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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
October 8, 2002
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JENNIFER GAYLE POTTER, Debtor.	BAP No. UT-01-027
DONALD E. ARMSTRONG, Plaintiff – Appellant, v. JENNIFER GAYLE POTTER, Defendant – Appellee.	Bankr. No. 00-21039 Adv. No. 00-2089 Chapter 7 ORDER AND JUDGMENT*

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

Before PUSATERI, BOHANON, and MICHAEL, Bankruptcy Judges.[1]

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).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 plaintiff/appellant, Armstrong, has filed a civil suit in federal court against each of the judges on this panel in which he alleges that we have denied his constitutional rights in previous rulings. In that action, Armstrong seeks to prohibit us from hearing any matters to which he is a party. *See Armstrong v. Boulden*, Case No. 2:02CV0500 (D. Utah filed May 22, 2002). As judges, we are required to avoid the appearance of bias or partiality and to recuse ourselves if our "impartiality might reasonably be questioned." 28 U.S.C. § 455. After careful review, we find that Armstrong's suit against us is not cause for our recusal. *See United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976). A judge's duty to hear cases is not so ephemeral that it dissipates at the first sight of any potential bias or partiality towards one of the litigants. *United States v. Hines,* 696 F.2d 722, 729 (10th Cir. 1982) ("[S]ection 455(a) must not be so broadly construed that it

(continued...)

MICHAEL, Bankruptcy Judge.

Donald E. Armstrong ("Armstrong") appeals from orders of the United States Bankruptcy Court for the District of Utah (the "bankruptcy court") (1) dismissing an adversary proceeding filed by Armstrong against Debtor Jennifer Gayle Potter ("Potter"), and (2) denying Armstrong's Amended Motion to Recuse (the "Motion to Recuse"). For the reasons set forth below, we dismiss this appeal with respect to the order dismissing the adversary proceeding and affirm the order denying the Motion to Recuse.

I. Background

In early 1999, Armstrong filed suit against Potter in Utah state court (the "State Court"). On June 14, 1999, the State Court entered judgment against Potter and ordered her to pay Armstrong $10,312.92 plus interest, costs and attorney fees. The State Court issued a supplemental judgment September 29, 1999, increasing the amount owed by Potter to $18,123.45, plus interest, costs, and attorney fees. Potter filed for relief under Chapter 7 of the Bankruptcy Code on January 31, 2000.

On March 10, 2000, Armstrong filed for Chapter 11 bankruptcy relief. On April 17, 2000, Armstrong filed an adversary proceeding in Potter's bankruptcy case seeking a determination that the debt owed by Potter to Armstrong was nondischargeable pursuant to §§ 523(a)(2)(A) and (a)(6) of the Bankruptcy

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[1] (...continued)
becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."). Moreover, "[t]he statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). *Cooley* expressly states that prior adverse rulings and "baseless personal attacks on or suits against the judge by a party" are not cause for recusal. *Id*. On this basis, we believe our hearing of this case to be proper and indeed mandatory. *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) (per curiam) ("There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.").

Code.[2] On June 5, 2000, Armstrong filed the Motion to Recuse. On July 26, 2000, the bankruptcy court issued its Order Denying Plaintiff's Motion to Recuse. The bankruptcy court conducted a pretrial conference in the adversary proceeding July 11, 2000. Armstrong appeared *pro se*, along with counsel for Potter. On July 31, 2000, the bankruptcy court issued a scheduling order (the "Scheduling Order") in the adversary proceeding directing the parties to file a proposed pretrial order by March 6, 2001, and to appear for a final pretrial conference on March 20, 2001. Armstrong and counsel for Potter were served with a copy of the Scheduling Order by first class mail on August 1, 2000.

On September 18, 2000, Kenneth Rushton ("Rushton" or "Trustee") was appointed Chapter 11 trustee in Armstrong's bankruptcy case. On March 20, 2001, the bankruptcy court convened for the final pretrial conference. Neither Rushton nor Armstrong appeared. Potter's counsel also failed to appear. The bankruptcy court dismissed the adversary proceeding by minute entry, noting the parties' failure to appear and their failure to submit a proposed pretrial order as directed in the Scheduling Order.[3]

On March 28, 2001, Armstrong filed a Motion to Reconsider Dismissal of Case (the "Motion to Reconsider"). Rushton filed a response to the Motion to Reconsider on April 12, 2001. On April 16, 2001, Potter filed an objection to the Motion to Reconsider. The bankruptcy court issued a written order dismissing the adversary proceeding on May 3, 2001. Armstrong timely filed a notice of appeal

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[2] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq*. (West 2002).

[3] Sometime after Rushton's appointment, he began negotiating the sale to Armstrong of certain claims that were property of the Armstrong bankruptcy estate. The cause of action against Potter was among the claims discussed during the negotiations. On May 29, 2001, after the bankruptcy court had dismissed the adversary proceeding, an order was entered in Armstrong's bankruptcy case approving the sale of claims.

on May 14, 2001.[4] On March 27, 2002, this Court entered an Order of Limited Remand directing the bankruptcy court to rule on the Motion to Reconsider and retaining jurisdiction to address this appeal following the bankruptcy court's ruling. On June 5, 2002, the bankruptcy court denied the Motion to Reconsider. The order denying the Motion to Reconsider contained no explanation of the basis for the bankruptcy court's decision. Accordingly, this appeal is now ripe for review.[5]

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, order, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001. Neither party elected to have this appeal heard by the United States District Court for the

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[4] The tenth day after entry of the order was a Sunday; thus, Armstrong had until Monday, May 14, 2001, to file his notice of appeal. *See* Fed. R. Bankr. P. 8002(a) and 9006(a).

[5] We note that the filing of the notice of appeal while the Motion to Reconsider was pending before the bankruptcy court does not render this appeal untimely. Bankruptcy Rule 8002 contemplates just such a scenario and provides in relevant part:

> A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree or part thereof, specified in the notice of appeal, *until the entry of the order disposing of the last such motion outstanding.*

Fed. R. Bankr. P. 8002(b) (emphasis added). The advisory committee notes to the 1994 amendment to the rule state in part:

> This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. *A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.*

Fed. R. Bankr. P. 8002 advisory committee notes (emphasis added).

District of Utah; thus they have consented to our review. 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.'" *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States,* 324 U.S. 229, 233 (1945)). An order dismissing an adversary proceeding is a final order. *See In re Davis,* 177 B.R. 907, 910 (9th Cir. BAP 1995). An order denying a motion to recuse is interlocutory and is not immediately appealable. *See Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (per curiam) (citing *Lopez v. Behles (In re American Ready Mix, Inc.),* 14 F.3d 1497, 1499 (10th Cir.), *cert. denied,* 513 U.S. 818 (1994)). However, once the bankruptcy court ruled on the Motion to Reconsider, the order dismissing the adversary proceeding became a final order, permitting our review of the Order Denying the Motion to Recuse.

III. Discussion

A. The Order Dismissing Adversary Proceeding

We find it necessary to first address Armstrong's standing to appeal from the order dismissing the adversary proceeding. Potter contends that Armstrong lacks standing. Armstrong argues Potter has waived the issue by failing to raise it below. This argument lacks merit. Armstrong fails to differentiate between his standing, or lack thereof, in the bankruptcy court and his standing to appeal from adverse decisions of that court. Potter's alleged failure to object to Armstrong's standing before the bankruptcy court is irrelevant to our determination here. Moreover, we are required to address the issue of standing even if the court below did not pass on it, and even if no party has raised the issue. *See FW/PBS, Inc., v. City of Dallas,* 493 U.S. 215, 230-31 (1990). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *Id.* (quoting *Allen v. Wright,* 468 U.S. 737, 750 (1984)). "Standing may be raised at any time in the

judicial process," *Board of County Commissioners v. W.H.I., Inc.,* 992 F.2d 1061, 1063 (10th Cir. 1993), and cannot be waived. *See United States v. Hays,* 515 U.S. 737, 742 (1995).

Armstrong contends that his status as the debtor out of possession in his bankruptcy case confers upon him standing to appeal from the bankruptcy court's orders. The Bankruptcy Code does not contain a grant or limitation on appellate standing. The Tenth Circuit has adopted the "person aggrieved" standard embodied in § 39(c) of the Bankruptcy Act of 1898. *See Holmes v. Silver Wings Aviation, Inc.,* 881 F.2d 939, 940 (10th Cir. 1989). Under this standard, the right to appeal is limited to those persons "whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court." *Id.* (internal quotes omitted). "'Litigants are "persons aggrieved" if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights.'" *American Ready Mix,* 14 F.3d at 1500 (quoting *GMAC v. Dykes (In re Dykes)*, 10 F.3d 184, 187 (3d Cir. 1993)). The party seeking to exercise jurisdiction in his favor must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *City of Dallas,* 493 U.S. at 231 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

There is no dispute that Armstrong no longer had standing to prosecute the adversary proceeding once Rushton was appointed Trustee in Armstrong's bankruptcy case. *See Rooney v. Thorson (In re Dawnwood Properties/78)*, 209 F.3d 114, 116 (2d Cir. 2000) (appointment of Chapter 11 trustee deprives debtor of standing to bring adversary proceeding). The appointment of a trustee does not divest a Chapter 11 debtor of all its rights under the Bankruptcy Code, however. Among the rights retained by a debtor out of possession is the right to file a plan of reorganization. 11 U.S.C. § 1121(c). During oral argument, Armstrong suggested his status as a debtor with the right to file a Chapter 11 plan vests him

with standing to pursue this appeal. Under this theory, the order dismissing the adversary proceeding stripped Armstrong's bankruptcy estate of an asset that could have been used in formulating a plan of reorganization.

This argument might have gained some traction if Armstrong had come forth with any facts tending to indicate that he is an "aggrieved person" as that term has been applied in the Tenth Circuit. There is nothing in the record before us, however, indicating that Armstrong's rights or interests *qua* Armstrong have suffered an adverse pecuniary effect resulting from the order dismissing the adversary proceeding. Furthermore, even if we were to concede that the bankruptcy court's order did adversely impact Armstrong's pecuniary interests, that impact must be direct before Armstrong can acquire standing to appeal. *See Silver Wings Aviation,* 881 F.2d at 940. Here, we have only some remote unquantified possibility that the adversary proceeding could result in a possible future benefit to Armstrong. Any injury suffered by Armstrong as a result of the bankruptcy court's order is speculative at best. We will not expand the boundaries of appellate standing through speculation.[6] Armstrong has the burden of establishing that he has standing to appeal the order dismissing the adversary proceeding. *See City of Dallas,* 493 U.S. at 231. He has failed to meet that burden.[7] This appears to be where the majority and the dissent part company. The statement that "[a]pparently the majority believes that Armstrong has not shown anything more than a speculative injury because he has not shown that his

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[6] We are not willing to assume that, but for the order dismissing the adversary proceeding, Armstrong would have prosecuted and ultimately prevailed in the adversary proceeding, realized an economic recovery from the same, filed a Chapter 11 plan that included the claim against Potter as an asset, and that the claim's inclusion in the plan would have materially affected the chances that the plan would be confirmed.

[7] Having determined that Armstrong lacks standing, the fact that the reasoning behind the bankruptcy court's decision to deny the Motion for Reconsideration was not disclosed to this Court is immaterial.

judgment against Potter actually is nondischargeable," *see* dissent at 6, ignores the above analysis.[8]

Important policy considerations support our decision. Limiting appellate standing to those entities that can show a concrete pecuniary injury resulting from an order of the bankruptcy court promotes the expeditious resolution of disputes, hastening both distributions to creditors and the debtor's "fresh start," while preventing bankruptcy litigation from "becom[ing] mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." *Silver Wings Aviation*, 881 F.2d at 940 (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988)). It is not difficult to envision the Pandora's Box that would be opened were we to conclude that alleged injuries as remote as Armstrong's provide a party with standing to appeal. The Code section that empowers Armstrong to file a Chapter 11 plan in this case also confers that right upon all other parties in interest, including "a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. § 1121(c). A rule permitting any party who is entitled to file a plan to appeal from an order of the bankruptcy court that affects them merely tangentially would inject needless delay into the

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[8] In addition, the dissent postulates that:

> Armstrong is personally liable for the debts of his estate, and will likely remain so unless a plan of reorganization is filed and confirmed that allows him to receive a discharge. Probably only a plan filed by Armstrong himself would give him a discharge. So Armstrong will more likely than not have to pay his debts except to the extent they are paid from the assets of his bankruptcy estate. One of those assets is his judgment against Potter for over $18,000. The loss of this asset as a sanction for failure to pursue the proceeding, and not because it was found to be dischargeable or because Potter could never pay any of it, surely deprived Armstrong of an asset that might have reduced his obligations to his creditors, no matter what the ultimate outcome of his Chapter 11 case might be.

See dissent at 5-6. We respectfully find this reasoning to be speculation that we decline to engage in.

reorganization process.

Even if Armstrong could show that he has suffered a direct, pecuniary injury resulting from the order dismissing the adversary proceeding, he would still lack standing to appeal that order. "'Prerequisites for being a "person aggrieved" are attendance and objection at a bankruptcy court proceeding.'" *In re Weston,* 18 F.3d 860, 864 (10th Cir. 1994) (quoting *In re Schultz Mfg. Fabricating Co.,* 956 F.2d 686, 690 (7th Cir. 1992)). In *Weston,* the debtor and a group of creditors (the "opposing creditors") opposed the election of a Chapter 7 trustee chosen by a second group of creditors. The creditors supporting the election filed a motion to resolve the dispute. The debtor filed an objection and appeared at a hearing held by the bankruptcy court. The opposing creditors failed to object or appear. The bankruptcy court overruled the debtor's objection and held the election was proper. On appeal, the circuit court held that the opposing creditors' failure to file an objection, appear at the hearing or file a timely joinder of the debtor's appeal deprived them of standing to appeal. *See id.*

Armstrong failed to appear at the final pretrial conference or to take any steps prior to dismissal to convince the bankruptcy court not to dismiss the adversary proceeding. A debtor is a "party in interest" with a right to be heard. 11 U.S.C. § 1109(b). Notwithstanding the appointment of the Trustee, Armstrong could have sought to intervene in the adversary proceeding on the ground that the trustee refused to prosecute the claim. He did not do so, and under *Weston,* has not met the prerequisites for being a "person aggrieved." Accordingly, we hold that Armstrong lacks standing to appeal from the order dismissing the adversary proceeding. In so holding, we recognize that this result may appear harsh. To be sure, the fact that the adversary proceeding was dismissed because the Trustee neglected to file a pretrial order or to appear at the final pretrial conference is worrisome. We need not engage in speculation as to whether Armstrong has any

recourse on that front. It is sufficient for our purposes to note that Armstrong has failed to meet his burden.

The dissent takes the position that the filing of the Motion to Reconsider by Armstrong operated as a motion to intervene under Federal Rule of Civil Procedure 24(a)(2), and that it was in effect error for the bankruptcy court to not allow Armstrong to assume prosecution of the claim against Potter. *See* dissent at 2-4. We are not so persuaded. The United States Court of Appeals for the Tenth Circuit has held that:

> An intervenor under Rule 24(a)(2) must meet the following requirements: (1) submit a timely application to intervene, (2) demonstrate an interest in the property or transaction, (3) show that the intervenor's ability to protect such interest might be impaired, and (4) demonstrate that the interest is not adequately represented by the existing parties.

Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.), 998 F.2d 783, 790 (10th Cir. 1993). The record does not establish that Armstrong has met any of these requirements.

Armstrong has never filed a motion to intervene. It has long been established that a "'party who ha[s] taken part in the proceedings and ha[s] the right to intervene, but who ha[s] not formally done so, [is] not capable of appealing, as such a party [is] not properly on the record as an intervenor, and not being a party to the record has no standing to appeal.'" *In re Central Ice Cream Co.*, 62 B.R. 357, 360 (N.D. Ill. 1986) (quoting *In re South State Bldg. Corp.*, 140 F.2d 363, 367 (7th Cir. 1943); *accord Kowal v. Malkemus (In re Thomson)*, 965 F.2d 1136, 1142 (1st Cir. 1992) ("[M]ere participation in a hearing . . . [of] an adversary proceeding does not constitute *de facto* intervention."); *Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654, 659 (4th Cir. 1997) ("In order to prove that the party sought to intervene in the bankruptcy court, the intervenor must prove some formal attempt to intervene."). The purpose of formally pleading intervention is so that a court can adequately determine whether

intervention is proper. *See Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941). Nothing in Armstrong's Motion to Reconsider specifically referenced intervention or Rule 24.[9]

In addition, the Motion to Reconsider was filed after the adversary proceeding was dismissed. However, according to pleadings filed by Rushton and made a part of the record on appeal by Armstrong,

> The Trustee never intended to prosecute this lawsuit [against Potter] and never made any representation to Mr. Armstrong that he would do so. The Trustee has consistently stated to Mr. Armstrong that he would take no action against Ms. Potter except to the extent he might sell or abandon any such claim.

Trustee's Response to Motion to Reconsider Dismissal of Case ¶ 4, *in* Appellant's Appendix at tab 15. If this statement is true, Armstrong had ample notice of the Trustee's position before the adversary proceeding was dismissed. Under this scenario, even if the Motion to Reconsider were construed as a motion to

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[9] The fact that the Motion to Reconsider was filed by Armstrong *pro se* causes us no pause in foreclosing the dissent's position that the Motion to Reconsider operated as a motion to intervene. As the United States Supreme Court acknowledged in *McNeil v. United States*, 508 U.S. 106, 113 (1993), it has only required liberal construction of pleadings filed by *pro se* defendants in criminal matters, and it has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *See also Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998) (Easterbrook, J.) ("To put [*McNeil*] differently, rules apply to uncounseled litigants and must be enforced."). Furthermore, as the Seventh Circuit has recognized, "[t]he Supreme Court insists that federal judges carry out the rules of procedure whether or not those rules strike the judges as optimal." *Tuke v. United States*, 76 F.3d 155, 157 (7th Cir. 1996) (Easterbrook, J.) (citing the relevant Supreme Court cases).

While we are not advocating a mechanical approach to reviewing *pro se* motions, we do feel it proper to call for restraint in construing such motions. It is one thing for a court to give *pro se* litigants the benefit of the doubt when they are asking the court for ambiguous requests; it is quite another for the court to convert one request for another. We feel that the dissent is asking for the latter; and this we cannot do. Thus, we decline to construe Armstrong's Motion to Reconsider as an application for intervention under Rule 24. As the Supreme Court stated: "'[I]n the long run, experience teaches that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *McNeil*, 508 U.S. at 113 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)).

intervene, its timeliness is in question. Thus, standing based on intervention under Rule 24 is untenable in this case.

The dissent also takes the position that Armstrong had standing because the adversary proceeding might have generated funds that could have been used to satisfy creditors in this bankruptcy case. *See* dissent at 5-6. The flaw in this argument is that, taken to its logical conclusion, it would have the effect of conferring standing on every issue in the case on every party in the case. If a debtor out of possession has standing because a recovery in an adversary proceeding may create "an asset that might have reduced his obligations to his creditors," then the same would hold true for every creditor in the case, as recovery in the adversary may result in additional payments to them. This reasoning has been rejected by one of the foremost bankruptcy treatises:

> It might be said that all creditors and the debtor are parties to every order entered in a bankruptcy proceeding. However, that does not help in determining which parties have standing to take an appeal. If such reasoning were employed, the result would be a rule that any party who is involved either directly, indirectly, or tangentially in the bankruptcy proceeding has the power to appeal from almost any order entered by the bankruptcy judge. The search must be for a workable and, one would hope, predictable rule to govern the standing of parties who may take an appeal from an order, judgment or decree of the bankruptcy court.

10 *Collier on Bankruptcy* ¶ 8001.05 (Lawrence P. King ed., 15th ed. 2002); *see also Thompson*, 965 F.2d at 1141 (same, quoting prior edition of *Collier* treatise). If the dissent's analysis is sound, then any individual or entity that had guaranteed any of the debtor's obligations would also have standing, because a reduction in the direct indebtedness would have an effect upon their secondary liability. The dissent's compassion for the appellant is admirable. The ultimate result of its reasoning is problematic.

B. The Order Denying Motion to Recuse

Regarding Armstrong's appeal from the order denying the Motion to Recuse, we note that on August 2, 2000, Armstrong filed a Motion to Leave to

Appeal Order Denying Motion to Recuse and to Stay Proceedings until Appeal is Determined (the "August 2 Motion"). Apparently, neither the bankruptcy court nor the District Court for the District of Utah has taken action on said motion. For the purposes of this appeal, we assume without deciding that the August 2 Motion was rendered moot when the bankruptcy court denied the Motion to Reconsider, finalizing the order dismissing the adversary proceeding.[10]

Assuming for the purposes of our decision today that Armstrong has standing to appeal from the order denying the Motion to Recuse, he has failed to establish that he is entitled to relief. Ordinarily, we review the denial of a motion to recuse for abuse of discretion. *See American Ready Mix,* 14 F.3d at 1500. Armstrong, citing *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999), argues that we should review the bankruptcy court's ruling *de novo*. Where a judge does not create a record or document her decision not to recuse, an appellate court conducts a *de novo* review. *See id.* at 1168 (citing *United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994)). In the present case we are not convinced that the bankruptcy court failed to create a record. Indeed, the Order Denying Plaintiff's Motion to Recuse indicates that the bankruptcy court

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[10] The Notice of Appeal filed by Armstrong does not refer to the bankruptcy court's order denying the Motion to Recuse. Bankruptcy Rule 8001(a) states that the notice of appeal shall "conform substantially to the appropriate Official Form." Official Form 17 requires a description of the judgment, order or decree from which the appeal is taken. However, Bankruptcy Rule 8001(a) further states:

> An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

Fed. R. Bankr. P. 8001(a). Because we perceive of no prejudice to Potter, we decline to dismiss this appeal simply because Armstrong failed to designate the order denying the Motion to Recuse. *See generally Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1460 (10th Cir. 1996) (applying Fed. R. App. P. 3, from which Fed. R. Bankr. P. 8001 is derived).

conducted a hearing, provided the parties with an opportunity for argument, and "entered findings and conclusions on the record." *See Appellant's Appendix at Ex. 1.* It occurs to us that the absence of a complete record regarding the order denying the Motion to Recuse can be attributed to the parties' failure to obtain a transcript of the hearing conducted by the bankruptcy court.

In any event, we cannot say that the bankruptcy court improperly denied the Motion to Recuse under either standard of review. Armstrong argues that recusal is mandated here by 28 U.S.C. § 455, which requires federal judges to disqualify themselves in proceedings where their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir. 1987) (per curiam). Under 28 U.S.C. § 455, factual allegations need not be taken as true, and the judge is not limited to the facts presented by the challenging party. *See id.*

Armstrong grounds his argument for recusal largely on adverse rulings he has received from the bankruptcy court in several other cases in which Armstrong has been involved. Judicial rulings alone almost never constitute a valid basis for a recusal motion. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). Moreover,

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a [recusal] motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. We find nothing in the record before us that bespeaks of a deep-seated

antagonism toward Armstrong that would cause a reasonable person to conclude that the bankruptcy court was unable to render a fair and impartial decision. The one or two comments from the bench that are contained in the record amount to nothing more than the bankruptcy court's opinions concerning the relative merit of positions advanced by Armstrong, and those opinions appear to derive directly from the judicial proceedings in which they were voiced.

IV. Conclusion

For the reasons stated herein, the appeal from the bankruptcy court's order dismissing the adversary proceeding is dismissed. The order of the bankruptcy court denying the Motion to Recuse is affirmed.

PUSATERI, Bankruptcy Judge, Dissenting.

I respectfully dissent from that part of the opinion in which my colleagues reach the conclusion that Armstrong lacks standing to appeal the order dismissing the adversary proceeding against Potter.

Aside from the unnecessary discussion of "aggrieved parties," the record before us establishes that Armstrong does have standing to pursue this appeal. By minute entry, the bankruptcy court dismissed the adversary proceeding against Potter, and less than ten days later, Armstrong filed a motion to reconsider. Later, the court entered a written order dismissing the proceeding. Armstrong filed a notice of appeal within the time to appeal that order, assuming it was then appealable. That appeal came before us, and we construed Armstrong's motion to reconsider the dismissal to be a motion to alter or amend the judgment of dismissal under Fed. R. Civ. P. 59(e), which is made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 9023. We concluded that the motion was still pending before the bankruptcy court and remanded for the limited purpose of allowing that court to rule on the motion. We directed the clerk of the bankruptcy court to send us a copy of the ruling when it was entered, and retained jurisdiction to finally dispose of the appeal after we received the ruling. Before the bankruptcy court ruled on the motion, Armstrong bought the claim against Potter. I do not understand the majority to be saying that the Chapter 11 trustee would not have had standing to appeal the order dismissing the proceeding, and I see no reason why Armstrong did not step into the trustee's shoes by buying the claim.

Armstrong's motion to reconsider the dismissal and amend the scheduling order was also sufficient to constitute a motion to intervene in this adversary proceeding so that he could continue to try to preserve from Potter's discharge the state court judgment he had obtained against her before she filed for bankruptcy.

He explained in his motion that he was not aware that the trustee of his Chapter 11 bankruptcy estate had taken no action to preserve this asset. Instead, the trustee had allowed the proceeding to be dismissed as a sanction for failing to file a pretrial order or appear at the scheduled pretrial conference. While the debtor's motion to reconsider had, as we ruled when this appeal was first before us, prevented the order dismissing the adversary proceeding from becoming final, Armstrong bought the claim against Potter from the trustee of his Chapter 11 bankruptcy estate on May 29, 2001. Thus, even if Armstrong had no standing to appeal before that purchase, he owned whatever rights remained in the adversary proceeding against Potter when the bankruptcy court denied his motion to reconsider on June 5, 2002, and so had standing to appeal that denial.

Even if Armstrong had not bought the claim before the dismissal became final, I could not agree with my colleagues' conclusion that Armstrong was not a "person aggrieved" by the dismissal. I trust we can all agree that a person who exercises a right to intervene in a proceeding is "aggrieved" by any ruling that denies his or her claims. Bankruptcy Rule 7024 makes Civil Rule 24 applicable to adversary proceedings, and Rule 24(a) provides in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[1]

In his motion to reconsider the dismissal and amend the scheduling order, Armstrong included the following assertions: (1) the trustee of his Chapter 11 bankruptcy estate had a conflict of interest in the pursuit of the claim against Potter because he was also appointed as the trustee in Potter's Chapter 7 case; (2) Armstrong had agreed to buy several claims from his Chapter 11 estate, including

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[1] Fed. R. Civ. P. 24(a).

the claim against Potter; (3) he relied on the Chapter 11 trustee to prosecute the adversary proceeding against Potter until that agreement was approved; and (4) in many proceedings, the Chapter 11 trustee had sought extensions of time. In the discussion portion of the motion, Armstrong stated that he believed, "[I]t is appropriate to vacate the dismissal of this adversary proceeding and to amend the Scheduling Order to allow Debtor Armstrong to prosecute this adversary proceeding upon the stipulation approving the sale of the adversary proceeding to Debtor Armstrong."[2]

The only part of Rule 24(a) that Armstrong would not have satisfied before the bankruptcy court made its minute entry of dismissal is the last one, namely that his interest should have been adequately represented by the Chapter 11 trustee who had succeeded to Armstrong's interest in the proceeding. As soon as he learned that the trustee had allowed the proceeding to be dismissed as a sanction, that is, that the trustee was not adequately representing his interest, Armstrong asserted his right to intervene in his motion to reconsider and amend the scheduling order. A motion to intervene must, like a complaint, state a claim for relief, and the general rules on testing the sufficiency of a pleading are applicable.[3] A complaint filed by a pro se litigant must be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.[4]

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[2] Memorandum in Support of Motion at 4, *in* Appellant's Appendix, Exhibit 14.

[3] 7C Charles Alan Wright *et al*., Federal Practice & Procedure, Civil 2d § 1914, at 416-18 (1986).

[4] *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (prisoners' civil rights suit); *White v. Colorado*, 82 F.3d 364, 365-66 (10th Cir. 1996) (former prisoner's civil rights, Rehabilitation Act, and Americans with Disabilities Act suit); *see also, e.g.*, *Tarshis v. Riese Organization*, 211 F.3d 30, 39 (2d Cir. 2000) (employee's national origin discrimination claim), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Holley v. Dep't of Veterans Affairs*, 165 F.3d 244, 247-48 (3d Cir. 1999) (former employee's employment discrimination suit); *Ortez v. Washington County*, 88 F.3d 804, 807 (9th Cir.

(continued...)

Clearly, the claim for relief that Armstrong was asking to prosecute was the one stated in the complaint that he had originally filed to commence this adversary proceeding. This seems sufficient to me to establish that Armstrong had stated a right to intervene and so was a "person aggrieved" by the dismissal.

If having a right to intervene and asserting it as soon as the existence of the right became apparent was not enough to demonstrate that Armstrong was aggrieved by the dismissal, I am also satisfied that Armstrong meets the applicable "person aggrieved" standard so that he has standing to pursue this appeal. For ease of reference, I repeat the Tenth Circuit's definition of the "person aggrieved" standard as stated by the majority (omitting citations and quotation marks):

> Under this standard, the right to appeal is limited to those persons whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court. Litigants are persons aggrieved if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights. The party seeking to exercise jurisdiction in his favor must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.[5]

The majority cites no case with facts similar to this one to support their conclusion that Armstrong did not have standing to pursue the claim against Potter. In the case in which the Tenth Circuit adopted an old appellate standing rule for cases under the 1978 Bankruptcy Code, the Circuit held that the debtors were not aggrieved by an order that allocated part of the total amount they would pay through their confirmed Chapter 13 plan because the order did not affect that total amount.[6] In a later case in which the Circuit again applied that appellate standing rule, it held that an accountant who had been employed postpetition by

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[4] (...continued)
1996) (former employee's civil rights suit).

[5] Majority opinion at 6.

[6] *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989).

related debtors had no standing to appeal (1) an order granting stay relief to foreclose a mortgage on the debtors' building because he asserted no interest in the building; or (2) an order allowing another professional's fees because he had asserted no direct interest in the actual funds distributed by the order, failing to show either that paying the fees meant he would not get paid or that not paying the fees meant he would get paid.[7]

The majority concludes that the dismissal of the proceeding against Potter has no adverse pecuniary effect on Armstrong, or that if it does, the effect is merely speculative because Armstrong has not shown more than the bare possibility that the suit might have provided him a future pecuniary benefit. I disagree. Before either of them filed for bankruptcy, Armstrong obtained a state court judgment against Potter. After they each filed for bankruptcy, Armstrong (as the Chapter 11 debtor-in-possession) filed this adversary proceeding to try to have his judgment excepted from Potter's Chapter 7 discharge. Although the suit against Potter was property of Armstrong's Chapter 11 estate, Armstrong retained a reversionary interest in it—if his bankruptcy case were dismissed, the suit would have reverted to him personally. Dismissal of the suit deprived him of at least this reversionary interest.

Furthermore, Armstrong is personally liable for the debts of his estate, and will likely remain so unless a plan of reorganization is filed and confirmed that allows him to receive a discharge. Probably only a plan filed by Armstrong himself would give him a discharge. So Armstrong will more likely than not have to pay his debts except to the extent they are paid from the assets of his bankruptcy estate. One of those assets is his judgment against Potter for over $18,000. The loss of this asset as a sanction for failure to pursue the proceeding, and not because it was found to be dischargeable or because Potter could never

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[7] *In re American Ready Mix, Inc.*, 14 F.3d 1497, 1501-02 (10th Cir. 1994).

pay any of it, surely deprived Armstrong of an asset that might have reduced his obligations to his creditors, no matter what the ultimate outcome of his Chapter 11 case might be.

Apparently the majority believes that Armstrong has not shown anything more than a speculative injury because he has not shown that his judgment against Potter actually is nondischargeable. Of course, the majority's decision deprives him of the opportunity to do exactly that. Assuming he had been allowed to pursue this proceeding on the merits and either succeeded or failed, Armstrong would not have appealed on the ground the suit should not have been dismissed for failure to prosecute it. It appears that the majority is saying Armstrong has no standing to appeal because he was not allowed to prove the merits of his claim. At least, that is the only way I can understand the majority's assertion that the pecuniary impact of the dismissal on Armstrong is speculative. Clearly, if he would win the dischargeability claim against Potter and collect anything from her, he would gain a pecuniary benefit, and the dismissal of this proceeding against her deprived him of that possible benefit. In my view, the fact that Armstrong's actual future use of this asset to try to fund a Chapter 11 plan in his separate bankruptcy case or otherwise might be speculative does not make the pecuniary loss to him through dismissal of the adversary proceeding in Potter's case also speculative. Until he loses the dischargeability claim against Potter, that claim has some pecuniary value to him. Consequently, he is aggrieved by the order dismissing the adversary proceeding.

The majority further concludes that Armstrong is not a "person aggrieved" because he did not appear at the pretrial hearing at which the bankruptcy court made its minute entry of dismissal. They begin their reasoning on this point by stating that Armstrong no longer had standing to pursue the adversary proceeding against Potter after the trustee was appointed in his bankruptcy case. So far, I

agree with them. But then, citing *In re Weston*[8] and suggesting that § 1109(b) made Armstrong a "party in interest" with the right to be heard, not in his Chapter 11 case, but in this adversary proceeding in Potter's Chapter 7 case, they conclude that Armstrong was not aggrieved. Section 1109(b), though, does not apply in Chapter 7 cases, so it did not give Armstrong the right to appear in Potter's case after the trustee succeeded to his interest in the adversary proceeding. In addition, in *Weston*, creditors who opposed the election of a Chapter 7 trustee favored by others failed to object to a motion to elect that trustee and failed to appear at a hearing on the motion, and then appealed his election.[9] The Tenth Circuit ruled that the creditors had no standing to pursue that appeal.[10] Armstrong, by contrast, along with all the creditors of his bankruptcy estate, had the right to expect, based on 11 U.S.C. § 1106(a)(1) and § 704(2), that the Chapter 11 trustee would do whatever might be necessary to preserve the claim in this adversary proceeding as an asset of the bankruptcy estate, because the trustee was required to be accountable for all the estate's assets.[11] As soon as Armstrong discovered that the trustee had allowed the proceeding to be dismissed as a sanction for failure to appear and submit a pretrial order, Armstrong filed his motion to reconsider the dismissal and amend the scheduling order, adequately asserting, albeit in layman's terms, his desire to intervene under Bankruptcy Rule 7024, and his wish for the court to alter or amend the dismissal under Rule 9023.

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8 18 F.3d 860 (10th Cir. 1994).

9 *Id.* at 862.

10 *Id.* at 864.

11 *See* 7 *Collier on Bankruptcy* ¶ 1106.03[1][a] & [b] (15th ed. rev., Lawrence P. King, editor-in-chief 2002). (discussing Chapter 11 trustee's responsibility for lawsuits, among other things, that are property of estate).

Armstrong's actions seem to satisfy the *Weston* requirement[12] of attendance and objection at a bankruptcy court proceeding to qualify as a "person aggrieved" by the order dismissing this adversary proceeding.

I would allow this appeal to proceed on the issue of the propriety of the bankruptcy court's dismissal of the adversary proceeding. Because we do not have a transcript of the oral ruling that preceded the bankruptcy court's written order denying Armstrong's motion to reconsider, I would direct the parties to supplement the record with that transcript, and then to supplement their briefs to address the reasons given for that ruling.[13]

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[12] 18 F.3d at 864.

[13] I also disagree with the decision not to publish the opinion we are issuing in this case. I believe the opinion merits publication for two reasons: first, there is a paucity of case law anywhere addressing, in any context, the standing of a Chapter 11 debtor out of possession; and second, this Court has seldom addressed standing issues of any sort.