FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 27, 2006
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JEFFERY WATSON POTTER, Debtor.	BAP No. NM-06-019
MARTIN S. FRIEDLANDER, Appellant, RICHARD COOK, Plaintiff – Appellee, v. EL LLANO SUMMIT CAJA DEL RIO, LLC, and JEFFERY WATSON POTTER, Defendants – Appellees.	Bankr. No. 11-05-14071-MS Adv. No. 05-1218-M Chapter 11 ORDER AND JUDGMENT*

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

Before CLARK, CORNISH, and MICHAEL, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

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. The Court grants the Appellant's request for a decision on the briefs without oral argument. Fed. R. Bankr. P. 8012. The case is therefore

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

submitted without oral argument.

Martin S. Friedlander ("Friedlander") appeals an order of the United States Bankruptcy Court for the District of New Mexico denying his motion to intervene in an adversary proceeding previously pending in the Chapter 11 bankruptcy case of Jeffery Watson Potter ("Debtor"). For the following reasons, we dismiss the appeal for lack of jurisdiction as it is now moot.

I. BACKGROUND

Friedlander is a California attorney who previously represented Debtor in various legal matters, including litigation in New Mexico state court. One of the cases was a foreclosure and declaratory judgment action filed by Richard Cook ("Cook"), Debtor's business partner, against Debtor and El Llano Summit Caja Del Rio, LLC ("LLC"), a company in which Debtor owns an interest. Friedlander had associated with local counsel and was permitted to represent Debtor *pro hac vice* in New Mexico. According to Friedlander, he advanced expenses and fees to local counsel in the amount of approximately $210,000 in connection with the various legal matters, which remain unreimbursed by Debtor. Local counsel then withdrew from the case and Friedlander was no longer able to represent Debtor.

Debtor filed a voluntary Chapter 11 bankruptcy petition on May 19, 2005. On September 29, 2005, the foreclosure and declaratory judgment proceeding was removed from New Mexico state court to the bankruptcy court by Debtor. On December 30, 2005, pursuant to Federal Rule of Bankruptcy Procedure 7024, Friedlander filed a "Motion to Intervene on Behalf of the Defendants" ("Motion to Intervene"), claiming he has an interest in the subject of the action that is not adequately represented by existing parties.

Friedlander contends his claims against Debtor for the $210,000 in expenses and fees are secured by a lien on the assets of a trust formed by the Debtor and known as the "Legal Defense and Maintenance Trust of California,

dated August 25, 2003" ("Trust"), to which Debtor transferred all of his assets.[1] The property upon which Cook seeks to foreclose is owned 50% by the Trust. Friedlander also claims Debtor was ineffectively represented by special counsel Debtor had employed.[2] The bankruptcy court denied Friedlander's Motion to Intervene and he now appeals that denial to this Court.

II. JURISDICTIONAL ANALYSIS

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, 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. 8002. Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico. The parties have thus consented to appellate review by this Court.

The bankruptcy court's order denying the Motion to Intervene is not a final order in the ordinary sense. However, it is an adverse pretrial order that is nonetheless appealable. An order denying intervention as of right has the degree of definitiveness which supports an appeal because the adversely affected applicant cannot appeal from any subsequent order or judgment in the proceeding. *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524 (1947). As a result, an order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to an action. *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 839 (10th

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[1] Friedlander argues that Debtor also conveyed all of his future assets to the Trust. Additionally, Friedlander contends he is a beneficiary of the Trust. Friedlander also happens to be the successor trustee of the Trust.

[2] Debtor was briefly represented by special counsel in this adversary proceeding. However, special counsel was subsequently allowed to withdraw from representation. At the time of the bankruptcy court's ruling on the Motion to Intervene, Debtor was unrepresented in the adversary proceeding, as well as the bankruptcy case.

Cir. 1996) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377-78 (1987). Thus, the decision of the bankruptcy court is a final order for purposes of review.

However, in addition to determining whether an order is "final" as required under 28 U.S.C. § 158(a)(1), this Court must also determine the jurisdictional issue of whether the appeal is moot, including whether it is moot in the constitutional sense, i.e., that there is no case or controversy. *See* U.S. Const. art. III, § 2, cl. 1; *Yellow Cab Coop. Ass'n v. Metro Taxi, Inc.* (*In re Yellow Cab Coop. Ass'n*), 132 F.3d 591, 594-95 (10th Cir. 1997); *N.M. Env't Dep't v. Foulston* (*In re L.F. Jennings Oil Co.*) 4 F.3d 887, 889 (10th Cir. 1993); *see also Arizonans for Official English v. Ariz.*, 520 U.S. 43, 73 (1997) (court has an obligation to satisfy itself that it has jurisdiction to hear an appeal). "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). A controversy is no longer "live" when the reviewing court is not capable of rendering effective relief or restoring the parties to their original position. *Mills v. Green*, 159 U.S. 651, 653 (1895); *see Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *In re Osborn*, 24 F.3d 1199, 1203 (10th Cir. 1994); *In re King Res. Co.*, 651 F.2d 1326, 1331-32 (10th Cir. 1980) (if the only effect of reversal on appeal would be to order the impossible, court should not address the merits of the appeal). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Osborn*, 24 F.3d at 1203 (quoting *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653)).

In this case, events have occurred which make it impossible for this Court to grant any relief on appeal to Friedlander regarding his Motion to Intervene. On March 27, 2006, the bankruptcy court granted Cook's motion to remand the

foreclosure and declaratory judgment action to New Mexico state court. LLC, which was then represented by Friedlander, filed a motion for reconsideration of the remand order. On March 31, 2006, the bankruptcy court denied LLC's motion for reconsideration of the remand order. LLC appealed the bankruptcy court's denial of its motion for reconsideration in BAP No. NM-06-042.[3] By order dated August 16, 2006, the motions panel of this Court dismissed LLC's appeal for lack of standing.

As a result, the bankruptcy court, and thus this Court, no longer have any jurisdiction over the foreclosure and declaratory judgment action. Therefore, this Court cannot grant any effectual relief to Friedlander by reversing the bankruptcy court's denial of his Motion to Intervene, even if the merits of the case so warranted. Accordingly, this appeal must be dismissed as moot.

III. CONCLUSION

The foreclosure and declaratory judgment action in which Friedlander seeks to intervene is now within the jurisdiction of a New Mexico state court. Therefore this Court is without jurisdiction, and the appeal must be and hereby is dismissed as moot.

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[3] We note that Friedlander apparently believes the bankruptcy court's denial of LLC's motion for reconsideration in the foreclosure action is on appeal before the Court in this case as he included the issue in his brief. He is mistaken, however, for the only issue on appeal in this case is the bankruptcy court's denial of his Motion to Intervene.