

March 27, 2002

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

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

IN RE JENNIFER GAYLE POTTER,
Debtor.

BAP No. UT-01-027

DONALD E. ARMSTRONG,
Plaintiff – Appellant,

Bankr. No. 00-21039
Adv. No. 00-2089
Chapter 7

v.

JENNIFER GAYLE POTTER,
Defendant – Appellee.

ORDER OF LIMITED REMAND*

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

Before PUSATERI, BOHANON, and MICHAEL, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

Donald E. Armstrong (“Armstrong”) appeals from orders of the United States Bankruptcy Court for the District of Utah (the “bankruptcy court”) (1) dismissing an adversary proceeding filed by Armstrong against Debtor Jennifer Gayle Potter (“Potter”), and (2) denying Armstrong’s Amended Motion to Recuse (the “Motion to Recuse”). For the reasons stated herein, we remand this case to the bankruptcy court for the limited purpose of ruling on a pending postjudgment motion.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. Background

In early 1999, Armstrong filed suit against Potter in Utah state court (the “State Court”). On June 14, 1999, the State Court entered judgment against Potter and ordered her to pay Armstrong \$10,312.92 plus interest, costs and attorney fees. The State Court issued a supplemental judgment September 29, 1999, increasing the amount owed by Potter to \$18,123.45, plus interest, costs and attorney fees. Potter filed for relief under chapter 7 of the Bankruptcy Code on January 31, 2000.

On March 10, 2000, Armstrong filed for chapter 11 bankruptcy relief. On April 17, 2000, Armstrong filed an adversary proceeding in Potter’s bankruptcy case seeking a determination that the debt owed by Potter to Armstrong was nondischargeable pursuant to §§ 523(a)(2)(A) and (a)(6) of the Bankruptcy Code.¹ On June 5, 2000, Armstrong filed the Motion to Recuse. The bankruptcy court conducted a pretrial conference in the adversary proceeding July 11, 2000. Armstrong appeared *pro se*, along with counsel for Potter. On July 26, 2000, the bankruptcy court issued its Order Denying Plaintiff’s Motion to Recuse. On July 31, 2000, the bankruptcy court issued a scheduling order (the “Scheduling Order”) in the adversary proceeding directing the parties to file a proposed pretrial order by March 6, 2001, and to appear for a final pretrial conference on March 20, 2001. Armstrong and counsel for Potter were served with a copy of the Scheduling Order by first class mail on August 1, 2000.

On September 18, 2000, Kenneth Rushton (“Rushton”) was appointed chapter 11 trustee in Armstrong’s bankruptcy case. Rushton and Armstrong then began negotiating the sale of certain claims that were property of the Armstrong bankruptcy estate to Armstrong individually. The cause of action against Potter

¹ Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2002).

was among the claims discussed during the negotiations. On March 20, 2001, the bankruptcy court convened for the pretrial conference. Neither Rushton nor Armstrong appeared. Potter's counsel also failed to appear. The bankruptcy court dismissed the adversary proceeding by minute entry, noting the parties' failure to appear and their failure to submit a proposed pretrial order as directed in the Scheduling Order.

On March 28, 2001, Armstrong filed a Motion to Reconsider Dismissal of Case (the "Motion to Reconsider"). Rushton filed a response to the Motion to Reconsider on April 12, 2001. On April 16, 2001, Potter filed an objection to the Motion to Reconsider. The bankruptcy court issued a written order dismissing the adversary proceeding on May 3, 2001. Armstrong timely filed a notice of appeal on May 14, 2001.²

II. Jurisdiction

Neither party elected to have the appeal from the order dismissing the adversary proceeding heard by the United States District Court for the District of Utah; thus they have consented to our review.³ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. We have jurisdiction to hear timely-filed appeals from "final judgments, order, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1). A decision is considered final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). An order dismissing an

² The tenth day after entry of the order was a Sunday; thus, Armstrong had until Monday, May 14, 2001, to file his notice of appeal. *See* Fed. R. Bankr. P. 8002(a) and 9006(a).

³ On August 2, 2000, Armstrong filed a Motion for Leave to Appeal Order Denying Motion to Recuse and to Stay Proceedings until Appeal is Determined. As of the date of this order, that motion was still pending in the District Court for the State of Utah. We need not decide today what effect the pending district court motion has on our jurisdiction over this appeal.

adversary proceeding is a final order. *See In re Davis*, 177 B.R. 907, 910 (9th Cir. BAP 1995).

This case, however, comes to us in an unusual procedural posture. Initially, we note that the Federal Rules of Civil Procedure do not recognize a motion for reconsideration. *See Hatfield v. Bd. of County Commr's*, 52 F.3d 858, 861 (10th Cir. 1995). In the Tenth Circuit, such filings are construed in one of two ways. If the motion is filed within ten days of the bankruptcy court's entry of judgment, the motion is treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).⁴ If the motion is filed more than ten days after the entry of judgment, it is treated as a motion for relief from judgment under Fed. R. Civ. P. 60(b). *See id.* Armstrong filed the Motion to Reconsider eight days after the bankruptcy court entered a minute order dismissing the adversary proceeding and more than a month before the written order was entered. A postjudgment motion filed after the court has rendered its decision but before entry of a formal judgment is timely for purposes of Fed. R. Civ. P. 59. *See Lopez v. Long (In re Long)*, 255 B.R. 241, 244 (10th Cir. BAP 2000). Accordingly, we construe the Motion to Amend as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).

The filing of certain postjudgment motions has important ramifications on the timing of an appeal. Bankruptcy Rule 8002 requires that a notice of appeal be filed within ten days of the date of entry of the judgment. *See* Fed. R. Bankr. P. 8002(a). The ten-day period is tolled where a party makes a timely motion of the type specified in Bankruptcy Rule 8002(b). In such instances, "the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding." Fed. R. Bankr. P. 8002(b). A motion to alter or amend the

⁴ With limited exceptions not relevant here, Fed. R. Civ. P. 59(e) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9023.

judgment under Rule 9023 is among the motions enumerated in Rule 8002(b).

Bankruptcy Rule 8002 also makes provision for those instances where a notice of appeal is filed after entry of the judgment but while one of the enumerated postjudgment motions remains pending. Rule 8002(b)(4) states in pertinent part:

A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order or decree or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding.

Fed. R. Bankr. P. 8002(b) (emphasis added). In 1994 the Rule received significant amendments intended to conform it to Fed. R App. P. 4(a)(4). The advisory committee notes to the 1994 amendments indicate that the drafters sought to prevent the results obtained under previous versions of the Rule wherein a notice of appeal was rendered a nullity if filed before the disposition of a pending postjudgment motion:

This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

.....

The amendment provides that a notice of appeal filed before the disposition of a postjudgment tolling motion is sufficient to bring the judgment, order, or decree specified in the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgment motion, however, and if a party who has previously filed a notice of appeal wishes to appeal from disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Fed. R. Bankr. P. 8002 advisory committee notes (emphasis added). *See* Fed. R. App. P. 4 advisory committee notes (former version of Rule 4(a)(4) “created a

trap” for unsuspecting litigants who filed notice of appeal while posttrial motion pending).

In the present case, Armstrong filed the Motion to Reconsider on March 28, 2001. On May 3, 2001, the bankruptcy court entered its order dismissing the adversary proceeding. Thus, the Motion to Reconsider was timely filed. *See Long*, 255 B.R. at 244. Armstrong filed his notice of appeal on May 14, 2001, while the Motion to Reconsider was still pending before the bankruptcy court.

The bankruptcy court’s denial of a motion, though not formally expressed, “may be *implied* by the entry of a final judgment or of an order inconsistent with the granting of the relief sought by the motion.” *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) (emphasis in original). Here, the bankruptcy court entered an order dismissing the adversary proceeding, an act clearly inconsistent with granting the relief sought in the Motion to Reconsider. We are hard pressed, however, to find that the order denied by implication the Motion to Reconsider. Both the title and the body of the order make it clear that the adversary proceeding was dismissed because the parties failed to file the required pretrial order. *See* Appellant’s Appendix, Exh. 2. Nothing in the order or elsewhere in the record indicates the bankruptcy court considered the Motion to Reconsider either before or after issuing the order dismissing the adversary proceeding. We conclude that the Motion to Reconsider remains pending before the bankruptcy court. Accordingly,

IT IS HEREBY ORDERED that this appeal is REMANDED to the bankruptcy court for the limited purpose of entering an order on the Motion to Reconsider.⁵

⁵ This may, of course, involve a determination as to whether Armstrong has standing to contest the dismissal of the adversary proceeding, a determination that should be made by the bankruptcy court in the first instance. *See Spenlinhauer v. O’Donnell*, 261 F.3d 113, 118 (1st Cir. 2001).

IT IS FURTHER ORDERED that upon entry of the bankruptcy court's order, the clerk of the bankruptcy court shall send to this Court a supplemental transmission pursuant to 10th Cir. BAP L.R. 8007-1(b).

IT IS FURTHER ORDERED that this Court will otherwise retain jurisdiction of this appeal and will make a final disposition of the appeal after receipt of the supplemental transmission.