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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 23, 2001
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE STEVE A. FLORES, Debtor.	BAP No. NM-00-069
STEVE A. FLORES, Appellant, v. UNITED STATES TRUSTEE and MICHAEL J. CAPLAN, Trustee, Appellees.	Bankr. No. 99-15446 Chapter 7 ORDER AND JUDGMENT*

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

Before BOHANON, BOULDEN, and ROBINSON, Bankruptcy Judges.

ROBINSON, Bankruptcy Judge.

This Panel has before it for review the Order of the United States Bankruptcy Court for the District of New Mexico, denying the Debtor's motion to reopen his case. For the reasons set forth below, we conclude that the decision of the bankruptcy court should be vacated and the matter remanded to that court for further proceedings.

I. Jurisdiction and Standard of Review.

A bankruptcy appellate panel, with the consent of the parties, has

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As none of the parties have opted to have this appeal heard by the District Court for the District of New Mexico, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(c).

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; *see First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir. 1985). Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). A bankruptcy court's denial of a motion to reopen a case is reviewed under an abuse of discretion standard. *In re Woods*, 173 F.3d 770, 778 (10th Cir.), *cert. denied*, 528 U.S. 878 (1999).

II. Background.

Steve Flores ("the Debtor") filed a chapter 13 petition in September 1999. During his chapter 13 proceedings, Debtor and Associates Home Equity Services, Inc. ("Associates") entered into a consensual order granting immediate relief from the automatic stay to Associates to pursue its state court rights against Debtor's residence if Debtor defaulted on his mortgage payments. Debtor did in fact default, and relief from the automatic stay was granted on or around November 16, 1999, by way of a consent order. Associates subsequently foreclosed on Debtor's real property. Associates did not have a security interest in any of Debtor's personal property.

In January 2000, Debtor's counsel withdrew from his bankruptcy case, leaving him unrepresented by counsel. In his motion, Debtor's counsel requested leave to withdraw because Debtor converted his case to Chapter 7 without informing counsel.

In April 2000, after noticing someone removing his personal property from the real estate, Debtor filed a motion for temporary restraining order and preliminary injunction in state court. The state court heard Debtor's motion on April 14, 2000, and ordered that Debtor had until 5:00 p.m. Friday, April 21, 2000, to remove his possessions from the house and yard "and/or to purchase the property from" Associates. The court further ordered that in the event Debtor did not purchase the property by the deadline, he was to bring the house key to the courthouse and leave it with the Judge's secretary, and Associates could proceed to remove and dispose of any items left on the property. For reasons not revealed in the record, Debtor failed to remove the personal property by the deadline. The record indicates that Associates' agent removed the property and stored it at his home. Debtor apparently obtained a truck, a fax-phone, and items of cultural and religious significance, and was told by Associates' agent that he could purchase the remaining property for $1,000. The Court notes that neither Debtor's brief nor appendix contains an itemized list of his personal property. Although Debtor presented two checks, Associates' agent apparently refused to accept them. All of these events transpired while Debtor's bankruptcy case was pending.

On April 3, 2000, the Chapter 7 Trustee filed a motion to dismiss Debtor's bankruptcy case. On May 15, 2000, the bankruptcy court entered an order dismissing Debtor's case for failure to appear at the meeting of creditors. No appeal was taken from this order. Four months later, on September 26, 2000, Debtor's new counsel filed a motion to reopen the case pursuant to 11 U.S.C. § 350(b)[1], alleging that Debtor never received notice of the meeting because it was sent to his home under foreclosure, and further, that Associates had willfully violated the automatic stay. No objection was filed to Debtor's motion, and no

[1] Future references are to Title 11 of the United States Code unless otherwise indicated.

hearing was held. On October 11, 2000, the bankruptcy court denied Debtor's motion to reopen. The entire substance of the order is as follows:

> THIS MATTER came before the Court on the Motion to Reopen Case ("Motion"), filed on September 26, 2000 by the Debtor, Steve Flores. On May 15, 2000, this Court entered an Order Granting Motion to Dismiss Bankruptcy in this case, which became a final order on May 25, 2000. It would be inappropriate to reopen this case since no relief can be afforded to the Debtor. Therefore, the motion will be denied.

This appeal followed.

I. Discussion.

Debtor contends that the bankruptcy court abused its discretion because it denied his motion to reopen without affording him a hearing. We will first address the issue of whether a hearing was required. Debtor bases his argument on N.M. LBR 9013-1(c)(2), which provides that with respect to a motion, other than one that may be heard *ex parte*, movant shall secure a hearing by calling judge's chambers to request a date and time. Debtor contends that his counsel called chambers to schedule a hearing, but the court never replied with a date.

We conclude that it was not an abuse of discretion for the bankruptcy court to rule on Debtor's motion without a hearing. Motions to reopen under § 350(b) and Fed. R. Bankr. P. 5010 may be considered *ex parte*. *In re Menk*, 241 B.R. 896, 914 (9th Cir. BAP 1999). Further, N.M. LBR 9013-1(c)(2) is triggered by the preceding subsection (c)(1), which provides that "[i]f an objection is filed, the movant shall promptly request a hearing as provided in subsection (2), below." No objection to Debtor's motion to reopen was filed, and no hearing was required under the Local Rule.

Debtor also argues that the bankruptcy court should have reopened his case pursuant to § 350(b). That section provides in pertinent part that "[a] case may be reopened . . . to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). While the Code does not define "other cause,"

" 'the decision to reopen or not is discretionary with the court, which may consider numerous factors including equitable concerns, and ought to emphasize substance over technical considerations.' " *Batstone v. Emmerling (In re Emmerling)*, 223 B.R. 860, 864 (2d Cir. BAP 1997) (quoting *Collier on Bankruptcy* ¶ 350.03[5] (1996)). Accordingly, the bankruptcy court's refusal to reopen Debtor's case will not be upset absent an abuse of discretion. *In re Woods*, 173 F.3d 770, 778 (10th Cir.), *cert. denied*, 528 U.S. 878 (1999); *Nintendo Co. v. Patten (In re Alpex Computer Corp.)*, 71 F.3d 353, 356 (10th Cir. 1995).

The majority view appears to be that a case cannot be reopened unless it was closed pursuant to § 350(a) after it has been administered, so a dismissed case could not be reopened under § 350(b). As the Ninth Circuit recognized in the case of *In re Income Property Builders, Inc.*, a case that is dismissed is fundamentally different from a case that is closed:

> 11 U.S.C. § 349, treating the effects of a bankruptcy, obviously contemplates that on dismissal a bankrupt is reinvested with the estate, subject to all encumbrances which existed prior to bankruptcy. After an order of dismissal, the debtor's debts and property are subject to the general laws, unaffected by bankruptcy concepts. After dismissal a debtor may file another petition for bankruptcy unless the initial petition was dismissed with prejudice.
>
> On the other hand, a bankruptcy is normally closed after the bankruptcy proceedings are completed. At that time the debts of the bankrupt are usually discharged and the proceeds of debtor's nonexempt assets divided among creditors. A bankruptcy is reopened under 11 U.S.C. 350(b), not to restore the prebankruptcy status, but to continue the bankruptcy proceeding. The word "reopened" used in Section 350(b) obviously relates to the word "closed" used in the same section. In our opinion a case cannot be reopened unless it has been closed. An order dismissing a bankruptcy case accomplishes a completely different result than an order closing it would and is not an order closing.

Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.), 699 F.2d 963, 965 (9th Cir. 1982) (per curiam) (footnotes omitted).

Although it appears that Debtor's case may not be "reopened" under

§ 350(b), the order of dismissal may be set aside pursuant to Fed. R. Bankr. P. 9024. This rule incorporates Fed. R. Civ. P. 60 and provides that a party may receive relief from a "final judgment, order or proceeding" on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence . . . ;
> (3) fraud . . . , misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> (6) any other reason justifying relief . . . .

Fed. R. Civ. P. 60(b)(1)-(6). Debtor alleges in his motion to reopen that it was excusable neglect for him to miss his § 341 meeting. Accordingly, Debtor's motion to reopen could be construed as one to set aside the bankruptcy court's May 15, 2000, order of dismissal, and proper analysis would be under Rule 9024 and Rule 60(b). *See In re Barnes*, 969 F.2d 526, 527 (7th Cir. 1992) ("The usual motion to reopen a proceeding in which the judgment has become final is a collateral attack on the judgment and is therefore subject, in bankruptcy as in other federal cases, to the strict limitations of Rule 60(b) of the Federal Rules of Civil Procedure."); *In re Critical Care Support Servs.*, 236 B.R. 137, 140 (E.D. N.Y. 1999); *In re King*, 214 B.R. 334, 336-37 (Bankr. W.D. Tenn. 1997); *In re Spanish Cay Co., Ltd.,* 161 B.R. 715, 718 (Bankr. S.D. Fla. 1993).

Yet another consideration is authority that, where the underlying case has been dismissed, a bankruptcy court retains discretionary subject matter jurisdiction over a complaint alleging a § 362(h) willful violation of the stay. *See, e.g., Price v. Rochford*, 947 F.2d 829, 831-32 (7th Cir. 1991) (§ 362(h) creates a cause of action that can be enforced after bankruptcy proceedings have terminated); *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 363 n. 2 (6th Cir. 1997); *Fernandez v. GE Capital Mortgage Servs., Inc. (In re*

Fernandez), 227 B.R. 174, 179 (9th Cir. BAP 1998), *aff'd without published opinion*, 208 F.3d 220 (9th Cir. 2000).

In the instant appeal, the threshold problem for this Court is the lack of substantive findings by the bankruptcy court. The court's order denying Debtor's motion to reopen fails to address any of the applicable standards set forth above. A court abuses its discretion if it fails to exercise that discretion or if it makes a decision without providing reasons. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1459 (10th Cir. 1995). Without anything in the record to indicate how the court made its determination to deny the motion to reopen, appellate review is impossible. Consequently, the order denying the motion to reopen will be vacated, and the Court will remand the issue to the bankruptcy court for specific findings and conclusions explicating the court's exercise of discretion under § 350(b), Rule 9024, or other applicable law.

I. Conclusion.

For the reasons set forth above, the order denying the motion to reopen is VACATED. This matter is REMANDED for further proceedings consistent with this Order and Judgment.