

October 18, 2000

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

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

IN RE CHARLES D. HATHAWAY and
JUDITH E. HATHAWAY,

Debtors.

BAP No. EO-00-034

CHARLES D. HATHAWAY and
JUDITH E. HATHAWAY,

Appellants,

v.

UNITED STATES OF AMERICA and
WILLIAM MARK BONNEY, Trustee,

Appellees.

Bankr. No. 98-71577
Chapter 13

ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, CLARK, and MATHESON, Bankruptcy Judges.

PER CURIAM

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. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

The Chapter 13 Debtors appeal an order of the United States Bankruptcy Court for the Eastern District of Oklahoma denying the Debtors' Motion to Determine Tax Liability Combined with Request for Findings of Fact and

* 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.

Conclusions of Law and an order denying the Debtors' Motion for a Rehearing. For the reasons set forth below, the Court DISMISSES the Debtors' appeal of the motion to determine tax liability, and AFFIRMS the order of the bankruptcy court denying the Debtors' Motion for a Rehearing.¹

I. Background

The Debtors filed a Chapter 13 case in June 1998. The Debtors represent in their brief in this Court that the reason for the filing was the institution of certain enforcement and collection actions by the Internal Revenue Service ("IRS") to collect unpaid taxes. The IRS filed claims in the Chapter 13, and the Debtors objected to those claims. Ultimately, the Debtors filed tax returns, the IRS claims were amended to conform to the taxes that were shown to be due on the filed returns, the Debtors withdrew their objections to the IRS claims, and a plan was confirmed on December 28, 1998. That plan provided for payment of the IRS claims as allowed.

On January 18, 2000, the Debtors filed what they styled as a Motion to Determine Tax Liability Combined With Request for Findings of Fact and Conclusions of Law. That motion alleged that the debtors had "discovered since the confirmation of my [sic] plan, that in preparing said Proof of Claim [for taxes claimed to be due] that unknown employees of the Service were willfully negligent in depriving me of certain steps that the Service is required . . . to comply with." (Debtor's Motion at 1.) The motion sets forth a rambling discourse on the Debtors' due process rights and how those rights were violated by the Service. The motion sought entry of an order expunging the tax claim and deeming it satisfied. That motion was denied by the bankruptcy court, after hearing, by an order entered February 25, 2000.

¹ The Court notes that William Mark Bonney, Chapter 13 Trustee, filed a motion to be dismissed from the appeal. In light of our disposition of the appeal, the motion is moot and is hereby denied.

No notice of appeal was filed by the Debtors regarding the order of February 25, 2000. Instead, on March 10, 2000, more than ten days after the entry of the February 25 order, the Debtors filed what they styled as a Motion for a Rehearing. On March 13, 2000, the bankruptcy court entered an order striking the Motion for a Rehearing because it was procedurally deficient. The Debtors filed a corrected Motion for a Rehearing on March 15, 2000, to which the IRS objected. That Motion was ultimately denied by the court on May 8, 2000.

A notice of appeal was then filed on May 16, 2000, and the matter comes to this Court for resolution. The notice of appeal states:

DEBTORS, CHARLES D. HATHAWAY AND JUDITH E. HATHAWAY, HEREBY APPEAL THE DECISION OF THE JUDGE DATED MAY 8, 2000, DENYING DEBTORS' MOTION TO DETERMINE TAX LIABILITY COMBINED WITH REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED JANUARY 18, 2000 AND THE DEBTOR'S MOTION FOR REHEARING DATED MARCH 15, 2000.

Although the notice is ambiguous, this Court construes the Debtors' notice of appeal to be an appeal from the February 25 order denying their motion to determine tax liability and an appeal from the Motion for a Rehearing.

II. Appellate Jurisdiction

This Court, with the consent of the parties, has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001-8002. The orders entered by the bankruptcy court are reviewable under that standard.

III. Discussion

It is important that the matter before the Court be considered in its procedural context. The order of the bankruptcy court that was entered on February 25, 2000, is a final order disposing of the contentions raised by the Debtors in their motion to have their tax liabilities determined. If the Debtors

desired to appeal that order, they were required to file a notice of appeal within ten days after its date of entry. Fed. R. Bankr. P. 8002(a). They did not do so, and, therefore, any appeal from the February 25, 2000, order is untimely. The filing of a timely notice of appeal is jurisdictional. *Aspect Technology v. Simpson (In re Simpson)*, 215 B.R. 885 (10th Cir. BAP 1998) (citing *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir.1992); *Weston v. Mann (In re Weston)*, 18 F.3d 860, 862 (10th Cir.1994)). The lack of a timely filed notice of appeal deprives this Court of jurisdiction to consider the propriety of the February 25 order.

The Debtors could have extended the time for the filing of the notice of appeal from the February 25, 2000, order by the *timely* filing of one of the motions listed in Bankruptcy Rule 8002(b). Of the motions listed, the Debtors' Motion for a Rehearing could be construed as either a motion for new trial under Bankruptcy Rule 9023, which incorporates Fed. R. Civ. P. 59, or a motion for relief under Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60(b). Whether considered to be a Rule 59 motion or a Rule 60(b) motion, the extension granted in Bankruptcy Rule 8002(b) does not apply because the Motion for a Rehearing was filed more than 10 days after the entry of the February 25 order.

If the Motion for a Rehearing was intended to be a motion for a new trial under Rule 59, it was untimely because that Rule states that “[a]ny motion for a new trial shall be filed no later than 10 days after entry of the judgment.” Fed. R. Civ. P. 59(b). The Motion for a Rehearing, whether considered filed on March 10, 2000, or March 15, 2000, was filed more than 10 days after the entry of the February 25 order. As such, any Rule 59 motion was untimely and the tolling provision in Bankruptcy Rule 8002(b) is inapplicable.

If the Motion was a Rule 60(b) motion, Bankruptcy Rule 8002(b) states that it must be filed “no later than 10 days after the entry of judgment” for the tolling

provision therein to apply. Fed. R. Bankr. P. 8002(b). As pointed out above, the Motion for a Rehearing was not filed within 10 days of the entry of the February 25 order, and the tolling provision in Rule 8002(b) is inapplicable.

Since the Debtors did not timely appeal the final order dated February 25, 2000, and the Debtors' time to appeal that order was not extended by the filing of their Motion for a Rehearing under Bankruptcy Rule 8002(b), this Court lacks jurisdiction to consider the merits of the February 25 order. As such, any appeal of that order must be dismissed.

The only order that this Court has jurisdiction to consider is the May 8, 2000, order denying the Debtors' Motion for a Rehearing inasmuch as the Debtors' notice of appeal was filed within 10 days of the entry of that order. As explained above, the Motion for a Rehearing could be construed as either a motion for a new trial under Fed. R. Civ. P. 59 or a motion under Fed. R. Civ. P. 60(b). An appellate court will only reverse a decision denying a motion for new trial under Fed. R. Civ. P. 59 or a motion under Fed. R. Civ. P. 60(b) if the trial court abused its discretion. *See, e.g., United States v. Messner*, 107 F.3d 1448, 1453 (10th Cir. 1997); *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 994 (10th Cir. 1996). Thus, "we will reverse the [trial] court only if it 'made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Messner*, 107 F.3d at 1453 (quoting *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994)).

The bankruptcy court did not abuse its discretion. If the Motion for a Rehearing was a motion for a new trial under Fed. R. Civ. P. 59, it was, for the reasons stated above, untimely and, therefore, could not be considered by the bankruptcy court.

If the Motion for a Rehearing was intended to be a Rule 60(b) motion, the Debtors' Motion for a Rehearing likely was timely, but it failed to plead sufficient

grounds for relief. That Rule states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b).

Neither in the Motion for a Rehearing nor in the briefs filed in this Court have the Debtors made any attempt to raise or argue any of the grounds for relief listed in Rule 60(b) that would provide a basis from deviating from the order previously entered by the bankruptcy court. Instead, the Motion for a Rehearing simply reargues the matters submitted in the original motion to have the taxes determined. The grounds stated for rehearing were:

Comes now the debtors, Charles D. and Judith E. Hathaway, to motion the Court for a rehearing on Debtors [sic] Motion to Determine Tax Liability Combined with Request for Findings of Fact and Conclusions of Law on a singular issue. The question for decision is whether the IRS' pre-bankruptcy alleged determination regarding an alleged tax liability without affording us the opportunity for an evidentiary hear prior to issuing such determination denies us procedural due process in violation of the Due Process Clause of the Fifth Amendment.

(Debtors' Motion for a Rehearing at 1.) The bankruptcy court properly denied the Motion for a Rehearing. It states no grounds for relief under Rule 60(b), as incorporated in bankruptcy proceedings under Bankruptcy Rule 9024.

IV. Conclusion

For the reasons stated above, the order of the bankruptcy court dated May

8, 2000, is AFFIRMED. To the extent that this appeal is also an appeal from the order of the bankruptcy court dated February 25, 2000, the appeal is untimely and, therefore, must be and hereby is DISMISSED.