FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit

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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CHEYENA HOUSTON KLEINHANS, also known as Cheyena Houston, Debtor.	BAP No. CO-08-056
DANIEL A. HEPNER, Plaintiff – Counter-Defendant – Appellant, v. ROBERT LAWRENCE PERRY, Defendant – Counter-Plaintiff – Appellee.	Bankr. No. 07-19376-SBB Adv. No. 08-01067-SBB Chapter 7 OPINION*

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

Before NUGENT, THURMAN, and KARLIN, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

This appeal arises out of an adversary proceeding filed by the Chapter 7 trustee ("Trustee"), wherein he seeks to avoid the debtor's post-petition transfer of title to a mobile home. Defendant/counter-claimant, Robert Perry ("Perry"), appeals the bankruptcy court's judgment dismissing his counterclaims. Because the order sought to be appealed is not final, this Court is without appellate

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

jurisdiction and the appeal must be DISMISSED.

I. BACKGROUND

Debtor, Cheyena Kleinhans[1] ("Debtor"), purchased a mobile home in Colorado in August 2007. Perry contends that he and Debtor purchased the mobile home together, but that he gave Debtor his half interest to offset costs she had incurred for their wedding. He also contends that he and Debtor had agreed that he would regain his ownership interest by making repairs to the mobile home, and that he had begun those repairs when Debtor filed her Chapter 7 petition on August 23, 2007.

Debtor then attempted to convey the mobile home to Perry on or about October 18, 2007. Trustee filed an adversary proceeding against Perry in January 2008, seeking to avoid that post-petition transfer of title to the mobile home. Perry filed several counterclaims in the adversary proceeding, all of which were in the nature of misconduct allegations against Trustee.

Trustee filed a motion to dismiss the counterclaims, to which Perry did not respond. However, on June 5, 2008, the bankruptcy court conducted a hearing on the motion to dismiss, and allowed Perry to argue in opposition to that dismissal motion. On June 6, 2008, the bankruptcy court entered both an order granting the motion to dismiss and a judgment denying it. Perry filed a notice of appeal from the judgment dismissing his counterclaims on June 16, 2008.[2]

Trustee's claims had not been adjudicated when the notice of appeal was filed. Although the bankruptcy court's docket sheet reflects that the matter was

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[1] Due to an apparent computer database error at case opening, debtor's last name was incorrectly spelled as "Kleinhaus." From papers filed in this Court, it has become apparent that the debtor's last name is "Kleinhans." The caption in this appeal has been amended accordingly.

[2] A corrected judgment, granting the motion to dismiss, was signed on June 12, 2008, "*nunc pro tunc*, June 5, 2008," and entered on June 13, 2008. The notice of appeal was filed within ten days of the judgment appealed, whether the judgment is treated as having been entered on June 5, 6, 12, or 13th.

tried on January 14-15, 2009, no final order had been entered resolving those claims as of the date this appeal was argued.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final" judgments of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[3] Since neither party elected to have this appeal heard by the United States District Court for the District of Colorado, the parties have consented to appellate review by this Court.

Neither party to this appeal raises the issue of this Court's appellate jurisdiction. In fact, when questioned during oral argument, Trustee suggested that the dismissal judgment should be considered final pursuant to Federal Rule of Civil Procedure 54(b) ("Rule 54(b)"), contending that was the implicit intent of the parties and the bankruptcy court.[4] However, an appellate court has "an independent duty to inquire into its jurisdiction over a dispute, even where neither party contests it and the parties are prepared to concede it."[5]

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.'"[6] The bankruptcy court's judgment dismissing Perry's counterclaims did not end the litigation between these parties, however, which continued to trial long after Perry had filed

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[3] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[4] Rule 54(b) is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7054. Although the bankruptcy court's use of a judgment, rather than an order, to dismiss the counterclaims may be suggestive of finality, none of the orders or judgments that were entered on the counterclaims actually contain a Rule 54(b) certification.

[5] *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1499 (10th Cir. 1994).

[6] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

his notice of appeal.[7] Therefore, the judgment sought to be appealed is not final for the purposes of an appeal.

There are limited exceptions to the final judgment rule, one of which is Rule 54(b), the rule upon which the parties orally rely for finality of the judgment at issue in this appeal. However, Rule 54(b) does not provide finality in all cases:

> Significantly, Rule 54(b) does not eliminate the need for finality. Rather, it simply allows a trial court to find that its judgment either (1) fully and finally disposes of one or more, but less than all, of the "claims" in the action, or (2) resolves all claims against one or more, but less than all, of the parties, and that it is appropriate for immediate appeal (*i.e.*, that "there is no just reason for delay"). Thus, under Rule 54(b), a trial court must determine, first, whether its order is "final" and, if so, whether the relief granted is sufficiently separable that an immediate appeal of the order makes sense within the context of the entire case.[8]

In applying Rule 54(b), the court must weigh the "policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal."[9]

In order to fit within the Rule 54(b) exception to the final order rule, an order sought to be appealed must, therefore: 1) satisfy one of the definitions of finality in Rule 54(b); 2) contain an express certification that "there is no just reason for delay"; and 3) have resulted from the bankruptcy court's "consideration and determination" of the no just reason for delay standard."[10] The appealed judgment contains no such certification and, in fact, does not even mention Rule

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[7] *See DeLuca v. Mountain States Financial Resources Corp.*, 827 P.2d 171 (Okla. 1992) (holding order dismissing counterclaim was not "final appealable order" because it left parties in court on claims against counter-claimant)*; Cf. Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1459 (10th Cir. 1996) (holding that an order dismissing plaintiff's complaint was not a final appealable order because the order did not dispose of a counterclaim).

[8] *In re Sukut*, 380 B.R. 577, 583 (10th Cir. BAP 2007).

[9] *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005) (also finding that "certification is appropriate *only* when the district court 'adheres strictly to the rule's requirement that a court make two express determinations,'" quoting *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001)).

[10] *Id.*

54(b).

"The purpose of the express determination and direction requirement is to ensure that the parties can judge the effect of the order entered, including the right of, or obligation to appeal."[11] Failure to clearly signify to the potential appellant that the order is being deemed final could either result in that party losing his or her appeal rights, or in encouraging protective, premature appeals from orders that were not final.[12] Accordingly, because the order from which appellant appealed did not clearly certify the order as final under Rule 54(b), this Court does not have appellate jurisdiction over this appeal.

This Court also considered whether it could exercise its discretion to treat Perry's timely filed notice of appeal as a motion for leave to appeal an interlocutory order.[13] However, "[l]eave to hear appeals from interlocutory orders should be granted with discrimination and reserved for cases of exceptional circumstances. Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate

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[11] Smith, F.M., *Moore's Federal Practice - Civil* § 54.21 (2009), citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-436 (1956) (purpose of express determination and direction requirement is to make appealability of order clear so that party adversely affected knows that time to appeal does not begin to run until certification has been made); and *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950) ("obvious purpose" is to provide "opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly").

[12] *Id.*, noting that, "Rule 54(b), as originally drafted, did not require an express determination and direction for entry of judgment; instead, if the court made an order finally disposing of one claim in a multi-claim action, the order was appealable under Rule 54(b) without the necessity of any further action by the court. That original version of the rule proved problematic, because it caused some parties to file protective, premature appeals from orders that were not final. It also resulted in some parties losing the right of appeal because of their failure to realize that the order was appealable under the rule as then drafted. To address these concerns, the rule was amended in 1946 to require the express determination and direction of entry of judgment."

[13] 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8003(c).

termination of the litigation."[14] Not only has there been no request for permission to appeal a non-final order, but this case is simply not an appropriate one for the granting of such relief.

III. CONCLUSION

Since the judgment sought to be appealed did not fully resolve all issues in the adversary proceeding, as Trustee's claims against Perry remained to be adjudicated, it lacks finality and may not be appealed at this time. Because this Court may not exceed its jurisdictional grant, which requires finality of judgments, this appeal is dismissed.

[14] *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 769 (10th Cir. BAP 1997).