NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE TENTH CIRCUIT**

---

| | |
|---|---|
| IN RE BRYAN C. ROBINSON,<br>Debtor. | BAP No. UT-02-043 |
| PETER O. PHILLIPS,<br>Appellant,<br>v.<br>ATTORNEYS TITLE GUARANTY FUND, INC.; UTAH STATE TAX COMMISSION; BRYAN C. ROBINSON; ANDRES DIAZ, Trustee; GENERAL MOTORS ACCEPTANCE CORPORATION; UNITED STATES TRUSTEE; and DOUG HOLMES,<br>Appellees. | Bankr. No. 02T-21711<br>Chapter 13<br>ORDER AND JUDGMENT* |

---

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

---

Before McFEELEY, Chief Judge, PUSATERI, and CORDOVA,[1] Bankruptcy Judges.

---

PUSATERI, Bankruptcy Judge.

Creditor Peter O. Phillips ("Phillips") brings this appeal from the judgment

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).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] The Honorable Donald E. Cordova, Chief Bankruptcy Judge for the District of Colorado, heard oral argument in this appeal but passed away February 16, 2003. However, he had fully considered the matter and concurred in the panel's resolution of the appeal, although the final order and judgment was written after his death.

of the United States Bankruptcy Court for the District of Utah dismissing the Chapter 13 bankruptcy petition of debtor Bryan C. Robinson ("the Debtor") with prejudice to refiling for 180 days. Phillips complains that the bankruptcy court erred by dismissing the case without notice to all the Debtor's creditors, in violation of the creditors' right to due process, and by failing to consider whether to convert the case to Chapter 7 rather than dismiss it. We must dismiss his appeal because it has become moot.

**Background**

In January 2002, acting *pro se*, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code, but filed, at most, an incomplete list of creditors. He never filed any schedules of assets and liabilities, a statement of financial affairs, or a Chapter 13 plan. He failed to make his first plan payment as required by a local rule, and also failed to attend the meeting of creditors scheduled pursuant to 11 U.S.C. § 341(a). The Chapter 13 Trustee reported these deficiencies to the court and recommended that the Debtor's case be dismissed.

One of the Debtor's creditors, Attorneys Title Guaranty Fund, Inc. ("Attorneys Title"), objected to dismissal without prejudice, and asked for an order dismissing the case with prejudice to refiling or, alternatively, granting it relief from the automatic stay. The Debtor responded to Attorneys Title's pleading with a "Statement . . . in Opposition to the Motion of [Attorneys Title] and in Support of Dismissal of the Chapter 13 Proceeding Without Prejudice," agreeing that his case should be dismissed but asking that the dismissal be without prejudice. The Debtor conceded that he did not meet the statutory criteria for filing a Chapter 13 petition, and indicated he had thought he did not qualify to file a Chapter 7 case but later learned he could file one. He said, "Since the proper chapter for Debtor is a chapter 7 filing, he elected to let the chapter 13

petition be dismissed and then re-file as a chapter 7."[2]

Phillips appeared at the ensuing hearing, but the Debtor did not. Phillips supported Attorneys Title's assertion that the Debtor had filed his Chapter 13 petition in bad faith. However, he complained that the Debtor's creditors should be given notice before the case was dismissed. He also suggested that the Chapter 13 Trustee should seek appointment of an examiner and turnover of all the Debtor's records. He stated that at the least, the case should be converted to Chapter 7 so that the Debtor would not have "that automatic right to convert it and get a super discharge."[3]

Relying on the Tenth Circuit's decision in *In re Gier*,[4] the pleadings on file, and the arguments of the parties at the hearing, the bankruptcy court concluded that the case had been filed in bad faith and should be dismissed with prejudice to refiling under any chapter of the Bankruptcy Code for 180 days. A written order to that effect was filed on April 23, 2002. Phillips filed a timely notice of appeal. By the time the appeal was argued to us, more than 180 days had passed since the bankruptcy court's order was entered. Phillips informed us during oral argument that the Debtor filed a Chapter 7 petition after the 180-day period expired.

**Discussion**

Before we address the merits of Phillips's appeal, we must consider whether his appeal has become moot, and must be dismissed.[5] "A matter is moot if the issues presented are no longer live because we are incapable of rendering effective relief or restoring the parties to their original position, or the parties

---

[2] Appellant's appendix at 37.

[3] Appellant's appendix at 51.

[4] 986 F.2d 1326 (10th Cir. 1993).

[5] *Southwestern Bell Tel. Co. v. Long Shot Drilling, Inc. (In re Long Shot Drilling, Inc.)*, 224 B.R. 473, 477-78 (10th Cir. BAP 1998).

lack a legally cognizable interest in the outcome."[6] We are convinced that Phillips has not established that a favorable ruling could be fashioned to grant him relief from any injury he might have suffered as a result of the dismissal of the Debtor's bankruptcy case.

We do not see how we could reinstate the Debtor's Chapter 13 bankruptcy case at this late date, and require the bankruptcy court to give notice to any other parties before deciding again whether to dismiss it. The dismissal order was not stayed, so the Debtor was free to carry on with his normal financial activities, and his creditors were free to pursue collection activities. It would be difficult, if not impossible, to undo all those activities now. In addition, according to Phillips, the Debtor has now filed a Chapter 7 petition, further complicating any efforts to restore the Debtor and his creditors to the positions they occupied at the time the case was dismissed. Besides, the Debtor's new bankruptcy case has given Phillips most of the relief he seems to seek in this appeal. In passing, we note that even though the bankruptcy court dismissed the Debtor's voluntary filing, if Phillips thought some benefit would have been gained by having the Debtor in bankruptcy, he was free to file an involuntary case against the Debtor (although he might have had to convince two or more other creditors to join him in doing so).[7] The record does not establish that we could grant any effective relief to Phillips in this appeal, so the appeal is moot and must be dismissed.

Even if the appeal were not moot, Phillips has not established that any due process violation infected the proceedings before the bankruptcy court. His main complaint on appeal is that the bankruptcy court should have given notice to all the Debtor's creditors before dismissing this case. To the extent Phillips is trying

---

[6] *Behles-Giddens, P.A., v. Raft (In re K.D. Co., Inc.)*, 254 B.R. 480, 486 (10th Cir. BAP 2000).

[7] *See* 11 U.S.C. § 303(b).

to invoke others' rights and not his own, he has not shown that he can properly obtain relief for himself this way.[8] To the extent he might be asserting his own right to due process notice, we conclude that any deficiency in the notice he received would not justify granting him any relief in this appeal. In some way, he became aware of and appeared at the hearing on the Chapter 13 Trustee's motion to dismiss, and was allowed to express his views about the proposed dismissal. Thus, even though the bankruptcy court apparently did not send him any notice, he nevertheless received actual notice of the hearing and was afforded the opportunity to present his objections, the essential goals of due process notice that have been identified by the Supreme Court.[9] Because so far as we can tell from the record on appeal, those goals have been satisfied, Phillips has not shown that any defect in the manner by which he received notice provides a basis for granting him any relief now.

Even if we could conceive of a remedy that would prevent this appeal from being moot, we would not reverse the bankruptcy court's dismissal order. In his appellate brief, Phillips's only attack on the substance of the bankruptcy court's decision to dismiss the case seems to be that the court did not consider whether conversion of the case would have served the interests of creditors and the estate better than dismissal. We review an order dismissing a bankruptcy case for an abuse of discretion.[10]

> 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. When we

---

[8] *See Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (ordinarily, party may not assert rights of others to justify relief for himself or herself).

[9] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[10] *In re Davis*, 239 B.R. 573, 576 (10th Cir. BAP 1999).

> apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value. *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (quoting *United States v. Ortiz*, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986)). An abuse of discretion occurs when the district court's decision is "arbitrary, capricious or whimsical," or results in a "manifestly unreasonable judgment." *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987).[11]

We are not convinced that any such error was made.

Although Phillips did suggest to the bankruptcy court that the case should be converted rather than dismissed, he did not provide much reason for doing so. He indicated that he was involved in a lawsuit against the Debtor in which the Debtor had failed to respond to discovery and recently filed a notice of bankruptcy. Even though the Debtor had similarly failed to supply required information in his bankruptcy case, Phillips seemed to think information about the Debtor's assets could be obtained if the bankruptcy case were not dismissed. So far as we are aware, the court where Phillips's lawsuit was pending would have had as much ability as the bankruptcy court to force the Debtor to supply any relevant information. Phillips also suggested that the Debtor might have made preferential or fraudulent transfers that could be recovered for the bankruptcy estate, but the only specific transfer he mentioned was one from the Debtor's wife to Attorneys Title. Attorneys Title had mentioned that transfer in seeking stay relief, indicating that the Debtor had been using the automatic stay imposed by his bankruptcy filing to keep Attorneys Title from having him removed from the property. Absent evidence that the Debtor was somehow involved in making the transfer from his wife to Attorneys Title, his bankruptcy estate would have no right to avoid it. Phillips suggested that Attorneys Title was gaining some improper advantage over the Debtor's other creditors by asking for stay relief. Even assuming this might be true, the dismissal of the case terminated the

---

[11] *Moothart v. Bell*, 21 F.3d 1499, 1504-05 (10th Cir. 1994).

automatic stay,[12] thus effectively giving all creditors stay relief.

In short, Phillips offered the bankruptcy court no plausible reason to convert the case rather than dismiss it, other than his bare assertion that the Debtor might have made preferential or fraudulent transfers, an assertion that could be made in every case. This is certainly not sufficient to convince us that the bankruptcy court abused its discretion by dismissing the case rather than converting it to Chapter 7.

Although Phillips has apparently overlooked it, the Debtor's statement opposing Attorneys Title's objection to dismissal without prejudice at least comes very close to asking that the case be dismissed. Section 1307(b) of the Bankruptcy Code provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."[13] This provision is generally regarded as giving a Chapter 13 debtor an absolute right to dismiss his or her case.[14] Because Attorneys Title had asked for stay relief, if the bankruptcy court had simply granted the Debtor's request for dismissal, § 109(g)(2) would have operated to bar the Debtor from filing another bankruptcy case for 180 days. These facts would provide an alternative basis for us to affirm the bankruptcy court's decision to dismiss the case and impose the 180-day filing bar.

**Conclusion**

After carefully reviewing the record before us, we conclude that Phillips's

---

[12] 11 U.S.C. § 362(c)(2)(B).

[13] 11 U.S.C. § 1307(b)

[14] *See Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616, 619-22 (2d Cir. 1999); 4 Keith M. Lundin, *Chapter 13 Bankruptcy*, § 330.1 (3d ed. 2002); *but see Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996) (despite mandatory language of § 1307(b), court has power to convert case where petition was filed in bad faith).

appeal has become moot, so the appeal must be dismissed. Phillips has not shown that there is any effective relief that we could grant him at this time. Even if the appeal were not moot, Phillips has not demonstrated that the bankruptcy court committed any reversible error. He has not shown that he can properly assert the due process rights of any other creditors of the Debtor. While he can properly assert his own right to due process notice, he has not shown that his right was violated or that he was harmed by any such violation. Phillips has also failed to show that the bankruptcy court abused its discretion by dismissing the Debtor's bankruptcy case. Phillips's appeal is hereby dismissed.