FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

May 25, 2005

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WILLIAM R. BARTMANN, KATHRYN A. BARTMANN, EQUINE ENTERPRISES, L. L. C., CFS LAND, L. L. C., and HAG, L. L. C., Debtor.	BAP No. NO-04-095
WILLIAM R. BARTMANN and KATHRYN A. BARTMANN, Appellants, v. PATRICK J. MALLOY, III, Trustee, Appellee.	Bankr. No. 03-04975-R Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before NUGENT, BROWN, and THURMAN, Bankruptcy Judges.

PER CURIAM.

The parties did not request oral argument, and 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. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtors William R. Bartmann and Kathryn A. Bartmann ("Bartmanns")

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

appeal the bankruptcy court's order denying their motion for extension of time to file a notice of appeal. The names of the parties in this appeal are identical to those in BAP No. NO-04-096. The orders appealed from are related but different; however, the outcome is the same. In both instances, the Debtors failed to timely appeal separate rulings by the bankruptcy court. Finding no abuse of discretion, we AFFIRM.

I. Background

Prior to filing their bankruptcy petition, the Bartmanns owned a parcel of real property on which their home was located. In February 2004, on their Schedule C, as amended, they claimed a homestead exemption with respect to their home and a one-acre tract surrounding the home. On June 3, 2004, the bankruptcy court authorized the sale of the remaining, non-exempt property to Wenmoor LLC.

In August 2004, the Bartmanns' Trustee filed a motion seeking an order directing the Bartmanns to remove certain encroachments that ran from the exempt homestead property onto the non-exempt property sold to Wenmoor. After the bankruptcy court granted the Trustee's motion, the Bartmanns amended their Schedule C to redraw the boundary line of their exempt property. The Trustee objected. After an evidentiary hearing, the bankruptcy court entered its Order Granting Trustee's Objection to Debtors' Amended Schedule C ("Schedule C Order"), holding that the Bartmanns could not amend their claimed homestead exemption, on November 8, 2004.

On November 19, 2004, one day after the ten-day deadline under Fed. R. Bankr. P. 8002(a) expired, the Bartmanns filed a notice of appeal of the Schedule C Order.[1] On December 2, 2004, the Bartmanns sought from the bankruptcy court

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[1] That appeal was transmitted to this Court and assigned case number NO-04-081. It has been stayed pending resolution of this appeal.

an extension of time to file the notice of appeal of the Schedule C Order, which the bankruptcy court denied by order entered December 13, 2004 ("Extension Order"). The Bartmanns timely filed a notice of appeal of the Extension Order.

II. Jurisdiction

The Court has jurisdiction over this appeal. The Bartmanns timely filed a Notice of Appeal from the Extension Order, which is a final order under 28 U.S.C. § 158(a).[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Northern District of Oklahoma.[3]

On March 24, 2005, the Trustee filed an Appellee's Motion to Dismiss Appeal on the Basis of Mootness Pursuant to 11 U.S.C. § 363(m) ("Motion"). The Trustee argues that Wenmoor LLC's purchase of the non-exempt property makes this appeal moot.

Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[4]

By its very terms, § 363(m) does not apply to this appeal, which is an appeal of an order denying an extension of time to file a notice of appeal under Fed. R. Bankr. P. 8002(c)(2). Even if § 363(m) were applicable, the record before this Court does not include any finding that Wenmoor LLC is a good faith purchaser. We therefore deny the Motion.

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[2] *Lang v. Lang (In re Lang)*, 305 B.R. 905, 908 (10th Cir. BAP 2004).

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

[4] 11 U.S.C. § 363(m).

III. Standard of Review

We review the bankruptcy court's Extension Order for abuse of discretion.[5] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[6]

IV. Discussion

In seeking an extension of time to file their notice of appeal, the Bartmanns relied on Fed. R. Bankr. P. 8002, which provides in part that:

> A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect.[7]

The Bartmanns argue that through the excusable neglect of their counsel, they failed to file a timely notice of appeal of the Schedule C Order. As their motion for extension of time stated:

> Counsel for the Bartmanns admit that the late filing was simply the result of ignorance of a key provision of the Federal Rules of Bankruptcy Procedure. Counsel inadvertently and mistakenly applied the rules for computing deadlines under the Federal Rules of Civil Procedure instead of the rules set forth in the Federal Rules of Bankruptcy Procedure.[2]
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> [2] Fed. R. Civ. P. 6(a) provides that when a time period allowed under the rules is less than 11 days, intermediate weekends and holidays are not included in the computation of time. The corresponding provision in Fed. R. Bankr. P. 9006(a), however, applies only to

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[5] *Lang*, 305 B.R. at 908; *Berger v. Buck (In re Buck)*, 220 B.R. 999, 1003 (10th Cir. BAP 1998). *Accord United States v. Torres*, 372 F.3d 1159, 1161 (10th Cir. 2004) (reviewing order granting extension of time under Fed. R. App. P. 4(b)(4) for abuse of discretion).

[6] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

[7] Fed. R. Bankr. P. 8002(c)(2).

time periods of 8 days or less.[8]

The leading case on the meaning of "excusable neglect" is *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*,[9] in which the Court approved consideration of the following factors: "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[10] In its Extension Order, the bankruptcy court properly considered each of the *Pioneer* factors in determining that the Bartmanns had failed to show that counsel's neglect was excusable. As the *Pioneer* court noted: "[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect."[11]

The Bartmanns argue that the bankruptcy court erred in concluding that the Trustee would be prejudiced and administration of the estate would be delayed by the appeal of the Schedule C Order. They further argue that they acted in good faith. These arguments are insufficient to overcome the reason for the delay, which was within the reasonable control of the Bartmanns. "'[F]ault in the delay remains a very important factor – perhaps the most important single factor – in determining whether neglect is excusable.'"[12] As the bankruptcy court correctly found, the facts of this case are strikingly similar to those of *United States v.*

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[8] Motion for Extension of Time to File Appeal at 3, *in* Bartmanns' Appendix at 101.

[9] 507 U.S. 380 (1993). *See Torres*, 372 F.3d at 1162 (applying *Pioneer* factors to Fed. R. App. P. 4(b)(4), which allows a court to extend the time for filing a notice of appeal to the circuit upon a showing of excusable neglect).

[10] *Pioneer*, 507 U.S. at 395.

[11] *Id.* at 392.

[12] *Torres*, 372 F.3d at 1163 (quoting *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994)).

Torres, in which the Tenth Circuit Court of Appeals held that "counsel's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief unless 'the word "excusable" [is to be] read out of the rule.'"[13]

The Extension Order is sound and well-reasoned. The bankruptcy court did not make a clear error of judgment or exceed the bounds of permissible choice in the circumstances.

V. Conclusion

For the reasons stated by the bankruptcy court in its Extension Order, the Bartmanns' motion for extension of time to file a notice of appeal was properly denied. The Extension Order is AFFIRMED.

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[13] *Id.* at 1163-64 (quoting *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996)).