NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ANDREW LINTON,

Debtor,

ANDREW LINTON,

Appellant,

v.

COLPO TALPA, LLC, 1429 GRANT AVENUE LLC, JERIES AZAR, AND MUNIR SHAHIN

Appellees.

No. 21-60053

BAP No. NC-201175 KTB

Bk. No. 3:18-bk-30773

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Klein, Taylor, and Brand, Bankruptcy Judges, Presiding

Submitted November 16, 2022**
San Francisco, California

Before: McKEOWN and KOH, Circuit Judges, and SESSIONS,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

After a bankruptcy court dismissed two involuntary petitions against him, appellant Andrew Linton sought costs and damages under 11 U.S.C. § 303(i). During the § 303(i) proceeding, Linton filed a motion to add three non-petitioners to the action. The bankruptcy court denied the motion, Linton appealed, and, in a published decision, the Bankruptcy Appellate Panel affirmed. *See In re Linton*, 631 B.R. 882, 887 (B.A.P. 9th Cir. 2021). We affirm.[1]

As we must, we first address our jurisdiction to hear Linton's appeal. *See United States v. Bastide-Hernandez*, 39 F.4th 1187, 1190 (9th Cir. 2022) (en banc). We have jurisdiction under the doctrine of cumulative finality: while the appeal was pending, the bankruptcy court entered a final judgment in the § 303(i) proceeding, belatedly curing Linton's otherwise incognizable appeal. *See Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900–01 (9th Cir. 2005).

With our jurisdiction established, we turn next to the relevant standards of review. We review the decision of the bankruptcy court without deference to the Bankruptcy Appellate Panel decision. *See Khan v. Barton (In re Khan)*, 846 F.3d 1058, 1062–63 (9th Cir. 2017). In reviewing the bankruptcy court's decision, we review legal questions de novo and factual findings for clear error. *See Brace v. Speier (In re Brace)*, 979 F.3d 1228, 1232 (9th Cir. 2020). We review a

[1] The parties are familiar with the facts of this case, so we include them only as necessary to resolve the appeal.

bankruptcy court's determination about the sufficiency of service of process de novo. *See Rubin v. Pringle (In re Focus Media, Inc.)*, 387 F.3d 1077, 1081 (9th Cir. 2004).

1. We begin our analysis of Linton's appeal by clarifying its scope and consequences. Before this court, as before the Bankruptcy Appellate Panel, Linton argues at length that the bankruptcy court erred by rescinding its bad faith determination against petitioner Colpo Talpa, LLC. However, Linton did not appeal that decision, and that order is not before us.

In the alternative, Linton argues that once this appeal was filed, the bankruptcy court lost jurisdiction to reconsider its bad faith determination. Here, the denial of Linton's motion to join non-petitioners was not a final order because it did not "definitively dispose" of the dispute over costs and damages. *Harrington v. Mayer (In re Mayer)*, 28 F.4th 67, 70 (9th Cir. 2022). Linton's appeal of a non-final order did not deprive the court of jurisdiction: "the trial court retains jurisdiction to enter final judgment." *In re Rains*, 428 F.3d at 903–04. Therefore, the bankruptcy court had jurisdiction to address the bad faith determination while this appeal was pending.

2. We now address the sole subject of Linton's appeal, the denial of his motion to add non-petitioners. We conclude that the bankruptcy court did not err in denying the motion because Linton failed to properly serve it and, as a result, the

court lacked personal jurisdiction over the non-petitioners.

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). It is the burden of the party responsible for process to show that service was sufficient. *See* 4A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1083 (4th ed. 2022); *see also Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). In this case, the proper modes for service of process are established by Federal Rules of Bankruptcy Procedure 9014 and 7004. *See In re 701 Mariposa Project, LLC*, 514 B.R. 10, 16 (B.A.P. 9th Cir. 2014). Linton served the non-petitioners by electronic service through CM/ECF to counsel for Colpo Talpa. As the bankruptcy court concluded and Linton concedes, this is not a proper method of providing service unless the non-petitioners waived service or authorized Colpo Talpa's attorneys to serve as their agents for accepting service.

Linton offers no evidence that the non-petitioners waived service or authorized Colpo Talpa's counsel to receive service of process as their agent. Instead, Linton relies exclusively on an e-mail to Colpo Talpa's counsel to establish agency. In that e-mail, Linton's counsel wrote, "I presume . . . that [counsel for Colpo Talpa] are authorized agents for service of our motion papers on [the three non-petitioners] and Colpo Talpa . . . under Rule 7004. Please advise me ASAP if this not what you intended." Counsel for Colpo Talpa did not reply, and Linton provides no evidence that any of the non-petitioners were aware of the e-mail.

Linton makes a number of additional arguments about service of process, none of which have merit. First, Linton argues that the bankruptcy court should have granted Colpo Talpa's request to withdraw or waive any jurisdictional challenge to the motion. At the hearing, counsel for Colpo Talpa said, "I realize I'm here on behalf of CT [Colpo Talpa]. But is it possible for us to withdraw or waive the jurisdictional argument so that we don't wind up in a situation where we're doing this over again?" It is not clear from this single question that Colpo Talpa was withdrawing or waiving any argument. Moreover, as counsel for Colpo Talpa acknowledged, he was present "on behalf of [Colpo Talpa]," not the non-petitioners. Thus, he could not waive service of process for parties he did not represent.

Second, Linton's claim that the bankruptcy court should not have addressed the adequacy of service of process because counsel for Colpo Talpa never challenged it is at odds with our precedent. *See Tuli v. Rep. of Iraq (In re Tuli)*, 172 F.3d 707, 712 (9th Cir. 1999) ("When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over . . . the parties.").

Third, Linton argues that the court should have granted the motion as unopposed because Colpo Talpa lacked standing to contest it. Colpo Talpa was already a party to the action and did not need to separately prove its standing to challenge each motion in the litigation. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 173–74 (2000) (emphasizing that standing is a requirement at start of suit, not an on-going requirement post-commencement).

Fourth, Linton argues that the bankruptcy court wrongly concluded that he needed to commence an adversary proceeding to properly serve the non-petitioners. However, the bankruptcy court did not deny the motion on this basis. Even if it had, the rules governing service of process are the same for contested matters and adversary proceedings, so Linton would have failed to properly serve the motion regardless. *See* Fed. R. Bankr. P. 9014(b) (incorporating Rule 7004, which governs service in adversary proceedings, into contested matters).

Finally, Linton argues that even if he failed to comply with the rules governing service of process, the trial court should have dismissed the motion without prejudice and allowed him to properly serve non-petitioners. Linton cites no binding authority for this argument, and his motion was not dismissed with prejudice. Thus, the bankruptcy court did not err.

3. Because the failure to properly serve the non-petitioners with service of process is sufficient to affirm the bankruptcy court's order, we decline to address

the bankruptcy court's alternative bases for denying the motion.

AFFIRMED.