

December 13, 2002

Barbara A.
Schmerhorn
Clerk

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

IN RE CRESTVIEW FUNERAL HOME,
INC., doing business as Crestview Florist,

Debtor.

BAP No. NM-02-044

JOHN LESTER SALAZAR,

Plaintiff – Appellant,

Bankr. No. 7-95-11923 MA

Adv. No. 00-1091 M

Chapter 7

v.

JAMES A. MCCORMICK and ARTHUR
PEPIN,

Defendants – Appellees,

ORDER AND JUDGMENT*

LINDA S. BLOOM; TIM RIVERA;
STEPHEN D. TURPEN; RON KOCH;
TOM UDALL; JULIE ALTWISSE;
REBECCA E. WARDLAW; Honorable
RICHARD J. KNOWLES; Honorable
DIANE DAL SANTO; PHYLLIS
FERGUSON BEKAERT; JEROME DUKE
BEKAERT; ELIZABETH VINCILL;
DIANE WEBB; CHERYL A. RYERSON;
ROSE ROYBAL; DAN WASKO;
NEWEST PROPERTY
MANAGEMENT; FOX EXECUTIVE
OFFICES; CHESTER FRENCH
STEWART; WRIGHT MAINS
KOWSTER, INC., AGENCY; AAAA
AUCTIONS; CRESTVIEW FUNERAL
HOME, INC.; LARRY BARKER; PAUL
LOGAN; ALICE NYSTAL; KAREN A.
INGLIS, ASA; JACK YARMOLA;
ROXANNE BACA; DAVID GILPEN;
BARBARA C. EVERAGE; JEROME
MARSHAK; DON D. BECKER; and
JEROME J. BEKAERT, JR.,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Defendants.

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before PUSATERI, CORNISH, and NUGENT, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

John Lester Salazar (“Salazar”) appeals the bankruptcy court’s order denying his request for an emergency writ of habeas corpus. After giving the matter careful consideration, we affirm.

Background

This appeal and a related one, BAP No. NM-02-046, arise from an adversary proceeding that Salazar filed in connection with the bankruptcy case of Crestview Funeral Home, Inc. (“Crestview”). He is representing himself in both appeals, and has not provided us with a complete record for either one. By reviewing both appeals, though, we have been able to piece together the facts involved.

Salazar was an officer and shareholder of Crestview, a company operating in the funeral business in New Mexico. Phyllis Ferguson Bekaert (“Bekaert”) was his wife and, at least at one time, also a shareholder of Crestview. In the course of its business, Crestview accepted money from customers to pay for their funerals before they died (“preneed money”); such payments were supposed to be held in one or more trust accounts. At some point, it was discovered that Crestview did not have all the preneed money it had received. Ultimately, Salazar pleaded guilty to state criminal charges of fraud, embezzlement, and forgery in connection with the disappearance of several thousand dollars of the preneed money. He is serving his sentence in a New Mexico state prison.

In 1993, Bekaert left Salazar and moved out of state. In subsequent divorce proceedings, through her attorney, she offered to settle a property division dispute by

accepting \$50,000 from Salazar. Salazar characterizes this offer as attempted extortion.

Crestview filed a voluntary Chapter 11 bankruptcy case in 1995. Salazar complains that Bekaert's opposition prevented Crestview from confirming a reorganization plan that would have compensated the victims of the preneed money shortfall. The bankruptcy court appointed a Chapter 11 trustee for Crestview in August 1997. The trustee closed the business the following January, and the case was converted to Chapter 7 that April. It appears that the person serving as the Chapter 11 trustee was then appointed as the Chapter 7 trustee ("the Trustee") for Crestview's bankruptcy estate. Salazar complains that the Trustee has somehow acted improperly, although it is impossible to discern exactly how. In July 1998, Crestview's business property was sold at auction.

Sometime during 2000, Salazar commenced an adversary proceeding against a variety of people, including Bekaert and the Trustee. On March 6, 2002, perhaps because the case was set for trial the next week, Salazar filed an "Emergency Writ of Habeas Corpus." In it, he asked the bankruptcy court (1) to allow him to come before the court "for examination, to testify and perform a duty imposed on [him,] under this title,"¹ and (2) to order his release from state custody. He also revealed that he had a habeas petition pending before the United States District Court, but suggested that his pleading before the bankruptcy court was somehow properly brought separately. Although no order about the first part of Salazar's request appears in the record,² in an order entered May 30, 2002, on Bekaert's motion for directed verdict or to dismiss, the bankruptcy court indicated that Salazar did appear in person for trial from March 11 to 15, 2002. On May 9, 2002, the bankruptcy court entered an order denying the second

¹ Appellant's Appendix at 6.

² The State of New Mexico, appearing as the appellee in this case, has submitted a copy of an "Order to Transport Inmate," entered on July 3, 2002, that directed the state corrections department to transport Salazar to the continuation of the trial on the merits in the adversary proceeding that was scheduled to begin two weeks later. However, the record on appeal contains no similar order for the March 11 to 15, 2002, portion of the trial.

part of Salazar's request for an emergency writ of habeas corpus, declaring that it had no authority to alter or amend the terms of his incarceration. Salazar filed a timely notice of appeal.

Discussion

Salazar asserts a confusing litany of complaints in his *pro se* brief, beginning by listing in eleven numbered paragraphs the issues he believes are involved in this appeal. Some of the confusion arises from Salazar's mistaken belief that he personally, not the corporate entity Crestview, was the debtor-in-possession in Crestview's Chapter 11 bankruptcy case and is now the Chapter 7 debtor. Salazar also wants to attack in this appeal orders that were entered in Crestview's main bankruptcy case, even though nothing in the record he has provided indicates that he appealed those orders. Finally, and perhaps this misunderstanding is what inspired his habeas corpus request to begin with, Salazar discovered a federal statute, 28 U.S.C. § 2256, that would have given bankruptcy courts jurisdiction of certain habeas corpus matters, but he failed to discern that the statute never took effect. Salazar's arguments then fail to address the asserted issues in any coherent fashion, making his concerns even more difficult to follow.

We will begin with Salazar's reliance on the statute that never took effect. The statute's history is rather peculiar. It began as a part of the Bankruptcy Reform Act of 1978,³ but was not to take effect until April 1, 1984.⁴ The provision would have given bankruptcy courts authority to issue writs of habeas corpus in certain very limited circumstances. Then in 1984, the statute's effective date was delayed four times.⁵ Finally, the statute was repealed in an unusual way: the provision specifying its effective date was amended to strike the phrase "shall take effect on June 28, 1984," and replace

³ See Pub. L. No. 95-598, §250(a), 1978 U.S.C.C.A.N. (92 Stat.) 2549, 2672.

⁴ Pub. L. No. 95-598, § 402(b), 1978 U.S.C.C.A.N. (92 Stat.) at 2682.

⁵ See Pub. L. No. 98-249, § 1(a), 1984 U.S.C.C.A.N. (98 Stat.) 116; Pub. L. No. 98-271, § 1(a), 1984 U.S.C.C.A.N. (98 Stat.) 163; Pub. L. No. 98-299, § 1(a), 1984 U.S.C.C.A.N. (98 Stat.) 214; Pub. L. No. 98-325, § 1(a), 1984 U.S.C.C.A.N. (98 Stat.) 268.

it with the phrase “shall not be effective.”⁶

Even if 28 U.S.C. § 2256 were in effect, Salazar has not shown that he would be entitled to any relief under it. The first subsection of the statute would have given a bankruptcy court authority to issue a writ of habeas corpus to bring a person before the court for examination, to testify, or to perform a duty imposed on the person under title 11.⁷ Although Salazar vaguely asserts that the bankruptcy court should have given him this type of relief, he was brought to court for the trial in this adversary proceeding, and he has not identified any other specific hearing that he believes the court improperly conducted in his absence. Besides that, the case is now a Chapter 7 liquidation being administered by the Trustee, and Crestview is no longer an operating business. In such circumstances, there is seldom much that a shareholder and former corporate officer can add to any hearings in the case. The general rule in civil proceedings is that prisoners have no absolute right to be present at any stage of the proceedings.⁸ With respect to any part of Crestview’s main bankruptcy case, even if we assume that Salazar remains a party in interest, he has not identified any matter for which he wanted but was not allowed to appear. Not having specified what matter he wanted to appear for, Salazar has of course not shown why his presence was necessary for any hearing on that matter.⁹

The second subsection of 28 U.S.C. § 2256 would have given a bankruptcy court authority to issue a writ of habeas corpus to release the debtor in a bankruptcy case

⁶ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 1984 U.S.C.C.A.N. (98 Stat.) 333, 343.

⁷ Pub. L. No. 95-598, § 250(a), 1978 U.S.C.C.A.N. (92 Stat.) 2672.

⁸ *Price v. Johnston*, 334 U.S. 266, 285-86 (1948), *overruled in part on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991); *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998).

⁹ See *Wilkinson*, 137 F.3d at 915-16 (prisoner required to make specialized showing of necessity of his attendance at pretrial deposition); *Stone v. Morris*, 546 F.2d 730, 735-36 (7th Cir. 1976) (specifying factors for court to consider in deciding whether to require prisoner’s presence to testify at hearing).

from custody, but only if the debtor had been arrested or imprisoned through a civil action to collect a debt.¹⁰ Although he does not seem to recognize the fact, Salazar is not the debtor in the Crestview bankruptcy case. Furthermore, he is in prison as a result of a criminal prosecution, not a civil debt collection action. So even if this statute were in effect, it would not authorize the relief that Salazar wants. Salazar cites nothing other than this never-effective statute to support his assertion that the bankruptcy court had authority to order his complete release from state custody. Unlike most state courts, federal courts are courts of limited, not general, jurisdiction, and a party bringing a case before a federal court must demonstrate that the court has jurisdiction of the case.¹¹ Jurisdiction of bankruptcy matters is given to federal district courts under 28 U.S.C. § 1334, and then referred by those courts to bankruptcy courts under 28 U.S.C. § 157(a). Nothing in these provisions gives bankruptcy courts jurisdiction of habeas corpus petitions filed by prisoners held in custody on state criminal charges.¹²

Salazar's arguments also suffer from some basic misunderstandings about bankruptcy in general and Crestview's bankruptcy case in particular. Salazar appears to believe that he could have avoided his criminal liability for shortfalls in Crestview's preneed accounts either through a Chapter 11 plan that would repay the shortfalls or else through a bankruptcy discharge. Bankruptcy, though, generally deals with civil monetary obligations, not criminal obligations imposed for rehabilitative and punitive purposes. Some years ago, the United States Supreme Court ruled that restitution obligations imposed as conditions on probation in state criminal proceedings were

¹⁰ Pub. L. No. 95-598, § 250(a), 1978 U.S.C.C.A.N. (92 Stat.) 2672.

¹¹ 13 Charles Alan Wright, *et al.*, *Federal Practice & Procedure: Jurisdiction 2d* § 3522 at 60-65 (2d ed. 1984).

¹² *See Bryan v. Rainwater*, 254 B.R. 273, 276 (N.D. Ala. 2000) (bankruptcy courts cannot issue writs of habeas corpus under 28 U.S.C. § 2241; proper federal process to obtain release of state prisoner is action in federal district court); *Cornelious v. Bishop (In re Cornelious)*, 214 B.R. 588, 590 (Bankr. E.D. Ark. 1997) (modern authority for release from incarceration through writ of habeas corpus is 28 U.S.C. § 2241, and bankruptcy courts are not given authority by that statute).

nondischargeable in Chapter 7 cases.¹³ A few years later, the Court ruled that such obligations could be discharged through a Chapter 13 plan,¹⁴ but Congress quickly amended the Bankruptcy Code to remove that possibility.¹⁵ The limited chance that a bankruptcy proceeding can have any impact on a criminal prosecution of a debtor is further emphasized by the fact that the stay of actions against the debtor that is automatically imposed when a bankruptcy petition is filed does not protect the debtor from “the commencement or continuation of a criminal action or proceeding.”¹⁶ Even if the automatic stay, a bankruptcy discharge, or a bankruptcy plan could protect a debtor from a criminal prosecution, the fact remains that Salazar is not the debtor in this case, Crestview is. Furthermore, even if a bankruptcy reorganization plan might call for the payment of a debt that arose from circumstances that also created criminal liability, nothing in the Bankruptcy Code provides that the plan would prevent the state whose criminal law was broken from pursuing criminal charges against the debtor.

We note in passing that some of Salazar’s complaints concern the propriety of the Trustee’s appointment as the Chapter 11 and Chapter 7 trustee for Crestview’s bankruptcy estate. The Trustee’s appointments, however, occurred in Crestview’s main bankruptcy case, not in this adversary proceeding. Salazar’s appeal of the order in this adversary proceeding that denied his motion to be released from prison does not properly bring those matters before us.

Salazar may be making other arguments that we have not specifically addressed

¹³ *Kelly v. Robinson*, 479 U.S. 36 (1986).

¹⁴ *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990).

¹⁵ See Crime Control Act of 1990, Pub. L. No. 101-647, § 3103, 1990 U.S.C.C.A.N. (104 Stat.) 4789, 4916 (amending 11 U.S.C. § 1328(a) to except “restitution included in a sentence on the debtor’s conviction of a crime” from the Chapter 13 discharge).

¹⁶ 11 U.S.C. § 362(b)(1); see also § 362(a) (specifying broad range of actions against the debtor that are stayed by the filing of a bankruptcy petition).

above. For example, he appears to be asserting a variety of non-bankruptcy reasons why his state court convictions should be overturned. We have not considered any of his arguments that do not fall within bankruptcy jurisdiction, and we conclude that any others he may be making do not justify altering the bankruptcy court's handling of his request for a writ of habeas corpus.

Conclusion

The bankruptcy court's order denying the portion of Salazar's request that sought a writ of habeas corpus ordering his release from prison is affirmed. The rest of his habeas corpus request is moot to the extent he sought to be brought to court for the trial of this adversary proceeding. To the extent he might have been asking to be brought to court for other hearings, we affirm the bankruptcy court's handling of his request because he failed to adequately identify the hearings he wanted to attend and failed to show that his attendance was necessary at those hearings.