

December 21, 2001

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE TIMOTHY ROBERT
SWANSON, also known as Timothy R.
Swanson, Timothy Swanson, Tim
Swanson, and Tim R. Swanson,

Debtor.

BAP No. WY-01-021

KETEL THORSTENSON, L.L.P.,

Appellant,

v.

TIMOTHY ROBERT SWANSON,
and MOUNT RUSHMORE
BROADCASTING, INC.,

Appellees.

Bankr. No. 99-10015
Chapter 13

ORDER AND JUDGMENT*

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

Before BOULDEN, CORNISH, and KRIEGER, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

This is an appeal from the order denying the motion to modify stay filed by Ketel Thorstenson, L.L.P. For the reasons discussed below, we AFFIRM.

BACKGROUND

On January 21, 1999, Timothy Robert Swanson (“Debtor”) filed for relief under Chapter 13 of the Bankruptcy Code. On September 15, 1999, an order was

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

entered confirming the Debtor's Amended Plan. Thereafter, Ketel Thorstenson, L.L.P. ("Ketel") sought relief from the automatic stay to add the Debtor as a named defendant in an action in the United States District Court for the District of South Dakota ("District Court Action"). Mount Rushmore Broadcasting, Inc. ("Mount Rushmore") had filed the District Court Action against Ketel seeking damages for Ketel's failure to monitor and review transactions conducted by the Debtor as the General Manager of Mount Rushmore. The Debtor had embezzled money from Mount Rushmore during his employment and subsequently pled guilty to two felony counts of fraud and larceny. Ketel denies liability in the District Court Action. Ketel seeks to add the Debtor as a defendant so that a jury may determine his liability but seeks no damages against the Debtor. As a result, Ketel argues the Debtor will suffer no prejudice. The Debtor argues that he will suffer prejudice if he is made a party to the District Court Action because all of his disposable income is being paid into the plan and he has no excess funds for attorney's fees or travel expenses.

A hearing was held on Ketel's motion, and an order denying the motion entered. In the Order, the Bankruptcy Court stated: "For the reasons stated on the record and herein, the motion must be denied." Order Denying Application to Modify Stay, *in* Appellant's Appendix at 105. The Court ordered Ketel to dismiss the Debtor as a party defendant but modified the stay to allow the Debtor to appear as a witness in the District Court Action, subject to payment of appropriate witness fees and expenses. This appeal followed. Ketel did not provide a copy of the transcript of the hearing on the motion for relief from stay to this court. The parties agree that the court did not hold an evidentiary hearing on the motion to modify stay.

DISCUSSION

_____ This court, with the consent of the parties, has jurisdiction to hear timely

filed appeals from final judgments and orders of bankruptcy courts within this circuit. 28 U.S.C. §158(a)(1), (b)(1) and (c)(1). Since neither party opted to have this appeal heard by the United States District Court for the District of Wyoming, each is deemed to have consented to have this appeal heard by the Bankruptcy Appellate Panel. 10th Cir. BAP L.R. 8001-1(d). An order denying relief from stay is a final order. *Eddleman v. United States Dept. of Labor*, 923 F.2d 782, 784-86 (10th Cir. 1991), *overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 & n.3 (10th Cir. 1992).

“Decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).” *Pierce v. Underwood*, 487 U.S. 552, 558 (1998). The Bankruptcy Court’s decision denying relief from the stay is reviewed for an abuse of discretion. *Benedor Corp v. Conejo Enters., Inc. (In re Conejo Enters., Inc.)*, 96 F.3d 346, 351 (9th Cir. 1996); *Laguna Assocs. Ltd. P’ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P’ship)*, 30 F.3d 734, 737 (6th Cir. 1994). An abuse of discretion has been defined in the Tenth Circuit as “‘an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.’” *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

“[T]he burden of providing the appellate court with an adequate record for review is on the appellant.” *In re Rambo*, 209 B.R. 527, 530 (10th Cir. BAP 1997), *aff’d without opinion*, 132 F.3d 43 (10th Cir. 1997); *Berger v. Buck (In re Buck)*, 220 B.R. 999, 1005 (10th Cir. BAP 1998); see also 10th Cir. R. 10.1(A)(1). Appellant’s failure to provide the court with a transcript frustrates appellate review and any attempt to apply the abuse of discretion standard.

Rambo, 209 B.R. at 530. There is no record for this appellate court to review, and thus, the failure to provide this court with the transcript of the hearing makes it impossible to determine whether the Bankruptcy Court abused its discretion.

CONCLUSION

Since Ketel has failed to provide an adequate record for review, the order denying relief from the stay must be and is AFFIRMED.