

January 27, 2004

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION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

IN RE DONALD E. ARMSTRONG,
Debtor.

BAP No. UT-03-026

DONALD E. ARMSTRONG,
Appellant,

Bankr. No. 00-26592
Chapter 11

v.

ORDER AND JUDGMENT*

KENNETH A. RUSHTON, Trustee, and
STEPPE APARTMENTS, LTD.,
Appellees.

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

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

McFEELEY, Chief Judge.

Debtor/Appellant, Donald E. Armstrong (“Armstrong”) appeals two orders of the United States Bankruptcy Court for the District of Utah (“bankruptcy court”) that assessed \$29,983.50 in fees and costs to Appellee Kenneth A. Rushton (“Rushton”), and \$8,002.50 in fees and costs to Steppes Apartments, Ltd. (“Steppes”). The orders awarding fees and costs to the Appellees (“Fee Orders”) originated in an earlier order by the bankruptcy court that found Armstrong liable for civil contempt. Armstrong argues that the bankruptcy court erred because the civil contempt order was in error.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

We agree and REVERSE and REMAND for proceedings consistent with this opinion.

I. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. The bankruptcy court's order imposing fees and costs is a final order subject to appeal under 28 U.S.C. § 158(a)(1). *See Phelps v. Washburn Univ.*, 807 F.2d 153, 154 (1986) (per curiam) (an award of attorneys' fees is final for the purposes of appeal after it is reduced to a sum certain). Armstrong timely filed his notice of appeal pursuant to Federal Rule of Bankruptcy Procedure 8002. The parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

II. Standard of Review

“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; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

We review a bankruptcy court's award of attorneys' fees for an abuse of discretion. *Homeward Bound, Inc. v. Hissom Memorial Center*, 963 F.2d 1352, 1355 (10th Cir.1992); *see also Aguinaga v. United Food and Commercial Workers Int'l*, 993 F.2d 1480, 1481 (10th Cir. 1993). “However, the court's ‘legal analysis which provides the basis for the fee award is reviewable de novo.” *Aguinaga*, 993 F.2d at 1481 (quoting *Homeward Bound*, 963 F.2d at 1355).

III. Background

The background of this case is extensive and has been documented at length in an appeal to this Court of an order of the bankruptcy court that found Armstrong liable for

contempt (“Contempt Order”). *See Armstrong v. Rushton (In re Armstrong)*, No. UT-02-080 (10th Cir. BAP January 27, 2004). In the Contempt Order the bankruptcy court sanctioned Armstrong in the amount of \$5,000. The bankruptcy court also provided that the Trustee and participating creditors could file an application for fees within twenty days of the order.

On December 9, 2002, the bankruptcy court heard both the Trustee’s Application for Fees and Costs Associated with the October 18, 2002 Order Finding Debtor in Contempt and Response to Kenneth A. Rushton November 6, 2002 Application for Fees and Costs (“Trustee’s Application”) and Steppes’s Application for Award of Fees and Costs Incurred as a Result of Donald E. Armstrong’s Contempt of Court and Objection by Donald E. Armstrong (“Steppes’s Application”). On February 19, 2003, the bankruptcy court entered the Fee Orders: one on the Trustee’s Application and one on Steppes’s Application. The Fee Orders award \$29,983.50 to the Trustee and \$8002.50 to Steppes for fees and costs expended in association with the Contempt Motion. However, the Fee Orders disallow fees and costs for any other litigation. This appeal timely followed¹ and was heard in conjunction with Armstrong’s appeal of the Contempt Order.

IV. Discussion

In Armstrong’s appeal of the Contempt Order we determined that the Contempt Order imposed criminal contempt sanctions. The local rules for the United States District Court for the District of Utah mandate the removal of all criminal contempt proceedings from the bankruptcy court to the district court. For this reason, we concluded that the bankruptcy court had no jurisdiction to issue the Contempt Order and accordingly, we reversed and remanded for further proceedings.

Armstrong argues that the bankruptcy court erred when it issued the Fee Orders

¹ On March 17, 2003, a panel of this court entered an order construing the Fee Orders as one order for purposes of appeal.

because they originate in the Contempt Order. Steppes argues that the Fee Orders can be separated from the Contempt Order and reviewed as civil contempt sanctions.² This we cannot do.

While the Fee Orders determine the amount of fees and costs to be awarded, the Contempt Order established the liability for those fees and costs. Where both civil and criminal relief are imposed in an order “the criminal feature of the order is dominant and fixes its character for purposes of review.” *Hicks v. Feiock*, 485 U.S. 624, 638 n.10 (1988) (internal quotation omitted). In BAP No. UT-02-080, we concluded that the Contempt Order was criminal in character and exceeded the bankruptcy court’s jurisdiction. The Fee Orders are based on the Contempt Order. As such, the Fee Orders are also criminal in character and exceed the bankruptcy court’s jurisdiction.

The other arguments raised by Armstrong are not relevant to the issues in this appeal.

V. Conclusion

For the reasons set forth above, the bankruptcy court’s fee order is REVERSED, and we REMAND for proceedings consistent with this order.

² In Utah, bankruptcy courts may impose civil contempt sanctions. The distinction between civil and criminal contempt turns on the “character and purpose” of the sanction. *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Fines imposed for civil contempt are meant to coerce a defendant into compliance with a court order or compensate the complainant for actual losses. *Id.* at 829 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947)). If a fine is not compensatory, it will be civil only if the contemnor has the opportunity to avoid the fine and purge his contempt. *Id.* Steppes argues that the Fee Order imposes a civil sanction because it compensates the Appellees for its costs related to the Armstrong’s prohibited conduct.