (we assume that Kopp’s timely-filed Notice of Appeal can be amended to include a timely appeal of the Participation Order); *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 325 n.1 (10th Cir. 1996) (entry of final order renders all previous interlocutory orders final for purposes of appeal); *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir. 1988) (same). The Reconsideration Motion extended the time to appeal the Participation Order. Fed. R. Bankr. P. 8002(b).

But, even when a timely appeal from a “final” order is taken, this Court must satisfy itself that a “case or controversy” exists—*e.g.*, that the case is not moot.¹⁸ It is well-established that:

“[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” A controversy is no longer “live” if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position. . . . *In re King Resources Co.*, 651 F.2d 1326, 1331-32 (10th Cir. 1980) (if the only effect of reversal on appeal would be to order the impossible, we should not address the merits of the appeal).¹⁹

Based on this test, any appeal of the Participation Order and the Reconsideration Order (collectively, the “Disputed Orders”) is moot.

The Disputed Orders dealt with the Kopp’s ability to participate in the December Claims Litigation. Even if the bankruptcy court abused its discretion in limiting the Kopp’s participation in the December Claims Litigation, a point which we expressly decline to review, we are incapable of rendering Kopp effective relief at this point because there is no longer any litigation pending in which he could participate. Specifically, the December Claims Litigation concluded when the Claim Orders became final and non-appealable.²⁰ Because the December Claims Litigation has ended, “the only effect of reversal on appeal

¹⁸ U.S. Const. art. III, § 2, cl. 1; *see In re Long Shot Drilling, Inc.*, 224 B.R. 473, 477 (10th Cir. BAP 1998) (citing cases).

¹⁹ *Long Shot Drilling*, 224 B.R. at 477 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (further quotations and citations omitted.)

²⁰ The Claim Orders are final orders under 28 U.S.C. § 158(a)(1) because they resolved a discrete dispute related to the allowance of the proofs of claims objected to, and the time to appeal those Orders has expired under Fed. R. Bankr. P. 8002. Kopp’s Notice of Appeal did not serve as a timely appeal of the Claim Orders. *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991) (a notice of appeal from an interlocutory ruling, such as a discovery ruling, does not ripen into a notice of appeal from the final judgment). Any attempt to dispute the outcome of the December Claims Litigation in this appeal would be an improper collateral attack of the final Claim Orders. Furthermore, to the extent that Kopp contests the final Claim Orders, he would, for the reasons discussed below, lack standing to do so.

would be to order the impossible”--mandating Kopp’s participation in litigation that has been fully and finally resolved. As such, this appeal is moot and must be dismissed.²¹

B. Kopp does not have standing to appeal the Disputed Orders and, therefore, the appeal must be dismissed.

The Trustee contests Kopp’s standing to appeal the Disputed Orders. “Standing . . . is . . . a threshold issue in every case before a federal court” because, like mootness, it pertains to the existence of a “case or controversy” as mandated under the Constitution.²² A party “must maintain standing at all times throughout the litigation[,]” including on appeal.²³ In bankruptcy, the appellant has standing to appeal only if he or she is a “person aggrieved” by a bankruptcy court’s order.²⁴ Under this standard, “parties will have standing to appeal a bankruptcy court order only if their ‘rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court.’”²⁵ We have stated that appellants are “‘persons aggrieved if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights’[, and the] test is meant to be a limitation on appellate standing in order to avoid ‘endless appeals brought by myriad of parties’”²⁶

²¹ *In re King Res. Co.*, 651 F.2d 1326, 1331-32 (10th Cir. 1980), *cited in Long Shot Drilling*, 224 B.R. at 478.

²² *Hutchinson v. Pfeil*, 211 F.3d 515, 523 (10th Cir.), *cert denied*, 531 U.S. 959 (2000).

²³ *Phelps v. Hamilton*, 122 F.3d 1309, 1315 (10th Cir. 1997) (quotations omitted); *accord Petroleum Prod.*, 282 B.R. at 13; *In re Kopexa Realty Venture Co.*, 240 B.R. 63, 65 (10th Cir. BAP 1999).

²⁴ *Petroleum Prod.*, 282 B.R. at 13-14; *Kopexa*, 240 B.R. at 65 (citing cases).

²⁵ *Kopexa*, 240 B.R. at 65 (quoting *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989)). *Accord Petroleum Prod.*, 282 B.R. at 14 (quoting *Am. Ready Mix*, 14 F.3d at 1500).

²⁶ *Petroleum Prod.*, 282 B.R. at 14 (quoting *Am. Ready Mix*, 14 F.3d at 1500)

(continued...)

Kopp seeks review of the Disputed Orders to establish that he and Mrs. Kopp, as equity holders of the debtor, had a right to participate in the December Claims Litigation to protect any residual estate that might exist. But, any interest that the Koppes might have in any residual estate of the debtor was not diminished by the December Claims Litigation. In fact, the December Claims Litigation only served to increase any residual estate by disallowing the proofs of claims disputed therein in full. Since Kopp was not adversely affected pecuniarily by the bankruptcy court's refusal to allow him to participate in the December Claims Litigation, and he is not a "person aggrieved" with standing to appeal the Disputed Orders, and this appeal must be dismissed.

C. The Court lacks jurisdiction to consider Kopp's right to participate in future litigation in the debtor's case because the Disputed Orders did not affect any such right.

Kopp "prays that this Court enter an order requiring the bankruptcy court to enter an order allowing [him] to participate fully in any and all proceedings regarding this bankruptcy."²⁷ This prayer for relief is inappropriate.

This Court's jurisdiction is expressly limited to the review of orders, judgments or decrees of the bankruptcy court.²⁸ In this case, the bankruptcy court did not enter *any* order barring Kopp from participating in future litigation in the debtor's case. The Disputed Orders, the orders that are the subject of this appeal, only limited his participation in the December Claims Litigation.²⁹ This being the

²⁶ (...continued)
(further citations omitted).

²⁷ Appellant's Brief at 9.

²⁸ 28 U.S.C. § 158(a).

²⁹ Although the Disputed Orders are the orders appealed, or assumed to be appealed, our review of the entire record shows that the bankruptcy court has never ruled that the Claims Stipulation bars the Koppes' participation in all matters arising in the debtor's case. Rather, the court has limited the Koppes' participation
(continued...)

case, there is no order, judgment or decree on which to base our appellate jurisdiction, and the appeal must be dismissed. If Kopp wishes to participate in future litigation in the debtor's case, he must request such relief from the bankruptcy court in the first instance. We lack jurisdiction to order the bankruptcy court to issue orders on matters that have not arisen in and been disposed of by that court.³⁰

III. Conclusion

For the reasons stated herein, this appeal is DISMISSED.

²⁹ (...continued)
only in specific matters, such as at the October Hearing and in the December Claims Litigation.

³⁰ Because Kopp has not requested a ruling from the bankruptcy court on his putative future right to participate in the debtor's case, the jurisdictional requirement of ripeness is not squarely before the court. But, we note that the ripeness doctrine requires that we avoid "premature adjudication" of "abstract disagreements[.]" *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *quoted in Utah v. United States*, 210 F.3d at 1196.