

November 12, 2003

**Barbara A.
Schermmerhorn
Clerk**

NOT FOR PUBLICATION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

IN RE TEC RESOURCES, LLC; and TEC
PIPELINE, LLC,

Debtors.

BAP No. NO-03-033

DELMER B. GARRETT,

Plaintiff – Appellant,

Bankr. No. 00-03850-M
Chapter 11
Bankr. No. 00-03851-M
Chapter 11
Adv. No. 02-0249-M

(Jointly Administered)

v.

ORDER AND JUDGMENT*

TEC RESOURCES, LLC, a Delaware
limited liability company; and TEC
PIPELINE, LLC, also known as Thermal
Energy Corporation, a Delaware limited
liability company,

Defendants – Appellees.

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

Before McFEELEY, Chief Judge, NUGENT, and BROWN, Bankruptcy Judges.

McFEELEY, Chief Judge.

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

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

is therefore ordered submitted without oral argument.

Plaintiff/Appellant Delmer B. Garrett (“Garrett”) argues that the bankruptcy court erred when it denied his motion for summary judgment on an adversary complaint, and granted summary judgment in favor of Debtors/Defendants/ Appellees, TEC Resources, LLC and TEC Pipeline, LLC (“Defendants”), and accordingly, dismissed the case. For the following reasons, we affirm.¹

I. Background

Garrett was the lessor in an oil and gas lease with Cherokee Basin Production Company as the lessee (“Lease”). The Lease covered certain mineral interests located in Washington County, Oklahoma and was duly filed of record in that county.

On October 10, 2000, Defendants filed their respective petitions for relief under Chapter 11 of the Bankruptcy Code. The bankruptcy court set a deadline of February 15, 2001, for filing claims in Defendants’ cases. Garrett filed a proof of claim in Defendants’ cases on October 19, 2000, in the amount of \$18,500.00 (“Claim”). The Lease was attached to the Claim, and the Claim was based on the Lease.

Subsequently, the bankruptcy court entered an order on August 14, 2001, disallowing Garrett’s Claim. The order disallowing the claim was not appealed and became final.

On November 27, 2002, Garrett, appearing pro se, filed an adversary complaint in Defendants’ cases entitled “Delmer B. Garrett’s Federal Rules of Bankruptcy Procedure Rule 7003 Adversary Proceeding Under Authority of 11 USC 7001 to Recover a Property Interest” (“Complaint”). On January 14, 2003, Garrett filed a Motion for Summary Judgment. Defendants responded on February 11, 2003, by filing a “Combined Objection to Motion for Summary Judgment and Motion for Summary

¹ Garrett has filed “Appellant’s Show Cause Why Appellant’s Reply Brief Should Be Filed Out of Time,” asking that his reply brief be accepted by this court although untimely. The Defendants have not objected. Therefore, we allow the filing of the late reply brief.

Judgment” (“Defendants’ Motion”), which objected to Garrett’s Motion for Summary Judgment and asked for summary judgment on the Complaint in their favor. On March 4, 2003, the bankruptcy court granted the Defendants’ Motion and dismissed the Complaint (“Order”).

On March 10, 2003, Garrett filed a Motion for Rehearing on the Motion for Summary Judgment (“Motion for Rehearing”). On April 1, 2003, the bankruptcy court heard the Motion for Rehearing². On that same date Garrett filed a Submission of Additional Evidence. The bankruptcy court denied the Motion for Rehearing by minute entry on April 1, 2003.

This appeal was filed on April 7, 2003.³

II. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. Garrett timely filed a notice of appeal. The bankruptcy court’s Order disposed of the adversary proceeding and is a final order subject to appeal under 28 U.S.C. § 158(a)(1). See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (reciting general rule first articulated in Catlin v. United States, 324 U.S. 229, 233 (1945), that a decision is ordinarily considered final and appealable only if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”). The parties have consented to this Court’s jurisdiction because they did not elect to have the appeal heard by the United States District Court for the Northern District of Oklahoma. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

III. Standard of Review

² On May 6, 2003, Garrett filed a “Restatement by Delmer B. Garrett of Motion for Rehearing on Motion for Summary Judgment” (“Second Motion for Rehearing.”) The bankruptcy court found that it had no jurisdiction while the appeal was pending to entertain the Second Motion for Rehearing.

³ Garrett’s notice of appeal does not identify the order or orders that are being appealed. However, we assume on the basis of the Garrett’s brief that he is appealing both the Order and the order denying the Motion for Rehearing.

“For purposes of standard of review, 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 (1988); *see* Fed. R. Bankr. P. 8013.

We review the denial of a motion for rehearing under the abuse of discretion standard. Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997); Lopez v. Long (In re Long), 255 B.R. 241, 245 (10th Cir. BAP 2000). We review bankruptcy orders denying or granting summary judgment under the *de novo* standard. Spears v. St. Paul Ins. Co. (In re Ben Kennedy & Assocs.), 40 F.3d 318, 319 (10th Cir. 1994).

IV. Discussion

Federal Rule of Bankruptcy Procedure 7056 adopts the Federal Rule of Civil Procedure 56, which delineates the requirements for granting or denying summary judgment. Fed. R. Bankr. P. 7056. Pursuant to Rule 56(c), summary judgment is appropriate when after consideration of the record, the court determines that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A controverted fact that will preclude summary judgment must be material to the summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Garrett alleges that summary judgment was inappropriate because the evidence showed that TEC had committed fraud. He argues that the bankruptcy court disregarded that evidence and abetted TEC’s fraud. This argument fails.

It is clear from the record before us that in the adversary proceeding Garrett attempted to reestablish that he was owed money by the estate. All of Garrett’s allegations of error in this appeal revolve around his argument that the bankruptcy court failed to recognize his claim. But Garrett’s claim had already been disallowed in a previous order. That order was not appealed. Thus, the issue of whether Garrett had a

claim against the Defendants' estate had previously been conclusively established and was res judicata to his claims in this proceeding. See King v. Union Oil Co., 117 F.3d 443, 444 (10th Cir.1997) (stating elements of res judicata – prior judgment on the merits, identity of parties, identity of cause of action – all of which are present here). Because there was no claim, there was no property that Garrett could recover from the estate and no facts in dispute that could be resolved at trial.

For similar reasons, Garrett's Motion for Rehearing fails. Motions for rehearing that are filed within ten days of a bankruptcy court judgment are governed by Bankruptcy Rule 9023, which incorporates Federal Rule of Civil Procedure 59 ("Rule 59") into the Bankruptcy Code. Fed. R. Bankr. P. 9023. Rule 59(e) provides that motions made under its provisions "should be granted only 'to correct manifest errors of law or to present newly discovered evidence.'" Phelps, 122 F.3d at 1324 (quoting Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1523 (10th Cir.1992) (further quotation omitted)); Adams v. Reliance Standard Life Ins. Co., 225 F.3d 1179, 1186 n.5 (10th Cir. 2000).

In his Motion for Rehearing, Garrett again attempts to argue the validity of his claim. In considering the Motion for Rehearing, as in making its determination in the adversary proceeding, the bankruptcy court had to proceed with the established fact that Garrett had no claim against the Defendants' estates. Any purported evidence that there might be a claim was thus irrelevant. Furthermore, in his Motion for Rehearing, Garrett demonstrated no manifest errors of law, nor did he present newly uncovered evidence. The bankruptcy court did not abuse its discretion when it denied his Motion for Rehearing.

V. Conclusion

For the reasons set forth above, the bankruptcy court's judgment is AFFIRMED.