NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE C.W. MINING COMPANY, doing business as Co-Op Mining Company, Debtor.	BAP No. UT-09-014
STANDARD INDUSTRIES, INC. and C.O.P. COAL DEVELOPMENT COMPANY, Appellants, v. AQUILA, INC., KENNETH A. RUSHTON, Trustee, and C.W. MINING COMPANY, Appellees.	Bankr. No. 08-20105 Chapter 11 OPINION*

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

Before MICHAEL, BROWN, and ROMERO, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

In this involuntary proceeding, two creditors appeal the bankruptcy court's order holding them in civil contempt for violating the automatic stay and its order denying them post-judgment relief from the same. Having reviewed the record and applicable law, we affirm the bankruptcy court's orders.

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. BACKGROUND FACTS

Debtor C.W. Mining Company ("CWM") was in the business of coal production, and mined property in Bear Canyon, Utah. Creditor C.O.P. Coal Development Company ("COP") owns the Bear Canyon property, and leased it to CWM in return for royalty payments on each ton of coal CWM removed. In 2007, CWM became delinquent in its royalty payments to COP. Creditor Standard Industries, Inc. ("Standard") was the exclusive broker of coal mined by CWM. Pursuant to an agency arrangement, Standard paid CWM in advance for coal not yet mined, taking title to the coal directly from COP as it was produced. Standard alleges CWM owes it more than $5,000,000 in advance payments for coal that has not been mined. Creditor Aquila, Inc. ("Aquila"), an electric utility service, contracted with CWM to supply coal for two of its power plants. In October 2007, Aquila obtained a $25,000,000 judgment against CWM in the United States District Court for the District of Utah ("District Court") as damages for breach of the coal supply agreement.

On January 8, 2008, Aquila and two other creditors filed an involuntary bankruptcy petition against CWM pursuant to 11 U.S.C. § 303(b).[1] Thereafter, COP and Standard took various actions that Aquila alleges were in violation of the automatic stay imposed by § 362(a). On January 9, 2008, COP purported to terminate its coal operating agreement with CWM. Further, COP attempted to collect pre-petition royalties, and threatened to evict CWM from the mine. Standard, among other things, filed suit in Utah state court against UtahAmerican Energy, Inc. ("UEI"), an entity that purchased coal from and was indebted to CWM. In that lawsuit, Standard sought an order from the state court directing UEI to pay it certain funds that had been garnished by Aquila.

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[1] Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

On June 25, 2008, Aquila filed a motion for civil contempt against Standard and COP, alleging violations of the automatic stay ("Contempt Motion").[2] Aquila served its Contempt Motion by first class mail on COP's registered agent for service, Carl E. Kingston ("Kingston"), and Standard's attorney, F. Mark Hansen ("Hansen"). Additionally, on June 27, 2008, both Kingston and Hansen were personally served with the Contempt Motion by constable.[3] On June 30, 2008, Aquila filed a related notice of hearing, again serving Kingston and Hansen by first class mail.[4] The notice indicated a hearing on the Contempt Motion was scheduled for August 1, 2008, and the objections deadline was set for July 18, 2008.

On July 11, 2008, Standard and COP took the following actions: 1) Standard filed a motion to dismiss the involuntary petition, asserting the petitioning creditors were not qualified under § 303(b) ("Motion to Dismiss");[5] and 2) Standard and COP filed a motion to enlarge time to respond to Aquila's Contempt Motion, requesting the deadline be set for ten days after the bankruptcy court ruled on Standard's Motion to Dismiss ("Motion to Enlarge Time").[6] Three days later, the bankruptcy court entered a scheduling order consistent with the previous notice of hearing ("Scheduling Order"), thereby effectively denying

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[2] *Contempt Motion, in* Appellants' App. at 7.

[3] *See Certificate of Service, in* Appellee's Supp. App. at 81.

[4] *Notice of Hearing, in* Appellants' App. at 423.

[5] *Motion to Dismiss, in* Appellee's Supp. App. at 1. We note that the bankruptcy court's determination regarding the qualified status of the petitioning creditors was affirmed by this Court in *In re C.W. Mining Co.*, BAP No. UT-08-102, 2009 WL 4798264 (10th Cir. BAP Dec. 14, 2009).

[6] *Motion to Enlarge Time, in* Appellants' App. at 428. Additionally, on the same day, Standard and COP filed a complaint against Aquila in Utah federal district court for conversion of property, intentional interference with economic relations, abuse of process, and civil conspiracy. *Complaint, in* Appellants' App. at 716.

Standard's and COP's Motion to Enlarge Time.[7]

Standard and COP failed to file a response in opposition to the Contempt Motion by the July 18, 2008, deadline. Five days after the deadline, Aquila filed a certificate of non-opposition pursuant to a Utah bankruptcy court local rule that authorizes relief without a hearing when no response has been filed.[8] As a result, later the same day, the bankruptcy court entered an order holding Standard and COP in contempt for violations of the automatic stay ("Contempt Order").[9]

The Contempt Order directed Standard and COP to return to the bankruptcy estate all money and assets in which CWM had an interest, and ordered Standard to dismiss its state court lawsuit against UEI. Further, it declared post-petition attempts by COP to terminate its coal operating agreement with CWM null and void.[10] As a sanction for violating the stay, the bankruptcy court ordered Standard and COP to pay all of Aquila's attorneys' fees and costs incurred in prosecuting the Contempt Motion.[11]

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[7] *Scheduling Order*, *in* Appellants' App. at 431. The Scheduling Order reiterated that the Contempt Motion would be heard on August 1, 2008, and the objections deadline was July 18, 2008.

[8] *Certificate of Non-Response to Motion for Order of Civil Contempt*, *in* Appellant's App. at 435. Utah Bankruptcy Local Rule 9013-1(c) provides as follows:

> Response to Motions. A party responding to a motion must file a response within any applicable time limitation, including the time limitations of these Local Rules. A response must set forth succinctly, but without argument, the response, including objections, to the motion. If an objection is not timely filed, the court may grant the relief requested without a hearing. A party submitting an order where no objection has been filed to the motion must submit an application or declaration of noncompliance with the motion stating that there has been no objection filed or served on the movant.

[9] *Contempt Order*, *in* Appellant's App. at 440.

[10] *Id.* at 3-4, *in* Appellant's App. at 442-43.

[11] *Id.* at 4-5, *in* Appellant's App. at 443-44. Specifically, the Contempt Order stated:

(continued...)

Within ten days of the Contempt Order, Standard and COP filed their memoranda in opposition to Aquila's Contempt Motion, together with a motion for post-judgment relief and memorandum in support.[12] In the post-judgment motion, Standard and COP argued they were entitled to relief pursuant to Federal Rule of Civil Procedure 60(b)(1), (3) & (5) ("Rule 60(b) Motion").[13] They further complained the Contempt Order violated Standard's and COP's Fifth Amendment

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[11] (...continued)

> Aquila may submit an attorneys' fee affidavit setting forth the amount and reasonableness of those fees. Standard and COP Coal shall have an opportunity to object to the reasonableness of those attorneys' fees. Thereafter, the Court will make and enter a separate final order for the amount of reasonable attorneys' fees and costs to be paid by Standard and COP Coal.

Id. Further, the Contempt Order states: "This order is final as to the matters ruled upon, this Court having determined that there is no just reason to delay the entry and enforcement of this order." *Id.* at 5, *in* Appellant's App. at 444.

[12] *See* Appellant's App. at 448-519.

[13] *Rule 60(b) Motion*, *in* Appellant's App. at 503. The pertinent parts of Rule 60(b) provide as follows:

> (**b) Grounds for Relief from a Final Judgment, Order, or Proceeding**. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
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> . . .
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> . . .
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> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]

Fed. R. Civ. P. 60(b). Rule 60 is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9024.

rights of due process,[14] and that Aquila was required to bring its claims via adversary proceeding rather than on motion.

On November 3, 2008, the bankruptcy court held a hearing on the Rule 60(b) Motion and made findings of fact and conclusions of law on the record. The bankruptcy court entered a short written order on November 24, 2008, denying Standard and COP any relief under Rule 60(b)(1) & (3), and setting an evidentiary hearing on their Rule 60(b)(5) argument ("Rule 60(b) Order").[15] On April 15, 2009, Standard and COP withdrew the remainder of their Rule 60(b) Motion.[16] Later the same day, Standard and COP appealed both the Contempt Order and the Rule 60(b) Order.

II. 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.[17] Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

The notice of appeal of the Rule 60(b) Order was timely because it was filed the same day the Rule 60(b) Order became final, i.e., when Standard and COP withdrew their pending Rule 60(b)(5) argument that was set for hearing. Additionally, the Rule 60(b) Motion tolled the time for appeal of the Contempt

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[14] Additional facts relevant to Standard's and COP's due process argument will be developed in the analysis section below.

[15] *Rule 60(b) Order, in* Appellant's App. at 774.

[16] *Notice of Withdrawal, in* Appellant's App. at 779.

[17] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

Order because it was filed within ten days thereafter.[18] Thus, the notice of appeal is timely with respect to the underlying Contempt Order as well.

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.'"[19] Not all civil contempt orders are final appealable orders.[20] However, the Tenth Circuit has held that when "there is no ongoing underlying action other than the general bankruptcy proceeding,"[21] and a "finding of contempt has been made and a sanction imposed, [an] order has acquired all the elements of operativeness and consequence necessary to be possessed by any judicial order to enable it to have the status of a final decision."[22] Therefore, we believe the bankruptcy court's order finding Standard and COP in contempt and imposing a sanction is a final order subject to appeal under 28 U.S.C. § 158(a)(1).[23] A court's decision on a

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[18] Fed. R. Bankr. P. 8002(b)(4).

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

[20] *O'Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1208 (10th Cir. 1992).

[21] *In re Steele Cattle, Inc.*, 39 F.3d 1192, 1994 WL 596627 at *1 (10th Cir. 1994).

[22] *O'Connor*, 972 F.2d at 1208 (quoting *Shuffler v. Heritage Bank*, 720 F.2d 471, 475 (8th Cir. 1972)) (internal quotation marks omitted).

[23] *United States ex rel. SBA v. Gonzales*, 531 F.3d 1198, 1202-03 (10th Cir. 2008); *In re Armstrong*, 304 B.R. 432, 434-35 (10th Cir. BAP 2004). Some authority exists to suggest that, because the sanction imposed here–the attorneys' fees and costs–has not yet been quantified, the Contempt Order is not final. *See United States v. Torres*, 142 F.3d 962, 969-70 (7th Cir. 1998) (contempt order not final because requirement to pay government's fees and costs associated with response to motion to vacate not quantified); *In re Tetracycline Cases*, 927 F.2d 411, 412-13 (8th Cir. 1991) (contempt order not final because compensatory damages in the amount of costs incurred in opposing attempt to obtain protected documents not quantified); *In re U.S. Abatement Corp.*, 39 F.3d 563, 567 (5th Cir. 1994) (without an assessment of damages, the contempt order is merely interlocutory). However, this Court also has jurisdiction to hear interlocutory orders by granting leave to appeal. 28 U.S.C. § 158(a)(3); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997). Federal Rule of

(continued...)

Rule 60(b) motion is a final order, provided the ruling or judgment challenged by the Rule 60(b) motion was a final decision of the trial court.[24] Because the Contempt Order is final, the Rule 60(b) Order is also final for purposes of review.

III. STANDARD OF REVIEW

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."[25] Whether a bankruptcy court properly imposed civil contempt sanctions is reviewed for abuse of discretion.[26] A bankruptcy court will have abused its discretion if the "'adjudication of the contempt proceedings is based upon an error of law or a clearly erroneous finding of fact.'"[27]

Whether bankruptcy court proceedings have violated a party's rights of due process is a legal question reviewed *de novo*.[28] *De novo* review requires an independent determination of the issues, giving no special weight to the

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[23] (...continued)
Bankruptcy Procedure 8003(c) permits us to treat a notice of appeal as a motion for leave to appeal. Therefore, to the extent the Contempt Order is not final, we grant leave to appeal because immediate resolution of the order will materially advance the ultimate termination of the litigation.

[24] *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 993 (10th Cir. 1996) (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)).

[25] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[26] *In re Armstrong*, 304 B.R. at 435 (citing *Federal Trade Commission v. Kuykendall*, 312 F.3d 1329, 1333 (10th Cir. 2002)).

[27] *Id.*

[28] *State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1083 (10th Cir. 1996). *See also In re Amerivision Commc'ns, Inc.*, 349 B.R. 718, 722 (10th Cir. BAP 2006).

bankruptcy court's decision.[29]

Denial of a Rule 60(b) motion is reviewed for abuse of discretion.[30] 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.[31]

IV. ANALYSIS

On appeal, Standard and COP contend: 1) Aquila lacked standing to file its Contempt Motion; 2) Aquila was required to pursue its requested relief by adversary proceeding; 3) the bankruptcy court's Scheduling Order and Contempt Order deprived Standard and COP of their Fifth Amendment rights to due process of law; and 4) Standard and COP were entitled to post-judgment relief from the Contempt Order pursuant to Rule 60(b)(1) & (3). We are not persuaded.

A. Standing to File Contempt Motion

Standard and COP argue Aquila lacked standing to file the Contempt Motion. This argument is premised on the assertion Aquila was not a qualified petitioning creditor under § 303(b) because its claim was subject to a bona fide dispute. Essentially, COP and Standard contend that since Aquila "lacked standing even to file the involuntary petition in the first place, [it] lacked standing to file its contempt motion."[32]

Aquila responds that this issue is not properly before this Court on appeal as Standard and COP did not timely raise it in opposition to the Contempt Motion or in their Rule 60(b) Motion, and thus it was not first addressed by the

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29 *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

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

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

32 Appellant's Br. at 43.

bankruptcy court.[33] However, because Standard filed its Motion to Dismiss on the same creditor-standing basis after Aquila filed its Contempt Motion, the issue was arguably before the bankruptcy court. This Court need not decide whether Aquila was in fact a qualified petitioning creditor under § 303 in order to dispose of Standard's and COP's creditor-standing argument in this appeal.

Pursuant to § 362(a), the automatic stay comes into effect upon the filing of an involuntary petition exactly the way it does upon filing a voluntary petition.[34] However, the filing of an involuntary petition does not constitute an order for relief, and therefore § 303 contemplates a "gap period" during which a debtor may continue to operate its business.[35] With respect to application of the automatic stay during the gap period, though subject to some debate,

> [t]he only correct conclusion, given the wording of section 362, is that section 362 applies during the gap period, thus preventing prepetition creditors from collecting from the debtor. This is the best way of insuring that an involuntary filing does not harm the debtor while the matter is sorted out.
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> . . .
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> One clear consequence of the stay during the gap period is that a post-filing creditor cannot enforce its claim absent stay relief. . . . The stay cannot be circumvented by a stipulation entered into by the debtor and a secured creditor authorizing the stay to be lifted,

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[33] Appellee's Br. at 38. Further, Aquila points out that the qualification of the petitioning creditors was decided by the bankruptcy court in the context of entering the order for relief, which determination we note was affirmed by this Court in *In re C.W. Mining Co.*, BAP No. UT-08-102, 2009 WL 4798264 (10th Cir. BAP Dec. 14, 2009). *Id.*

[34] Section 362(a) provides:

> (a) Except as provided in subsection (b) of this section, ***a petition filed under section*** 301, 302, or ***303*** of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, ***operates as a stay***, applicable to all entities[.]

11 U.S.C. § 362(a) (emphasis added).

[35] 11 U.S.C. § 303(f). *See In re E.D. Wilkins Grain Co.*, 235 B.R. 647, 650 (Bankr. E.D. Cal. 1999) (period prior to entry of an order for relief is commonly referred to as the gap period).

> without prior court approval or notice to other creditors. If such an approach were permitted during the gap period, the entire prospects for reorganization (in the case of an involuntary chapter 11 case) could be curtailed and the opportunities accorded other creditors through an involuntary filing would be thwarted.[36]

Thus, we rule the automatic stay was in place as soon as the involuntary petition was filed and continued in operation during the gap period.

Federal Rule of Bankruptcy Procedure 9020 permits contempt proceedings to be commenced on motion by the United States trustee or a party in interest with respect to stay violations.[37] Aquila is a creditor with a $25 million judgment against CWM, and is therefore a party in interest.[38] Consequently, even if not ultimately a qualified petitioning creditor for purposes of § 303(b), Aquila was entitled to file the Contempt Motion against Standard and COP for alleged violations of the automatic stay. As a result, Standard's and COP's argument that Aquila lacked standing to file its Contempt Motion fails.

B. Requirement of Adversary Proceeding

Standard and COP assert Aquila's Contempt Motion asked the bankruptcy court to "determine the validity and extent of CWM's, Standard's, and COP's respective interests in certain property, for a declaratory judgment declaring that Standard and COP had injured Aquila through alleged violations of the automatic stay, for injunctive relief against Standard and COP, and for an award of damages

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[36] 2-303 *Collier on Bankruptcy* ¶ 303.23[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). *But cf. In re Acelor*, 169 B.R. 764 (Bankr. S.D. Fla. 1994); *Chalmers v. Benson (In re Benson)*, 33 B.R. 572 ((Bankr. N.D. Ohio 1983).

[37] Fed. R. Bankr. P. 9020; *Mar. Asbestosis Legal Clinic v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 920 F.2d 183, 187 (2d Cir. 1990).

[38] A party in interest includes a creditor with a pecuniary interest. Pursuant to 11 U.S.C. § 101(10), the term creditor means an "entity that has claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]" The term claim is defined by 11 U.S.C. § 101(5) to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]"

to Aquila, i.e., for Aquila to recover money."[39] Therefore, they contend Aquila was required to commence this proceeding by adversary complaint rather than on motion.[40] We disagree.

Under Federal Rule of Bankruptcy Procedure 9020, the United States trustee or a party in interest may commence contempt proceedings on motion. Specifically, Rule 9020 provides that "Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest."[41] Rule 9014 applies to contested matters not otherwise governed by the rules, and states "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."[42] Further, Rule 9014 requires that a motion be served in the same manner as an adversary complaint.[43] "[T]he contested matter process provides due process in a streamlined and efficient manner."[44] It is undisputed that Standard and COP were served notice of Aquila's Contempt Motion in the same manner as required for adversary proceedings, and were afforded an opportunity for a hearing.[45] Nevertheless, Standard and COP argue an adversary proceeding was necessary in order to provide them with the "full panoply of protections." They do not, however,

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39 Appellant's Br. at 25-26.

40 Adversary proceedings are governed by Federal Rules of Bankruptcy Procedure 7001, *et seq.*, and include proceedings to recover money or property (Rule 7001(1)), proceedings to determine the validity, priority, or extent of liens or other interests in property (Rule 7001(2)), proceedings to obtain an injunction or other equitable relief (Rule 7001(7)), and proceedings to obtain a declaratory judgment (Rule 7001(9)).

41 Fed. R. Bankr. P. 9020.

42 Fed. R. Bankr. P. 9014(a).

43 Fed. R. Bankr. P. 9014(b).

44 *Dean v. Global Fin. Credit, LLC (In re Dean)*, 359 B.R. 218, 222 (Bankr. C.D. Ill. 2006).

45 *See* discussion below at C.

specify what additional protections they should have been afforded.

The primary authority cited by Standard and COP for requiring an adversary proceeding is *In re Dean*.[46] However, the facts of that case are the reverse of the facts presented in this appeal. In *Dean*, debtors brought an adversary proceeding against a creditor for alleged violations of the automatic stay. Creditor moved to dismiss, arguing the matter should have been brought by motion. The *Dean* court ruled that "even if it was error for the Debtors to bring their claim for violation of the automatic stay as an adversary proceeding, such error in this instance is a mere technical violation and therefore harmless."[47] The ruling in *Dean*, therefore, does not support Standard's and COP's argument that an adversary proceeding was required in this case.

Additionally, many other stay-related matters are conducted on motion. As stated by one bankruptcy court:

> A proceeding for relief from the automatic stay is brought by motion, not complaint. *See* Fed. R. Bankr. P. 4001, 9013. It follows logically that a proceeding for a declaration that the stay does not apply should also be a contested matter, not a full blown adversary proceeding. The Debtor concedes that the present issue relates to protections of the automatic stay, and the Court concludes that this matter is appropriately a contested matter, not an adversary proceeding.[48]

Similarly, in this case, the issues relate to enforcement of the automatic stay, and we, like other courts, conclude they may appropriately be resolved in a contested matter.[49]

Moreover, the Tenth Circuit has opined that when the plain language of one

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[46] 359 B.R. 218.

[47] *Id.* at 224.

[48] *In re Thongta*, No. 07-21837, 2009 WL 1587308 at *1 (Bankr. E.D. Wis. 2009).

[49] *In re Hildreth*, 362 B.R. 523, 526 (Bankr. M.D. Ala. 2007) (citing *In re LTV Steel Co., Inc.*, 264 B.R. 455, 462-62 (Bankr. N.D. Ohio 2001) and *In re Timbs*, 178 B.R. 989, 994 (Bankr. E.D. Tenn. 1994)).

bankruptcy rule specifically authorizes a party to proceed on motion, the general language of another rule should not be interpreted so broadly as to negate the more specific.[50] In *In re Gledhill*, the Tenth Circuit ruled that even though reviving the automatic stay may technically amount to "an injunction or other equitable relief" as described in Rule 7001(7), a "party may seek relief from an order granting relief from the automatic stay by filing a motion as a contested matter under Rules 9024 and 60(b) without filing an adversary proceeding."[51] Likewise, giving credence to Standard's and COP's argument that an adversary proceeding was required in this case would run afoul of the fundamental tenet of construction that the more specific governs the general.[52]

Courts have also applied a harmless error analysis when matters that should have been brought by adversary complaint were commenced on motion.[53] Standard and COP devote much of their brief on this issue to arguing their actions were not in violation of the automatic stay. However, to support their argument that an adversary proceeding was necessary, they should have informed this Court how the process would have differed materially from what actually transpired. Standard and COP were ultimately afforded a hearing in connection with their post-judgment Rule 60(b) Motion. There is no indication how they were harmed by Aquila seeking relief by motion rather than by adversary proceeding.

C. Violation of Due Process Rights

Standard and COP claim "[t]he scheduling order and order of contempt

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[50] *State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1078 (10th Cir. 1996).

[51] *See id.*

[52] *Id.*

[53] *In re Munoz*, 287 B.R. 546, 551 (9th Cir. BAP 2002); *In re Beta Int'l, Inc.*, 210 B.R. 279, 282 (E.D. Mich. 1996); *In re Metro Transp. Co.*, 117 B.R. 143, 146 (Bankr. E.D. Pa. 1990).

deprived Standard and COP of their Fifth Amendment constitutional right to due process of law. They were denied notice and a meaningful opportunity to be heard on Aquila's contempt motion."[54] This claim is quite far-fetched.

It is undisputed that on June 25, 2008, Aquila served its Contempt Motion by first class mail on Kingston on behalf of COP, and Hansen on behalf of Standard. Additionally, on June 27, 2008, both Kingston and Hansen were personally served with the Contempt Motion by constable.[55] Notwithstanding these facts, Standard and COP claim they "were never served with Aquila's contempt motion," and therefore argue they have been denied due process.[56] To support this argument, they allege neither Kingston nor Hansen had entered appearances as counsel in this case, nor were they authorized agents for service. As a result, Standard and COP claim they made no appearances in the case until July 11, 2008, when Standard filed its Motion to Dismiss, and Standard and COP filed their Motion to Enlarge Time.

"An attorney does not have to enter a formal appearance in a case in order to be the party's attorney for purposes of service of process."[57] When Aquila filed its Contempt Motion on June 25, 2008, Kingston was COP's registered agent for service with the Utah Department of Commerce.[58] Hansen was Standard's attorney in matters relating to CWM, having confirmed the same by letter dated June 12, 2008, in response to Aquila's subpoena requesting production of

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54 Appellant's Br. at 22.

55 *See Certificate of Service*, *in* Appellee's Supp. App. at 81.

56 Appellant's Br. at 22.

57 *In re Hildreth*, 362 B.R. 523, 525 (Bankr. M.D. Ala. 2007).

58 Appellant's App. at 708.

documents in the underlying bankruptcy case.[59] Standard's and COP's lack of proper service argument is disingenuous since they filed lengthy responses in opposition to the Contempt Motion asserting they had not violated the stay without raising any issue as to personal jurisdiction.[60]

Additionally, the bankruptcy court's entry of the Contempt Order without a hearing was a situation totally of Hansen's own making. According to Hansen, who represents both Standard and COP, he is the sole employee of his law firm, has no other person to handle matters in his absence, and works out of his home.[61] In response to Aquila's Contempt Motion, Hansen filed the Motion to Dismiss and the Motion to Enlarge Time on July 11, 2008. The next day, Hansen began a family vacation and put a hold on his mail deliveries.[62] After returning from vacation, Hansen received his first mail delivery on July 23, 2008, which included the bankruptcy court's Scheduling Order.[63] By that time, the deadline for objections to the Contempt Motion had passed and the Contempt Order entered.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."[64] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

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59 *Id.* at 329.

60 *See Standard's Memorandum in Opposition to Contempt Motion, in* Appellants' App. at 448; *COP's Memorandum in Opposition to Contempt Motion, in* Appellants' App. at 489.

61 Appellant's Br. at 10, ¶¶ 8-9.

62 *Id.* at ¶ 9.

63 *Id.* at ¶ 10.

64 *State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1083 (10th Cir. 1996) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)).

and afford them an opportunity to present their objections."[65] Additionally, actual notice bears on whether a court's exercise of personal jurisdiction violates the Fifth Amendment's due process requirements.[66]

Here, there is no dispute that Standard and COP had actual notice of the Contempt Motion and the objections deadline. After receiving the Contempt Motion, they filed the Motion to Dismiss and Motion to Enlarge Time. The fact that the bankruptcy court did not grant the Motion to Enlarge Time, and counsel did not receive the Scheduling Order because he was on vacation, are not legitimate grounds for relief. The Fifth Amendment's right to due process of law does not include the right to assume a court will grant a motion to enlarge time, nor the right to have court proceedings revolve around counsel's personal schedule. Thus, Standard's and COP's due process argument is meritless.

D. Denial of Rule 60(b) Relief

Standard and COP also argue the bankruptcy court erred in denying them post-judgment relief from the Contempt Order pursuant to Rule 60(b)(1) on the basis of mistake, inadvertence, surprise, or excusable neglect, or Rule 60(b)(3) on the basis of fraud, misrepresentation, or misconduct by Aquila in obtaining the Contempt Order. However, Standard and COP have failed to provide an adequate record on appeal with respect to this argument, thereby preventing meaningful review by this Court. In appeals to a bankruptcy appellate panel, appellants are required to provide an appendix to their briefs containing the opinion, findings of fact, or conclusions of law filed or delivered orally by the court, and all transcripts, or portions of transcripts necessary for this Court's review.[67]

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[65] *Id.* (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. at 13).

[66] *In re Longoria*, 400 B.R. 543, 551-52 (Bankr. W.D. Tex. 2009).

[67] Fed. R. Bankr. P. 8009; 10th Cir. BAP L.R. 8009-1(b)(5). Specifically, Federal Rule of Bankruptcy Procedure 8009(b) provides:

(continued...)

Standard and COP have failed to comply with these requirements.

The Rule 60(b) Order entered on November 24, 2008, indicates the bankruptcy court's decision is based on various pleadings, arguments of counsel, and applicable law for the "reasons stated on the record."[68] Additionally, the bankruptcy docket sheet reflects a minute entry made on November 3, 2008,

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[67] (...continued)

> (b) Appendix to Brief. If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:
>
> > (1) The complaint and answer or other equivalent pleadings;
> > (2) Any pretrial order;
> > (3) The judgment, order, or decree from which the appeal is taken;
> > (4) Any other orders relevant to the appeal;
> > ***(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;***
> > (6) Any motion and response on which the court rendered decision;
> > (7) The notice of appeal;
> > (8) The relevant entries in the bankruptcy docket; and
> > ***(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.***

Fed. R. Bankr. P. 8009(b) (emphasis added). Tenth Circuit BAP Local Rule 8009-1(b)(5) provides:

> (5) **Transcripts**. The appendix must contain all transcripts, or portions of transcripts, necessary for the court's review.

10th Cir. BAP L.R. 8009-1(b)(5).

[68] *Rule 60(b) Order* at 2, *in* Appellant's App. at 775. Specifically, the order provides:

> 1. The Motion is DENIED as to the request for relief from the civil contempt order pursuant to Fed. R. Civ. P. 60(b)(b)(1). The Court finds that the Movants have not met their burden of showing mistake, inadvertence, surprise or excusable neglect.
>
> 2. The Motion is DENIED as to the request for relief from the civil contempt order pursuant to Fed. R. Civ. P. 60(b)(3). The Court finds that the Movants have not shown any fraud, misrepresentation or misconduct by an opposing party.

stating "[f]indings of fact and conclusions of law made on the record."[69] While Standard and COP have provided a lengthy appendix, it does not contain a transcript of the November 3, 2008, hearing on their Rule 60(b) Motion. Without the bankruptcy court's findings of facts and conclusions of law, the Rule 60(b) Order is not reviewable on appeal, particularly since denial of a Rule 60(b) motion is reviewed for abuse of discretion. The function of this appellate court is to adjudicate error on the part of the bankruptcy court, not to rehear the Rule 60(b) Motion. In failing to provide an adequate record, Standard and COP fail to demonstrate the bankruptcy court abused its discretion in denying post-judgment relief from the Contempt Order.

V. CONCLUSION

Standard and COP have not shown that the bankruptcy court committed reversible error in holding them in contempt for violating the automatic stay or in denying them post-judgment relief. Accordingly, the bankruptcy court's Contempt Order and Rule 60(b) Order are affirmed.

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69 *See Bankruptcy Docket*, *in* Appellant's App. at 797.