

April 5, 2013

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

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

IN RE MANIER H. ISHO,
Debtor.

BAP No. UT-12-090

MANIER H. ISHO,
Appellant,

Bankr. No. 11-30284
Chapter 7

v.

OPINION*

ELIZABETH R. LOVERIDGE, Chapter
7 Trustee, LEWIS HANSON &
COMPANY, INC., an Oregon
corporation, HVS, INC., a Missouri
corporation, doing business as Hopkins
Appraisal Services, EDWARD JOYCE,
MALDEN CAPITAL, an Oregon
limited liability company, SOHAIL
KHAN, FARZANA KHAN, and
UNITED STATES TRUSTEE,

Appellees.

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

Before MICHAEL, KARLIN, and JACOBVITZ, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

The appellant asks this Court to find error in the bankruptcy court's resolution of a dispute between him and the Chapter 7 trustee over the handling of a lawsuit that he had filed against various defendants prior to filing his petition in

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

bankruptcy.¹ The trustee obtained approval from the bankruptcy court to settle the suit upon payment of \$15,000 by those defendants, which will be used to pay creditors of appellant's bankruptcy estate. Appellant contends that the settlement amount is insufficient. As approval of the settlement was not an abuse of discretion, we affirm.

I. BACKGROUND

Appellant Manier Isho ("Debtor") purchased two Sinclair gas station/convenience stores in Salt Lake City in 2008. In June of 2011, he filed a state court lawsuit against several parties who had been involved in the sale, asserting that they had defrauded him. The complaint principally alleged that the defendants misrepresented both the property values and their earnings in order to induce his purchase.

Less than a month later, on July 13, 2011, Debtor filed a voluntary Chapter 11 petition. He amended his schedules twice, ultimately claiming assets of \$444,600,² and liabilities in the amount of \$1,547,845. Three months later, the bankruptcy court held a status conference and indicated by minute entry that Debtor's Chapter 11 case was at risk of either dismissal or conversion to Chapter 7 unless he filed required monthly operating reports for his two stores. Although Debtor did not file the reports, the bankruptcy court neither dismissed nor converted his case *sua sponte*. However shortly thereafter, in November, 2011, one of the state court defendants, Lewis Hanson & Co., Inc., filed a motion to convert the Debtor's case to Chapter 7. Debtor opposed this motion. After a

¹ 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 is therefore ordered submitted without oral argument.

² See Appellee's Brief at 5, and 6 n.2 (explaining calculation of this figure, which takes Debtor's ownership of properties by joint tenancy and as community property into account). This asset figure does not include the fraud claims, which Debtor claims to be worth between \$500,000 and \$1,000,000.

hearing, the bankruptcy court granted that motion to convert in December 2011. Debtor did not appeal that conversion order, and Appellee Loveridge (“the Trustee”) was appointed as the Chapter 7 trustee of Debtor’s estate.

After investigating Debtor’s state court fraud claims, the Trustee concluded that settlement of the lawsuit was in the best interests of the estate. She negotiated a settlement agreement (the “Settlement Agreement”) with the fraud defendants, which required those defendants to pay the estate \$15,000. In return, the estate would dismiss the lawsuit, with prejudice.

In September 2012, the Trustee filed a motion seeking the bankruptcy court’s approval of the Settlement Agreement (in which the other parties to the Settlement Agreement ultimately joined). Debtor opposed the motion, principally on the ground that Trustee had vastly undervalued the claims. A few days later, Debtor filed a motion to dismiss the bankruptcy, asserting that he: 1) wanted to pay “all meritorious creditors outside of bankruptcy;” 2) preferred to dismiss rather than pursue a Chapter 7 discharge; and 3) wanted to pursue his “meritorious” pending civil case, which he claimed had a potential value of over \$1,000,000.³

On October 10, 2012, the bankruptcy court conducted a hearing on both the Trustee’s settlement motion and Debtor’s motion to dismiss, at which a proffer of evidence was received and Debtor apparently withdrew his motion to dismiss.⁴ The bankruptcy court granted the settlement motion by order entered on October

³ See Motion to Dismiss Chapter 7 Bankruptcy, *in* Appellant’s Appendix (“Appx”) at 28.

⁴ Debtor appeared pro se at this hearing, his previous counsel having been allowed to withdraw in January 2012. Regarding the motion to dismiss, the court’s minute entry states only “Motion withdrawn.” On appeal, Debtor asserts that the bankruptcy court’s approval of the settlement agreement prior to consideration of his motion to dismiss left him with no choice but to withdraw the motion since the settlement eliminated his only asset. This, he claims, deprived him of due process. See Notice of Appeal and Appeal at 3, *in* Appx at 62.

23, 2012, and Debtor filed a timely notice of appeal. No party has elected to have the district court hear the appeal.

II. ISSUES

Debtor states the issues on appeal as whether: 1) his Chapter 11 case should have been dismissed rather than converted; 2) conversion was proper over his objection; 3) he should have been allowed to proceed with the fraud case “instead of allowing the perpetrators of fraud to convert the matter to an involuntary Chapter 7”; and 4) approval of the settlement was proper when Debtor had both objected to it and filed a motion to dismiss the case.⁵

III. DISCUSSION

A. The Conversion Order

The parties did not raise the issue of this Court’s appellate jurisdiction to consider Debtor’s challenges to the December 9, 2011 conversion order. Nonetheless, an appellate court has an independent duty to ensure that it has jurisdiction over an appeal, even if the parties fail to raise the issue.⁶ It is well-established that orders converting a Chapter 11 case to Chapter 7 are final for purposes of appeal.⁷ As such, the proper time for Debtor to appeal the bankruptcy court’s conversion order was in 2011. Because Debtor failed to timely file an appeal of that conversion order, this Court is precluded from now considering the

⁵ See Designation of Issues on Appeal *in* Appx at 64-65. Debtor restates essentially the same issues in his appeal brief. See Appellant’s Opening Brief at 3.

⁶ *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1499 (10th Cir. 1994); *Ries v. Sukut (In re Sukut)*, 380 B.R. 577, 582 (10th Cir. BAP 2007).

⁷ See, e.g., *Mason v. Young (In re Young)*, 237 F.3d 1168, 1173 (10th Cir. 2001) (order converting from Chapter 13 to Chapter 7 is “necessarily more final in nature than an order converting to Chapter 13” from Chapter 7); *In re Vista Foods U.S.A., Inc.*, 202 B.R. 499, 500 (10th Cir. BAP 1996) (order converting Chapter 11 case to Chapter 7 is final and appealable).

propriety of that order.⁸

B. Debtor's Motion to Dismiss

Debtor contends that the only reason he withdrew his motion to dismiss in the bankruptcy court was because the court's decision to approve the settlement of his fraud lawsuit deprived him of his only potential source of income with which to pay his creditors. Based on this premise, Debtor asserts that the bankruptcy court's timing of its consideration of the two motions deprived him of due process. However, because Debtor withdrew the motion, this Court is left without a decision to review.

Significantly, the appellate record is devoid of any indication that Debtor raised his timing concerns to the bankruptcy court, which might have handled the hearing differently if he had. The record does show that the Trustee filed her notice of hearing on September 17, 2012, setting the motion to approve the settlement for hearing on October 10, 2012. Two weeks later, Debtor filed his motion to dismiss; he then filed a notice setting his motion for hearing on the same date and time. At no time prior to the October 10 hearing did Debtor, by motion or objection, raise any issue regarding timing of the court's consideration of the two motions. If he did so at the hearing itself, we do not have a record of it because Debtor did not provide a transcript of the hearing as part of the appellate record. Debtor also did not raise the timing issue after the hearing, although the order approving the settlement was not entered for nearly two weeks, which gave Debtor adequate time to assert it. His failure to do so constitutes a waiver of the issue on appeal.⁹

⁸ *In re K.D. Co., Inc.*, 254 B.R. 480, 490 (10th Cir. BAP 2000) (final orders may only be attacked by filing a timely appeal). *See also*, 28 U.S.C. § 158(a)(1) (appellate courts have jurisdiction over "final" judgments and orders issued by bankruptcy judges).

⁹ *Farmers Ins. Co., Inc. v. Hubbard*, 869 F.2d 565, 570 (10th Cir. 1989)
(continued...)

In any event, this Court could not reverse a denial of Debtor's motion to dismiss, even if it had preceded consideration of Trustee's motion. It is well-established that a Chapter 7 debtor does not have a right to dismiss his case, but must show "cause" for dismissal pursuant to 11 U.S.C. § 707(a), and the determination of cause is within the discretion of the bankruptcy court.¹⁰ Dismissal factors that are often considered are: the best interests of both debtor and creditors; trustee's consent or objection; potential to delay creditor payments; good or bad faith in seeking dismissal; and the possibility of payment priority becoming reordered outside of bankruptcy.¹¹ Emphasis is typically given to any prejudice that dismissal might cause the estate's creditors.¹² Finally, a debtor's ability to pay debts outside of bankruptcy is not sufficient cause, by itself, to dismiss.¹³

Debtor admitted that he could only afford to pay his creditors outside of bankruptcy if he were to prevail in the fraud lawsuit and recover damages in excess of the costs of pursuing the action. But the Trustee alleged, in seeking approval of the settlement, that the fraud litigation would be costly to pursue, the outcome was far from certain, and resolution of the lawsuit could take several years, while creditors remained unpaid. Significantly, Debtor has not indicated how he would finance the lawsuit, despite Trustee's assertion that the bankruptcy estate has insufficient assets with which to fund the lawsuit. Under these

⁹ (...continued)
(absent extraordinary circumstances, issues not raised below will not be heard on appeal).

¹⁰ See, e.g., *In re Schafroth*, No. 7-11-13685, 2012 WL 1884895, at *2 (Bankr. D.N.M. May 23, 2012); *In re Turpen*, 244 B.R. 431, 433 (8th Cir. BAP 2000).

¹¹ *Schafroth*, 2012 WL 1884895, at *2 n.8.

¹² *Id.* at *2 n.10.

¹³ *Turpen*, 244 B.R. at 434.

circumstances, denial of a debtor's motion to dismiss would not constitute an abuse of discretion.¹⁴

C. Approval of the Settlement Agreement

We likewise review a bankruptcy court's decision to approve or disapprove a proposed settlement for abuse of discretion.¹⁵ On appeal, Debtor argues only that the settlement should not have been approved because the claims asserted in the lawsuit are meritorious, and the settlement amount is too low in light of the amount of his damages. The factors that bankruptcy courts must consider with respect to proposed settlements, often called the "*Kopexa* factors" after the Tenth Circuit Bankruptcy Appellate decision in *In re Kopexa Realty Venture Co.*,¹⁶ are "the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views."¹⁷ Debtor addresses only one of these factors, asserting that his claims are meritorious and that his potential recovery in the lawsuit is between \$500,000 and \$1 million, which could be used to pay his creditors in full.¹⁸

In discussing the *Kopexa* factors in her motion, the Trustee partially conceded Debtor's contention about the merits of the fraud suit, stating that some

¹⁴ *Id.* at 433 (decision on motion to voluntarily dismiss is within the discretion of the bankruptcy judge).

¹⁵ *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997) (approval of settlement reversible only when it amounts to clear abuse of discretion).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Appellant's Opening Brief at 4 and 6. In his motion to dismiss the Chapter 7 bankruptcy, Debtor asserted that the lawsuit had "a potential value of over \$1,000,000," which he would use to pay "all meritorious creditors outside of bankruptcy." See Appx. at 28. Debtor's complaint in the fraud case did not state monetary values for his alleged damages, seeking only "unspecified damages" on each count. See Verified Complaint at 31-32, *in* Appellee's Appendix at 34-35.

of the claims asserted in the fraud case “are founded in law and fact.” Despite that admission, the Trustee concluded that the first *Kopexa* factor—probable success in the litigation—weighed in favor of settlement based on Debtor’s poor record-keeping and unwillingness to cooperate, both of which made it unlikely that his claims could ultimately be proven. She also noted that the defendants in the fraud case had asserted counterclaims and offsets in the lawsuit, which could also be meritorious.¹⁹

Regarding the difficulty of collection factor, the Trustee asserted that “the costs of collecting the judgment may be greater than the amount the Trustee might reasonably be able to collect.”²⁰ While no factual foundation for this statement was stated in her motion, from the record before us, it does not appear that Debtor disputed this. The Trustee also considered that the fraud case would be complex and costly to pursue, requiring the use of experts who the estate had no funds to pay. Finally, the Trustee considered that settlement would be in the best interests of creditors because it would provide immediate funds to reduce the estate’s outstanding unsecured claims.²¹ Rather than respond to the Trustee’s analysis of the *Kopexa* factors in any meaningful way, Debtor simply insisted that the fraud case had merit and that an award of damages on his claims would far exceed the proposed settlement amount.

It is an appellant’s burden to establish error on appeal and to provide the appellate court with an adequate record for review.²² As part of that duty, both

¹⁹ See Chapter 7 Trustee’s Motion to Approve Settlement at 3, *in Appx.* at 34. See also Appellee’s Brief at 20-22.

²⁰ Chapter 7 Trustee’s Motion to Approve Settlement at 4, *in Appx.* at 35.

²¹ It is also significant that the bankruptcy court docket reflects that no creditor objected to the proposed settlement.

²² *In re Nordin*, CO-12-041, 2013 WL 936370, at *5 (10th Cir. BAP Mar. 12, 2013) (it is appellant’s burden to establish error); *McEwen v. City of Norman*, 926 (continued...)

the Federal Rules of Bankruptcy Procedure and the Local Rules of this Court require that the appellate record include all transcripts necessary for the appellate court's review.²³ Debtor's failure to provide a transcript of the hearing in the bankruptcy court, at which the Trustee made her proffer, and at which the court stated its findings and conclusions, makes it impossible for this Court to conduct a meaningful review of the bankruptcy court's decision. As a result, we are required to summarily affirm the decision.²⁴

IV. CONCLUSION

For the foregoing reasons, the bankruptcy court's order approving the settlement proposed by the Trustee is AFFIRMED.²⁵ Debtor's challenges to the bankruptcy court's December 9, 2011, conversion order are DISMISSED. The arguments regarding Debtor's motion to dismiss were waived by Debtor's withdrawal of the motion and, in any event, denial of the motion would not have been an abuse of discretion.

²² (...continued)
F.2d 1539, 1550 (10th Cir. 1991) (appellant has duty to supply adequate record for review).

²³ Fed. R. Bankr. P. 8009(b)(9); 10th Cir. BAP L.R. 8009-3(f). The Federal Rules of Appellate Procedure require the same. Fed. R. App. P. 10(b)(2).

²⁴ See, e.g., *McEwen*, 926 F.2d at 1550; *In re Castro*, CO-11-040, 2012 WL 611437, at *2 (10th Cir. BAP Feb. 27, 2012), *aff'd*, No. 12-1087, 2012 WL 5935957 (10th Cir. Nov. 28, 2012); *In re Kleinhans*, CO-09-028, 2010 WL 1050583, at *3 (10th Cir. BAP Mar. 23, 2010).

²⁵ The Trustee raised as an issue that this appeal may be equitably moot because the parties' settlement agreement has been fully consummated, including the dismissal with prejudice of the underlying fraud lawsuit. Because resolution of that issue is not necessary to this decision, we do not address it herein.