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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
September 24, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PHYLLIS L. CROWDER, Debtor.	BAP No. NM-08-017
CATALINA DEVELOPMENT, INC., Appellant, v. BERNARD R. GIVEN II, Trustee, Appellee.	Bankr. No. 96-10336-m7 Chapter 7 OPINION*

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

Before MICHAEL, BROWN, and McNIFF[1], Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Catalina Development, Inc. ("CDI") appeals the bankruptcy court's partial denial of its motion to amend findings of fact pursuant to Federal Rule of Civil Procedure 60(b).[2] After reviewing the record and applicable law, we affirm.

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* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).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 Peter J. McNiff, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Wyoming, sitting by designation.

2 CDI filed its motion to amend pursuant to Federal Rule of Civil Procedure 52, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052. However, because the motion was filed beyond the ten-day

(continued...)

I. Background

Phyllis L. Crowder ("Debtor") filed for bankruptcy protection on January 26, 1996. In June 1996, CDI entered into a letter agreement to purchase certain assets of the bankruptcy estate, including the Santa Teresa Country Club ("STCC"). For various reasons, the sale did not immediately close. After approximately four years of delays, Bernard R. Given II, the trustee in Debtor's bankruptcy case (Trustee"), brought a motion to compel closing of the sale. The bankruptcy court granted the motion, establishing an effective closing date of December 20, 1996, and an actual closing date of July 14, 2000. During the intervening period, the Debtor and her non-filing husband continued to manage and operate the STCC. After entry of the court's order compelling closing of the sale, CDI filed its proof of claim, asserting that numerous personal expenses of the Debtor and her family had been paid from STCC accounts for which it should be reimbursed ("Cash Claim").

The Trustee objected to the Cash Claim as part of his Omnibus Objection to Remaining Disputed Claims. The bankruptcy court held three days of hearings on the Cash Claim. On November 9, 2007, the bankruptcy court entered its Order Determining Allowed Claim of Catalina Development, Inc. Relating to its "Cash Claim," ("Cash Claim Order").[3] On November 26, 2007, CDI filed its Catalina

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[2] (...continued)
period contained in Bankruptcy Rules 7052 and 9023, the bankruptcy court considered the motion under the standards applicable to a motion to alter or amend under Civil Rule 60(b), made applicable to bankruptcy proceedings by Bankruptcy Rule 9024. A motion for reconsideration under Bankruptcy Rule 3008 that is filed beyond the ten-day deadline should be treated as a motion under Bankruptcy Rule 9024, which incorporates Civil Rule 60. *In re Aguilar*, 861 F.2d 873, 874-75 (5th Cir. 1988).

[3] *See Order Determining Allowed Claim of Catalina Development, Inc. Relating to Its "Cash Claim"* at 1, *in* Appellant's App. at 15.

Development, Inc.'s Motion to Amend Findings of Fact ("Motion to Amend"),[4] requesting that the court amend its findings with respect to eleven different categories of alleged personal expenses, and allow the Cash Claim in the additional sum of $147,009.72. The bankruptcy court granted in part, and denied in part, CDI's Motion to Amend by order entered on January 15, 2008 ("Amended Order"),[5] increasing the amount of expenses allowed in six of the eleven categories. CDI timely appealed the bankruptcy court's Amended Order with respect to the five categories of expenses which were not increased, and one category which was increased, but not to CDI's satisfaction.

II. 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.[6] Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico, thus consenting to review by this Court.

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."[7] A court's decision on a Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") motion is a final order, provided that the ruling or judgment was a final decision of the district court.[8] In this case, the bankruptcy court granted in part, and denied in part, CDI's Motion

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[4] *See Catalina Development Inc.'s Motion to Amend Findings of Fact, in* Appellant's App. at 47.

[5] *See Order Granting, In Part, and Denying, In Part, Catalina Development, Inc.'s Motion to Amend Findings of Fact* at 1, *in* Appellant's App. at 90.

[6] 28 U.S.C. § 158 (a)(1), (b)(1) & (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

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

[8] *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 993 (10th Cir. 1996).

to Amend. The only thing left to do is to execute the judgment and for the Trustee to pay the Cash Claim as ordered. The bankruptcy court's Amended Order is therefore final for purposes of review.

III. Standard of Review

The standard of review for a denial of a Rule 60(b) motion is abuse of discretion.[9] 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.[10] Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances.[11]

IV. Discussion

The pertinent provisions of Rule 60(b) relied upon by CDI are as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.][12]

An appeal from denial of a Rule 60(b) motion addresses only the trial court's order denying the motion and not the underlying decision itself.[13] If the factual and legal conclusions in the order are "arguable," Rule 60(b)(1) does not provide a basis for relief.[14] Relief is available only for obvious errors of law, apparent on

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9 *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000).

10 *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

11 *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996).

12 Fed. R. Civ. P. 60(b) (2007).

13 *Stubblefield*, 74 F.3d at 994.

14 *Seyler v. Burlington N. Santa Fe Corp.*, 121 F.Supp. 2d 1352, 1357 (D. Kan. 2000).

the record.[15] In addition, Rule 60(b)(1) is not available to allow a party to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument.[16]

On appeal, CDI asserts the bankruptcy court committed error on several matters of substantive fact or law in the Amended Order. Specifically, CDI argues that the court erred in its analysis of requests for increases to its Cash Claim in the following categories of expenses: (A) Charlie Trujillo; (B) NationsBank mortgage payments, Matrix Financial, and cash payments; (C) liability insurance; (D) Owners' Draws– Charles Crowder and Phyllis Crowder; and (E) telephone expenses. We review each category separately.

A. Charlie Trujillo.

CDI argues the bankruptcy court committed a substantive error of fact and law in concluding that its claim in the amount of $22,000, which represented "free rent" to Charlie Trujillo, was a business expense of STCC. Charlie Trujillo was a long-time employee of STCC who also performed work for Debtor's husband individually. On appeal, CDI argues only that there was no written agreement to support the "free rent," but does not explain the alleged mistake of law or fact. In its Amended Order, the bankruptcy court denied the $22,000 adjustment as "an inappropriate attempt to rehash arguments already considered and implicitly rejected by the Court[.]"[17] We agree.

The "mistake" provision of Rule 60(b)(1) addresses situations in which the trial court has made a substantive mistake of law or fact in a final judgment or

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15 *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991).

16 *Id.* at 1243.

17 *See Order Granting, In Part, and Denying, In Part, Catalina Development, Inc.'s Motion to Amend Findings of Fact* at 3, *in* Appellant's App. at 92.

order.[18] Errors that are not "facially obvious" do not warrant relief under Rule 60(b)(1).[19] It is clear from the Cash Claim Order that the bankruptcy court concluded that the "free rent" constituted a business expense of STCC based on the Debtor's husband's testimony that the free rent provided to Mr. Trujillo after he stopped working represented retirement benefits for which there was no written agreement. Because it is not facially obvious that the bankruptcy court made a mistake of law or fact regarding this expense, it did not err in declining to re-address the issue.

B. NationsBank Mortgage Payments, Matrix Financial and Cash Payments.

CDI asserts the bankruptcy court erred in refusing to increase the Cash Claim by the sum of $11,280.44, representing mortgage payments that were made from STCC funds on rental properties that did not belong to STCC. In its Amended Order, the bankruptcy court stated that it would not increase the Cash Claim as requested, reasoning that "because of the impossibility of reconciling mortgage payments against rental income [received by STCC from the properties, no further adjustments were needed]."[20] The bankruptcy court considered CDI's arguments and determined that CDI had not proven the validity and amount of the claim by a preponderance of the evidence. On appeal, CDI complains that the bankruptcy court improperly shifted the burden of proof to CDI to prove up offsetting rents received.

The Federal Rules of Bankruptcy Procedure provide that a proof of claim that has been executed and filed in accordance with the rules constitutes prima

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[18] *Van Skiver*, 952 F.2d at 1244.

[19] *Id.*

[20] *See Order Granting, In Part, and Denying, In Part, Catalina Development, Inc.'s Motion to Amend Findings of Fact* at 5, *in* Appellant's App. at 94.

facie evidence of the validity of the amount of the claim.[21] The Bankruptcy Appellate Panel of the Tenth Circuit held that the failure to attach written documentation to a proof of claim does not in itself require outright disallowance of the claim.[22] The objecting party has the burden of going forward with evidence supporting the objection that is of equal probative force as the allegations contained in the proof of claim, after which the claimant will have the burden of persuasion as to the validity and the amount of the claim.[23]

In this case, CDI filed its claim and the Trustee objected to the validity and amount of the claim. The parties submitted competing accountings with respect to the rental income received. In its Cash Claim Order, the bankruptcy court specifically and accurately addressed the burdens of the parties in the claims objection process. It then held that CDI failed to carry its burden. CDI has not demonstrated that the bankruptcy court made a facially obvious substantive mistake in applying the law.

C. Liability Insurance.

On appeal, CDI argues that the bankruptcy court made a substantive mistake in its Amended Order by not adjusting its Cash Claim to include an additional $7,077.10 in liability insurance expense. CDI claims that the bankruptcy court made a factual error by misidentifying STCC in the cash disbursement journals as "Company 1" as opposed to "Company 2." In its Amended Order, the bankruptcy court reiterated its finding that STCC was "Company 1" based on the testimony of Mr. Collins and the cash disbursements journals. Further, the bankruptcy court stated "the face amount for the referenced

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[21] Fed. R. Bankr. P. 3001(f).

[22] *In re Kirkland*, 379 B.R. 341 (10th Cir. BAP 2007), *appeal docketed*, No. 08-2017 (10th Cir. Jan. 7, 2008).

[23] *In re Broadband Wireless Int'l Corp.*, 295 B.R. 140, 145 (10th Cir. BAP 2003).

checks is greater than the amount CDI asserts is attributable to a company other than STCC, and the cash disbursement journals do not break out the total payment by entity."[24] Therefore, it determined that the amount was a STCC expense. We cannot say that the bankruptcy court made a facially obvious error for which Rule 60(b) relief is available.

D. Owners' Draws (Charles Crowder and Phyllis Crowder).[25]

CDI argues on appeal that the bankruptcy court should have added an additional amount of approximately $60,000 to its Cash Claim, representing "owners' draws" taken by Debtor and her husband. CDI claimed that because it became the owner of STCC as of the established closing date of December 20, 1996, the owners' draws were not STCC expenses, but distributions of income. The bankruptcy court determined that the funds paid to Debtor and her husband were business expenses for the services of operating and managing STCC during the four years that the sale was pending.

The bankruptcy court's Amended Order stated that CDI's argument was a continuation of the argument from the hearing and denied further consideration. CDI does not argue that the Debtor and her husband did not provide services to STCC, but points only to some testimony by the Trustee's certified public accountant that draws ordinarily represent distributions of income that are not charged as expenses. It is not facially obvious that the bankruptcy court made a substantive error of fact or law in denying the adjustment for owners' draws.

E. Telephone Expenses.

In its Amended Order, the bankruptcy court partially adjusted CDI's Cash Claim for telephone expenses. However, CDI asserts that approximately $20,000

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[24] *See Order Granting, In Part, and Denying, In Part, Catalina Development, Inc.'s Motion to Amend Findings of Fact* at 6, *in* Appellant's App. at 95.

[25] The Charles Crowder and Phyllis Crowder issues are considered together in this opinion, although they are separate in the Amended Order.

should be added to its Cash Claim as reimbursement for telephone bills paid by STCC to various providers that in reality represented personal expenses of the Debtor and members of her family. In support of its Motion to Amend, CDI attached "Exhibit D," which consisted of copies of relevant pages from the audit trail reflecting the telephone expenses as attributable to members of Debtor's family.[26] In its Amended Order, the court bankruptcy court rejected this evidence:

> None of the telephone expenses identified in Exhibit D appear to correlate to the remaining disputed items for this category identified in the list prepared by the Chapter 7 Trustee, either by date or by amount. Exhibit D thus fails to demonstrate that the Court made a mistake of fact requiring further adjustment to the Court's Order.[27]

CDI has failed to establish that the bankruptcy court made a substantive mistake of fact, and is not entitled to Rule 60(b)(1) relief with respect to the telephone expenses.

V. Conclusion

For the reasons set forth above, we conclude that CDI failed to show that the partial denial of its Motion to Amend was an abuse of discretion by the bankruptcy court. CDI did not present facts warranting extraordinary or exceptional circumstances that indicate the bankruptcy court abused its discretion. This Court is not left with the definite and firm conviction that the bankruptcy court made clear errors of judgment or fact in considering the evidence and testimony. Nor does it appear that the bankruptcy court exceeded the bounds of permissible choice in considering the facts and circumstances. Accordingly, the bankruptcy court's Amended Order is affirmed.

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[26] *Exhibit D to Motion to Amend, in* Appellant's App. at 61.

[27] *See Order Granting, In Part, and Denying, In Part, Catalina Development, Inc.'s Motion to Amend Findings of Fact* at 8-9, *in* Appellant's App. at 97-98.