FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
August 13, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DANIEL WILLIAM COOK and YOLANDA T. COOK, Debtors.	BAP No. NM-12-097
DANIEL WILLIAM COOK, Appellant, v. WELLS FARGO BANK, N.A., Successor to Wells Fargo Bank New Mexico, N.A., Appellee.	Bankr. No. 04-17704 Chapter 7 OPINION*

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

Before MICHAEL, ROMERO, and MARKER[1], Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

In this no-asset Chapter 7 case, Debtor appeals the Bankruptcy Court's order denying his motion to alter, amend, or vacate the final decree. The final decree was entered more than three years after the Chapter 7 trustee filed a notice of no distribution and abandonment of property, to which no objection was filed.

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Honorable Joel T. Marker, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

Having reviewed the record and applicable law, we affirm the Bankruptcy Court's order denying debtor's motion to set aside the final decree.

I. BACKGROUND AND BANKRUPTCY PROCEEDINGS

Underlying this appeal is a pre-bankruptcy dispute over rights in certain intellectual property that began in 2001 between debtor, Daniel William Cook ("Debtor"), and creditor, Wells Fargo Bank, N.A. ("Wells Fargo"). The dispute led to litigation in the New Mexico state courts, followed by litigation in the Bankruptcy Court and the New Mexico federal District Court. We have thoroughly immersed ourselves in the complex factual details of the case. The long and tortured history of the dispute and litigation between the parties beginning more than a decade ago, and continuing through eight years of bankruptcy proceedings need not be set forth here. That history has been well documented not only in orders and opinions of the Bankruptcy Court, but also in numerous opinions by this Court and the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit").[2] Only the facts and bankruptcy proceedings critical to deciding the appeal are described below.

Debtor filed for Chapter 11 protection on October 21, 2004. In 2008, his case was converted to one under Chapter 7 upon motion of the United States Trustee. Phillip J. Montoya was appointed as Chapter 7 trustee ("Trustee"). On April 21, 2008, the Bankruptcy Court granted Wells Fargo's motion for relief from stay, permitting the prepetition state court litigation between Debtor, Wells Fargo, and others to proceed.

On July 1, 2009, Trustee filed his Report of No Distribution and Notice of Abandonment of Property ("Report and Notice"). However, Trustee did not give

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[2] *See In re Cook*, Case No. NM-11-082, 2012 WL 1356490 (10th Cir. BAP Apr. 19, 2012), *aff'd*, Case No. 12-2100, 2013 WL 1297590 (10th Cir. Apr. 2, 2013); *Cook v. Baca*, 512 F. App'x 810 (10th Cir. 2013); *Garrett v. Cook*, 652 F.3d 1249 (10th Cir. 2011).

notice of the proposed abandonment or fix a deadline for objections as required by Federal Rule of Bankruptcy Procedure 6007, and therefore, the case was not closed.

Shortly after Trustee filed his Report and Notice, Debtor began pursuing sanctions against Wells Fargo and others for alleged stay violations based on litigation activities in New Mexico state court. Concluding Debtor had no standing to assert stay violations against Wells Fargo, the Bankruptcy Court denied Debtor's motions for sanctions by opinion and order dated April 6, 2011, and Debtor filed a motion to reconsider. The Bankruptcy Court denied the motion to reconsider on August 9, 2011, and Debtor appealed to this Court. This Court affirmed the Bankruptcy Court's order on April 19, 2012 by unpublished opinion. Debtor then appealed this Court's decision to the Tenth Circuit. That appeal remained pending when this one was filed but was subsequently affirmed.[3]

In December 2010, Debtor filed a civil rights action in federal District Court against the judge presiding over the litigation in the New Mexico state court, Wells Fargo, and others, making a myriad of claims, including racial discrimination, violation of due process, fraud, and civil conspiracy. The District Court dismissed Debtor's complaint in July 2011 for failure to state a cognizable federal claim.[4] After filing a motion to reconsider, which the District Court denied, Debtor appealed the dismissal of his civil rights action to the Tenth Circuit. That appeal also remained pending when this one was filed.

Three years after Trustee filed his Report and Notice, with nothing of

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[3] *In re Cook*, NM-11-082, 2012 WL 1356490 (10th Cir. BAP Apr. 19, 2012), *aff'd*, Case. No. 12-2100, 2013 WL 1297590 (10th Cir. Apr. 2, 2013).

[4] *See Cook v. Baca*, U.S. Dist. Ct. Case No. 10-cv-1173: *Memorandum Opinion and Order Dismissing Complaint*, Docket # 94, July 8, 2011; *Memorandum Opinion and Order Denying Plaintiff's Motion to Re-Open and Reconsideration Under Fed. R. Civ. P. 59(e) and 60(b)*, Docket #122, Jan. 12, 2012.

substance having transpired during that time, the Bankruptcy Court entered a final decree and closed Debtor's case on August 21, 2012. On September 4, 2012, Debtor filed his Motion to Alter or Amend Final Decree Alternatively Vacate (Doc 940), Reinstate Automatic Stay, with Relief to Include Order Specifically Retaining Jurisdiction for All Matters Related to the Cooks['] Bankruptcy to Afford Constitutional Rights Granted by Art[.] I, Section 8, Clause 4 of the United States Constitution ("Motion to Vacate").[5] Debtor asserted two primary reasons for setting aside the final decree.[6] First, Debtor alleged the estate was not fully administered because it held claims for damages resulting from stay violations and various causes of action, such as those alleged in his civil rights action, against Wells Fargo and others.[7] Second, Debtor argued his case should remain open so he could pursue "possible lien avoidance" for his exempt property.[8]

The Bankruptcy Court denied Debtor's Motion to Vacate by order and memorandum opinion dated November 6, 2012.[9] First, the Bankruptcy Court

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[5] *Motion to Vacate, in* Appellant's App. at 1293. The Motion to Vacate briefly references 11 U.S.C. § 350(b), but does not appear to argue for "reopening" the case, and instead asks that the final decree be set aside so that the case will remain open. *Id.* at 9, *in* Appellant's App. at 1301. No fee was paid in connection with the Motion to Vacate.

[6] Debtor also "incorporated by reference" a 67-page opening brief submitted to the Tenth Circuit in his appeal of this Court's order affirming the Bankruptcy Court's determination that he lacked standing, as well as a subsequent "notice of errata and correction" to that brief as "support for vacating the 'Final Decree,'" by attaching them as exhibits to his Motion to Vacate. *See Motion to Vacate* at 2 and 6 ¶ 18, *in* Appellant's App. at 1294 and 1298.

[7] *Motion to Vacate* at 2-3, *in* Appellant's App. at 1294-95.

[8] *Id.* at 10, *in* Appellant's App. at 1302.

[9] *Order Denying with Prejudice Debtor Daniel W. Cook's [Motion to Vacate]* and *Memorandum Opinion on Debtor Daniel W. Cook's [Motion to Vacate]*(hereafter, collectively "*Order Denying Motion to Vacate*"), *in* Appellant's App. at 1241 and 1243.

concluded that Debtor, who received a Chapter 7 discharge in April 2009,[10] lacked standing to pursue the alleged stay violations unless and until its previous order to that effect was reversed by the Tenth Circuit.[11] Next, the Bankruptcy Court pointed out that any claims stemming from alleged violations of Debtor's civil rights in connection with his bankruptcy case arose post-petition, and therefore, were not property of the bankruptcy estate.[12] Finally, with respect to Debtor's argument regarding avoidance of liens, the Bankruptcy Court denied the Motion to Vacate as unripe because Debtor mentioned only "possible" liens, resulting in no current case or controversy to permit jurisdiction.[13] Cook timely appealed the Bankruptcy Court's order denying his Motion to Vacate to this Court on November 20, 2012.

Since Debtor filed this appeal, the Tenth Circuit has disposed of both of Cook's pending appeals. On March 7, 2013, the Tenth Circuit issued an unpublished opinion affirming the District Court's dismissal of Debtor's civil rights action, and denied Debtor's motion for rehearing of the same.[14] On April 2, 2013, the Tenth Circuit issued an unpublished opinion affirming the Bankruptcy Court's order determining Debtor lacked standing to pursue sanctions for alleged stay violations against Wells Fargo and others because he suffered no injury to a legally protected interest.[15] The Tenth Circuit also denied Debtor's motion for

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[10] *Discharge of Debtor Yolanda T. Cook and Daniel William Cook*, *in* Appellant's App. at 1518.

[11] *Order Denying Motion to Vacate* at 38, *in* Appellant's App. at 1280.

[12] *Id.* at 11, *in* Appellant's App. at 1253.

[13] *Id.* at 39, *in* Appellant's App. at 1281. In fact, the Bankruptcy Court stated Debtor has no liens to avoid. *Id.* at 10-11, *in* Appellant's App. at 1252-53.

[14] *Cook v. Baca*, 512 F. App'x 810 (10th Cir. 2013).

[15] *In re Cook*, Case No. 12-2100, 2013 WL 1297590 (10th Cir. Apr. 2, 2013), *aff'g* NM-11-082, 2012 WL 1356490 (10th Cir. BAP Apr. 19, 2012).

rehearing of the same.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of Bankruptcy Courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[16] Neither party elected to have these appeals heard by the United States District Court for the District of New Mexico. The parties have therefore consented to appellate 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.'"[17] The Bankruptcy Court's order denying Debtor's Motion to Vacate the final decree is a final order for purposes of appeal because there is nothing further for the Bankruptcy Court to do in the case.[18]

III. STANDARD OF REVIEW

The Motion to Vacate can be viewed as a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e) ("Rule 59(e)")[19] because it was filed within 14 days after entry of the final decree.[20] Substantively, however, the Motion to Vacate is analogous to a motion to reopen

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[16] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

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

[18] *See Riazuddin v. Schindler Elevator Corp. (In re Riazuddin)*, 363 B.R. 177, 182 (10th Cir. BAP 2007) (order denying a motion to reopen is a final order for purposes of appeal).

[19] Unless otherwise specified, all future references to "Rule" are to the Federal Rules of Civil Procedure.

[20] Rule 59(e) is made applicable to bankruptcy by Federal Rule of Bankruptcy Procedure 9023.

a bankruptcy case pursuant to 11 U.S.C. § 350(b),[21] without Debtor having paid the reopening fee.

An appellate court reviews a Bankruptcy Court's ruling on a debtor's Rule 59(e) motion for abuse of discretion.[22] "A Rule 59(e) motion to alter or amend the judgment should be granted only to correct manifest errors of law or to present newly discovered evidence."[23] A Rule 59(e) motion is only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[24] Grounds warranting altering or amending a judgment include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[25] An appeal from a ruling on a Rule 59(e) motion makes the bankruptcy court's underlying judgment subject to review by this court.[26]

Similarly, an appellate court reviews a Bankruptcy Court's denial of a motion to reopen a closed case pursuant to § 350(b) under an abuse of discretion standard.[27] "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

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

[22] *Loughridge v. Chiles Power Supply Co., Inc.*, 431 F.3d 1268, 1275 (10th Cir. 2005).

[23] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted).

[24] *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[25] *Id.*

[26] *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (an appeal from the denial of a motion to reconsider construed as a Rule 59(e) motion permits consideration of the merits of the underlying judgment).

[27] *In re Woods*, 173 F.3d 770, 778 (10th Cir. 1999). *See also In re Union Home and Indus., Inc.*, 375 B.R. 912, 916 (10th Cir. BAP 2007); *Redmond v. Fifth Third Bank*, 624 F.3d 793, 798 (7th Cir. 2010).

the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[28]

Whether Bankruptcy Court proceedings have violated a party's rights of due process is a legal question reviewed *de novo*.[29] *De novo* review requires an independent determination of the issues, giving no special weight to the Bankruptcy Court's decision.[30]

IV. ANALYSIS

In his brief, Debtor sets forth thirteen issues on appeal.[31] Some of Debtor's assertions of error are repetitive and overlapping, while others make little sense or are largely irrelevant. For example, more than one of Debtor's thirteen statements of error relate to his allegation that the Bankruptcy Court violated his right to due process because it did not hold a hearing before ruling on his Motion to Vacate. Additionally, Debtor's assertion that this Court should reverse the Bankruptcy Court's order pursuant to Federal Rule of Bankruptcy Procedure 8013 for lack of a sufficient record and remand for further proceedings makes no sense. Further, Debtor's charge that Wells Fargo lacked standing to object to reopening his case makes no difference, as the Bankruptcy Court's decision not to reopen the case is not premised upon the objection. To resolve this appeal, we need only address Debtor's argument regarding lack of due process, and then determine whether the Bankruptcy Court abused its discretion in denying the Motion to Vacate.

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[28] *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)).

[29] *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).

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

[31] Appellant's Opening Brief at 13-14.

A. No Violation of Debtor's Right to Due Process

Debtor argues he was denied his right to due process because the Bankruptcy Court did not hold a hearing before ruling on his Motion to Vacate. Due process requires notice and a meaningful opportunity to be heard.[32] An actual hearing is not required, just an opportunity to be heard.[33] An opportunity to fully brief the issue satisfies the due process requirements.[34]

Here, the final decree that Debtor sought to have vacated was entered more than three years after the bankruptcy estate had been fully administered and the Chapter 7 Trustee filed his Report and Notice seeking to be discharged. It is important to note that although Trustee did not give notice of the proposed abandonment or fix a deadline for objections as required by Federal Rule of Bankruptcy Procedure 6007, Debtor knew of the Report and Notice and never objected to it. In fact, about two weeks after it was issued, Debtor used the Report and Notice as a basis to argue that he had standing to bring motions for sanctions based on alleged stay violations because Trustee had been discharged of his duties. Thus, Debtor had notice that his bankruptcy case was ready to be closed.

The Supreme Court has stated that "due process is flexible and calls for such procedural protections as the particular situation demands."[35] In this case, the Motion to Vacate was filed by Debtor, not against him.[36] Additionally,

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[32] *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

[33] *In re C.W. Mining Co.*, 625 F.3d 1240, 1244-45 (10th Cir. 2010).

[34] *See Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc).

[35] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[36] Rule 9014, Contested Matters, provides in pertinent part:

> (a) MOTION. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, ***and reasonable notice and opportunity***

(continued...)

Debtor submitted briefing and exhibits with his Motion to Vacate, followed a week later by the additional filing of an "errata, correction and supplement" to the Motion to Vacate,[37] neither of which requested that the Bankruptcy Court set the matter for hearing. Further, the Bankruptcy Court was intimately familiar with Debtor and his eight-year-old, no-asset case. In its 49-page Order Denying Motion to Vacate, the Bankruptcy Court carefully addressed Debtor's arguments for setting aside the final decree, and it is extremely difficult, if not impossible, to see how a hearing would have aided the Bankruptcy Court in its decision. In sum, Debtor was afforded notice and an opportunity to be heard, and was not deprived of his right to due process when the Bankruptcy Court ruled on his Motion to Vacate without holding a hearing.

B. No Abuse of Discretion in Denying Debtor's Motion to Vacate

The final decree was entered more than three years after the bankruptcy estate had been fully administered and the Chapter 7 Trustee filed his Report and Notice, to which Debtor never objected. Whether we construe Debtor's Motion to Vacate as a Rule 59(e) motion to set aside the final decree or a motion to reopen pursuant to § 350, there is nothing to support an argument that the Bankruptcy Court abused its discretion in denying the Motion to Vacate. There was no intervening change in the controlling law or new evidence previously unavailable that warranted altering or amending the final decree pursuant to Rule 59(e). Nor was it necessary to set aside the final decree to correct clear error or prevent manifest injustice.

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[36] (...continued)
for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

Fed. R. Bankr. P. 9014 (emphasis added).

[37] *Errata, Correction and Supplement to [Motion to Vacate]*, *in* Appellant's App. at 1390.

Pursuant to § 350(b), a case that has been closed may be reopened to administer assets, to accord relief to the debtor, or for other cause.[38] Contrary to Debtor's assertions, there was no reason for his case to be reopened because there were no estate assets and nothing of substance had occurred in the main bankruptcy case for more than three years. In his Motion to Vacate, Debtor alleged his case should remain open because the estate was not fully administered. This argument was based, in part, on his assertion that the estate held claims against Wells Fargo and others resulting from violations of the automatic stay.[39] As the Bankruptcy Court explained, it had already ruled that Debtor lacked standing to bring the actions for stay violations. That decision was affirmed by this Court. Since Debtor filed this appeal, the Tenth Circuit has now also affirmed the Bankruptcy Court's decision that Debtor lacked standing,[40] and he cannot continue to argue his case should remain open on this basis.

Debtor's argument that there were estate assets still to be administered was also based on his allegation that the estate had various causes of action against Wells Fargo and others for violation of his civil rights. But like the standing appeal, the District Court's dismissal of Debtor's civil rights lawsuit has now been affirmed by the Tenth Circuit.[41] Even if that litigation remained pending,

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[38] Section 350, Closing and reopening cases, provides as follows:

> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
>
> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350.

[39] *Order Denying Motion to Vacate* at 2, *in* Appellant's App. at 1244; *Motion to Vacate*, *in* Appellant's App. at 1293.

[40] *In re Cook*, Case No. 12-2100, 2013 WL 1297590 (10th Cir. Apr. 2, 2013).

[41] *Cook v. Baca*, 512 F. App'x 810 (10th Cir. 2013).

the Bankruptcy Court correctly explained that any claims stemming from alleged violations of Debtor's civil rights arose post-petition, and therefore, were not property of the bankruptcy estate.

Further, Debtor argued in his Motion to Vacate that his bankruptcy case should remain open so he could pursue "possible lien avoidance" with respect to his exempt property.[42] In response to that argument, the Bankruptcy Court denied the Motion to Vacate as unripe because Debtor mentioned only "possible" liens.[43] While avoidance of actual liens that impair exempt property pursuant to § 522(f)(1) may provide appropriate cause for reopening a case under § 350(b),[44] the same is not true of unspecified or hypothetical liens. Without actual liens to avoid, there was no current case or controversy giving rise to the Bankruptcy Court's jurisdiction, and therefore, no cause to set aside the final decree or reopen the case.[45] In sum, the Bankruptcy Court did not abuse its discretion in denying

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[42] *Order Denying Motion to Vacate* at 3, in Appellant's App. at 1245.

[43] *Id.* at 39, *in* Appellant's App. at 1281.

[44] *See In re Levy*, 256 B.R. 563, 565-66 (Bankr. D.N.J. 2000).

[45] We note that in his brief, Debtor argues his case should be reopened so he may "pursue the discharge of disputed taxes." Appellant's Opening Brief at 6. Debtor also raised the issue of IRS liens at oral argument. However, our review of the record on appeal reveals that Debtor never filed a motion or complaint to determine dischargeability of taxes. Moreover, in his Motion to Vacate, Debtor stated only:

> A significant amount of taxes are due by Cook to the IRS that may not have been discharged, thus vacating the "Final Decree" is warranted to accord relief to Debtor in the administration of alleged stay violations and other assets, once the determination by the Tenth Circuit is made on standing, if not mooted by a modified order of this Court, to pursue alleged violations.

Motion to Vacate at 7 ¶ 19, *in* Appellant's App. at 1299.

As the Bankruptcy Court noted, this statement conveys the idea that Debtor wants to pursue sanctions for stay violations that can be used to pay taxes, not that he disputes taxes are owed. *Order Denying Motion To Vacate* at 32 n.20, *in* Appellant's App. at 1274. As an appellate court, our function is to analyze for error the action taken by the Bankruptcy Court on the record before it in light of

(continued...)

Debtor's Motion to Vacate.

On a final note, Debtor erroneously believes the Bankruptcy Court's Order Denying Motion to Vacate "clos[es] the case prospectively forevermore with prejudice denying Debtor his Constitutional right[s],"[46] and that he may never again file a motion to reopen for any reason. But the Bankruptcy Court's order only prevents Debtor from filing a motion to reopen on the same grounds as asserted in his Motion to Vacate.

V. CONCLUSION

The Bankruptcy Court did not violate Debtor's right of due process when it ruled on his Motion to Vacate without holding a hearing. Nor did the Bankruptcy Court abuse its discretion in denying Debtor's Motion to Vacate. Therefore, the Bankruptcy Court's order is hereby AFFIRMED.

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[45] (...continued)
the applicable standard of review. Absent extraordinary circumstances, such as when jurisdiction is questioned, sovereign immunity is raised, or it is necessary to prevent miscarriage of justice, we do not consider issues first presented to the appellate court. *In re C.W. Mining Co.*, 625 F.3d 1240, 1246 (10th Cir. 2010). As a result, we do not address Debtor's argument that his case should remain open so he may pursue dischargeability of disputed taxes.

[46] Appellant's Opening Brief at 13, ¶ 2.