

NOV 14 2017

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-16-1263-SKuF
)		
FIVE LOTS, LLC,)	Bk. No.	2:16-bk-06224-MCW
)		
Debtor.)		
_____)		
)		
FIVE LOTS, LLC,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
UNITED STATES TRUSTEE,)		
)		
Appellee.)		
_____)		

Argued and Submitted on October 26, 2017
at Phoenix, Arizona

Filed - November 14, 2017

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

Honorable Madeleine Carmel Wanslee, Bankruptcy Judge, Presiding

Appearances: David Allegrucci argued for appellant; John
Postulka argued for appellee.

Before: SPRAKER, KURTZ, and FARIS, 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 8024-1.

1 **INTRODUCTION**

2 Chapter 7¹ debtor Five Lots, LLC appeals from the bankruptcy
3 court's ruling that a postpetition retainer paid from a third
4 party to pay Five Lots' attorney's fees was property of Five
5 Lots' bankruptcy estate. This ruling was set forth in the
6 court's order authorizing Five Lots to employ bankruptcy counsel.
7 Five Lots has not challenged any other aspect of the employment
8 order apart from the determination that the retainer is property
9 of its bankruptcy estate. On appeal, Five Lots has not
10 established that the property of the estate ruling had a direct
11 and adverse pecuniary affect. Consequently, this appeal will be
12 DISMISSED for lack of standing.

13 **FACTS**

14 On June 1, 2016, Five Lots commenced its bankruptcy case by
15 filing a voluntary chapter 11 petition. At the time of its
16 bankruptcy filing, its only assets were four parcels of real
17 property located in Arizona. As of the petition date, Five Lots'
18 only creditors were a secured creditor, owed roughly \$700,000,
19 and the Maricopa County Treasurer, owed roughly \$5,600 for real
20 property taxes.

21 At the first chapter 11 status conference held on July 5,
22 2016, Five Lots appeared through Judith V. Brown, its sole member
23 and manager. The bankruptcy court directed Five Lots to retain
24 counsel and indicated that the bankruptcy case would be dismissed
25 unless it did so. Several days later, Five Lots filed an
26

27 ¹Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 application for an order approving the retention of David
2 Allegrucci as its counsel. In the application, Five Lots
3 disclosed that, on July 8, 2016, Brown had paid Allegrucci
4 \$10,000 as a retainer to cover some of Five Lots' attorney's
5 fees.

6 The United States Trustee objected to the employment
7 application. Among other things, the United States Trustee
8 argued that the \$10,000 retainer was estate property that needed
9 to be turned over to the estate. The United States Trustee also
10 asserted that, as debtor's counsel, Allegrucci should be required
11 to comply with all employment and fee oversight provisions set
12 forth in §§ 327, 329 and 331.

13 In response to the concerns raised by the United States
14 Trustee, Five Lots filed a supplemental memorandum of points and
15 authorities urging the bankruptcy court to approve Allegrucci's
16 employment. It also disputed that the retainer was estate
17 property. In fact, it stated that Allegrucci was in the process
18 of returning the \$10,000 to Brown. Five Lots further requested
19 that Allegrucci be permitted to bill and collect compensation
20 directly from Brown for his legal services without having to file
21 any fee applications.

22 At the hearing on the employment application, the bankruptcy
23 court approved Allegrucci's employment. However, the court also
24 sustained many of the United States Trustee's objections. The
25 court explained to Five Lots that it would require Allegrucci to
26 comply with all of the fee oversight provisions set forth in the
27 Code regardless of whether he was paid from estate property or
28 from Brown's separate funds. In addition, the bankruptcy court

1 concluded that the \$10,000 retainer was property of the estate
2 that needed to be returned by Brown to the estate or to
3 Allegrucci to hold in trust for the estate.

4 On August 12, 2016, the bankruptcy court entered an order
5 approving Five Lots' application to employ Allegrucci as its
6 bankruptcy counsel. In the order, the court ruled not only that
7 the postpetition \$10,000 retainer was estate property, but also
8 that "any payment by third parties, to pay for legal
9 representation of the Debtor-in-Possession, is property of this
10 bankruptcy estate." Order (Aug. 12, 2016) at p. 2. The order
11 required Brown to return the \$10,000 retainer to the estate. The
12 order further specified that any compensation to be paid to
13 Allegrucci was subject to the fee oversight provisions set forth
14 in §§ 329, 330 and 331. Five Lots timely filed a notice of
15 appeal.

16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b)(2)(A), and we have jurisdiction under
19 28 U.S.C. § 158.

20 **ISSUE**

21 Does Five Lots have standing to appeal the bankruptcy
22 court's ruling that the retainer (and any other third-party funds
23 paid to cover Five Lots' attorney's fees) are property of its
24 bankruptcy estate?

25 **STANDARD OF REVIEW**

26 We review de novo questions regarding the appellant's
27 standing to appeal. Giesbrecht v. Fitzgerald (In re Giesbrecht),
28 429 B.R. 682, 687 (9th Cir. BAP 2010).

1 **DISCUSSION**

2 We must satisfy ourselves that we have jurisdiction over
3 this appeal and that we should exercise jurisdiction. See West
4 v. United States, 853 F.3d 520, 522 (9th Cir. 2017); Mastro v.
5 Rigby, 764 F.3d 1090, 1093 (9th Cir. 2014). Here, jurisdictional
6 concerns stem from the fact that Five Lots has consistently
7 emphasized that it appeals only the bankruptcy court's ruling
8 that the \$10,000 (and any other funds paid by third parties to
9 cover Five Lots' legal expenses) are property of Five Lots'
10 bankruptcy estate. The limited scope that Five Lots has imposed
11 on its own appeal raises questions regarding its standing to
12 appeal and whether this appeal has been rendered moot. In an
13 order issued on October 2, 2017, we directed the parties to
14 address the standing and mootness issues, and each party duly
15 responded to our order.

16 **A. Standing Issue**

17 There are two broad aspects of the standing doctrine. The
18 first, constitutional standing, is derived from the case and
19 controversy requirement of Article III of the Constitution and
20 requires a plaintiff to demonstrate "injury in fact, causation
21 and redressability." Republic of Marshall Islands v. United
22 States, 865 F.3d 1187, 1199 (9th Cir. 2017) (citing Lexmark
23 Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377,
24 1386 (2014)). The second broad standing aspect, prudential
25 standing, is a set of "judicially self-imposed limits on the
26 exercise of federal jurisdiction.'" Veal v. Am. Home Mortg.
27 Servicing, Inc. (In re Veal), 450 B.R. 897, 906 (9th Cir. BAP
28 2011) (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S.

1 269, 289 (2008)). Five Lots bears the burden of establishing its
2 standing. Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430,
3 434 (9th Cir. BAP 1997).

4 There is little doubt that in the bankruptcy court, Five
5 Lots met the relatively minimal requirements of constitutional
6 standing. As the debtor, it had a vested interest in whether or
7 not the bankruptcy court would approve the employment
8 of Allegrucci as its bankruptcy counsel and whether or not the
9 \$10,000 retainer was property of the estate.

10 On appeal, however, Five Lots only challenges the bankruptcy
11 court's property of the estate ruling. The limited scope of Five
12 Lots' appeal implicates the facet of prudential standing known as
13 the "person aggrieved" standard: an appellant seeking review of a
14 bankruptcy court's judgment or order must be a "person aggrieved"
15 by the order appealed. Lehman Commercial Paper, Inc. v.
16 Palmdale Hills Prop., LLC (In re Palmdale Hills Prop., LLC),
17 423 B.R. 655, 662 (9th Cir. BAP 2009), aff'd, 654 F.3d 868 (9th
18 Cir. 2011). Under this standard, only "those persons who are
19 directly and adversely affected pecuniarily by an order of the
20 bankruptcy court" have standing to appeal. Id. (quoting
21 Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th
22 Cir. 1983)). At bottom, the person aggrieved standard presents a
23 question of fact. Int'l Ass'n of Firefighters, Local 1186 v.
24 City of Vallejo (In re City of Vallejo), 408 B.R. 280, 299 (9th
25 Cir. BAP 2009) (citing Paine v. Dickey (In re Paine), 250 B.R.
26 99, 104 (9th Cir. BAP 2000)). Thus, Five Lots needs to show that
27 the order on appeal diminished its property, increased its
28 burdens or otherwise detrimentally affected its rights. See

1 In re Fondiller, 707 F.2d at 442-43.

2 Five Lots has not persuaded us that its pecuniary interests
3 have been directly and adversely affected by the bankruptcy
4 court's ruling that the retainer is property of its estate. To
5 the contrary, the court's ruling **increased** Five Lots' property by
6 classifying third-party payments made to Allegrucci as estate
7 property. There is no readily apparent detriment to its rights
8 or increase in its burdens resulting from this ruling. Five Lots
9 has not presented anything on appeal that would permit us to find
10 that it is a person aggrieved and, hence, has standing to appeal.

11 **B. Mootness Issue**

12 Because we have concluded that Five Lots lacks standing to
13 appeal, we decline to address the mootness issue.

14 **CONCLUSION**

15 For the reasons set forth above, we DISMISS this appeal for
16 lack of standing.