FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit
February 10, 2006
Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ROCOR INTERNATIONAL, INC., doing business as Consolidated Traffic Management Company, doing business as Rocor Transportation,

Debtor.

BAP No. WO-05-087

ROCIN LIQUIDATION ESTATE,

Plaintiff – Appellee,

v.

GREYHOUND BUS LINES,

Defendant – Appellant.

Bankr. No. 02-17658-WV
Adv. No. 04-1239-WV
Chapter 11

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before NUGENT, McNIFF, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Rocin Liquidation Estate commenced this adversary proceeding against Greyhound Bus Lines, seeking to avoid an allegedly preferential transfer. The

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Bankruptcy Court held a scheduling conference and issued a scheduling order, setting a deadline for exchange of witness lists and proposed evidence. Rocin complied with this deadline, and Greyhound did not. At trial, the Bankruptcy Court refused to allow Greyhound to present witnesses or introduce direct evidence. The Court entered judgment in favor of Rocin in the amount of $46,679.77. Greyhound appeals the judgment and the Bankruptcy Court's order denying Greyhound's Motion to Allow Late-filed List of Witnesses and Exhibits. We hold that the Bankruptcy Court did not abuse its discretion in denying Greyhound's motion. Accordingly, the Bankruptcy Court's judgment is AFFIRMED.

I. FACTUAL BACKGROUND:

The facts underlying this appeal are not in dispute. On August 5, 2002, Rocor International, Inc. ("Rocor") filed the present bankruptcy case under Chapter 11.[1] Rocor submitted a plan of reorganization and a disclosure statement on January 16, 2003, proposing to create an independent estate entitled Rocin Liquidation Estate ("Rocin"). Rocin is the plaintiff in this adversary proceeding. The plan vested Rocin with all rights of action previously owned by Rocor. The Bankruptcy Court confirmed Rocor's plan on July 24, 2002. Among the rights of action transferred to Rocin under the plan was a claim against Greyhound Bus Lines ("Greyhound") for preferential transfers.

On August 3, 2004, Rocin capitalized on its claim against Greyhound by filing the present adversary proceeding. The complaint seeks to recover $46,679.77 as pre-petition preferential transfers. Greyhound timely filed an answer to Rocin's complaint. Initially, Greyhound asserted an affirmative defense to Rocin's complaint, alleging that the transfer at issue led to a transfer of

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[1] Unless stated otherwise, all statutory references herein refer to Title 11 of the United States Code.

'new value' to the debtor, under § 547(c)(4). Greyhound later stipulated with Rocin to a pretrial order, executed by the Court on August 24, 2005, which eliminated this defense. According to the pretrial order, the only issues for trial were whether Rocin could carry its burden to show that the transfer at issue was a preference under § 547(b).

The Bankruptcy Court issued a scheduling order governing dates in the adversary proceeding, on December 2, 2004. The scheduling order required the parties to exchange exhibits and lists of known witnesses within fifteen (15) days of the order. The order further required that no exhibits or lists of witnesses may be exchanged later than thirty (30) days before trial. Specifically, the order stated, "[n]o witness whose name has not been provided hereby shall be permitted to testify at trial and no exhibit that has not been exchanged as required hereby shall be admitted into evidence at trial." Trial was set for June 14, 2005. Thus, by the terms of the scheduling order, the parties were to exchange exhibits and witness lists no later than May 15, 2005. On April 7, 2005, the Bankruptcy Court rescheduled the trial date to August 23, 2005. The Court did not amend the deadlines in the scheduling order. Accordingly, it is arguable that the deadlines in the scheduling order were extended to require the parties to exchange final exhibits and witness lists no later than July 24, 2005 ("Extended Exchange Date").

Rocin timely complied with these deadlines, providing Greyhound with its exhibits and a final list of witnesses by July 22, 2005. Greyhound did not formally file or exchange any exhibits or witness lists until August 12, 2005.

Greyhound argues that Rocin could easily have discovered the identity of this unnamed witness from materials disclosed to Rocin through prior discovery. In support of this, Greyhound points to a letter it sent to counsel for Rocin, dated December 2, 2004, wherein Greyhound notified counsel for Rocin of an intent to call as a witness an unnamed person who had custody of certain account

documents. Greyhound's first formal attempt to exchange a list of witnesses with Rocin occurred on August 12, 2005, nineteen (19) days after the Extended Exchange Date and eleven (11) days before trial, when Greyhound filed a "List of Known Exhibits and Witnesses," identifying David McMichael and MaryAnn Nelson as potential witnesses for Greyhound.

Rocin objected to Greyhound's August 12, 2005 list of witnesses, arguing that the list was not timely filed. In response to Rocin's objection, Greyhound filed its Motion to Allow Late-Filed Witnesses and Exhibits ("Motion to Allow") as to Mr. McMichael only and exhibits it intended to produce. In its Motion to Allow, Greyhound argued that through the December 2, 2004, letter and through prior discovery, Rocin could reasonably have ascertained Greyhound's intent to call Mr. McMichael as a witness before the Extended Exchange Date. Rocin again objected, arguing that it would be prejudiced if Greyhound were allowed to call Mr. McMichael as a witness. Specifically, Rocin argued that with trial in less than one week, it had already developed a trial strategy which would be impeded by allowing Mr. McMichael's testimony. Rocin further contended that it lacked the proper time to depose Mr. McMichael and to adequately prepare for trial.

At trial, the Bankruptcy Court first addressed Greyhound's Motion to Allow. Counsel for Greyhound admitted that the witness list was not timely filed. Greyhound argued only that it would be prejudiced by any decision forbidding Mr. McMichael from testifying. The Court denied Greyhound's Motion to Allow, and forbade Greyhound to call Mr. McMichael as a witness or to present direct evidence. The Court stated:

> " . . . I cannot allow a party to fail to disclose a name of a witness and then wish to go forward and produce that witness. . . [I]nsofar as prejudice goes, the plaintiff has prepared for trial and has incurred expense in that preparation, and it would be prejudicial to continue the trial with it being necessary for the preparation to some degree to begin again."

Despite the Court's ruling, Greyhound attempted to proffer testimony

relating to its 'new value' defense. Greyhound also moved the Court to take judicial notice of its Proof of Claim, as evidence of 'new value.' The Court rejected Greyhound's proffered evidence, and entered judgment in favor of Rocin.[2]

Greyhound appeals the Bankruptcy Court's ruling disallowing Greyhound's proposed witnesses and evidence. Greyhound has designated the discovery requests made from Rocin to Greyhound, and its Proof of Claim, as part of the appellate record. Rocin objects to these exhibits and moves us to strike them from the record.

II. APPELLATE JURISDICTION AND STANDARD OF REVIEW:

This Court has jurisdiction over this appeal. The Bankruptcy Court's judgment is a final order to appeal under 28 U.S.C. § 158(a)(1).[3] Greyhound timely filed its notice of appeal under Federal Rule of Bankruptcy Procedure 8002, and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.

The Bankruptcy Court's decision to restrict Greyhound's witnesses and evidence is reviewed for an abuse of discretion.[4] "In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment."[5]

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[2] In disallowing Greyhound's witnesses and evidence, the Court determined that Rocin was entitled to judgment on the pleadings.

[3] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996).

[4] Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655 (10th Cir. 1991).

[5] United States v. Mitchell, 113 F.3d 1528, 1531 (10th Cir. 1997).

III. DISCUSSION:

A. Rocin's Motion to Strike is Appropriate:

Generally, an appellate court may consider evidence which was before the lower court.[6] Evidence not before the lower court may not be considered by an appellate court, unless the lower court improperly excluded such evidence. At the same time, all docket entries before the lower court must be submitted to the appellate court.[7] This requirement works in tandem with Federal Rule of Evidence 201(d), which allows a court to take judicial notice of its own records.[8]

Greyhound is attempting to include discovery requests from Rocin to Greyhound, and its proof of claim as part of the record before this Court. Rocin objects and moves to strike those exhibits from the record, arguing that neither of these documents were before the Bankruptcy Court.

The discovery requests were neither offered nor received by the Bankruptcy Court as evidence. Accordingly, this Court may not consider the discovery requests for the first time on appeal.[9] Rocin's motion to strike should be granted as to the discovery requests.

The Bankruptcy Court denied Greyhound's motion to take judicial notice of its proof of claim. As the proof of claim was part of the Bankruptcy Court's record in Rocor's main bankruptcy case, the Bankruptcy Court had discretion to admit the proof of claim into its evidentiary record. Nevertheless, the Bankruptcy Court refused to exercise that discretion.

While the Bankruptcy Court could have taken judicial notice of

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[6] Boone v. Carlsbad Bancorp., Inc., 972 F.2d 1545 (10th Cir. 1992); *see also* Fed. R. Bankr. P. 8006 & 8009(b); 10th Cir. BAP L.R. 8006-1(a).

[7] 10th Cir. BAP L.R. 8007-1.

[8] Applied to this Court by Fed. R. Bankr. P. 9017.

[9] O'Connor v. City and County of Denver, 894 F.2d 1210, 1214 (10th Cir. 1990).

Greyhound's proof of claim, we question whether doing so would have altered the outcome of this adversary proceeding. The proof of claim contains no information that would have supported either of the defenses raised by Greyhound. Under these circumstances, we cannot find that refusing to admit the proof of claim was an abuse of discretion.

Rocin's motion to strike is granted. Neither the discovery requests nor the proof of claim will be considered by this Court.

B. The Bankruptcy Court Did Not Abuse its Discretion in Excluding Greyhound's Witnesses and Exhibits:

Greyhound appeals the Bankruptcy Court's decision in denying Greyhound's Motion to Allow. Greyhound argues that any sanction the Bankruptcy Court issued for noncompliance with its scheduling order should have been imposed on counsel for Greyhound only, and argues that the resulting judgment was too harsh.

Although Greyhound filed a motion to approve late-filed witnesses, it did not file a motion to amend the scheduling order. This fact is central to this appeal. A motion to amend a scheduling order is governed by Federal Rule of Civil Procedure 16(b). A court's decision to take action to enforce a scheduling order is governed by Federal Rule of Civil Procedure 16(f). Greyhound did not file a motion requesting that the court amend the scheduling order. Accordingly, the Bankruptcy Court's decision on Greyhound's Motion to Allow was an exercise of the court's authority under Rule 16(f).

Federal Rule of Civil Procedure 16(e) requires a court to issue a pretrial order to control the course of litigation.[10] Federal Rule of Civil Procedure 16(f) states:

> Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own

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[10] Extended to the Bankruptcy Court by Fed. R. Bankr. P. 7016.

> initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Federal Rule of Civil Procedure 37(b)(2)(B) provides for an order refusing to allow a party to introduce matters into evidence.

By the terms of Rule 16(f), a court has broad discretion in determining which sanctions are appropriate to meet a party's violation of a scheduling order.[11] Under the abuse of discretion standard, this Court should only overturn a Bankruptcy Court's election of sanctions, other than a sanction of dismissal, where its decision is "arbitrary, capricious or whimsical," or results in a "manifestly unreasonable judgment."[12] Unlike a court's sanction of dismissal, a court's election to forbid a party's evidence is not subject to review under a framework involving specific factors.[13]

It is undisputed that Greyhound did not comply with the terms of the scheduling order. The only issue on appeal is whether the Bankruptcy Court abused its discretion in choosing an appropriate sanction to meet Greyhound's non-compliance. We are not persuaded that the Bankruptcy Court's decision to prohibit Greyhound's evidence was beyond the bounds of permissible choice under the circumstances. The scheduling order itself contemplated the Bankruptcy Court's chosen sanction. The order stated that "[n]o witness whose name has not been provided hereby shall be permitted to testify at trial and no exhibit that has not been exchanged as required hereby shall be admitted into evidence at trial." Further, the last sentence of the scheduling order states in bold, underlined, and capitalized font that "[f]ailure to comply with this order

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[11] Comcoa, 931 F.2d at 666; *but see* Jones v. Thompson, 996 F.2d 261 (10th Cir. 1993) (noting that the sanction of dismissal is extreme).

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

[13] *Compare* Gripe v. City of Enid, Okla., 312 F.3d 1184 (10th Cir. 2002), *with* Comcoa, 931 F.2d at 666.

may result in the striking of pleadings, entry of default, dismissal of a cause of action or defense, and/or other action, *sua sponte*."[14]

Despite this explicit language, Greyhound did not give formal notice to Rocin of contemplated evidence or witnesses until nineteen (19) days after the Extended Exchange Date. Greyhound's tardy compliance with the scheduling order gave Rocin only one week to contemplate a new litigation strategy and to depose Greyhound's proposed witnesses. It makes sense that the Bankruptcy Court might choose to respond to Greyhound's tardy submission of evidence by forbidding that evidence entirely. The Court does not have a firm conviction that the Bankruptcy Court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[15] We are not persuaded that the Bankruptcy Court's order of sanctions was an abuse of discretion.

Both parties submit that the Court's inquiry in reviewing a sanctions order is governed by In re Mellor.[16] In Mellor, the issue was whether the bankruptcy court improperly denied a motion to modify a scheduling order.[17] There, the United States District Court of Colorado set out four factors for consideration in reviewing a lower court's denial of a motion to modify a scheduling order under Federal Rule of Civil Procedure 16(b).[18] This case is inapplicable to the standard governing a court's sanctions order under Federal Rule of Civil Procedure 16(f). In Mellor, the issue was whether the lower court improperly considered a motion

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[14] Scheduling Order at ¶ 10, *in* Appellant's Appendix at 17.

[15] Bell, 21 F.3d at 1504.

[16] Law Office of Larry A. Henning v. Mellor (In re Mellor), 226 B.R. 451 (D. Colo. 1998).

[17] Id.

[18] Id. at 457.

to amend a scheduling order.[19] No such motion was filed here. Instead, this case concerns sanctioning a noncompliant party. The factors discussed by Mellor do not apply.

Finally, Greyhound argues that a more appropriate sanction in this case would have been one which impacted only Greyhound's counsel. It is not for this Court to second-guess the wisdom of a lower court's choice of sanctions, so long as the Bankruptcy Court did not abuse its discretion in issuing those sanctions.

IV. CONCLUSION:

Rocin's motion to strike is GRANTED. The Bankruptcy Court's judgment is AFFIRMED.

[19] Id.