NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP Nos. AZ-11-1535-TaAhJu
	)	AZ-12-1213-TaAhJu
POWELL'S INTERNATIONAL, INC.,	)	(Related Appeals)
	)	
Debtor.	)	Bk. No. 10-02965-GBN
LEWIS HUNT ALTON,	)	
Appellant,	)	
v.	)	MEMORANDUM[*]
KEYBANK, N.A.; LOTHAR GOERNITZ, Chapter 7 Trustee,	)	
Appellees.	)	

Argued and Submitted on June 21, 2013
at Phoenix, Arizona

Filed - July 9, 2013

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Lewis Hunt Alton, Appellant, argued pro se.

Before: TAYLOR, AHART,[**] and JURY, Bankruptcy Judges.

[*] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[**] Hon. Alan M. Ahart, United States Bankruptcy Judge for the Central District of California, sitting by designation.

INTRODUCTION

Appellant Lewis H. Alton appeals from adverse rulings on two motions for reconsideration. First, the bankruptcy court denied reconsideration of an order (the "Sept. 12, 2011 Order") denying Alton's request for employment and compensation for services allegedly rendered in connection with a chapter 11 § 363 sale[1] (the "§ 363 Sale"). Alton failed to timely appeal from this order, so he sought and obtained an extension of the time to file this appeal. Appellees, however, successfully obtained an order on a reconsideration motion reversing this determination (the "2012 Order").[2] Alton timely appealed from this ruling.

Alton did not obtain a stay pending either appeal. Thus, the § 363 Sale proceeds were distributed; the chapter 11 case was converted to a case under chapter 7; and on November 13, 2012, the chapter 7 trustee, appellee Lothar Goernitz ("Trustee"), filed his report certifying that the chapter 7 estate is fully administered ("Final Report").[3] The Final Report evidences that

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[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2] On January 26, 2012, a motions panel issued an order suspending prosecution of the appeal from the Sept. 12, 2011 Order pending the bankruptcy court's ruling on Appellee's reconsideration motion. After the bankruptcy court issued the 2012 Order, from which Alton timely appealed, the motions panel issued an order that required briefing in the related appeals to be filed concurrently. Alton filed the briefs in both appeals, as required, and we have considered all such briefing for purposes of this disposition.

[3] We have exercised our discretion to independently review documents contained on the bankruptcy court's electronic docket. (continued...)

the chapter 7 case is administratively insolvent.[4] As a result of the current status of the bankruptcy, we DISMISS the appeal from the 2012 Order as moot. And, as a result, we DISMISS the appeal from the Sept. 12, 2011 Order based on lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND[5]

The chapter 11 debtor in this case owned and operated a Volvo franchised automobile dealership in Scottsdale, Arizona. KeyBank held liens on substantially all of Debtor's assets. On February 4, 2010 ("Petition Date"), Debtor filed its petition under chapter 11.

On June 25, 2010, Debtor filed a motion under § 363 ("Sale Motion") seeking authorization for the sale of substantially all

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[3](...continued)
See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mortg Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). We note that the chapter 7 was closed for a brief period of time on November 21, 2012; however, the bankruptcy court entered an order reopening it the same day and re-appointing the Trustee, as the case had been closed due to administrative error.

[4] Trustee also reduced his fee request from $52,750, the statutorily-based amount, to $12,776.06, paid from $30,000 carved out from the Trustee's sale of KeyBank's real property collateral to pay some chapter 7 administrative expenses.

[5] On December 12, 2012, Trustee filed a Notice of Election Not to File Brief ("Trustee's Notice of Election"). Trustee's Notice of Election included an assertion in footnote 1 that KeyBank, N.A. ("KeyBank") "was improperly designated as an appellee by appellant and has also indicated to the Trustee that it will not file a brief." See BAP dkt. #42. The majority of the facts contained herein we obtained from Alton's briefs and his excerpts of the record. Some additional procedural and other background information we developed based on our independent review of documents contained on the bankruptcy court's electronic docket. See In re E.R. Fegert, Inc., 887 F.2d at 957-58.

of its assets free and clear of liens. The assets included all business assets related to the dealership.[6] Four days later, the Debtor filed an emergency application to employ Alton to assist in the sale, as a "finder," retroactively to the Petition Date ("Debtor's First Employment Application"). The bankruptcy court approved the Debtor's First Employment Application by order entered on July 28, 2010 ("Employment Order"), but made the employment effective only as of that date, not retroactively.[7]

The bankruptcy court conducted a successful auction on the Sale Motion on August 3, 2010. In October 2010, the bankruptcy court entered a stipulated order on the Sale Motion ("Stipulated Sale Order").[8] Proceeds of the sale, less some previously-

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[6] The Sale Motion did not include Debtor's real property, which was eventually sold pursuant to an application filed by the Trustee after the case was converted. KeyBank was not paid in full on its allowed secured claim against the Debtor, and no funds were generated for the benefit of unsecured creditors through either the Sale Motion or the subsequent sale of the real property collateral. KeyBank did, however, consent to payment of some priority and administrative claims from its cash collateral and sale proceeds.

[7] KeyBank filed a reservation of rights in response to the Debtor's Employment Application. KeyBank did not object to Alton's employment, but reserved the right to object to any compensation "until further application and review of evidence concerning services rendered and benefit to the estate." Notice of Reservation of Rights, Bk. Dkt. #63. The Employment Order specifically provided that it was without prejudice to the right of Debtor or Alton to apply for retroactive employment and compensation. Eventually, the bankruptcy court required Alton to apply for such retroactive approvals. We render no opinion regarding whether Alton's employment needed to be approved retroactively as our decision here deprives us of jurisdiction to review the issues raised by Alton in connection with his late-filed appeal from the Sept. 12, 2011 Order.

[8] Recitals contained in the Stipulated Sale Order reveal that Volvo Cars of North America, LLC ("Volvo"), a party to the Stipulated Sale Order, exercised its statutory and contractual (continued...)

authorized disbursements to KeyBank and disbursement to the Arizona Department of Revenue for its administrative claim, were to be deposited in Debtor's counsel's trust account, with liens, claims, encumbrances, and interests attached, and subject to further order of the bankruptcy court.[9]

After the auction, but before entry of the Stipulated Sale Order, Debtor filed a fee application seeking payment to Alton ("Alton's First Fee Application"). Although Alton's employment was made effective only as of July 28, 2010, Alton's First Fee Application sought compensation for services during the period commencing on the Petition Date and ending August 20, 2010.[10] KeyBank filed an objection to Alton's First Fee Application on multiple grounds.[11] The bankruptcy court never entered an order on Alton's First Fee Application, but instead ordered Alton to file a supplemented application. In response, Alton timely filed

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[8](...continued)
right of first refusal and notified Debtor of its intention to purchase the assets at the price offered by the successful bidder and under the same terms. Volvo also exercised its right to assign the assets it acquired.

[9] The sale did not close, however, until sometime after December 10, 2010, when the bankruptcy court entered a second stipulated order that resolved the Arizona Department of Revenue's motion for reconsideration of the Stipulated Sale Order.

[10] The time records attached to Alton's First Fee Application reflect that all but three-quarters of an hour of his services were performed prior to the July 28, 2010 effective date of his employment.

[11] The grounds included failure to obtain approval of employment for the period of time for which compensation was sought, failure to justify retroactive approval, failure to satisfy U.S. Trustee's Guidelines, failure to satisfy § 330(a) requirements, and prematurity, as the § 363 Sale was not closed.

an Amended Application for Employment and Compensation ("Alton's Amended Application") seeking "nunc pro tunc appointment to serve the bankruptcy estate as a professional back to the petition filing date in February 4, 2010 as well as compensation for the period between then and now." Bk. Dkt. #186 at 1:12-15. The bankruptcy court scheduled the hearing on Alton's Amended Application for May 2, 2011.[12]

Meanwhile, in February of 2011, the United States Trustee filed its motion to convert or dismiss the case ("Conversion Motion"), and KeyBank filed its motion seeking bankruptcy court authority to distribute funds from the closed § 363 Sale ("Motion to Distribute"). The bankruptcy court granted the Motion to Distribute in April of 2011; however, the order required $120,000 to be held in escrow "for the claim of Alton subject to further hearing and order."[13] Bk. Dkt. #188. On May 24, 2011, the bankruptcy court entered an order denying Alton's Amended Application ("Order Denying Amended Application"), pursuant to the bankruptcy court's extensive oral ruling rendered at the May 2, 2011 hearing, and also ordered that the $120,000 held in escrow be turned over to KeyBank. Shortly thereafter, the bankruptcy court entered the order converting the case to a case under chapter 7.

Alton timely filed a motion to reconsider the Order Denying Amended Application, which drew an objection from KeyBank. The

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[12] Neither Alton nor the record on appeal clearly explains why the matter was continued multiple times.

[13] The order on the Motion to Distribute does not recite the grounds on which the bankruptcy court based the hold-back.

bankruptcy court held the hearing on Alton's motion for reconsideration on July 26, 2011. At the hearing, the bankruptcy court denied the motion for reconsideration and again placed extensive findings on the record. The bankruptcy court did not enter the order, however, until September 12, 2011. Alton filed an untimely notice of appeal on September 27, 2011 along with a single-page request for extension based on his receipt of the Sept. 12, 2011 Order on September 13, 2011. The bankruptcy court "summarily granted" the requested extension and deemed the notice of appeal timely filed, subject to reconsideration ("Order Granting Extension"). The Sept. 12, 2011 Order is the subject of BAP No. AZ-11-1535 (the "First Appeal").

Trustee and KeyBank jointly filed a timely motion on October 7, 2011 for reconsideration of the Order Granting Extension ("Joint Reconsideration Motion"). The Joint Reconsideration Motion was based on the bankruptcy court's failure to require Alton to establish excusable neglect, as required under Rule 8002(c) and the standards articulated in Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993).

A week later, Alton filed a combined amended motion for extension and response to the Joint Reconsideration Motion. And a week thereafter, he filed a further supplemental brief. The bankruptcy court held the final hearing on the Joint Reconsideration Motion on April 3, 2012.[14] At the hearing, the

[14] The final hearing was continued multiple times on the agreement of the parties due to Alton's scheduling and personal financial issues.

bankruptcy court granted the Joint Reconsideration Motion and read its findings and conclusions into the record. The order granting the Joint Reconsideration Motion was entered on April 4, 2012. Alton timely filed a notice of appeal, which is the subject of BAP No. AZ-12-1213 (the "Second Appeal").

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B). Subject to the mootness discussion set forth below, we have jurisdiction under 28 U.S.C. § 158 as to the Second Appeal. As a necessary result of our conclusion that the Second Appeal is moot, we lack jurisdiction to review issues raised by Alton in the First Appeal. See Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994).

ISSUES

Is the Second Appeal moot?

STANDARD OF REVIEW

We have an independent duty to determine whether an appeal is moot within the meaning of Article III's case or controversy requirement,[15] and we consider the mootness issue de novo. See United States v. Golden Valley Elec. Ass'n, 689 F.3d 1108, 1112 (9th Cir. 2012); Hunt v. Imperial Merchant Servs., Inc., 560 F.3d 1137, 1141 (9th Cir. 2009).

DISCUSSION

Ultimately, Alton seeks an order from either this Panel or

[15] In September 2012, Trustee and KeyBank filed a Joint Motion to Dismiss both these appeals for mootness. Alton filed opposition and a motions panel for the BAP denied the motion at that time, concluding that appellees had "not met their heavy burden to demonstrate that these appeals are moot." BAP Dkt. #39 (citation omitted).

the bankruptcy court requiring KeyBank to pay him for the benefit he argues he provided to KeyBank "as a result of his efforts to bring buyers" to the Debtor's § 363 Sale. First Appeal Suppl. Apl't Brief at 8. Alton argues that KeyBank, as a party to the appeals, has the financial ability and should be ordered to disgorge $126,000. Unfortunately for Alton, such a result is not a simple matter under the governing statutory law and procedural rules, which we acknowledge are complicated and technical by nature. Alton did not have his own legal counsel during the bankruptcy proceedings. And, as he argues on appeal, Debtor's counsel may have let him down and KeyBank's counsel may have encouraged Alton's participation while simultaneously protecting KeyBank's rights in its collateral. Nonetheless, and despite the extensive time and effort Alton put into promoting the § 363 Sale and the success he believes he achieved, our ability, as well as the bankruptcy court's ability, to consider "equity," does not afford either of us free rein. Alton has not pointed us to any authority that would permit us, by virtue of either of these appeals, to grant the relief he requests. Nor are we aware of any such authority.

Our role in these appeals necessarily is limited to, first, review of the order granting the Joint Reconsideration Motion. Only if we were to conclude that the bankruptcy court abused its discretion by denying extension of the time for Alton to file the notice of appeal from the Sept. 12, 2011 Order would our role then expand to review of the bankruptcy court's denial of Alton's motion for reconsideration of the order denying Alton's Amended

Application.[16] But we may not fulfill even that limited role unless a live case or controversy exists. Therefore, as a threshold matter, we first must determine whether the Second Appeal is moot.

As an appellate court, our jurisdiction is limited to actual cases and controversies. Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 980, 990 (9th Cir. 2012) (citing U.S. Const. art. III, § 2, cl. 2.). "The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." Id. (internal quotation and citations omitted). As discussed below, even if Alton were to prevail on both appeals, there is no effective relief available to Alton in the bankruptcy case.[17]

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[16] The First Appeal was taken solely from the order denying the reconsideration of the order denying Alton's Amended Application. The issues addressed by Alton, however, relate to the appropriateness of the underlying order, which denied retroactive employment and compensation in the chapter 11 case. In the bankruptcy court's oral ruling denying Alton's motion for reconsideration, the bankruptcy court addressed the merits of Alton's Amended Application. Thus, the bankruptcy court's decision to deny the motion for reconsideration was inextricably intertwined with the correctness of the original order. Accordingly, we could conclude that Alton's limited notice of appeal, if deemed to be timely, would not present a jurisdictional bar to our review of the order denying him retroactive employment and compensation. See McCarthy v. Mayo, 827 F.2d 1310, 1314 (9th Cir. 1987).

[17] As previously discussed the only bankruptcy matter potentially at issue here is the employment and compensation application. Alton's briefs in these appeals primarily argue that KeyBank is directly responsible to pay him. We, as well as the bankruptcy court, lack jurisdiction over any claims by Alton directly against KeyBank. See 28 U.S.C. § 1334. Thus, we take no position with respect thereto.

Under the Bankruptcy Code, conversion of the bankruptcy case from chapter 11 to chapter 7 resulted in chapter 7 administrative expenses taking priority over unpaid chapter 11 administrative claims. § 726(b); and see Temecula v. LPM Corp. (In re LPM Corp.), 269 B.R. 217, 223 (9th Cir. BAP 2001). Put another way, until all chapter 7 administrative expenses are paid, a chapter 7 trustee in a converted case is not authorized to pay administrative expenses incurred during the chapter 11 case. Here, the Trustee administered the chapter 7 case for 18 months and was not able to pay all chapter 7 administrative expenses.[18] In fact, the Trustee voluntarily reduced his own priority statutory fees by nearly $40,000 to enable him to pay the United States Trustee's unpaid fees and fees and costs of Trustee's counsel from the carve-out from KeyBank's real property collateral sold by the Trustee during the chapter 7. The Trustee certified that the estate is fully administered and all estate assets and funds that came under his control have been properly accounted for. If approved, Alton's Amended Application would entitle Alton, at most, to a chapter 11 administrative claim — a claim for which he would receive no payment under the Bankruptcy Code and the realities of this case. Thus, even if Alton were to prevail on both appeals, the relief would be ineffective.

Alton argues, however, that KeyBank should be required to

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[18] The Trustee sought and obtained bankruptcy court authority to make interim distributions on some chapter 7 administrative claims by order entered on October 25, 2011. From a $30,000 carve-out from the sale of KeyBank's real property collateral, the bankruptcy court authorized Trustee to pay United States Trustee's fees of $1,625; Trustee's attorneys' fees and costs of $15,598.945; and Trustee's voluntarily reduced statutory fees.

disgorge funds to pay him, on the theory that KeyBank benefitted from Alton's services. And Alton argues that he has the right to pursue surcharge against KeyBank under § 506(c). Section 506(c) of the Bankruptcy Code allows a trustee to "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." Standing to seek surcharge, however, is limited to the trustee in a chapter 7 case or the debtor-in-possession in a chapter 11 case. See Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1066 (9th Cir. 2001) (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).[19]

Here, Alton's alleged services related to the § 363 Sale of business assets in the chapter 11. The Debtor conceivably could have sought approval to surcharge KeyBank's collateral to pay an allowed claim for Alton's services if sought and obtained under § 506(c) prior to conversion of the case. The Debtor, however, lost control of the case when the case was converted to chapter 7. The Debtor is no longer a debtor-in-possession with standing to bring a § 506(c) motion. Therefore, only the Trustee would have § 506(c) standing here, if a § 506(c) motion were available under the circumstances.

But, here, such a motion is not available. Because the case is administratively insolvent at the chapter 7 level and has been

[19] Arguing against this point, Alton relies on case authority in his appellate briefs that is no longer good law after the U.S. Supreme Court's decision in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.

fully administered, the Trustee lacks any basis under the rationale of § 506(c) to seek to surcharge KeyBank's now-liquidated collateral to pay Alton. See In re Smith Int'l Enters., Inc., 325 B.R. 450, 456 (Bankr. M.D. Fla. 2005) (trustee could not be compelled to pursue surcharge recovery that would not benefit the estate); and In re Suntastic USA, Inc., 269 B.R. 846, 850 (Bankr. D. Ariz. 2001) (trustee need not take action that would benefit only an individual creditor or claimant). A surcharge motion here, if successful, would benefit no estate creditors other than Alton.

Thus, the only appropriate provision under the Bankruptcy Code that might provide effective relief to Alton is not available to Alton as a matter of law.[20] Alton has mentioned no other, and we know of no other.[21] Therefore, we are unable to

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[20] Although we found no Ninth Circuit decisions on point, we are aware that at least one circuit court has held that once the secured creditor's assets have been sold unencumbered from the estate, the assets are no longer subject to surcharge under § 506(c) because they are no longer property of the estate over which the bankruptcy court may exercise jurisdiction. See Borrego Springs Bank, N.A. v. Skuna River Lumber, LLC (In re Skuna River Lumber, LLC), 564 F.3d 353, 355 (7th Cir. 2009).

[21] Administrative expenses are generally satisfied out of unencumbered assets. Id. Nothing in the record on appeal, nor in the documents on the bankruptcy court's electronic docket that we have reviewed independently, reveal the existence of any payments made from unencumbered estate assets to chapter 11 administrative claimants that could be subject to a motion to disgorge for the purpose of achieving parity for Alton (if he were to prevail on both appeals) with and among other claimants with allowed administrative claims at the chapter 11 level. The administrative claims paid during the case all appear to have been paid from KeyBank's cash collateral, with KeyBank's consent, or from KeyBank's § 363 Sale proceeds, again, with KeyBank's consent. KeyBank did not consent to pay Alton's claim, was not itself paid in full, and the estate lacks any remaining assets to be administered.

provide effective relief to Alton.

Even if we were to reach the merits of the Second Appeal, we would be inclined to affirm. A request for extension of the deadline to file a notice of appeal under Rule 8002(c) is reviewed for abuse of discretion. Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 184 (9th Cir. BAP 2002). Likewise, a motion for reconsideration is also reviewed for abuse of discretion. Sch. Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). The bankruptcy court entered its Order Granting Extension summarily, without articulation or any analysis of the applicable legal standard under Rule 8002(c). The bankruptcy court, thus, abused its discretion when it granted the extension. See United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (a trial court's failure to identify the correct legal rule to apply to the relief requested is an abuse of discretion). Nor was this error harmless.

On reconsideration, the bankruptcy court identified and applied the correct standard articulated by the Supreme Court in Pioneer, which has been used and applied in construing "excusable neglect" under Rule 8002(c). See In re Warrick, 278 B.R. at 185. The bankruptcy court found that the delay of one day was minimal; the prejudice to Trustee and KeyBank was slight; and there was no indication that Alton acted in bad faith. But, as to the fourth Pioneer factor, the reason for the delay, the bankruptcy court could not excuse Alton's lack of knowledge of the rules, or the "fact that he had the order within enough time to file a simple notice to appeal, but he didn't get that done." Hr'g Tr. (April 3, 2012) at 3:8-11. In essence, the bankruptcy court

found that Alton made choices that resulted in the late-filed notice of appeal. See id. at 15-16. The bankruptcy court, thus, did not abuse its discretion when it granted the Joint Reconsideration Motion, as its findings and application of those findings were not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." See United States v. Hinkson, 585 F.3d at 1251. Thus, if the bankruptcy court's denial of Alton's request for extension of the deadline to file the notice of appeal from the Sept. 12, 2011 Order were before us, we would affirm.

CONCLUSION

For the reasons set forth above, we DISMISS the Second Appeal as moot, and, as a result, we DISMISS the First Appeal for lack of jurisdiction.