FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 28, 2002
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD E. ARMSTRONG, Debtor.	BAP No. UT-01-039
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee, and STEVEN R. BAILEY, Trustee, Appellees.	Bankr. No. 00-26592 Chapter 11 ORDER AND JUDGMENT*

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

Before PUSATERI, BOHANON, and MICHAEL, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

Appellant Donald E. Armstrong appeals the order of the bankruptcy court approving the Appellees' settlement agreement. The settlement agreement resolved claims between the Appellant's Chapter 11 estate (hereinafter "Armstrong estate") and the Chapter 7 estate of Willow Brook Cottages, L.L.C. (hereinafter "Willow Brook estate").[1] The Appellant argues that the bankruptcy

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Appellee Kenneth A. Rushton is trustee for the Appellant's Chapter 11 (continued...)

court abused its discretion in approving the settlement because the evidence presented at the hearing on the approval of the settlement did not show the settlement was fair and equitable and in the best interests of the estate. For reason set forth below, we AFFIRM the bankruptcy court's decision.[2]

I. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. The bankruptcy court's decision is subject to appeal under 28 U.S.C. § 158(a)(1). Neither party elected to have this matter heard by the district court; therefore, the parties have assented to the jurisdiction of this Court. See 28 U.S.C. § 158(c).

II. Standard of Review

The standard of review for the approval of the settlement by the bankruptcy court is the abuse of discretion standard. See In re Kopexa Realty Venture Co., 213 B.R. 1020, 1022 (10th Cir. BAP 1997). The Appellant's contention that the de novo standard is the proper standard of review is erroneous. The Tenth Circuit Court of Appeals has held, "A bankruptcy court's approval of a compromise may be disturbed only when it achieves an unjust result amounting to a clear abuse of discretion." Reiss v. Hagmann (In re Reiss), 881 F.2d 890, 891-92 (10th Cir. 1989).

III. Background

This case began when an involuntary Chapter 11 petition was filed against Willow Brook Cottages, L.L.C. Appellee Bailey (hereinafter "Bailey") was named Chapter 11 trustee for the Willow Brook estate. Bailey hired Duane

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[1] (...continued)
estate, and Appellee Steven A. Bailey is trustee for the Chapter 7 estate of Willow Brook Cottages, L.L.C.

[2] We also DENY the Appellee's Motion to Strike Supplemental Designation of Record, filed August 8, 2001, and GRANT the Motion to Supplement the Record and for Extension of Time to Respond to Appellee's Brief, filed November 15, 2001.

Gillman (hereinafter "Gillman") as legal counsel. Later, the Willow Brook case was converted from one under Chapter 11 to one under Chapter 7.

In May 1999, the Appellant brought a complaint against Bailey and his counsel Gillman in their personal capacity as well as their representative capacities for the Willow Brook estate. The Appellant was president of Mountainview Pacific Ventures (hereinafter "MPV"), an entity that had formed Willow Brook and is, itself, a debtor. In the complaint, the Appellant alleged negligent breach of fiduciary duty, willful and deliberate breach of fiduciary duty, breach of fiduciary duty to maximize the estate, and waste of estate assets. In addition, the Appellant sought removal of Bailey as trustee of the Willow Brook Estate, but this Court held that the Appellant had no standing to seek that remedy.

The complaint against Bailey and Gillman was later dismissed with prejudice. In the Willow Brook case, the bankruptcy court held the Appellant in contempt for violating the automatic stay by bringing the complaint, and it awarded Bailey $3,620.50 in actual damages and $5,000 in punitive damages. Thus, a judgment for $8,620.50 was entered in favor of Bailey. After entry of the judgment, Bailey initiated garnishment proceedings against the Appellant by serving Roger Segal, trustee for the MPV estate, with garnishment documents. Segal held $8,620.50 owed by the MPV estate to the Appellant. Additionally, the bankruptcy court in the Willow Brook case enjoined the Appellant from asserting claims against Bailey or Gillman without prior court approval.

The Appellant appealed the award of damages to the district court. It reversed the $5,000 award for punitive damages but upheld the $3,620.50 award for actual damages. The Appellant appealed the district court's ruling on the actual damages to the Tenth Circuit Court of Appeals, and Bailey cross-appealed the district court's decision on punitive damages. A decision on this appeal has not yet been entered.

In the meantime, the Appellant himself had filed a Chapter 11 petition. The Appellant was removed as debtor-in-possession, and Appellee Rushton was appointed as trustee. Bailey, acting as trustee for the Willow Brook estate, filed a proof of claim in the Armstrong case for approximately $150,000 based on a promissory note that the Appellant had executed in favor of Willow Brook.

Acting on behalf of the respective estates, Rushton and Bailey reached a settlement agreement, which resolved the litigation pending before the Tenth Circuit Court of Appeals. Bailey filed a motion to approve the settlement in the Armstrong case. Rushton did not initially join in Bailey's motion, but he later filed a memorandum in support of it.

The settlement called for Segal to pay Rushton as trustee for the Armstrong estate $5,000. Segal also was to pay the Armstrong estate $3,620.50 for a recovery of a preferential transfer. Bailey reserved the right to file a claim against the Armstrong estate for $3,620.50. Bailey also reserved his right to pursue the proof of claim filed against the Armstrong estate for $150,000 relating to the validity of a promissory note. Likewise, Rushton retained the right to object to the $150,000 proof of claim. Bailey and Rushton were to waive their estates' claims against one another with two specified exceptions.[3]

On May 14, 2001, the bankruptcy court held a hearing on the motion to approve the settlement. On the same day, Rushton filed his joinder for the approval of the settlement. The Appellant objected to the settlement. Both Bailey and Rushton presented evidence in favor of the settlement. The Appellant actively participated in the proceeding. Upon conclusion of the evidence and argument, the bankruptcy court approved the settlement.

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[3] Those two exceptions were the final resolution of the $150,000 proof of claim and the resolution of the $3,620.50 proof of claim.

IV. Discussion

Although the Appellant advances many propositions of error, they can be reduced to one issue: whether the bankruptcy court abused its discretion by approving the settlement in determining if the settlement was fair and equitable and if it was in the best interests of the Armstrong estate.

Rule 9019(a) of the Federal Rules of Bankruptcy Procedure governs compromises of controversies. It provides: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct." Fed. R. Bankr. P. 9019(a).

The Supreme Court has recognized that, "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). To this end, the bankruptcy court must weigh the following factors in deciding whether to approve a compromise: (1) the probable success of the underlying litigation on the merits; (2) the potential difficulty in collecting on a judgment; (3) the complexity and expense of the litigation; and (4) the best interests of creditors. See In re Kopexa Realty, 213 B.R. at 1022.

In approving a settlement, the bankruptcy court is not required to conduct a "mini-trial on the merits." Comm. of Unsecured Creditors of Interstate Cigar Co., Inc. v. Interstate Cigar Distribution, Inc. (In re Interstate Cigar Co., Inc.), 240 B.R. 816, 822 (Bankr. E.D. N.Y. 1999). Indeed, at least one appellate court has noted that Rule 9019(a) does not even require the bankruptcy court to hold an

evidentiary hearing on approval of a settlement. See Depoister v. Mary M. Holloway Foundation (In re Depoister), 36 F.3d 582, 586 (7th Cir. 1994). Nevertheless, the bankruptcy court is also not to merely rubber stamp the trustee's judgment in reaching a settlement. See id. at 587.

A thorough review of the transcript of the hearing on the approval of the settlement reveals that the bankruptcy court conducted an evidentiary hearing on the motion to approve the settlement. The hearing lasted several hours. The bankruptcy court heard testimony from Bailey and Rushton. The Appellant also presented his own testimony.

The bankruptcy court considered the likelihood of success on the merits by Rushton on behalf of the Armstrong estate. Rushton, an experienced bankruptcy trustee, testified that he had doubts that the claims against Bailey and Gillman had any merit. Moreover, it is uncertain whether Rushton could assert those claims on behalf of the Armstrong estate considering that this Court has ruled that the Appellant has no standing to assert claims against the Willow Brook estate. The bankruptcy court weighed the potentially high expenses in pursuing the appeals pending before the Tenth Circuit, a factor that is very salient here because the dispute concerns only $8,600.

The Appellant urges that the bankruptcy court should not have approved the settlement because it did not include any resolution on the $150,000 proof of claim by the Willow Brook estate against the Armstrong estate. The bankruptcy court considered the Appellant's argument that Rushton should use this settlement as leverage to also resolve the $150,000 proof of claim dispute. The bankruptcy court rejected that approach as improper, and we find no basis to reverse the bankruptcy court's informed judgment in that regard.

The record shows that the bankruptcy court had the benefit of testimony from numerous witnesses, two of whom are experienced bankruptcy trustees.

Moreover, the bankruptcy court was fully apprised of all circumstances surrounding the Armstrong bankruptcy case. The Appellant has not pointed to anything in the record that leads us to conclude that the bankruptcy court abused its discretion. Accordingly, the bankruptcy court's approval of the settlement is AFFIRMED.