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First Circuit

Aja v. Fitzgerald, 2011 Bankr. Lexis 138 (BAP 1st Cir. 1/19/11)(Before Judges Votolato, Lamoutte and Tester, Opinion by Bankruptcy Judge Votolato).

Appeal dismissed as moot. Appellant filed a Chapter 11 case, which the US Trustee successfully moved to convert to Chapter 7 (on grounds the debtor did not have liability insurance on her property), which conversion hearing the debtor did not appear claiming no notice. The debtor requested reconsideration, which the Bankruptcy Court denied. The debtor unsuccessfully appealed: Although debtor appealed the denial of reconsideration, it did not appeal the conversion order nor seek a stay pending appeal; and, at the time the appeal was heard the Chapter 7 case had been substantially completed. Substantively, the record did not support the debtor's position, with the BAP admonishing the *pro se* debtor to avoid sanctions by not continuing meritless litigation. *Companion case of* ***Aja v. Emigrant Bank, 2011 Bankr. Lexis 131 (BAP 1st Cir. 1/19/11)(Before Judges Votolato, Lamoutte and Tester, Opinion by Bankruptcy Judge Votolato)****(Court also dismissed debtor's challenge to stay relief orders, as only the Chapter 7 trustee, and not the debtor, had standing to take any appeal).*

Frati v. Gennaco, 2011 U.S. Dist. Lexis 6563 (D. Mass. 1/25/11)(Patti B. Saris, District Judge).

District Court affirmed Bankruptcy Court's dismissal of plaintiff's non-dischargeability complaint against the debtor as untimely under Fed. R. Bankr. P 4004(a). Case converted from Chapter 11 to 7; notices in the Chapter 7 case set forth the date to file non-dischargeability complaints which notice plaintiff's counsel did receive. The Chapter 7 Trustee had continued for a second time the 341(a) meeting, awaiting documents from the debtor. At that meeting, the Trustee advised creditors he would be filing a motion to extent the discharge deadline, and the creditors in question relied on that. However, the Trustee moved pursuant to 4004(b) to cover the Trustee and did not reference 4004(a) to cover other creditors. Where a motion is unambiguous, it applies only to the moving party. Although the Supreme Court has held that Rule 4004(a) is not jurisdictional, it is strictly construed (but the Circuits are split as to whether the Rule allows equitable exceptions).

Massillion v. Riley, 2011 Bankr. Lexis 83 (BAP 1st Cir. 1/11/11)(Before Judges Votolato, Lamoutte and Tester, Opinion by Bankruptcy Judge Lamoutte).

BAP reversed and remanded to be consistent with the legal position that (1)The corpus of a valid testamentary spendthrift trust is excluded as property of the bankruptcy estate, (2) The distributions from the trust to the debtor received by the debtor in the first 180 days of the bankruptcy case are property of the estate per 11 U.S.C. §541(a)(5)(A); and, (3) Distributions received *after* 180 days from date of petition filing are not property of the estate.

Banco Popular v. Torres (In re Torres), 2011 Bankr. Lexis 130 (BAP 1st Cir. 1/19/11)[not for publication](Before Judges Kornreich, Hillman and Bailey, Opinion by Bankruptcy Judge Bailey).

BAP vacated and remanded Bankruptcy Court's finding that a portion of the secured creditor's claim be disallowed, as it was based on grounds not articulated in the debtor's objection such that the creditor had no opportunity to be heard on the basis for disallowance. The argument centered upon the debtor's objection to paying the lender's costs and fees to file a POC on a mortgage that was current pre and post-petition.

In re Seger, Chapter 13 Debtors Case 10-42776-MSH, (Bankr. D. Mass. 1/24/11)(Melvin S. Hoffman Bankruptcy Judge)[unreported].

Court denied Chapter 13 Trustee's motion to dismiss debtor's case for "non-compliance". Debtors maintained funds from their business, a dance school, in an FDIC insured account, which was not on the Trustee's approved list of financial institutions. Court found there is no obligation for the debtor to maintain their operating accounts exclusively in US Trustee approved depositories. Here, the debtor wanted a bank closer to home with banking fees lower than the Trustee approved institution. 11 U.S.C. §345 does not apply to Chapter 13 debtors, even though applicable to Chapter 7 trustees and Chapter 11 trustees or DIP's.

Submitted by:

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DORA L. AJA, Debtor. DORA L. AJA, Appellant, v. JOHN P. FITZGERALD, III, Acting United States Trustee, Appellee

BAP NO. MB 10-010

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 138

January 19, 2011, Decided

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. **Bankruptcy** Case No. 09-21872-JNF. (Hon. Joan N. Feeney, U.S. **Bankruptcy** Judge).
Aja v. Emigrant Funding Corp. (In re Aja), 2011 Bankr. LEXIS 131 (B.A.P. 1st Cir., Jan. 19, 2011)

CASE SUMMARY
PROCEDURAL POSTURE: Appellant debtor filed a petition under Chapter 11 of the **Bankruptcy** Code, and appellee Acting United States Trustee ("UST") filed a motion to convert the debtor's case to one under Chapter 7 of the **Bankruptcy** Code. The United States **Bankruptcy** Court for the District of Massachusetts granted the UST's motion and denied the debtor's motion for reconsideration, and the debtor appealed.

OVERVIEW: The debtor declared Chapter 11 **bankruptcy** in December 2009, and the UST moved to convert the case to one under Chapter 7. Although the court scheduled a hearing for February 17, 2010, it issued an order, sua sponte, that moved the hearing to January 21, 2010, and the UST notified the debtor by telephone that the hearing date was moved. The debtor failed to attend the hearing and the court ordered her case converted to one under Chapter 7. The day after the hearing, the debtor moved for reconsideration of the conversion order, on the ground that she had not received notice of the hearing. The court held a hearing on the debtor's motion for reconsideration and denied the motion, and the debtor appealed. The **bankruptcy** appellate panel dismissed the debtor's appeal. Because the debtor appealed the **bankruptcy** court's order denying her motion for reconsideration but did not appeal the conversion order and did not obtain a stay pending appeal, the liquidation of her Chapter 7 **bankruptcy** estate had progressed to the point where nothing was left to be administered. In addition, there was nothing in the record to support a ruling that the debtor could prevail on the merits of her appeal.

OUTCOME: The **bankruptcy** appellate panel dismissed the debtor's appeal and stated that it would consider imposition of sanctions if the debtor instituted further meritless litigation.

CORE TERMS: notice, reconsideration, conversion, reorganization, discovered evidence, movant, newly, lender, rental properties, extraordinary circumstances, convert, moot, notice of appeal, notice period, stay pending appeal, failure to maintain, estate property, final report, improper factor, excusable neglect, property insurance, hearing date, denying reconsideration, failed to comply, secured creditor, judicial notice, interlocutory orders, appealable orders, real estate, liability insurance

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

Evidence > Judicial Notice > Adjudicative Facts > Proceedings in Other Courts

HN1 The United States **Bankruptcy** Appellate Panel for the First Circuit may take judicial notice of the proceedings in a **bankruptcy** court. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

Civil Procedure > Judgments > Relief From Judgment > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN2 The United States **Bankruptcy** Appellate Panel for the First Circuit has jurisdiction to hear appeals from (1) final judgments, orders, and decrees, or (2) with leave of a **bankruptcy** court, from certain interlocutory orders. 28 U.S.C.S. § 158(a). 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, whereas an interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. Generally, orders denying reconsideration are final, appealable orders, and orders denying motions under Fed. R. Civ. P. 60(b) are final orders and are appealable as such. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN3 The United States **Bankruptcy** Appellate Panel for the First Circuit's review of a **bankruptcy** court's denial of a motion for relief from judgment is based on an abuse of discretion standard. Judicial discretion is necessarily broad, but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the court makes a serious mistake in weighing them. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence

HN4 Fed. R. Civ. P. 59, which is applicable in **bankruptcy** proceedings, requires that a motion to alter or amend a judgment be brought within 14 days, and a motion seeking reconsideration of a **bankruptcy** court's order converting the debtor's case to one under another chapter of the **Bankruptcy** Code that is filed more than 14 days after the order is entered must be treated as one brought under Fed. R. Civ. P. 60(b). Rule 60(b) provides that a party may seek relief from judgment for mistake, inadvertence, surprise, or excusable neglect, Fed. R. Civ. P. 60(b)(1), newly discovered evidence that, with reasonable diligence, could not have been discovered, Fed. R. Civ. P. 60(b)(2), or any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b)(6). Motions brought under Rule 60(b)(1) and (2) must be filed within one year of entry of the judgment from which relief is sought; those brought under Rule 60(b)(6) must be filed "within a reasonable time." Fed. R. Civ. P. 60(b)(1) and (6). More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > Excusable Neglect

HN5 In determining whether excusable neglect exists, courts consider all relevant circumstances, including the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. The most important factor in this test is the reason for the delay, which requires a statement of the reasons and a satisfactory explanation for the delay. The United States Court of Appeals for the First Circuit has repeatedly upheld findings of "no excusable neglect" in the absence of unique or extraordinary circumstances. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN6 Relief under Fed. R. Civ. P. 60(b) should not be denied for failure to designate the proper subsection of Rule 60(b). More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence

HN7 If a motion is deemed to have been brought under Fed. R. Civ. P. 60(b)(2), the United States Court of Appeals for the First Circuit has explained that the movant must, at the very least, offer a convincing explanation as to why he could not have proffered the crucial evidence at an earlier stage of the proceedings. Relief under Fed. R. Civ. P. 60(b)(6) is likewise reserved for "extraordinary circumstances" that justify "extraordinary" relief. Courts generally find extraordinary circumstances warranting relief under Rule 60(b)(6) only where the movant was not at fault in his predicament and was unable to take steps to prevent the judgment from which relief is sought. More Like This Headnote

Bankruptcy Law > Case Administration > Notice

Bankruptcy Law > Conversion & Dismissal > Reorganizations

HN8 Pursuant to 11 U.S.C.S. § 1112(b), a **bankruptcy** court may convert a Chapter 11 **bankruptcy** case after notice and a hearing. Pursuant to 11 U.S.C.S. § 102(1), "after notice and a hearing" means notice that is appropriate under the circumstances. Fed. R. Bankr. P. 2002(a)(4) provides that a clerk, or some other person as the court may direct, shall give a debtor at least 21 days' notice by mail of a hearing on a motion to convert. Fed. R. Bankr. P. 9006(c)(1) provides that the court, for cause shown, may reduce the notice period with or without a motion or notice. It is well settled that **bankruptcy** courts may reduce, extend, or otherwise amend or alter notice periods. More Like This Headnote

Bankruptcy Law > Conversion & Dismissal > Reorganizations

HN9 11 U.S.C.S. § 1112(b)(4)(C) requires Chapter 11 debtors to maintain property and liability insurance to protect estate property, and a Chapter 11 **bankruptcy** case should be dismissed or converted if the debtor's failure to maintain appropriate insurance poses a risk to the estate or to the public. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence

HN10 Newly discovered evidence must be of such a nature that it would likely change the result if a new trial is granted. More Like This Headnote

COUNSEL: Dora L. Aja, Pro se, on brief for Appellant.

Eric K. Bradford, Esq., on brief for Appellee.

JUDGES: Before Votolato, Lamoutte, and Tester, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Votolato

OPINION

Votolato, U.S. Bankruptcy Appellate Panel Judge

Dora L. Aja (the "Debtor") appeals from a ruling of the **bankruptcy** court denying her request for reconsideration of an order converting her case. For the reasons discussed below, the appeal is **DISMISSED**.

BACKGROUND

The Debtor filed for relief under chapter 11 in December 2009. In January 2010, the United States Trustee (the "U.S. Trustee") moved to convert the case to chapter 7 (the "Conversion Motion") on the grounds that the Debtor did not have required property insurance, and because she failed to open a debtor-in-possession account. The **bankruptcy** court initially set the Conversion Motion hearing for February 2010, but then, *sua sponte*, rescheduled the hearing for January 21, 2010. [1]

FOOTNOTES

1 The Trustee filed the Conversion Motion on January 6, 2010. On January 8, 2010, the **bankruptcy** court scheduled the **[*2]** hearing for February 17, 2010. On January 19, 2010, the **bankruptcy** court issued an order advancing the hearing date to January 21, 2010, based upon averments that there was no property insurance.

At the hearing on the Conversion Motion, the U.S. Trustee informed the **bankruptcy** judge that she notified the Debtor of the rescheduled hearing via telephone immediately after receiving the court's notice of the hearing date change. The court stated that it also had contacted the Debtor regarding the hearing date change. The Debtor did not appear at the hearing. The **bankruptcy** judge granted the Conversion Motion noting that the Debtor was using cash collateral without authority, had not provided evidence that required insurance was in place, and that there was no likelihood of rehabilitation, particularly given her mathematically incorrect operating report (the "Conversion Order").

The day after the hearing, the Debtor moved for reconsideration of the Conversion Order, on the ground that she had not received notice of the hearing. That same day, the **bankruptcy** judge denied the motion, saying that the Debtor had received timely telephonic notice of the hearing from the court, and failed to provide **[*3]** a credible reason for not appearing.

In February 2010, the **bankruptcy** court held a hearing on two motions for relief from stay, [2] and at the end of the hearing, the Debtor made an oral motion to "reconvert" her case. The **bankruptcy** court issued a bench order denying the motion, but did not formalize its decision in a written order. The Debtor filed a notice of appeal and a motion for reconsideration of the Conversion Order (the "Reconsideration Motion").

FOOTNOTES

2 The Debtor's secured lender, Emigrant Funding Corporation, filed motions for relief from stay on two rental properties owned by the Debtor. The **bankruptcy** court granted one motion that day and continued the hearing on the second motion.

In the Reconsideration Motion, the Debtor argued: (1) that the **bankruptcy** judge had "made a factual error" because she did not receive adequate notice of the amended hearing date on the Conversion Motion; (2) that the **bankruptcy** court erred as a matter of law regarding the Debtor's failure to maintain property insurance because, had the **bankruptcy** court allowed her to use cash collateral, she would have been able to provide the insurance; (3) that the **bankruptcy** court erred in not resolving doubts in **[*4]** her favor, particularly as she "could increase her earnings"; and (4) that she had newly discovered evidence. That evidence, she explained, was that her reorganization prospects were brighter because she had greater monthly income after her lender received relief from stay on one of her properties.

In March 2010, at the hearing on the Reconsideration Motion and on the continued motion for relief from stay, the Debtor submitted income projections for herself and her rental properties, and there was a colloquy between the Debtor and the court regarding the secured claimholders and the means by which the Debtor could successfully reorganize. The **bankruptcy** court then requested input from the U.S. Trustee, the secured lender, and the chapter 7 trustee.

The U.S. Trustee reported that although the Debtor had satisfied the grounds upon which the U.S. Trustee had sought conversion, she did not believe that the Debtor was likely to present a successful plan of reorganization. The secured lender indicated that if the case were converted back to chapter 11, it would be a single asset case with property that was undersecured. The chapter 7 trustee reported that the Debtor did not attend the first **[*5]** meeting of creditors and failed to turn over post-conversion rental income.

The **bankruptcy** court ruled that based upon the Debtor's failure to comply with her duty to attend the Section 341 meeting, and to turn over estate property to the chapter 7 trustee, the court would not "reconvert" the case. In its "Reconsideration Order" dated March 19, 2010, the **bankruptcy** court held that the Debtor failed to demonstrate any error of fact or law, or newly discovered evidence, and rejected the Debtor's assertion that she did not have notice of the hearing. The court also ruled that "re-conversion" would be futile because of the Debtor's inability to file a feasible plan, and because the Debtor failed to comply with her duties as a chapter 7 debtor. [3] The Debtor filed a timely notice of appeal.

FOOTNOTES

3 The **bankruptcy** court also issued a proceeding memorandum denying the Debtor a stay pending appeal with respect to the Debtor's request for reconsideration. The Debtor has not sought a stay pending appeal from the Panel.

On April 5, 2010, the Panel issued an order construing the Debtor's notice of appeal to refer to the Reconsideration Order ("Panel Order"). The Debtor has not appealed the Conversion Order. **[*6]** [4]

FOOTNOTES

4 The docket in the chapter 7 case reflects that since this appeal was filed, the trustee filed her final report, stating that the estate is administratively insolvent. See "Trustee's Final Report and Account . . .", Docket No. 192; and "Notice of Intent to Abandon . . .", Docket No. 183. HN1 "The Panel may take judicial notice of the proceedings in the **bankruptcy** court." Hamilton v. Appolon (In re Hamilton), 399 B.R. 717, 719 n.1 (B.A.P. 1st Cir.

2009) (citing Maher v. Hyde, 272 F.3d 83, 86 n.3 (1st Cir. 2001); Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir.1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.")).

JURISDICTION

HN2 The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). 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," id. at 646 (citations omitted), whereas **[*7]** an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re Am. Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). Generally, orders denying reconsideration are final appealable orders. See, e.g., Balzotti v. RAD Invest., LLC (In re Shepherds Hill Dev. Co., LLC), 316 B.R. 406, 416 (B.A.P. 1st Cir. 2004), (and "an order denying relief from judgment under Rule 60(b) is generally considered a final appealable order."); see also Federal Deposit Ins. Corp. v. Ramirez-Rivera, 869 F.2d 624, 626 (1st Cir. 1989), and "orders denying Rule 60(b) motions are final orders and are appealable as such."

STANDARD OF REVIEW

HN3 The Panel's review of a **bankruptcy** court's denial of a motion for relief from judgment is based on an abuse of discretion standard. In re Shepherds Hill, 316 B.R. at 413. "Judicial discretion is necessarily broad - but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court **[*8]** makes a serious mistake in weighing them." Perry v. Warner (In re Warner), 247 B.R. 24, 25 (B.A.P. 1st Cir. 2000) (quoting Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir.1988)).

DISCUSSION

HN4 Fed. R. Civ. P. 59, which is applicable in **bankruptcy** proceedings, requires that a motion to alter or amend a judgment be brought within 14 days. As the Debtor filed the Reconsideration Motion more than 14 days after the Conversion Order entered, the motion must be treated as one brought under Fed. R. Civ. P. 60(b). That rule provides that a party may seek relief from judgment for "mistake, inadvertence, surprise, or excusable neglect," Fed. R. Civ. P. 60(b)(1), "newly discovered evidence that, with reasonable diligence, could not have been discovered . . . ," Fed. R. Civ. P. 60(b)(2), or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Motions brought under Rule 60(b)(1) and (2) must be filed within one year of entry of the judgment from which relief is sought; those brought under Rule 60(b)(6) must be filed "within a reasonable time." Fed. R. Civ. P. 60(b)(1), (6). Under any of these subsections, **[*9]** the Reconsideration Motion was timely filed.

In this circuit, such motions are granted only under exceptional circumstances. See Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002) ("Relief under Rule 60(b) is extraordinary in nature and [ ] motions invoking that rule should be granted sparingly."); Davila-Alvarez v. Escuela de Medicina Universidad Central del Caribe, 257 F.3d 58, 63-64 (1st Cir. 2001) ("Although many courts have indicated that Rule 60(b) motions should be granted liberally, this Circuit has taken a harsher tack."). The Debtor never clearly articulated the subsection under which she sought relief. [5] Treating the motion as one brought under Fed. R. Civ. P. 60(b)(1), the Panel has explained:

HN5 In determining whether excusable neglect exists, courts consider all relevant circumstances, including: "the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

The most important factor in this test is the reason **[*10]** for the delay which requires a statement of the reasons and a satisfactory explanation for the delay. Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc., 270 F.3d 1, 6 (1st Cir. 2001); EnvisioNet Computer Servs., Inc. v. ECS Funding LLC, 288 B.R. 163, 166 (D. Me. 2002). The First Circuit has repeatedly upheld findings of "no excusable neglect" in the absence of unique or extraordinary circumstances. Id.
Roman v. Carrion (In re Rodriguez Gonzalez), 396 B.R. 790, 802 (B.A.P. 1st Cir. 2008).

FOOTNOTES

5 HN6 Relief should not be denied for failure to designate the proper subsection of Fed. R. Civ. P. 60(b). Fisher v. Kadant, Inc., 589 F.3d 505, 513 (1st Cir. 2009).

HN7 If the motion were deemed brought under Fed. R. Civ. P. 60(b)(2), the First Circuit has explained that the movant must, "at the very least, offer a convincing explanation as to why he could not have proffered the crucial evidence at an earlier stage of the proceedings." Karak, 288 F.3d at 20.

Relief under Rule 60(b)(6) is likewise reserved for "extraordinary circumstances" that justify "extraordinary" relief. See Valley Citizens for a Safe Environment v. Aldridge, 969 F.2d 1315, 1317 (1st Cir. 1992). "Courts generally find **[*11]** extraordinary circumstances warranting relief under Rule 60(b)(6) only where the movant was not at fault in his predicament, and was unable to take steps to prevent the judgment from which relief is sought. See 12 James Wm. Moore, Moore's Federal Practice § 60.48 [3][c] (3d ed. 2005) ("Fault by movant usually means [a] lack of extraordinary circumstances")." In re Rodriguez Gonzalez, 396 B.R. at 803.

In her written submissions, the Debtor argues that the **bankruptcy** court erred in converting her case because she should have received notices *via mail*, that the **bankruptcy** judge ruled on the matter prematurely, and that the judge was biased. The Debtor also argues that the **bankruptcy** judge erred because she did not consider the Debtor's objection to the motions for relief from stay, and that the secured lender had not produced an accounting. The Debtor does not address in what way the **bankruptcy** court erred in denying reconsideration.

The U.S. Trustee argues: (1) that this appeal is confined to the Reconsideration Order; (2) it does not include the Conversion Order; (3) that the standard for overturning an order on reconsideration is so high in this circuit; and (4) because the circumstances **[*12]** in this case do not demonstrate any abuse of discretion, there was no error. We agree. For example, the U.S. Trustee explains that the telephonic notice the Debtor received was adequate in the circumstances, given that estate property was uninsured. In support, he cited In re Abijoe Realty Corp., 943 F.2d 121, 127 (1st Cir. 1991). As for the Debtor's contention that the **bankruptcy** court erred in its finding regarding her prospects of reorganization, the U.S. Trustee correctly points out that the **bankruptcy** court gave the Debtor ample opportunity to address the merits of that issue, and found that they were not sufficient. The U.S. Trustee also properly points out that the Debtor's arguments regarding relief from stay and bias are waived, as they were not raised below.

Finally, the U.S. Trustee argues that the Panel should dismiss the appeal as moot. The secured creditor has sold one of the two estate rental properties and has obtained relief from stay to foreclose on the second property. The chapter 7 trustee has abandoned his interest in the Debtor's residence and filed a final report indicating that the estate is administratively insolvent. [6] As a result, even assuming arguendo that **[*13]** it were appropriate to do so, the Panel is unable to provide any effective relief at this stage of the proceedings.

FOOTNOTES

6 The U.S. Trustee added to his appendix documents relating to the progress of the Debtor's chapter 7 case. Those documents were not included in his designation of record and has moved to supplement the record on appeal to include them. The motion to supplement is denied as moot, as the Panel has taken judicial notice of the chapter 7 docket, and those entries adequately reflect the travel of the chapter 7 case.

Notwithstanding her multiple arguments and the real time posture of the chapter 7 case, i.e, that it has been fully administered, this appeal is rife with serious obstacles, and very little, if any merit. Nevertheless, the Panel will address the arguments, seriatim.

In her reply brief, the Debtor asserts that this appeal is not primarily about the Reconsideration Order, but rather addresses the notice that she received regarding the hearing on the Conversion Motion. Because the Debtor chose to concentrate on this specious argument, [7] and failed to address the issues raised in her pleadings, but not presented in this appeal, the Panel considers them waived. U.S. v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

FOOTNOTES

7 This **[*14]** argument is subsumed and disposed of by the Panel Order.

A second fatal defect in this appeal is the present status of the chapter 7 case, i.e., if the Panel were to reverse the **bankruptcy** judge, that action cannot undo what has transpired in the chapter 7 case. Because the Debtor did not appeal the Conversion Order and did not obtain a stay pending appeal, the liquidation of the estate has progressed (in the normal course) to the point where nothing is left to be administered. The secured creditor has received relief from stay on two of the Debtor's rental properties and they are no longer part of this estate. The chapter 7 trustee has abandoned his interest in the remaining real estate. Therefore, even if the Panel were to rule that the **bankruptcy** judge abused her discretion in denying reconsideration (and we do not), no effective relief can be granted at this late stage of the proceeding. See, e.g., Sasso v. Boyajian (In re Sasso), 409 B.R. 251 (B.A.P. 1st Cir. 2009). Accordingly, this appeal should be dismissed as moot. Id.

Even if the foregoing impediments were not present, there is nothing in the record to support a ruling that the Debtor should prevail on the merits of her appeal. **[*15]** With respect to the Reconsideration Motion, the Debtor's only point is the sufficiency of the hearing notice. HN8 Pursuant to 11 U.S.C. § 1112(b), a **bankruptcy** court may convert a case after notice and a hearing. Pursuant to 11 U.S.C. § 102(1), "after notice and a hearing" means notice that is appropriate under the circumstances. Fed. R. Bankr. P. 2002(a)(4) provides that "the clerks, or some other person as the court may direct, shall give the debtor, . . . at least 21 days' notice of mail" of a hearing on a motion to convert. Fed. R. Bankr. P. 9006(c)(1) provides that the court, for cause shown, may reduce the notice period with or without a motion or notice. It is well settled that **bankruptcy** courts may reduce, extend, or otherwise amend or alter notice periods. Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 775 (9th Cir. 2008); Sunflower Racing Inc. v. Mid-Continent Racing & Gaming Co. (In re Sunflower Racing, Inc.), 226 B.R. 665, 671 (D. Kan. 1998). Here, the **bankruptcy** judge reduced the notice period because of the Debtor's failure to provide proof of insurance on the real estate. In re Sandra Cotton, Inc., 65 B.R. 153, 156 (W.D.N.Y. 1986) (shortening notice warranted in unusual **[*16]** circumstances). Lack of insurance warrants conversion, and the Debtor does not challenge that at the time that conversion was sought, she had not provided evidence of insurance. [8] The **bankruptcy** court found the U.S. Trustee's representation regarding notice to be credible and rejected the Debtor's factual assertions. Based on these facts, we cannot conclude that a material factor deserving significant weight was ignored, that any improper factor was relied upon, or that the **bankruptcy** court made a serious mistake in weighing any of said factors. We would also note that even were we to conclude that the **bankruptcy** court erred in denying reconsideration because of the shortened notice, such error would be harmless because of the current status of the case, as well as the fact that the Debtor was afforded two additional opportunities to explain her prospects for reorganization, and at each hearing the Debtor fell short. Sunflower Racing, 226 B.R. at 672.

FOOTNOTES

8 HN9 Section 1112(b)(4)(C) requires debtors to maintain property and liability insurance to protect estate property. See 11 U.S.C. § 1112(b)(4)(C) . A chapter 11 case should be dismissed or converted if the debtor's "failure to maintain appropriate **[*17]** insurance . . . poses a risk to the estate or to the public." Id.; see also Gilroy v. Ameriquest Mortgage Co. (In re Gilroy), No. NH 07-054, 2008 Bankr. LEXIS 3968, 2008 WL 4531982 (B.A.P 1st Cir. Aug. 4, 2008) (failure to maintain property and liability insurance for five condominiums constitutes cause for dismissal).

The only argument for newly discovered evidence that the Debtor proffered in the Reconsideration Motion is that her prospects for reorganization had improved. The **bankruptcy** court assessed the information provided by the Debtor, and determined that the alleged reorganization prospects were futile, that the Debtor had not been forthcoming with required information, and that she failed to comply with her obligations as a chapter 7 debtor. HN10 Newly discovered evidence must be of such a nature that it would likely change the result if a new trial were granted. Eastern Savings Bank, FSB v. LaFata (In re LaFata), 483 F.3d 13, 24 (1st Cir. 2007). The **bankruptcy** judge explained that the information provided by the Debtor only reaffirmed her decision to convert the case. The record in this case is replete with support for the **bankruptcy** court's conclusions and findings, and that there was no error committed **[*18]** at any stage of the proceedings below.

CONCLUSION

Notwithstanding all of the Debtor's arguments, the appeal is **DISMISSED** as moot for the procedural reasons discussed above. Alternatively, the Panel rules that the Debtor's arguments purportedly addressing substantive issues are unsupported, lack any merit, and at best have been a waste of time for all parties. The result would be the same on either procedural or substantive grounds. Therefore the appeal is dismissed, and the Debtor is forewarned that if she institutes further meritless litigation herein, such action may result in the imposition of sanctions.

ROSA M. MELENDEZ TORRES a/k/a ROSA MARIA MELENDEZ TORRES, Debtor. BANCO POPULAR DE PUERTO RICO, Appellant, v. ROSA M. MELENDEZ TORRES, Appellee.

BAP NO. PR 10-036, **Bankruptcy** Case No. 09-09187-ESL

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 130

January 19, 2011, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: **[*1]**
Appeal from the United States **Bankruptcy** Court, for the District of Puerto Rico. (Hon. Enrique S. Lamoutte, U.S. **Bankruptcy** Judge).

CASE SUMMARY
PROCEDURAL POSTURE: Appellant creditor sought review of orders from the United States **Bankruptcy** Court for the District of Puerto Rico, which sustained appellee Chapter 13 debtor's objection to the creditor's proof of claim and denied the creditor's motion for reconsideration.

OVERVIEW: The main thrust of the debtor's objection was her contention that fees and charges constituting the pre-petition arrearage portion of the claim were unrecoverable because she was current in her mortgage payments on the petition date and post-petition. The panel held that the objection was too ambiguous and lacked the factual and legal particularity required by Bankr. D. P.R. R. 3007-1(a). At best, it could only be construed as challenging the sufficiency of the summary of account or the documentation supporting the claim. The claim substantially conformed to Official Form 10 and was accompanied by the writing upon which it was based: the mortgage note, a portion of the mortgage evidencing perfection of the security interest, and an itemized statement of account. Assuming arguendo that the omission of the pages showing the creditor's entitlement to collection costs and advances deprived the claim of prima facie validity, their attachment to the response remedied any procedural defect. Instead, the **bankruptcy** court found that the response did not show that the amounts claimed were actual, necessary, and reasonable expenses, raising issues which were not articulated in the objection.

OUTCOME: The panel vacated the **bankruptcy** court's orders sustaining the objection and denying reconsideration and remanded the matter to the **bankruptcy** court for further proceedings.

CORE TERMS: mortgage, proof of claim, pre-petition, confirmed, mortgage payments, reconsideration, notice, arrearage, abuse of discretion, acceleration, attach, lease, order sustaining, statement of account, legal fees, documentation, collection, attachment, unmatured, claimant, itemized, vacate, conclusions of law, de novo, matter of fact, amounts claimed, mortgage note, real property, timely filed, evidence to support

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN1 A **bankruptcy** appellate panel may hear appeals from final judgments, orders and decrees pursuant to 28 U.S.C.S. § 158(a)(1) or with leave of the court, from interlocutory orders and decrees pursuant to § 158(a)(3). A decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. An interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN2 A **bankruptcy** appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. More Like This Headnote

Bankruptcy Law > Claims > Objections

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN3 An order sustaining an objection to a claim is a final appealable order. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

HN4 On appeal, the **bankruptcy** court's findings of fact are reviewed pursuant to the clearly erroneous standard, and its conclusions of law de novo. More Like This Headnote

Bankruptcy Law > Claims > Objections

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

HN5 A **bankruptcy** court's order disallowing a claim premised on a procedural default is an exercise of the court's general equitable powers and is reviewed for abuse of discretion, but an order premised on the **bankruptcy** court's interpretation and application of the **Bankruptcy** Code is properly characterized as determining a legal question and is thus reviewed de novo. More Like This Headnote

Bankruptcy Law > Claims > Reconsideration

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN6 A **bankruptcy** court's order denying a motion to reconsider is reviewed for manifest abuse of discretion. An abuse of discretion occurs where a **bankruptcy** court ignored a material factor deserving of significant weight, relied upon an improper factor or made a serious mistake in weighing proper factors. When the court below has not disclosed the findings and conclusions upon which relief was denied, the **bankruptcy** appellate panel will sustain on any independently sufficient ground made manifest by the record, but remand is necessary where the lack of a record on appeal precludes review under this standard. More Like This Headnote

Bankruptcy Law > Claims > Estimation

Bankruptcy Law > Claims > Objections

HN7 11 U.S.C.S. § 502(a) provides that a claim or interest, proof of which is filed under 11 U.S.C.S. § 501, is deemed allowed, unless a party in interest objects. 11 U.S.C.S. § 502(a). Even if a party in interest objects, however, § 502(b) provides that the **bankruptcy** court shall allow the claim unless one of nine enumerated exceptions apply. More Like This Headnote

Bankruptcy Law > Claims > Objections

HN8 See 11 U.S.C.S. § 502(b).

Bankruptcy Law > Claims > Proof > Content, Evidence & Form

HN9 Although the **Bankruptcy** Code does not prescribe what documentation must accompany a proof of claim, Fed. R. Bankr. P. 3001 requires that a proof of claim be a written statement that conforms substantially to the appropriate Official Form, and if the claim is secured by real property and based upon a writing, the claim must be accompanied by either the original or a duplicate of the writing, as well, as proof that the security interest has been perfected. Rule 3001 (a), (c)-(d). Official Form 10 (the appropriate Official Form) instructs the claimant to attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of liens. The creditor is required to explain any failure to attach documents based on a lack of availability. In addition, if the required documents are too voluminous, the creditor may attach a summary. Official Form 10 further requires the claimant to specify whether the claim includes any interest or other charges in addition to the principal amount of the claim, and if so, to attach an itemized statement of all interest or additional charges. More Like This Headnote

Bankruptcy Law > Claims > Proof > Content, Evidence & Form

HN10 The sufficiency of a summary attached to a proof of claim must be analyzed on a case-by-case basis, taking into account the detail provided, the content of the schedules, and the identity of the objector. More Like This Headnote

Bankruptcy Law > Claims > Proof > Content, Evidence & Form

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

HN11 A proof of claim executed and filed in accordance with the rules shall constitute prima facie evidence of the validity and amount of the claim, Fed. R. Bankr. P. 3001(f), requiring an objecting party to produce substantial evidence to rebut this presumption of validity. If the objection is substantial, the claimant is required to come forward with evidence to support its claims and bears the burden of proving its claims by a preponderance of the evidence. More Like This Headnote

Bankruptcy Law > Claims > Objections

HN12 Objections to proofs of claim, like proofs of claim themselves, must be in writing, Fed. R. Bankr. P. 3007, and pursuant to the Puerto Rico Local **Bankruptcy** Rules, must state the legal and factual grounds for the objection with particularity. Bankr. D. P.R. R. 3007-1(a). More Like This Headnote

Bankruptcy Law > Claims > Proof > Content, Evidence & Form

Bankruptcy Law > Claims > Proof > Effects & Procedures

HN13 A creditor should be allowed to amend his incomplete proof of claim to comply with the requirements of Fed. R. Bankr. P. 3001, provided that other creditors are not harmed by the belated completion of the filing. More Like This Headnote

COUNSEL: Wallace Vazquez Sanabria, Esq., on brief for Appellant.

Madeline Soto Pacheco, Esq., on brief for Appellee.

JUDGES: Before Hillman, Kornreich, and Bailey, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: HILLMAN

OPINION

HILLMAN, U.S. Bankruptcy Appellate Panel Judge.

The appellant, Banco Popular de Puerto Rico ("BPPR"), appeals from the **bankruptcy** court's orders dated May 10, 2010 and May 24, 2010, sustaining the objection to BPPR's proof of claim of appellee-debtor Rosa M. Melendez Torres (the "Debtor") and denying BPPR's motion for reconsideration, respectively. For the reasons set forth below, the Panel **VACATES** both orders and **REMANDS** the matter to the **bankruptcy** court for further proceedings consistent with this decision.

BACKGROUND

The Debtor filed her chapter 13 petition on October 29, 2009. On November 3, 2009, the **bankruptcy** court issued the "Notice of Chapter 13 **Bankruptcy** Case, Meeting of Creditors, & Deadlines" which, *inter alia*, scheduled the meeting of creditors to be held pursuant to 11 U.S.C. § 341 (the "Meeting of Creditors") for December 15, 2009, and established **[*2]** March 15, 2010, as the deadline for all non-governmental unit creditors to file a proof of claim. After the Meeting of Creditors was held and upon the recommendation of the chapter 13 trustee, the **bankruptcy** court confirmed the Debtor's plan on January 22, 2010. Notably, the order confirming plan expressly provided that "[i]f the debtor's plan is confirmed prior to the last day to file claims ... a modification of the confirmed plan pursuant to 11 U.S.C. [§] 1329 may be required after these dates have past [sic]."

On March 3, 2010, BPPR filed a proof of claim (the "Claim") in the amount of $77,366.61 secured by a mortgage on certain real estate. [1] The Claim reflected an outstanding arrearage of $162.72. The statement of account attached to the Claim disclosed that the arrearage was made up of the following components:

FOOTNOTES

1 Prior to filing the Claim, BPPR erroneously filed a proof of claim for a mortgage owed by Eduardo J. Nater Vazquez and Maritza Rodriguez Ortiz on February 25, 2010. Therefore, while the Claim is technically an amended claim, further discussion of this point is irrelevant because the prior claim was simply filed in the wrong case and the Claim was nonetheless timely filed. **[*3]**

AMOUNT IN ARREARS		
PER-PETITION AMOUNT:		
0 payments of $568.00 each one		0.00
Accumulated lated [sic] charges		22.72
Advances Under Loan Contract:		
Title Search	$45.00	
Other	$20.00	65.00
Legal Fees		75.00
A = TOTAL PRE-PETITION AMOUNT		162.72

Copies of the mortgage note and four pages of the mortgage were also attached. The mortgage pages bear an acknowledgment from the notary that the mortgage was presented for recordation, but does not include any language regarding collection costs or other expenses.

The Debtor filed an objection to the Claim (the "Objection") on March 29, 2010. In the Objection, the Debtor stated, in relevant part:
1. The claim includes an amount of $162.72, that purportedly corresponds to pre-petition fees and charges ....

2. The claim itself reflects, in its attachment, that there are no pre-petition arrears in mortgage payments. As a matter of fact, debtor is up to date on her mortgage payments to BPPR as it is shown in the attached certification provided by creditor (Attachment I).

3. The Chapter 13 plan was confirmed by order dated January 22, 2010 without any provision for payment of arrears to BPPR, since there were none as of filing (d. e. 12).

4. Should the claim, for these arrears not **[*4]** be disallowed debtor will be forced to modify her confirmed plan to provide for its payment. Accordingly, debtor will be forced to pay creditor an amount in excess of what is legally owed.

5. In a case where its secured status has not be questioned, and where debtor is current at the time of the **bankruptcy** filing in payments on the mortgage and remain current to this date, any fees are simply irrelevant as pertains to the administration of the estate, and certainly may not be designated or considered as pre-petition.

6. Any fee claimed for the filing of a claim in these circumstances ultimately amounts to a penalty levied against the estate merely for the debtor's exercise of her option to file for **bankruptcy.**

7. Moreover, the charge of $75.00 as legal fees is herein questioned on grounds that the preparation of a proof of claim is a purely ministerial act for which no legal's [sic] fees should be charged against a debtor. In re Allen[,] 215 B.R. 503 ([Bankr.] N.D. Tex. 1997); In re Maywood, 210 B.R. 91 (B[ankr.] N.D. Tex[.] 1997).

8. The net result of these actions is that, unless an order is entered to the effect that the amounts be expunged form [sic] debtor's record and creditor is **[*5]** barred from charging them, debtor herein will administratively and ultimately be charged for these amounts even though the arrears portion of the claim is disallowed.
The Objection was served on BPPR with a notice indicating that if no reply in opposition was filed within 30 days, the **bankruptcy** court could disallow the Claim without a hearing.

When BPPR did not file a response within 30 days of the Objection, the Debtor filed a request for an order disallowing the Claim on May 4, 2010. The next day, BPPR filed a response to the Objection stating in relevant part:
2. The reason for the objection is that Debtor was current as of the filing of the **bankruptcy** petition and accordingly Debtors [sic] are of the opinion that they should not pay anything.

3. Under the terms of the mortgage agreement ... Debtors [sic] are to pay legal expenses as well as other cost [sic] related to the servicing of the mortgage.

4. 11 USCA [§] 506 allows for the charges and fees called for by the mortgage.

5. Finally Debtors [sic] do not object the amount [sic] and in our view the fees and charges are very reasonable as a matter of fact they are clerical. BPPR also attached an additional two pages of the mortgage **[*6]** relating to collection costs and advances under the mortgage.

On May 10, 2010, the **bankruptcy** court, without a hearing, entered the following order:
Debtor's objection to claim #17 filed by BANCO POPULAR DE PUERTO RICO (docket entry #17), is hereby granted. The response by Banco Popular de Puerto Rico (docket entry #19) does not show that the amounts claimed are actual, necessary, and reasonable expenses.

On May 20, 2010, BPPR moved for reconsideration of the May 10, 2010 order pursuant to Fed. R. Civ. P. 59(e). BPPR asserted that the Debtor never claimed the charges were not actual, necessary, or reasonable, but merely that she should not have to pay them because her mortgage payments were current. Although BPPR contended those arguments were waived by her failure to raise them, it nonetheless asserted that the contemporaneousness, necessity, and reasonableness of the charges were issues of fact which required a hearing and evidence to support the **bankruptcy** court's conclusion. Moreover, BPPR argued that the **bankruptcy** court deprived it of reasonable due process by disregarding the Debtor's contractual obligations without a hearing.

Four days later, the **bankruptcy** court, without a hearing, **[*7]** denied the motion for reconsideration without further explanation. On June 7, 2009, BPPR filed a timely notice of appeal of both the May 10, 2009 and May 24, 2009 orders.

JURISDICTION

HN1 A **bankruptcy** appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" An interlocutory order "'only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). HN2 A **bankruptcy** appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). **[*8]** HN3 An order sustaining an objection to a claim is a final appealable order. See Orsini Santos v. Lugo Mender (In re Orsini Santos), 349 B.R. 762, 768 (B.A.P. 1st Cir. 2006) (citing Perry v. First Citizens Fed. Credit Union (In re Perry), 391 F.3d 282, 285 (1st Cir. 2004); Malden Mills Indus., Inc. v. Maroun (In re Malden Mills Indus., Inc.), 303 B.R. 688, 695 (B.A.P. 1st Cir. 2004)).

STANDARD OF REVIEW

HN4 On appeal, the **bankruptcy** court's findings of fact are reviewed pursuant to the clearly erroneous standard, and its conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). HN5 A **bankruptcy** court's order disallowing a claim premised on a procedural default is an exercise of the court's general equitable powers and is reviewed for abuse of discretion, see Neal Mitchell Assocs. v. Braunstein (In re Lambeth Corp.), 227 B.R. 1, 6 (B.A.P. 1st Cir. 1998), but an order premised on the **bankruptcy** court's interpretation and application of the **Bankruptcy** Code is properly characterized as determining a legal question and is thus reviewed *de novo*. See id. at 6 n.9; see also American Express Bank, FSB, v. Askenaizer (In re Plourde), 418 B.R. 495 (B.A.P. 1st Cir. 2009). **[*9]** In the present case, the **bankruptcy** court's May 10, 2010 order sustaining the Objection indicates that BPPR's response, while untimely, was nonetheless considered. Therefore, the proper standard of review for that order is *de novo*.

In contrast, HN6 a **bankruptcy** court's order denying a motion to reconsider is reviewed for manifest abuse of discretion. See Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991). An abuse of discretion occurs where a **bankruptcy** court "ignored a material factor deserving of significant weight, relied upon an improper factor or [made] a serious mistake in weighing proper factors." Howard v. Lexington Invs., Inc., 284 F.3d 320, 323 (1st Cir. 2002) (quoting Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988). "When . . . the court below has not disclosed the findings and conclusions upon which relief was denied, [the Panel] will sustain 'on any independently sufficient ground made manifest by the record,'" United States v. Sterling Consulting Corp. (In re Indian Motocycle Co.), 289 B.R. 269, 277 (B.A.P. 1st Cir. 2003) (quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998)), but **[*10]** remand is necessary where the lack of a record on appeal precludes review under this standard. See Salem Five Cents Savs. Bank v. Tardugno (In re Tardugno), 241 B.R. 777, 780 (B.A.P. 1st Cir. 1999).

DISCUSSION

HN7 Section 502(a) of the **Bankruptcy** Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a). Even if a party in interest objects, however, 11 U.S.C. § 502(b) provides that the **bankruptcy** court "shall allow" the claim unless one of nine enumerated exceptions apply. [2] Courts disagree as to whether 11 U.S.C. § 502(b) sets forth the exclusive bases upon which a claim maybe disallowed. See In re Plourde, 418 B.R. at 504 n.12 (collecting cases); B-Real, LLC v. Melillo (In re Melillo), 392 B.R. 1 (B.A.P. 1st Cir. 2008).

FOOTNOTES

2 HN8 Section 502(b) provides in relevant part:

> Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim **[*11]** in such amount, except to the extent that--
>
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
>
> (2) such claim is for unmatured interest;
>
> (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
>
> (4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
>
> (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
>
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid **[*12]** rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of--

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of **Bankruptcy** Procedure ....

11 U.S.C. § 502(b).

HN9 Although the **Bankruptcy** Code does not prescribe what documentation must accompany a proof of claim, Fed. R. Bankr. P. 3001 requires **[*13]** that a proof of claim be a written statement that conforms substantially to "the appropriate Official Form," and if the claim is secured by real property and based upon a writing, the claim must be accompanied by either the original or a duplicate of the writing, as well, as proof that the security interest has been perfected. Fed. R. Bankr. P. 3001 (a), (c)-(d). In In re Plourde, the Panel further explained:

Official Form 10[, the appropriate Official Form,] instructs the claimant to "attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of liens." Official Form 10. The creditor is required to explain any failure to attach documents based on a lack of availability. In addition, if the required documents are too voluminous, the creditor may attach a summary. Official Form 10 further requires the claimant to specify whether the claim includes "any interest or other charges in addition to the principal amount of the claim," and if so, to attach an "itemized statement of all interest or additional charges."

In re Plourde, 418 B.R. at 503-504. **[*14]** HN10 The sufficiency of a summary attached to a proof of claim must be analyzed on a case-by-case basis, taking into account the detail provided, the content of the schedules, and the identity of the objector. Id. at 509 n.22.

HN11 "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim," Fed. R. Bankr. P. 3001(f), requiring an objecting party to produce "substantial evidence" to rebut this presumption of validity. See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993). "If the objection is substantial, the claimant 'is required to come forward with evidence to support its claims ... and bears the burden of proving its claims by a preponderance of the evidence.'" In re Plourde, 418 B.R. at 504 (quoting In re Organogenesis, Inc., 316 B.R. 574, 583 (Bankr. D. Mass. 2004)); see also Tracey v. United States (In re Tracey), 394 B.R. 635, 639 (B.A.P. 1st Cir. 2008). HN12 Objections to proofs of claim, like proofs of claim themselves, must be in writing, see Fed. R. Bankr. P. 3007, and pursuant to the Puerto Rico Local **Bankruptcy** Rules, must state "the legal and factual grounds **[*15]** for the objection with particularity." P.R. LBR 3007-1(a).

Here, the main thrust of the Objection was the Debtor's contention that the fees and charges constituting the pre-petition arrearage portion of the Claim were unrecoverable because the Debtor was current in her mortgage payments on the petition date and remained so post-petition. Though not clearly, the Debtor also appears to have challenged the assertion that these charges were, in fact, pre-petition arrearages in as much as she refers to them being inappropriately "designated or considered as pre-petition." On the other hand, she undercuts this interpretation by asserting, without explanation, that "the arrears portion of the claim is disallowed," possibly reasoning that her confirmed plan did not provide for any arrearage. [3]

FOOTNOTES

3 This argument, however, fails to consider that the claims bar date had not yet passed by the time the plan had been confirmed.

Ultimately, the Objection is too ambiguous and lacks the factual and legal particularity required by the local rule. See P.R. LBR 3007-1(a). The Debtor's primary argument, that because there were no pre-petition or post-petition arrears in her mortgage payments, any fees are irrelevant, **[*16]** is without legal support. Notably, the Debtor did not state that she did not incur late fees, but only that her *payments* were current as of the petition date. Additionally, despite the initial absence of the mortgage pages relating to BPPR's entitlement to costs, which it subsequently attached to the response, she did not contest the amount or validity of either the "Title Search" or "Other" charges in the Objection. In fact, the only specific objection proffered was to legal fees incurred preparing the Claim, though it is not apparent on its face that such costs were actually included in the legal fees requested. To the contrary, the statement of account indicated that all these charges were incurred pre-petition. None of these arguments fall under any of the nine exceptions set forth in 11 U.S.C. § 502(b). At best, one could only construe the Objection as challenging the sufficiency of the summary of account or, more generally (and generously), the documentation supporting the Claim. [4]

FOOTNOTES

4 On appeal, however, the Debtor characterizes the Objection as follows: "it is objected [sic] that Melendez' estate be liable to BPPR for fees and charges that under the circumstances of the instant **[*17]** case are not required to have been incurred in the first place, and even worse, where no evidence of these having been incurred has been provided by BPPR." Essentially, the Debtor appears to argue that if she was otherwise current in her payments, BPPR should not have filed a proof of claim or incurred any fees. Alternatively, she may be arguing that default is a precondition to collect these fees under the mortgage. In any event, this emphasizes the Objection's lack of clarity even at this late stage.

Given the Objection's vagueness, it was error for the **bankruptcy** court to have sustained it. The Claim substantially conformed to Official Form 10 and was accompanied by the writing upon which the secured claim was based, namely, the mortgage note, a portion of the mortgage evidencing the perfection of the security interest, and an itemized statement of account. Assuming, *arguendo*, that the omission of the mortgage pages demonstrating BPPR's entitlement to collection costs and other advances deprived the Claim of prima facie validity, see Fed. R. Bankr. P. 3001(f), their attachment to the response, which was expressly considered by the **bankruptcy** court, should have remedied any procedural **[*18]** defect. See, e.g., In re Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993) (HN13 "A creditor should therefore be allowed to amend his incomplete proof of claim ... to comply with the requirements of Rule 3001, provided that other creditors are not harmed by the belated completion of the filing"); Heath v. American Express Travel Related Servs. Co., Inc. (In re Heath), 331 B.R. 424 (B.A.P. 9th Cir. 2005) (claim should not be disallowed simply for failure to fully comply with Fed. R. Bankr. P. 3001(c)); Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation), 318 B.R. 147, 152 (B.A.P. 8th Cir. 2004) ("[E]ven if the claims had not substantially complied with Rule 3001, the claims are still allowed claims under Section 502 of the **Bankruptcy** Code unless the Debtor establishes an exception under Section 502(b)."); cf. Caplan v. B-Line, LLC (In re Kirkland), 572 F.3d 838 (10th Cir. 2009) (claim disallowed for failure to provide *any* supporting documentation after an evidentiary hearing); In re Melillo, 392 B.R. at 4-5 (claim disallowed where creditor failed to prove ownership of claim by providing proof of assignment). Instead, the **bankruptcy** court found that the "response ... does not show that the **[*19]** amounts claimed are actual, necessary, and reasonable expenses," raising issues which were not articulated in the Objection, issues of which BPPR had no notice and to which BPPR was afforded no opportunity to respond. This too was error. [5]

FOOTNOTES

5 Alternatively, the Panel would be compelled to vacate the order denying reconsideration and remand the matter back to the **bankruptcy** court to make appropriate findings of fact and conclusions of law as a review for abuse of discretion is impossible where the **bankruptcy** court's reasoning is not articulated. See In re Tardugno, 241 B.R. at 779 .

CONCLUSION

The Panel **VACATES** the **bankruptcy** court's orders sustaining the Objection and denying reconsideration and **REMANDS** the matter to the **bankruptcy** court for further proceedings.

DORA L. AJA, Debtor; DORA L. AJA, Appellant v. EMIGRANT FUNDING CORPORATION, Appellee

BAP NO. MB 10-019, **Bankruptcy** Case No. 09-21872-JNF

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 131

January 19, 2011, Decided

SUBSEQUENT HISTORY: Appeal dismissed by, As moot Aja v. Fitzgerald (In re Aja), 2011 Bankr. LEXIS 138 (B.A.P. 1st Cir., Jan. 19, 2011)

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. (Hon. Joan N. Feeney, U.S. **Bankruptcy** Judge).

CASE SUMMARY
PROCEDURAL POSTURE: Pro se debtor, in a case converted to chapter 7, appealed from an order of the United States **Bankruptcy** Court for the District of Massachusetts that granted the motion of creditor mortgagee, for in rem relief from the automatic stay with respect to real property transferred from a Delaware limited liability company (LLC) to the debtor, against which the creditor sought to foreclose.

OVERVIEW: Debtor had been the managing partner of the LLC, which had itself recently filed three voluntary Chapter 11 petitions. The creditor had extended a loan to the LLC upon which it had defaulted. The debtor had transferred title to the property to herself personally for nominal consideration. She filed her own chapter 11 case minutes prior to the foreclosure sale. The creditor moved for relief from stay in rem, asserting cause existed for relief under 11 U.S.C.S. § 362(d)(1). The **bankruptcy** court converted the case to chapter 7 and granted retroactive relief from stay, ruling that there was no equity in the property, that the Debtor did not have a viable plan in prospect. The debtor appealed, but the appellate panel found that she lacked standing to appeal because she was a chapter 7 debtor, and the estate was insolvent. The grant of in rem relief was proper, and the debtor lacked standing.

OUTCOME: The appeal was dismissed.

CORE TERMS: reorganization, converting, rem, automatic stay, reconsideration, viable, order granting, proof of claim, addressing, prosecute, insolvent, usurious, foreclosure, general rule, bankruptcy case, promissory note, prior cases, bad faith, request to reopen, failed to comply, interlocutory orders, abuse of discretion, improper factor, judicial notice, standing to appeal, person aggrieved, required to file, pro se, interested parties, scheduled

LEXISNEXIS® HEADNOTES

Hide

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN1 Before addressing the merits of an appeal, an appellate panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. The panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C.S. § 158(a). 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, whereas an interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. A **bankruptcy** court's order granting relief from the automatic stay is a final order. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

HN2 A **bankruptcy** court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. Usually, orders granting relief from the automatic stay are reviewed for abuse of discretion. An abuse of discretion presents itself when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them. More Like This Headnote

Civil Procedure > Parties > Self-Representation > Pleading Standards

HN3 Although pro se litigants are held to a less stringent procedural standard that others, pro se litigants are not granted immunity from compliance with federal and local rules of practice, and applicable substantive law. More Like This Headnote

Civil Procedure > Justiciability > Standing > Injury in Fact

HN4 Only a person aggrieved has standing to pursue an appeal. A person aggrieved is one whose property is diminished, burdens are increased, or rights are impaired by order on appeal. More Like This Headnote

Evidence > Judicial Notice > General Overview

HN5 An appellate panel may take judicial notice of the proceedings in the **bankruptcy** court. More Like This Headnote

Bankruptcy Law > Estate Property > Content

HN6 Under 11 U.S.C.S. § 541(a), a debtor's legal and equitable property interests pass to the **bankruptcy** estate and all pre-petition creditors' claims become estate liabilities. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Relief From Stays > Cause

HN7 Under 11 U.S.C.S. § 362(d)(1), a **bankruptcy** court shall grant relief from the automatic stay for cause, including lack of adequate protection, and under 11 U.S.C.S. § 362(d)(2), relief may be granted if the debtor lacks equity and the property is not necessary for an effective reorganization. More Like This Headnote

Civil Procedure > Appeals > Reviewability > Preservation for Review

HN8 Absent extraordinary circumstances, parties may not raise issues for the first time on appeal. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Relief From Stays > Procedures

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > General Overview

HN9 An order granting in rem relief from stay is an appropriate remedy when a debtor or transferee of a debtor serially files **bankruptcy** petitions solely to invoke the automatic stay. More Like This Headnote

COUNSEL: Dora L. Aja, Pro se, on brief for Appellant.

Shawn M. Masterson, Esq., and Thomas E. Carlotto, Esq., on brief for Appellee.

JUDGES: Before Votolato, Lamoutte, and Tester United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Votolato

OPINION

Votolato, U.S. Bankruptcy Appellate Panel Judge.

Dora L. Aja (the "Debtor") appeals from the **bankruptcy** court's order granting the motion of Emigrant Funding Corporation ("Emigrant") for in rem relief from stay (the "Williams Street Order") with respect to real estate located at 9-11 Williams Street, Worcester, Massachusetts (the "Williams Street Property"). [1] For the reasons discussed below, the appeal is **DISMISSED**.

FOOTNOTES

1 In her brief, the Debtor asks the Panel to "overturn" three separate **bankruptcy** court orders: (1) the Williams Street Order; (2) the order (the "Hamilton Street Order") granting Emigrant relief from stay with respect to property located at 92 Hamilton Street, Worcester, Massachusetts (the

"Hamilton Street Property"); and (3) the order converting the Debtor's chapter 11 case to chapter 7. It is only the Williams Street Order that is before [*2] the Panel for consideration. Although the parties discuss the Hamilton Street Order in their briefs, the Debtor did not appeal the Hamilton Street Order, and, therefore, it is not subject to challenge in this appeal. In addition, although the Debtor has appealed the order denying reconsideration of the conversion of her case to chapter 7, that order is the subject of a separate appeal before the Panel. See BAP No. MB 10-010. The order converting the case has not been appealed.

BACKGROUND

The Debtor is the managing partner of 86-92 Hamilton Street Realty, LLC ("Hamilton"), a Delaware limited liability company. In April 2006, Emigrant extended a loan to Hamilton in the principal amount of $400,000.00. The loan was evidenced by a promissory note and secured by a mortgage on the Williams Street Property. Between September 2007 and December 2009, Hamilton filed three voluntary Chapter 11 petitions, all of which were dismissed prior to confirmation for disregard of its debtor-in-possession duties under the **Bankruptcy** Code, the reporting requirements of the U.S. Trustee, and the local **bankruptcy** rules.

On December 8, 2009, the Debtor, as Hamilton's manager, transferred title to the Williams [*3] Street Property from Hamilton to herself personally, for nominal consideration. On the same day, this chapter 11 case was filed, minutes prior to a foreclosure sale by Emigrant on the Williams Street Property.

In January 2010, Emigrant filed a motion seeking relief from stay in rem with respect to the Williams Street Property (the "Motion"), on the ground that cause existed for relief under 11 U.S.C. § 362(d)(1), including: (1) the Debtor's bad faith in commencing this **bankruptcy** case; [2] (2) lack of adequate protection regarding continuing decline in the value of the Williams Street Property; (3) the Debtor's failure to provide insurance coverage for the Williams Street Property; and (4) the Debtor's inability and/or refusal to competently manage the Williams Street Property. Emigrant asserted that in rem relief was warranted because of the number of prior cases involving the Williams Street Property and the fact that the Debtor filed for relief one day after Hamilton's request to reopen its third case was denied.

FOOTNOTES

2 Emigrant argued that the totality of the following circumstances warranted a finding of the Debtor's bad faith: (1) the **bankruptcy** court's prior determination that the Debtor [*4] lacked credibility; (2) the multiple filings by Hamilton on the eve of foreclosure; (3) the inability of Hamilton to propose a feasible plan in three prior **bankruptcy** cases; (4) the transfer of the Hamilton Street Property to the Debtor one hour before a scheduled foreclosure sale and only one day after the **bankruptcy** court denied Hamilton's request to reopen its third case; (5) the filing by the Debtor solely to create the automatic stay; (6) the absence of pressure from any creditor other than Emigrant; (7) the limited number of unsecured creditors; (8) the Debtor's unauthorized use of cash collateral; and (9) the fact that reorganization essentially involved a two-party dispute.

Although Emigrant sought relief under 11 U.S.C. § 362(d)(1), the Debtor seemed to object as though relief were sought under 11 U.S.C. § 362(d)(2), i.e., she asserted that there was no equity in the Williams Street Property, but argued that there was a reorganization in prospect. The Debtor further argued that Hamilton's three prior filings did not warrant relief because those filings were the result of Emigrant's predatory business tactics, and because this is a usurious loan. The **bankruptcy** court scheduled [*5] a hearing on the Motion for February 3, 2010. [3]

FOOTNOTES

3 After Emigrant filed the Motion and the Debtor filed her opposition, but before the hearing, the **bankruptcy** court entered an order converting the case to chapter 7.

At the hearing, the **bankruptcy** court continued the matter to afford the chapter 7 trustee time to respond to the Motion. [4] Thereafter, the trustee filed an opposition to the Motion, alleging among other things that there was equity in the Williams Street Property, which should be marketed commercially to maximize the benefit to creditors.

FOOTNOTES

4 The **bankruptcy** court did, however, consider Emigrant's motion with respect to the Hamilton Street Property and ultimately granted Emigrant retroactive relief from stay.

At the continued hearing, the **bankruptcy** court heard the Motion together with the Debtor's motion to reconsider the order converting the case. In the context of these motions, the **bankruptcy** court considered the arguments of the Debtor, Emigrant, the U.S. Trustee, and the chapter 7 trustee. After the hearing, including evidence of the Debtor's projected income, the court denied reconsideration on the grounds that the Debtor failed to propose viable plans of reorganization in [*6] three prior cases, and failed to comply with her duties as a chapter 7 debtor in this case, evidenced, *inter alia*, by converting property of the estate. With respect to the Motion, the chapter 7 trustee represented that she was withdrawing her opposition because she had determined that there was no equity in the Williams Street Property. Thereafter, the **bankruptcy** court ruled that there was no equity in the property, that the Debtor did not have a viable plan in prospect, and granted the Motion. [5] The Debtor appealed. [6]

FOOTNOTES

5 The transcript of the hearing reflects that the **bankruptcy** court considered the elements of cause that Emigrant had raised, but did so in the context of deciding whether to grant reconsideration. The **bankruptcy** court then addressed the Motion as though it were brought under 11 U.S.C. § 362(d)(2). The parties did not object then and do not raise the issue on appeal.

6 The Debtor did not seek from the **bankruptcy** court a stay pending appeal, but did file such a motion in this appeal. The Panel denied the request.

JURISDICTION

HN1 Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). **[*7]** The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). 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," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A **bankruptcy** court's order granting relief from the automatic stay is a final order. See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 131 (B.A.P. 1st Cir. 2004).

STANDARD OF REVIEW

HN2 A **bankruptcy** court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). Usually, orders granting relief from the automatic **[*8]** stay are reviewed for abuse of discretion. See Aguiar, 311 B.R. at 132 (citing Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997)). An "abuse of discretion presents itself 'when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Velez v. Awning Windows, Inc., 375 F.3d 35, 42 (1st Cir. 2004) (citing Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)).

DISCUSSION

The Debtor's first argument is that the **bankruptcy** court erred in granting relief from stay because it failed to weigh factors set forth in a Utah **bankruptcy** court decision. See In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984). She then argues that the **bankruptcy** court exhibited poor judicial temperament and bias against her. Third, the Debtor asserts that in granting stay relief on her two properties, the **bankruptcy** court committed error because Emigrant had failed to comply with its requirement to file a proof of claim and an accounting. Lastly, the Debtor argues that the promissory **[*9]** note is usurious. In addition to seeking reversal of the Williams Street Order, the Debtor asks for punitive damages.

Emigrant argues that the Debtor lacks standing to appeal because she is now a chapter 7 debtor, citing Kehoe v. Schindler (In re Kehoe), 221 B.R. 285 (B.A.P. 1st Cir. 1998), which held that the trustee is the proper person to prosecute appeals on behalf of the estate. Emigrant further argues that the cases upon which the Debtor relies in her brief are inapplicable as they involve cases where there was a reorganization in prospect - not the case here. Emigrant disputes that the **bankruptcy** judge was biased, and correctly points out that a secured creditor is not required to file a proof of claim.

HN3 Although pro se litigants "are held to a less stringent procedural standard that others . . . ," Nunnally v. MacCausland, 996 F.2d 1, 6 n.8 (1st Cir. 1993), the Panel does not understand that Nunnally granted immunity to pro se litigants from compliance with federal and local rules of practice, and applicable substantive law.

On several occasions, the Panel has explained that HN4 only a "person aggrieved" has standing to pursue an appeal and that a "person aggrieved" is one whose property **[*10]** is diminished, burdens are increased, or rights are impaired by order on appeal. See Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 551 (B.A.P. 1st Cir. 2004); In re Kehoe, 221 B.R. at 287-88; Norway Nat'l Bank v. Goodwin's Discount Furniture, Inc. (In re Goodwin's Discount Furniture, Inc.), 16 B.R. 885, 887 (B.A.P. 1st Cir. 1982). Generally, an insolvent chapter 7 debtor does not have standing to appeal. In re El San Juan Hotel, 809 F.2d 151, 154-55 (1st Cir. 1987). [7]

FOOTNOTES

7 In this case the estate is insolvent. See "Trustee's Final Report and Account Before Distribution . . . (*Administratively Insolvent*)". Docket No. 192.

" HN5 [T]he Panel may take judicial notice of the proceedings in the **bankruptcy** court." Hamilton v. Appolon (In re Hamilton), 399 B.R. 717, 719 n.1 (B.A.P. 1st Cir. 2009) (citing Maher v. Hyde, 272 F.3d 83, 86 n.3 (1st Cir. 2001) ; Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir.1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.")).

This is so because HN6 under the Code their legal and equitable property interests pass to the **bankruptcy** **[*11]** estate and all prepetition creditors' claims become estate liabilities. See § 541(a) (commencement of case "creates an estate"); § 502 (allowance of claims); In re El San Juan Hotel, 809 F.2d at 154 & n.5 (debtor normally has no interest in the distribution of estate's property); In re Goodwin's Discount Furniture, Inc., 16 B.R. at 887 (same).
In re Kehoe, 221 B.R. at 288. The exceptions to the general rule are if the appeal would result in a distribution to the debtor or if the debtor's discharge would be affected. In re El San Juan Hotel, 809 F.2d at 154-55.

In this case, Emigrant filed the Motion, the Debtor objected while the case was still in chapter 11, and the Motion was heard after the case was converted to chapter 7. The Debtor agrees that there is no equity in the Williams Street Property, she has not argued that a successful appeal would affect her discharge and, indeed, the Panel cannot envision how that could be the case. The Debtor did not appeal the order converting the case, but did appeal the order denying reconsideration of that order. The Debtor has provided no legal authority or factual basis for the Panel to depart from the general rule that she does not have standing **[*12]** to prosecute this appeal. Nevertheless, the Panel will briefly (but only hypothetically) discuss why the Debtor would not prevail, even if we were adjudicating the appeal on the merits.

HN7 Under 11 U.S.C. § 362(d)(1), a **bankruptcy** court shall grant relief from the automatic stay for cause, including lack of adequate protection, and under 11 U.S.C. § 362(d)(2), relief may be granted if the debtor lacks equity and the property is not necessary for an effective reorganization. Pursuant to 11 U.S.C. § 362(g), Emigrant had the burden of proof on the issue of equity and the Debtor had the burden of establishing that the Williams Street Property was necessary for an effective reorganization. See Compass Bank for Sav. v. Graves (In re Graves), 212 B.R. 692, 696 (B.A.P. 1st Cir. 1997).

The Debtor does not dispute that there is no equity in the Williams Street Property, and she clearly failed to support the contention that she could propose a viable plan. The **bankruptcy** court ruled, based upon Hamilton's failure to propose a confirmable plan in three prior **bankruptcies,** plus evidence provided by the interested parties regarding the Debtor's income, rents, and failure(s) to comply with the duties **[*13]** of chapter 11 and chapter 7 debtors, there was plainly no viable plan of reorganization in prospect. The **bankruptcy** judge's ruling on that issue was clearly the correct one.

The Debtor also contends that the **bankruptcy** judge abused her discretion because she did not follow the factors set forth in In re Curtis, 40 B.R. at 806. That case is inapplicable and irrelevant because the court in Curtis was addressing a completely unrelated issue - whether cause existed to modify the stay under 11 U.S.C. § 362(d)(1) to allow litigation to proceed against chapter 11 debtors. The Debtor's reliance on Curtis in this case is frivolous. The Debtor cites to no other examples of how the **bankruptcy** court abused its discretion, and the Panel, upon its review of the record, sees no such abuse. [8] The **bankruptcy** court held a hearing, provided the Debtor ample opportunity to present her arguments, and heard from all of the interested

parties. The **bankruptcy** court's ruling that there was no reorganization in prospect, is consistent with those cases holding that there cannot be a reorganization in prospect in a chapter 7 case. See, e.g., In re J&M Salupo Dev. Co., Inc., 388 B.R. 809, 812 -13 (Bankr. N.D. Ohio 2008) **[*14]** ("In a Chapter 7 case, as exists herein, the property is not necessary to a reorganization because the estate's assets are being liquidated in accordance with Chapter 7 provisions."). [9]

FOOTNOTES

8 We need not address the Debtor's arguments regarding bias or whether Emigrant was required to file a proof of claim, as she failed to raise those issues in the **bankruptcy** court. HN8 "Absent extraordinary circumstances not present in this case, the Debtors may not raise it for the first time on appeal." De Jounghe v. Lugo Mender (In re de Jounghe), 334 B.R. 760, 766 (B.A.P. 1st Cir. 2005) (citing Sammartano v. Palmas Del Mar Properties, Inc., 161 F.3d 96, 97-98 (1st Cir. 1998)) . Neither will we address the Debtor's contention that the loan was usurious, as that argument misapprehends the nature of relief from stay litigation. See Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir. 1994) .

9 On appeal, the Debtor does not raise an issue with the part of the Williams Street Order that provided for in rem relief. The general rule is that HN9 "[a]n order granting in rem relief from stay is an appropriate remedy when a debtor or transferee of a debtor serially files **bankruptcy** petitions solely to invoke the **[*15]** automatic stay." Gonzalez-Ruiz v. Doral Fin. Corp. (In re Gonzalez Ruiz), 341 B.R. 371, 384 (B.A.P. 1st Cir. 2006) . This case has all of the earmarks of such abuse.

CONCLUSION

Based upon all of the foregoing, including our overindulgence of the Debtor in addressing the merits of her appeal, it is the conclusion of the Panel that the Debtor lacks standing to prosecute this appeal, and the matter is therefore **DISMISSED**.

LISA FRATI, JAMES FRATI, JACK KARP, and DESPENA A. NIGRO, Plaintiffs v. JOSEPH GENNACO, Defendant.

CIVIL ACTION NO. 10-11055-PBS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 6563

January 24, 2011, Decided
January 24, 2011, Filed

CORE TERMS: deadline, extension of time, abuse of discretion, dischargeability, objecting, notice, equitable relief, general rule, timely filed, moving party, reasonably rely, equitable powers, misleading, scheduled, intend, order of dismissal, investors', packages

COUNSEL: **[*1]** For James Frati, Lisa Frati, Appellants: Sheri F. Murray, LEAD ATTORNEY, Murray & Toomey, LLP, Boston, MA.

For Jack Karp, Despena Nigro, Appellants: Sheri F. Murray, Murray & Toomey, LLP, Boston, MA.

For Joseph Gennaco, Appellee: Barry R. Levine, LEAD ATTORNEY, Beverly, MA.

JUDGES: PATTI B. SARIS, UNITED STATES DISTRICT JUDGE.

OPINION BY: PATTI B. SARIS

OPINION

MEMORANDUM AND ORDER

SARIS, U.S.D.J.

In these consolidated cases, Lisa and James Frati, Jack Karp, and Despena A. Nigro appeal the decision of the **bankruptcy** court, which dismissed their adversary complaints against debtor Joseph Gennaco on the grounds that the complaints were not timely filed within the period prescribed by Federal Rule of **Bankruptcy** Procedure 4004(a) ("Rule 4004(a)"). After hearing, the Court **AFFIRMS** the order of the **bankruptcy** judge.

I. FACTUAL BACKGROUND

The appellee, Joseph Gennaco, was in the business of selling financial packages based on death benefit life insurance policies. The appellants were among several investors who purchased Gennaco's financial packages. The investment, however, went awry, and Gennaco was unable to pay his investors' claims. As a result, the appellants have asserted fraud and conversion claims against Gennaco.

After **[*2]** an unsuccessful attempt at a Chapter 11 reorganization plan, Gennaco's case was converted into a Chapter 7 proceeding on October 27, 2009. The **bankruptcy** court appointed David Madoff as Trustee in the Chapter 7 proceedings. [1] On October 29, 2009, an amended "Notice of Chapter 7 **Bankruptcy** Case, Meeting of Creditors & Deadlines" was issued by the **bankruptcy** court. In that notice, the court scheduled a Section 341 creditors' meeting on December 1, 2009 and advised creditors that the deadline to file a complaint objecting to discharge or to determine the dischargeability of debts was February 1, 2010. It is uncontested that this notice was served upon the appellants' counsel, Sheri Murray.

FOOTNOTES

1 David Madoff also served as the Trustee in the attempted Chapter 11 proceedings in 2008.

Although appellants' counsel attended the scheduled Section 341 creditors' meeting on December 1, 2009, the proceedings were continued to a later date in order to provide the debtor with more time to produce documents. The issue here involves one particular continued session of the Section 341 creditors' meeting, held on January 11, 2010. At the meeting, the Trustee requested various documents and financial information **[*3]** from Gennaco. Because Gennaco did not have these records, the Trustee once again continued the Section 341 meeting to March 10, 2010. According to the appellants, at that meeting the Trustee notified the creditors, including the appellants' counsel, that he would file a motion to extend the time to object to discharge. The appellants' counsel claims that when making this statement, the Trustee communicated that this motion would apply to all creditors, and that the new deadline to file a complaint objecting to discharge would be March 11, 2010 - the day after the Section 341 meeting. [2]

FOOTNOTES

2 The January 11, 2010 meeting was recorded; however, the recording did not take and the tape for that meeting is blank. The only evidence to support the statements made at the January 11, 2010 meeting is the signed affidavit of Sherri Murray, counsel for the appellants. There is a motion pending as to whether this affidavit may come in as evidence to the Court, as it was not assembled as part of the record on appeal.

At the time of the January 11, 2010 creditors' meeting, the Trustee had already moved to extend the deadline to object. On December 22, 2009 the Trustee filed the "Trustee's Motion for Extension **[*4]** of Deadline to Object to Discharge." (See Designation of Record on Appeal, Ex. O.) The motion "move[d] pursuant to Fed. R. Bankr. P. 4004(b) for an extension of time to March 11, 2010 for the Trustee to object to the Debtor's discharge." (Id. (emphasis added).) As grounds for his motion, the Trustee explained that he had "not conducted a Section 341 meeting to date." (Id.) On December 23, 2009 the motion was granted by the **bankruptcy** court. The Trustee did file a second motion to extend the deadline on March 10, 2010, which extended the deadline to May 11, 2010 for the Trustee.

On March 11, 2010, nearly six weeks after the February 1, 2010 deadline, the appellants filed adversary complaints against Gennaco claiming non-dischargeability under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6). On April 8, 2010 the appellee filed a motion to dismiss the appellants' adversary complaints, arguing that the complaints were not timely filed. After a hearing, the **bankruptcy** court granted the motions to dismiss on April 27, 2010, finding that the motion for extension applied only to the Trustee. The appellants appeal the decision of the **bankruptcy** court to dismiss the adversary complaints, contending **[*5]** that the motion of the Trustee to extend the deadline to March 11, 2010 should have been applied to all creditors, thereby rendering the complaints timely.

II. STANDARD OF REVIEW

This Court reviews the **bankruptcy** court's judgment "in the same manner in which a [Court of Appeals] review[s] lower court proceedings." In re Watman, 331 B.R. 502, 507 (D. Mass. 2005) (citing In re DN Assocs., 3 F.3d 512, 515 (1st Cir. 1993)). Applications of law are reviewed de novo and are set aside only when they are made in error or constitute an 'abuse of discretion.'" In re DN Assocs., 3 F.3d at 515 (citations omitted). As such, this Court reviews the **bankruptcy** court's decision to dismiss a Chapter 7 adversary complaint for abuse of discretion. Id.

III. DISCUSSION

Plaintiffs argue that the **bankruptcy** court erred in finding that the Trustee's motion to extend applied only to the Trustee.

Under Rule 4004(a), a complaint objecting to discharge must be filed "no later than 60 days after the first date set for the meeting of creditors under [Section] 341(a)." Fed. R. Bankr. P. 4004(a). The **bankruptcy** court, for cause, may extend the time for filing a complaint, "[o]n motion of a party in interest." Id. As a **[*6]** party in interest, the Trustee may also move for an extension of time under this Rule. There is a circuit split as to whether the Trustee has the power to move for an extension of time with respect to all creditors in the case. The Fourth Circuit has held that the Trustee does not have standing under Rule 4007(c) to make such a motion. In re Farmer, 786 F.2d 618, 621 (4th Cir. 1986). The Sixth Circuit has found that the Trustee may make such a motion. See In re Brady, 101 F.3d 1165, 1170 (6th Cir. 1996). The Court assumes, only for purposes of this analysis, that the Trustee did have standing to request an extension of time.

As a general rule, a motion to extend, if granted, only applies to the moving party; and this general rule also holds when the Trustee is the party moving for an extension. Fed. R. Bankr. P. 4004(b); see also In re Tatum, 60 B.R. 335, 338 (Bankr. D. Colo. 1986) (citing In re Ortman, 51 B.R. 7, 8 (Bankr. D. Ind. 1984)); Fed. R. Bankr. P. 4004 advisory committee's note ("An extension granted on a motion pursuant to subdivision (b) of the rule would ordinarily benefit only the movant, but its scope and effect would depend on the terms of the extension.").

In jurisdictions **[*7]** allowing the Trustee to move for an extension of time on behalf of all creditors, an issue arises when the Trustee wishes to move only on his own behalf, but the creditors mistakenly believe that the extension also applies to them. Under these circumstances, courts have allowed the motion to extend filed by one party (usually the trustee) to apply to other creditors in the case, despite the fact that the court did not so intend, only if the order of the court granting the extension is misleading. See In re Demos, 57 F.3d 1037, 1039 (11th Cir. 1995). This stems from the proposition that the litigants should be permitted to reasonably rely on the information directly provided by the court. Id. at 1039.

In Demos, the court found that an order granting a motion to extend brought by the Trustee should extend to all creditors. This holding was based on the "sloppy" wording of the order. Id. The trustee's motion in Demos stated that "there [were] numerous interested parties and attorneys who [wished] to attend the . . . Examination of the Debtor . . . [and] [t]hat due to the large number of creditors involved in [the] **bankruptcy** proceeding, the Debtor's attorney and the Trustee have no objection **[*8]** to the . . . extension." Id. at 1039-40 (emphasis in original). The order extended the deadline for filing "Complaints to Determine Dischargeability and Objecting to Discharge." Id. Furthermore, the order made no mention of **Bankruptcy** Rule 4004, and thus, according to the Eleventh Circuit, appeared to be granting an extension through the court's general equitable powers under Section 105 of the **Bankruptcy** Code. Id.; see 11 U.S.C. § 105 (giving the court the power to "issue any order . . . necessary or appropriate to carry out the provisions of [the **Bankruptcy** Code]" and to "sua sponte, [take] any action or [make] any determination necessary or appropriate to enforce or implement court orders or rules, or prevent an abuse of process"). Given these facts, the Eleventh Circuit found that the creditor's reliance on the order was reasonable, and that the **bankruptcy** court "should have exercised its equitable powers under Section 105 to allow [the] complaint to stand." Id. at 1040; see also In re Watkins, 365 B.R. 574, 577 (Bankr. W.D. Pa. 2007) (finding that the **bankruptcy** court's order "that the time to file objection to discharge or dischargeability is extended until further order of Court" **[*9]** could have been construed by creditors to apply universally).

When the language of the order is unambiguous, however, courts have found that motions for extensions of time only apply as to the moving party. See, e.g., Matter of Ichinose, 946 F.2d 1169, 1176 (5th Cir. 1991) ("Such a general extension . . . would have to be evident on the face of the order granting it, or, if part of a practice of the **bankruptcy** court, would have to be reduced to writing, presumably in the form of a rule."); In re Avalos, 361 B.R. 129, 130 n.2 (Bankr. S.D. Tex. 2007) (finding that, because the trustee explicitly filed only on his own behalf, the order did not provide a general extension); In re Kneis, 2009 WL 1750101, at *3 (Bankr. D.N.J. June 15, 2009) ("In cases where courts have found that an order provides a general extension to all creditors, the surrounding circumstances provided notice to the court and the debtor that a general extension was requested, demonstrated that cause existed for a general extension, and the subsequent order indicated that a general extension was granted.").

In the case at hand, the Trustee moved "pursuant to Rule 4004(b) for an extension of time to March 11, 2010 for the **[*10]** Trustee to object to the Debtor's discharge" (emphasis added). This motion was granted by the court on December 23, 2009. The language of the motion makes it clear that the Trustee did not intend to request an extension for any other creditor. Moreover, unlike in Demos, this motion explicitly referred to Rule 4004(b). It

appears that the **bankruptcy** court merely granted the Trustee's motion without entering an order. Accordingly, there was no over-broad or misleading language upon which appellants could have reasonably relied. Thus, the **bankruptcy** court's interpretation of the pre-existing motion for an extension of time as limited to the Trustee did not constitute an abuse of discretion.

Counsel does not state that she relied on this earlier motion, but rather on a statement made by the Trustee at the January 11, 2010 meeting suggesting that he would file a motion for an extension of time. By that time, however, the Trustee had already filed his own motion for an extension on December 22, 2009, and he did not file another motion until after appellants' deadline had passed. Even if the Trustee made this statement (which is unlikely, since the Trustee had already obtained an extension **[*11]** for himself), appellants' counsel could not reasonably rely on a statement at a January 11, 2010 meeting that was not followed by the filing of a motion. The Court finds that the **bankruptcy** judge's order of dismissal was not an abuse of discretion. Most likely, this lapse arose from an unfortunate misunderstanding by counsel of something the Trustee said.

The time limit under Rule 4004(a) is strictly construed. In re Forness, 334 B.R. 724, 728 (Bankr. M.D. Fla. 2005). Although the Supreme Court has held that Rule 4004 is not jurisdictional, Kontrick v. Ryan, 540 U.S. 443, 455-56 (2004), the appellate courts have divided on the question of whether Rule 4004 allows equitable exceptions. Compare In re Kontrick, 295 F.3d 724, 733 (7th Cir. 2002) and In re Benedict, 90 F.3d 50, 54 (2d Cir. 1996) with In re Alton, 837 F.2d 457, 459 (11th Cir. 1988) (per curiam) and Neely v. Murchison, 815 F.2d 345, 346-47 (5th Cir. 1987). If the facts as they allege them are true, appellants have lost significant amounts of money as a result of the debtor's actions. While the Court notes that some equitable relief may have been available to appellants at the **bankruptcy** court, they did not specifically request **[*12]** equitable relief and the issue was not briefed before this Court or the **bankruptcy** court. (See Designation of Record on Appeal, Ex. C (Compl. to Determine Dischargeability of Debt); see also Appellants' Br.) Accordingly, the Court has no basis on which to award any equitable relief.

IV. ORDER

The order of dismissal is affirmed.

/s/ PATTI B. SARIS

PATTI B. SARIS

UNITED STATES DISTRICT JUDGE

MARY BETH MASSILLON and LEON J. MASSILLON, Debtors. MARY BETH MASSILLON, Appellant, v. LYNNE F. RILEY, Chapter 7 Trustee, Appellee.

BAP NO. MB 10-024

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 83

January 11, 2011, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. **Bankruptcy** Case No. 09-17613-FJB. (Hon. Frank J. Bailey, U.S. **Bankruptcy** Judge).

CASE SUMMARY
PROCEDURAL POSTURE: Appellant Chapter 7 debtor sought review of two orders from the United States **Bankruptcy** Court for the District of Massachusetts, which sustained appellee Chapter 7 trustee's objection to her claim of either an exclusion of, or exemption in, her interest in a testamentary spendthrift trust and which denied her motion for reconsideration.

OVERVIEW: The **bankruptcy** court determined that N.Y. C.P.L.R. § 5205(d)(1) was an exemption statute because it restricted only creditors but not the debtor's ability to spend or otherwise alienate the asset. As such, it held that future distributions were assets of the estate. The panel concluded that the corpus of the trust was excluded from the debtor's estate under 11 U.S.C.S. § 541(c)(2) because, as the parties agreed, it was a valid testamentary spendthrift trust. Further, the panel concluded, and the parties agreed at oral argument, that the two distributions that the debtor received in the 180 days post-petition became property of her estate under § 541(a)(5)(A). Any distributions that the debtor received after the 180 days post-petition were not property of the estate. The panel declined to follow decisions that permitted a creditor or trustee to receive a portion of post-180 day trust distributions based upon the language of N.Y.C.P.L.R. § 5205(d)(1) because those cases did not explain how distributions of a testamentary spendthrift trust received beyond 180-days post-petition could be considered property of the estate given the language of 11 U.S.C.S. § 541(a)(5)(A).

OUTCOME: The **bankruptcy** appellate panel reversed the order sustaining the trustee's objection and remanded the matter for orders consistent with its opinion.

CORE TERMS: exemption, spendthrift trust, post-petition, exempt, exemption statutes, testamentary, beneficiary, order denying reconsideration, corpus, commencement, acquire, bankruptcy estate, state law, beneficial interest, statutory construction, inter vivos, reconsideration, evidentiary, enforceable, remainder, inclusion, stacking, levy, judgment debtor, case law, testamentary trust, trust beneficiary, trust income, entitled to receive, parties agree

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Exemptions > Claims & Objections

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN1 A **bankruptcy** appellate panel may hear appeals from final judgments, orders and decrees pursuant to 28 U.S.C.S. § 158(a)(1) or with leave of the court, from interlocutory orders and decrees pursuant to § 158(a)(3). A decision is final if it ends the litigation on the merits and leaves

nothing for the court to do but execute the judgment. An order granting or denying a debtor's claimed exemption is a final order. An order denying reconsideration is final if the underlying order was final and together they end the litigation on the merits. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

HN2 A **bankruptcy** appellate panel reviews a **bankruptcy** court's findings of fact for clear error and conclusions of law de novo. The panel reviews questions of statutory construction de novo. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN3 A **bankruptcy** appellate panel reviews a denial of reconsideration for abuse of discretion. A **bankruptcy** court abuses its discretion if it ignores a material factor deserving of significant weight, relies upon an improper factor, or makes a serious mistake in weighing proper factors. More Like This Headnote

Bankruptcy Law > Estate Property > Content

HN4 A **bankruptcy** estate is created upon the filing of a petition. 11 U.S.C.S. § 541. Section 541 is construed broadly to bring in any and all of a debtor's property rights within the **bankruptcy** court's jurisdiction and the umbrella of protections granted by the **Bankruptcy** Code. The estate is normally comprised only of property and interests therein belonging to the debtor at the time the petition is filed. Property which a debtor subsequently acquires does not become property of the estate, but becomes the debtor's, clear of all claims that are discharged by the **bankruptcy** proceedings. A limited exception to this general rule is any interest in property which the debtor acquires or becomes entitled to acquire within 180 days from the commencement of the case by bequest, devise, or inheritance. 11 U.S.C.S. § 541(a)(5)(A). More Like This Headnote

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Exemptions > General Overview

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN5 A debtor may extract assets from the estate by claiming exemptions under 11 U.S.C.S. § 522. A debtor may also exclude assets from becoming property of the estate. For example, a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under Title 11. 11 U.S.C.S. § 541(c)(2). Thus, a debtor can exclude from property of the estate an interest in a valid spendthrift trust. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Exemptions > General Overview

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN6 To determine whether a debtor's interest in a trust is excluded from the estate or included and then subject to a potential exemption, the threshold determination is whether it is a spendthrift trust. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN7 Under New York law all express trusts are presumed to be spendthrift trusts unless a settlor expressly provides otherwise. A debtor's interest in a New York spendthrift trust is excludable under 11 U.S.C.S. § 541(c)(2). More Like This Headnote

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > General Overview

HN8 N.Y. Est. Powers & Trusts Law § 7-1.5(a)(1) provides that the right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. More Like This Headnote

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > General Overview

HN9 N.Y. C.P.L.R. § 5205(c)(1) provides that except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment. More Like This Headnote

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exceptions to Enforceability

HN10 N.Y. C.P.L.R. § 5205(d)(1) provides that the following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents: 90 percent of the income or other payments from a trust the principal of which is exempt under § 5205(c). More Like This Headnote

Bankruptcy Law > Exemptions > State Law > Opt-Out Powers

HN11 New York has opted out of the federal exemptions set forth in 11 U.S.C.S. § 522. N.Y. Debt. & Cred. Law §§ 284 (1990). More Like This Headnote

Bankruptcy Law > Estate Property > Content

HN12 11 U.S.C.S. § 541(a) provides for what interests of a debtor, as of the commencement of the case, constitute property of the estate. Interests which a debtor acquires post-petition become property of the estate under limited circumstances. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN13 A beneficiary of a spendthrift trust does not acquire or become entitled to any distribution until the trustees actually make a distribution. Consequently, a debtor's interest in a testamentary spendthrift trust is excluded from the **bankruptcy** estate pursuant to 11 U.S.C.S. § 541(c)(2), but any distribution a debtor receives within 180 days after commencement of the case becomes property of the estate. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN14 While the undistributed corpus of a spendthrift trust generally may not be reached to satisfy claims of a beneficiary's creditors, either in or outside of **bankruptcy,** any income actually available or distributed to the beneficiary prior to **bankruptcy,** or within 180 days of the commencement of the case, may become a part of the bankrupt estate under 11 U.S.C.S. § 541(a)(1) or (5). More Like This Headnote

Bankruptcy Law > Estate Property > Content

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

HN15 The post-petition distributions a debtor receives from an inter vivos spendthrift trust are not included in the estate as there is no statutory provision for their inclusion. Testamentary trust distributions in the 180-day window are "bequests" and therefore property of the estate under 11 U.S.C.S. § 541(a)(5)(A), but inter vivos trust distributions are neither. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Estate, Gift & Trust Law > Trusts > Spendthrift Trusts > Exclusion From Bankruptcy Estate

Governments > Legislation > Interpretation

HN16 Although the United States Congress enacted 11 U.S.C.S. § 541(a)(5)(A) to temper the exclusion from an estate of spendthrift trusts, it made no further provisions for testamentary spendthrift trust distributions a debtor might receive after 180 days. The decision of Congress to enumerate specific exclusions creates a presumption that cases not included in that list of exclusions are subject to the statute. Income distributions from a spendthrift trust that occur after the 180 day window of § 541(a)(5)(A) are not to be included in the debtor's **bankruptcy** estate and instead are part of the debtor's fresh start. To conclude otherwise would render the statutory scheme set forth in § 541 superfluous. More Like This Headnote

Governments > Legislation > Interpretation

HN17 A basic canon of statutory construction warns against superfluousness. More Like This Headnote

COUNSEL: Paul R. Chomko, Esq., on brief for Appellant.

Lynne F. Riley, Esq. and Maria C. Furlong, Esq., on brief for Appellee.

JUDGES: Before Votolato, Lamoutte, and Tester, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Lamoutte

OPINION

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Mary Beth Massillon (the "Debtor") appeals from the **bankruptcy** court order (the "Order") sustaining the Trustee's objection to her claim of either the exclusion of, or the exemption in, her interest in a testamentary spendthrift trust (the "Trust"). She also appeals from the subsequent order denying reconsideration (the "Order Denying Reconsideration"). Because we conclude that the **bankruptcy** court erred in determining that the Debtor's interest in the undisbursed income and corpus of the Trust were property of the estate subject only to her federal exemption, the Panel **REVERSES** the Order and **REMANDS** the matter for an order consistent with this opinion.

BACKGROUND

The Debtor and her husband filed their chapter 7 petition on August 10, 2009, and the chapter 7 trustee was **[*2]** appointed (the "Trustee"). [1] On Schedule B, the Debtor listed a beneficial interest in the Trust, which her deceased grandfather created in his will. On Schedule C, the Debtor claimed that either a portion of her interest in the Trust was exempt under § 522(d)(5) or the entire value was "exempt" under § 541(c)(2). [2]

FOOTNOTES

1 The Debtor's husband is not listed on the notice of appeal and has no interest in the Trust. The remainder of the opinion will address the facts as they pertain to the Debtor.

2 Unless otherwise indicated, the terms " **Bankruptcy** Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37.

The Trust is governed by New York law. Under the terms of the Trust, the Debtor is entitled to receive distributions of the net income of the Trust at least twice a year and distributions of the remaining principal in two installments of approximately $31,000.00 each, in June 2010 and June 2015. At oral argument, the parties agreed that the Debtor received two disbursements of less than $1,000.00 within 180 days of the filing of the petition. **[*3]** [3]

FOOTNOTES

3 The parties further agreed that if the Panel determine that § 541(a)(5)(A) is applicable, the Debtor would turn those two payments over to the Trustee.

The Trustee objected to the claimed exemption on several grounds. First, she argued that she was entitled to recover a portion of the Trust distribution pursuant to N.Y.C.P.L.R. § 5205(d), a New York statute that allows creditors of a spendthrift trust beneficiary to recover at least 10 percent of all trust disbursements until the recovery sought is satisfied. Second, she argued that she was entitled to reach all of the Trust income because the New York statute allows creditors to reach all income due to a trust beneficiary over and above what is needed for the beneficiary's education and support. Third, she argued that any distribution the Debtor received from the Trust within 180 days after commencement of the case is property of the estate pursuant to § 541(a)(5)(A). Fourth, she argued that the Debtor's claim of exemption pursuant to § 522(d)(5) must be limited to $11,200.00, because the Debtor's husband does not have an interest in the Trust and therefore cannot claim an exemption in it. The Debtor filed an opposition.

The **bankruptcy** **[*4]** court held a nonevidentiary hearing [4] and ordered the parties to brief the following questions: (i) whether the determination of the Debtor's need for education and support would be at the time of the distribution or otherwise; and (ii) the applicability of exemptions under § 522 to the proceeds of a trust that are includable in the estate under § 541(c)(2). [5] Thereafter, the Trustee filed a brief in which she argued that N.Y.C.P.L.R. § 5205(d) is part of New York's comprehensive exemption scheme, and that the Debtor may not stack federal and state exemptions. Additionally, the Trustee argued that the Debtor's entitlement to a percentage of Trust distributions is based on reasonable needs determined over a continuum of time.

FOOTNOTES

4 The Debtor did not include a transcript of the hearing in her appendix. This is not fatal to her appeal because the facts are not in dispute and the issues on appeal concern statutory construction. See Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), 401 B.R. 539, 541 (B.A.P. 1st Cir. 2009).

5 It appears that the parties resolved some of their disagreements at the hearing. In its memorandum of opinion that accompanied the Order, the **bankruptcy** court explained **[*5]** that the parties disagreed as to (i) whether New York law, in combination with § 541(c)(2), allowed the Debtor to exempt from the estate Trust distributions; and (ii) to the extent the Trust distributions are assets of the estate, whether the Debtor may claim them as exempt pursuant to § 522(d)(5), or whether such claim would be an impermissible stacking of Code exemptions on top of state law exemptions.

In her post-hearing brief, the Trustee argued that she was entitled to reach post-petition spendthrift trust distributions of interest and principal based upon reported decisions interpreting N.Y.C.P.L.R. § 5205(d)(1). She also argued that the Debtor cannot apply federal exemption statutes to any interest in the Trust because it would result in an impermissible stacking of exemptions. In her post-hearing brief, the Debtor acknowledged that N.Y.C.P.L.R. § 5205(d)(1) **[*6]** allows judgment creditors to levy on distributions of spendthrift trusts. However, the Debtor explained that she was not claiming exemptions under New York law, and that under the New York statute an evidentiary hearing was necessary to determine what portion of the distribution from the Trust should be available to the estate.

The **bankruptcy** court issued the Order sustaining the Trustee's objection and limiting the Debtor's exemption to $11,200.00 of post-petition distributions, with the remainder of the distributions of the Trust to be turned over to the Trustee. In the memorandum of decision that accompanied the Order, the **bankruptcy** court found that the Trust was a valid testamentary spendthrift trust governed by the laws of New York. The court

explained that under New York law spendthrift trust assets, while in trust, were protected from creditors, but upon distribution could be only partially protected.

The court then addressed whether N.Y.C.P.L.R. § 5205(d)(1) would allow the Debtor to exempt the distributions of the Trust or whether it functioned as a restriction on the transfer of a beneficial interest, thereby permitting the Debtor to exclude any distributions from being considered **[*7]** property of the estate under § 541(c)(2). The court determined that N.Y.C.P.L.R. § 5205(d)(1) was an exemption statute because the statute restricts only creditors but not the debtor's ability to spend or otherwise alienate the asset. As such, it held that "the future distributions are assets of the estate." Lastly, the **bankruptcy** court concluded that the Debtor could only apply her § 522(d)(5) exemption of $11,200.00 to post-petition distributions and that the remainder of her distributions were property of the estate.

The Debtor sought reconsideration of the Order on three grounds: (1) the **bankruptcy** court had failed to explain why distributions beyond 180 days post-petition should be included in the estate; (2) the **bankruptcy** court had failed to take into account case law regarding N.Y.C.P.L.R. § 5205(d)(1); and (3) the **bankruptcy** court did not hold an evidentiary hearing to determine whether the Debtor needed any portion of the Trust distribution for support as provided in N.Y.C.P.L.R. § 5205(d)(1). The Trustee opposed the motion.

The **bankruptcy** court issued the Order Denying Reconsideration, in which it clarified that: (1) it had not addressed § 541(a)(5)(A) because the Debtor had **[*8]** not raised it, even after inquiry by the court, and also because the distributions are only governed by § 541(a)(1) because the Debtor's rights to the distributions became fixed pre-petition despite the fact that those rights were not yet mature; (2) the case law to which the Debtor had cited was not instructive given that it was issued more than a decade before the current **bankruptcy** exemption scheme was enacted, and was not binding authority; (3) no evidentiary hearing was needed regarding whether the Debtor needed a portion of the Trust distribution for support, because the Debtor had not elected the state exemption scheme, and application of § 522 requires no evidence. The Debtor appealed.

JURISDICTION

HN1 A **bankruptcy** appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations **[*9]** omitted). An order granting or denying a debtor's claimed exemption is a final order. Fiffy v. Nickless (In re Fiffy), 293 B.R. 550, 553 (B.A.P. 1st Cir. 2003). An order denying reconsideration is final if the underlying order was final and together they end the litigation on the merits. Hamilton v. Appolon (In re Hamilton), 399 B.R. 717, 720 (B.A.P. 1st Cir. 2009). Here, the Order and the Order Denying Reconsideration are final, appealable orders. See id.; In re Fiffy, 293 B.R. at 553.

STANDARD OF REVIEW

HN2 The Panel reviews the **bankruptcy** court's findings of fact for clear error and conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). The Panel reviews questions of statutory construction *de novo*. Pellegrino v. Boyajian (In re Pellegrino), 423 B.R. 586, 589 (B.A.P. 1st Cir. 2010). HN3 The Panel reviews a denial of reconsideration for abuse of discretion. Schwartz v. Schwartz (In re Schwartz), 409 B.R. 240, 245 (B.A.P. 1st Cir. 2008). A **bankruptcy** court abuses its discretion if it ignores a material factor deserving of significant weight, relies upon an improper factor, or makes a serious mistake in weighing proper factors. Id.

DISCUSSION

I. [*10] Position of the Parties

The Debtor contends that N.Y.C.P.L.R. § 5205(d)(1) is not just an exemption statute, based upon In re Dolard, 275 F. Supp. 1001 (C.D. Cal. 1967). In that case, the court described the statute as more than an exemption statute notwithstanding the statutory captions, in that it prohibits a levy of more than 10 percent of a distribution unless the debtor is not in need of the money. The Debtor explained that as a Massachusetts resident, she could not take advantage of the New York exemption and that the **bankruptcy** court's analysis renders § 541(c)(2) meaningless. The Debtor argues that even if the Trustee is entitled to distributions beyond 180 days post-petition, the **bankruptcy** court should have held a hearing to determine what amount beyond 10 percent the Trustee was entitled to receive.

The Trustee argues that although the Debtor claimed in her petition that her interest in the Trust was excluded under § 541(c)(2), the issue was not raised before the **bankruptcy** court or in this appeal. The Trustee further argued that N.Y.C.P.L.R. § 5205(d)(1) was an exemption statute and the Debtor was restricted to claiming the federal exemption scheme. Therefore, the Debtor **[*11]** cannot exempt her interest under both N.Y.C.P.L.R. § 5205(d)(1) and § 522(d) and a determination would need to be made as to the application of N.Y.C.P.L.R. § 5205(d)(1) to any Trust distributions.

II. The Spendthrift Trust Exclusion and Post-Petition Distributions Inclusion

HN4 The **bankruptcy** estate is created upon the filing of the petition. See 11 U.S.C. § 541; Gourdin v. Agin (In re Gourdin), 431 B.R. 885, 890 (B.A.P. 1st Cir. 2010). [6] "Section 541 is construed broadly to bring in any and all of the debtor's property rights within the **bankruptcy** court's jurisdiction and the umbrella of protections granted by the **Bankruptcy** Code . . ." Id. at 891 (citing Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.), 335 B.R. 253, 259 (B.A.P. 1st Cir. 2005) aff'd, 482 F.3d 15 (1st Cir. 2007)). The "estate is normally comprised only of property and interests therein belonging to the debtor at the time the petition is filed." Patrick A. Casey, P.A. v. Hochman, 963 F.2d 1347, 1350 (10th Cir. 1992). Property which a debtor subsequently acquires "does not become property of the estate, but becomes the debtor's, clear of all claims that are discharged by the **bankruptcy** proceedings." Id. A **[*12]** limited exception to this general rule is any interest in property which the debtor acquires or becomes entitled to acquire within 180 days from the commencement of the case by bequest, devise, or inheritance. 11 U.S.C. § 541(a)(5)(A).

FOOTNOTES

6 The pleadings before the **bankruptcy** court, starting with the Debtor's petition and ending with the Debtor's brief, have repeated references to this provision. For example, the Debtor listed as her first issue on appeal "whether or not future distributions from a spendthrift trust not made within the filing of 180 days of the petition, should be included within property of the estate."

HN5 A debtor may extract assets from the estate by claiming exemptions under § 522. A debtor may also exclude assets from becoming property of the estate such as "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). Thus, a debtor can exclude from property of the estate an interest in a valid spendthrift trust. See Patterson v. Shumate, 504 U.S. 753, 758, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) ("The natural reading of [§ 541(c)(2)] entitles a debtor to exclude **[*13]** from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law."); see also Spenlinhauer v. Spencer Press, Inc. (In re Spenlinhauer), 195 B.R. 543, 547 (D. Me. 1996), aff'd, 101 F.3d 106 (1st Cir. 1996).

HN6 To determine whether the Debtor's interest in the Trust is excluded from the estate or included and then subject to a potential exemption, the

threshold determination is whether it is a spendthrift trust. The parties agree and the **bankruptcy** court found that the Trust was a spendthrift trust. Indeed, HN7 "under New York law all express trusts are presumed to be spendthrift trusts unless the settlor expressly provides otherwise." Regan v. Ross, 691 F.2d 81, 86 n.14 (2d Cir. 1982). [7] Therefore, the Debtor's interest in the Trust is excluded from her estate and the Trustee cannot assert a claim in the corpus. See In re Hilsen, 405 B.R. 49, 56-57 (Bankr. E.D.N.Y. 2009) (holding debtor's interest in New York spendthrift trust excludable under § 541(c)(2)); Heidkamp v. Galliher (In re Hunger), 272 B.R. 792, 794 (Bankr. M.D. Fla. 2002) (holding debtor's interest in undisbursed assets of New York testamentary spendthrift **[*14]** trust excluded from estate under § 541(c)(2)); see also Birdsell v. Coumbe (In re Coumbe), 304 B.R. 378, 386 (B.A.P. 9th Cir. 2003) (holding corpus of Arizona spendthrift trust excluded under § 541(c)(2) and income included under § 541(a)(5)(A)).

FOOTNOTES

7 See HN8 N.Y. Est. Powers and Trust Law § 7-1.5(a)(1) ("The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.").

The next issue is whether any distributions of income are property of the estate. The **bankruptcy** court explained that this determination should be made by looking to whether N.Y.C.P.L.R. § 5205(d)(1) [8] created a restriction on transfer thereby excluding the distributions from the estate or acted as an exemption statute. [9]

FOOTNOTES

8 The statute provides:

HN9 (c) Trust exemption. 1. Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded **[*15]** from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment. . . .

HN10 (d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c)[.]

9 It is from this presentation of the issue that the parties and court engaged in a discussion about the restriction against applying both state and federal exemptions. The Debtor did not and could not claim an exemption under N.Y.C.P.L.R. § 5205(d)(1) because she filed for relief in Massachusetts, see § 522(b), and applied the federal exemptions. HN11 New York has opted out of the federal exemptions set forth in § 522. N.Y. Debtor & Creditor Law § 284 (McKinney 1990). Because N.Y.C.P.L.R. § 5205(d)(1) is an exemption statute and the Debtor did not claim an exemption under the statute, stacking of state and federal exemptions is not at issue.

HN12 Section 541(a) provides for what interests of a debtor, as of **[*16]** the commencement of the case, constitute property of the estate. Interests which a debtor acquires post-petition become property of the estate under limited circumstances. United States v. Fuller (In re Fuller), 134 B.R. 945, 948 (B.A.P. 9th Cir. 1992). The **bankruptcy** court declined to apply § 541(a)(5)(A) because the Debtor had failed to raise the issue. It held instead that the Trust distributions are governed by § 541(a)(1) because the Debtor's right to distribution was fixed pre-petition and that the Debtor was required to turnover all distributions that were not subject to her federal exemption. [10] The record reflects, however, that the Trustee raised the issue of § 541(a)(5)(A) in her initial exemption objection and the Debtor did so in her motion for reconsideration.

FOOTNOTES

10 The **bankruptcy** court did not specify if this holding applied to distributions of both the corpus and income of the Trust.

The Panel finds that by concluding that the Debtor's rights to the distributions were property of the estate because she allegedly acquired an interest in the unmatured distributions pre- petition, the **bankruptcy** court misapprehended the nature of a beneficiary's interest in the distributions **[*17]** of a spendthrift trust. HN13 11 See Lonstein v. Rockman (In re Lonstein), 950 F.2d 77, 78 n.1 (1st Cir. 1991) (HN14 "While the undistributed corpus of a spendthrift trust generally may not be reached to satisfy claims of the beneficiary's creditors, either in or outside of **bankruptcy,** any income actually available or distributed to the beneficiary prior to **bankruptcy,** or within 180 days of the commencement of the case, may become a part of the bankrupt estate under § 541(a)(1) or (5).")

12 By contrast, **[*18]** HN15 the post-petition distributions a debtor receives from an inter vivos spendthrift trust are not included in the estate as there is no statutory provision for their inclusion. See, e.g., In re Blount, 438 B.R. 98, 2010 WL 4064796 (Bankr. E.D. Tex. 2010) ("Virtually every court which has addressed the issue has come to the same conclusion - that testamentary trust distributions in the 180-day window are 'bequests' and therefore property of the estate under § 541(a)(5)(A), but that inter vivos trust distributions are neither.").

The Trustee asks that the Panel recognize and apply the holdings of cases wherein the court permitted the creditor or trustee to receive a portion of post-180 day trust distributions based upon the language of N.Y.C.P.L.R. § 5205(d)(1). In In re Hilsen, the debtor held an interest in an inter vivos trust. The

trustee asserted that the trust was not a spendthrift trust. 405 B.R. at 57. The **bankruptcy** court disagreed and ruled that the debtor's interest in the trust was exempt but that the creditors were entitled to 10 percent of the Debtor's future income benefits under the New York statute. Id. at 58. In In re Hunger, a debtor had an interest in **[*19]** a New York testamentary trust. 272 B.R. at 794. The **bankruptcy** court determined that the debtor's interest in the trust was excluded from the estate and that the payments the debtor received in the 180 days post-petition were property of the estate. Id. at 795-96. The court further ruled that a hearing was necessary to determine what percentage of the post-180 day trust income should be made available to creditors under N.Y.C.P.L.R. § 5205(d)(1). Id. at 796. The court based this decision on Dzikowski v. Edmonds (In re Cameron), 223 B.R. 20, 26 (Bankr. S.D. Fla. 1998).

The Cameron court simply stated that "[a]lthough the **Bankruptcy** Code specifically includes certain types of property within the estate, state law must be used to determine the status of property which is not specifically addressed by the **Bankruptcy** Code, such as trust income distributions received by the Debtor beyond 180 days post-petition." Id. at 25. The court ruled that, under the New York statute, the trustee was entitled to at least 10 percent of "distributions, income and/or principal, made beyond 180 days post-petition . . ." Id. at 26.

The Cameron court relied, in part, on McCracken v. Manufacturers Hanover Trust Co. (In re Vogel), 16 B.R. 670 (Bankr. S.D. Fla. 1981). **[*20]** In Vogel, a New York state court had entered an order explaining the amounts a debtor's spendthrift trust distribution could be levied upon by a creditor under N.Y.C.P.L.R. § 5205(d)(1). Id. at 671-72. The debtor filed for relief before the state court had held a hearing to determine actual amounts. Id. at 672. The **bankruptcy** court thereafter and, without discussion, held a hearing to apply N.Y.C.P.L.R. § 5205(d)(1) to the pre-and post-petition payments of principal and interest. [13] The **bankruptcy** court considered, but rejected, an order for a "continuing levy" of the trust payments and instead appeared to have made a larger lump sum order.

FOOTNOTES

13 The Vogel court did not address § 541(a)(5)(A). Id. It first ruled that the trust was governed by New York law. Id. Thereafter it wrote that the state court opinion was persuasive and that the **bankruptcy** court would continue its work by determining the amount of the trust distributions that would be made available to creditors. Id.

The Panel declines to follow the decisions in these cases because they do not explain how distributions of a testamentary spendthrift trust received beyond six months post-petition can be considered property of the estate **[*21]** given the language of § 541(a)(5)(A). Because the distributions in those cases were not property of the estate, it is unclear how N.Y.C.P.L.R. § 5205(d)(1) as an exemption statute, and not the enabling statute for a New York spendthrift trust, was applicable. HN16 Although Congress enacted § 541(a)(5)(A) to temper the exclusion from the estate of spendthrift trusts, it made no further provisions for testamentary spendthrift trust distributions a debtor might receive after 180 days. Magill v. Newman (In re Newman), 903 F.2d 1150, 1154 (7th Cir. 1990) ("The decision of Congress to enumerate specific exclusions creates a presumption that cases not included in that list of exclusions are subject to the statute."); Smith v. Moody (In re Moody), 837 F.2d 719, 723 (5th Cir. 1988) ("income distributions from a spendthrift trust that occur after the 180 day window of § 541(a)(5)(A) are not to be included in the debtor's **bankruptcy** estate and instead are part of the debtor's fresh start."); Wetzel v. Regions Bank (In re Reagan), 433 B.R 263, 268 (W.D. Ark. 2010) (same). [14] To conclude otherwise would render the statutory scheme set forth in § 541 superfluous. Jenkins v. A.T. Massey Coal Co., Inc. (In re Jenkins), 410 B.R. 182 (Bankr. W.D. Va. 2008) **[*22]** ("Within [§ 541] Congress made only one provision for inclusion of a post-petition entitlement in the **bankruptcy** estate."); Moser v. Mullican (In re Mullican), 417 B.R. 389, 397 (Bankr. E.D. Tex. 2008) (HN17 "A basic canon of statutory construction warns against superfluousness . . . "), aff'd, 417 B.R. 408 (E.D. Tex. 2008).

FOOTNOTES

14 The Panel is cognizant of **bankruptcy** cases which discuss the impact of state law exceptions to the enforceability of a spendthrift trust for debts arising from, *inter alia*, domestic support obligations, necessaries, and taxes. See, e.g., Bucy v. Evans (In re Evans), 88 B.R. 813 (Bankr. M.D. Tenn. 1988). Trustees who have attempted to reach spendthrift trusts on this basis have largely failed. See In re White, No. 09-13663-NVA, 2010 Bankr. LEXIS 3505, 2010 WL 3927485 (Bankr. D. Md. Sept. 30, 2010); Garrett v. Finley (In re Finley), 286 B.R. 163 (Bankr. W.D. Wash. 2002); In re Cypert, 68 B.R. 449 (Bankr. N.D. Tex. 1987). Neither the Trustee nor the **bankruptcy** court framed the application of N.Y.C.P.L.R. § 5205(d)(1) in these terms and the Panel need not address the issue.

In summary, the Panel concludes that the corpus of the Trust is excluded from the Debtor's estate because, as the parties **[*23]** agree, it is a valid testamentary spendthrift trust. Further, the Panel concludes, and the parties at oral argument agreed, that the two distributions that the Debtor received in the 180 days post-petition became property of her estate. Any distributions from the Trust the Debtor received after the 180 days post-petition are not property of the estate.

CONCLUSION

For the reasons discussed above, the Panel **REVERSES** the Order and **REMANDS** this matter for orders consistent with this opinion. [15]

FOOTNOTES

15 The Panel need not address the appeal of the Order Denying Reconsideration as it is rendered moot by the disposition of the Order.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

In re:	)	Chapter 13
	)	Case No. 10-42776-MSH
JOEL D. SEGER	)	
CHRISTINE C. SEGER	)	
	)	
Debtors.	)	

MEMORANDUM OF DECISION ON CHAPTER 13 TRUSTEE'S CERTIFICATE OF NONCOMPLIANCE

The matter before me raises questions about the extent to which Chapter 13 debtors who engage in business must comply with administrative obligations imposed upon trustees. Specifically, the standing Chapter 13 trustee of this division asserts that, like a trustee, the business debtors in this case must maintain their checking account in one of the financial institutions designated by the United States Trustee as an approved depository for bankruptcy funds. The debtors, who own and operate a dance academy in Holden, Massachusetts, have opened a checking account in the Leominster Credit Union ("LCU"), (federally insured by the National Credit Union Association but not a U.S. Trustee-approved depository),[1] in the name of "CCS Dance Academy, Debtor In Possession, Christine C. Seger, Joel D. Seger." In justifying their choice the debtors observe that they have a long relationship with LCU and that the only bank on the U.S. Trustee-approved list near their home and business is Bank of America whose fees for maintaining a debtor-in-possession checking account are higher than those of LCU. Unmoved, the Chapter 13

[1] I take judicial notice of this fact pursuant to Fed. R. Evid. 201(b) which provides "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." LCU's letter regarding the debtors' account, which the debtors' counsel offered without objection at the hearing, is on LCU's letterhead and bears the notation "Federally Insured by NCUA."

trustee has filed a Certificate of Noncompliance and requested dismissal of this case. Because I find that there is no obligation imposed upon Chapter 13 business debtors to maintain operating accounts exclusively in U.S. Trustee- approved depositories, I must deny the Chapter 13 trustee's request.

The primary statutory source governing investments and deposits of bankruptcy estate funds is Bankruptcy Code § 345, 11 U.S.C. § 345. Section 345(a) requires a bankruptcy trustee to deposit or invest estate money so as to maximize the estate's return, taking into account the safety of the deposit or investment. Section 345(b) requires either that (i) the deposit or investment be insured or guaranteed by the United States, one of its departments, agencies or instrumentalities, or otherwise backed by the full faith and credit of the federal government, or that (ii) the trustee require the depository or investment entity to post a bond, secured by the undertaking of a corporate surety approved by the United States Trustee in favor of the United States or to deposit certain specified securities to ensure its ability to repay the deposit or investment obligation. For a depository whose deposits are not backed in some manner by the federal government, § 345(b) also requires such depository to provide a proper accounting for the deposits or investments and any income earned thereon. Finally, § 345(b) allows the court for cause to waive the requirements of the section.

Bankruptcy Code § 345 applies to trustees only, meaning Chapter 7 and Chapter 11 private trustees, Chapter 13 standing trustees, and Chapter 11 debtors-in-possession, but not Chapter 13 debtors. Unlike Chapter 11 debtors-in-possession who are invested under Bankruptcy Code § 1107 with virtually all the rights, powers and duties of a trustee, a Chapter 13 debtor's trustee-like powers and duties are far more circumscribed. The definitive treatise on Chapter 13

bankruptcy elaborates:

> It has been said that a Chapter 13 debtor operates the business much like a Chapter 11 debtor-in-possession. Unfortunately, the Code is not constructed exactly that way. In a Chapter 11 case, 11 U.S.C. § 1107(a) grants a debtor-in-possession the powers and duties of a trustee. With some limitations, the debtor in a Chapter 12 case is empowered much the same as the debtor-in-possession in a Chapter 11 case. Because many powers and duties in Chapters 3 and 5 of the Bankruptcy Code are worded in terms of "the trustee," this substitution gives a debtor-in-possession in a Chapter 11 case and the debtor in a Chapter 12 case broad powers.
>
> There is no analogue to § 1107 or to § 1203 in Chapter 13. A Chapter 13 debtor engaged in business is authorized by § 1304(b) to "operate the business of the debtor" and to use the powers in §§ 363(c) and 364. The many powers of a trustee under other chapters are no more available to a Chapter 13 debtor engaged in business than to an ordinary Chapter 13 debtor.

Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 57.1, at ¶¶ 7-8, Sec. Rev. Apr. 30, 2004, www.Ch13online.com (footnotes omitted).

In addition to being subject to the requirements of Bankruptcy Code § 345, pursuant to 28 U.S.C. § 586(a)(3)(D), trustees are closely supervised by the United States Trustee. To assist regional United States Trustees in carrying out their responsibilities under title 28, the Executive Office of the United States Trustee has promulgated handbooks for Chapter 7, Chapter 11 and Chapter 13 trustees. The Chapter 7 and Chapter 11 handbooks require private trustees (and by extension Chapter 11 debtors-in-possession) and the Chapter 13 handbook requires standing Chapter 13 trustees to use only depositories that have agreed to comply with "the requirements established by the United States Trustee". *See* Handbook for Chapter 7 Trustees at 9-4 (2002 Ed.); Chapter 11 Trustee Handbook at 26 (2004 Ed.); Handbook for Standing Trustees at 9-3 (1998 Ed.). The U.S. Trustee mandates that trustees hold estate funds only in depositories which have agreed to maintain appropriate collateralization of trustee deposits, waive certain service charges, establish certain controls over accounts, and provide the United States Trustee with account

information. The United States Trustee maintains an official list of approved depositories. Nothing in these handbooks appears to require Chapter 13 business debtors to restrict their depository relationships to those banks on the official list.

The Chapter 13 trustee creatively suggests that Bankruptcy Code § 704(a)(8), made applicable to Chapter 13 business debtors by Bankruptcy Code § 1304(c),[2] may be interpreted to require Chapter 13 business debtors to maintain bank accounts only in U.S. Trustee-approved depositories. Her reasoning is that Bankruptcy Code § 704(a)(8) requires Chapter 7 trustees to, among other things, file with the court and the U.S. Trustee statements of receipts and disbursements. Because the *Handbook for Chapter 7 Trustees* requires a Chapter 7 trustee to hold estate funds only in an approved depository, it follows, says the Chapter 13 trustee, that the statement of receipts and disbursements as it relates to a chapter 7 estate must reflect transactions arising exclusively from an approved depository. Therefore, she concludes, because Bankruptcy Code § 1304(c) requires a Chapter 13 business debtor to behave as a Chapter 7 trustee behaves under § 704(a)(8) a statement of receipts and disbursements for a Chapter 13 debtor operating a business must also be derived only from U.S. Trustee-approved depository transactions.

The Chapter 13 trustee's reasoning reflects a kind of *cum hoc ergo propter hoc* false logic by attempting to equate the statement of receipts and disbursements with a bank statement. While a statement of receipts and disbursements may include receipts and disbursements reflected on a bank statement it will also include all other transactions engaged in by a business debtor or trustee, such as cash and credit card transactions. In fact, a statement of receipts and disbursements may be required even when there are no financial transactions whatsoever and there is no bank account.

[2] The reference to § "704(8)" in § 1304(c) appears to be a typographical error.

Therefore, Bankruptcy Code §§ 704(a)(8) and 1304(c), which impose filing requirements on trustees and Chapter 13 business debtors, cannot reasonably or rationally be interpreted to incorporate a requirement regarding the locus of a depository account for funds of a bankruptcy estate.

Further undercutting the Chapter 13 trustee's position is the *Handbook for Chapter 13 Trustees* itself. Chapter 8 of that publication, entitled "Debtors Engaged in Business", nowhere requires the Chapter 13 business debtor to deposit funds in U.S. Trustee-approved depositories. In fact, section E.2 directs Chapter 13 trustees to instruct business debtors to file periodic operating reports and to attach monthly bank statements from the debtors' "bank, credit union, savings or other financial institution." Not only is there no qualifier limiting the depository list to those approved by the U.S. Trustee, the reference to credit unions and other financial institutions actually signifies that Chapter 13 business debtors are free from such a limitation because the U.S. Trustee-sanctioned list includes not a single credit union or non-bank financial institution.

Apart from the statutes and the U.S. Trustee handbooks, the only other authority remotely relevant to the nature of the bank account required to be maintained by a Chapter 13 business debtor is MLBR 13-2(a)(2)(A)(ii) of the local rules of this Court which requires a Chapter 13 debtor engaged in business to submit to the Chapter 13 trustee within seven days after the commencement of the case evidence of the opening of "appropriate debtor-in-possession checking accounts." The Chapter 13 trustee asserts that this local rule requires Chapter 13 business debtors to restrict their banking relationships to U.S. Trustee-approved depositories. Truly, the quoted phrase does not lend itself to an obvious interpretation, especially since the nominalization "debtor-in-possession" applies only to Chapter 11 debtors. S*ee* Bankruptcy Code

§ 1101(1). I do not, however, interpret MLBR 13-2(a)(2)(A)(ii) to restrict a Chapter 13 business debtor's bank account to U.S. Trustee-approved depositories. Rather, I conclude that the rule concerns itself with the nature of the account not its location and imposes upon a Chapter 13 business debtor, like a debtor-in-possession, the obligation to open a business checking account which identifies the account holder as a debtor and references the case docket number.

This is not to say that the bankruptcy court is powerless if a Chapter 13 business debtor's funds are deposited in an unsafe or unsound financial institution. Bankruptcy Code § 1304(b) permits the court to impose limitations or conditions on the debtor's business operations. Judge Lundin aptly elucidates:

> For example, if the debtor demonstrated poor fiscal control prior to bankruptcy, it might be appropriate for a creditor or the Chapter 13 trustee to ask the court to impose special banking or reporting requirements on the debtor's continued operation of the business.

Lundin § 57.1 at ¶ 9.

The bottom line is this. There is no basis upon which a Chapter 13 business debtor may be required to maintain bank accounts exclusively in U.S. Trustee-approved depositories. The existing regime of regulation requires merely that a Chapter 13 business debtor maintain at least one checking account in a bank, credit union, savings or other financial institution and that the checks issued on that account include a reference to the account holder as being a debtor and to the docket number of the Chapter 13 case. The debtors in this case, who have opened their account in a federally insured credit union, are in substantial but not total compliance with these requirements because their account at LCU does not reference the docket number of this case. In order to avoid the expense (and wasted paper) attendant in requiring the debtors to order new checks the debtors are directed to write or rubber stamp the case docket number upon each check as it is issued.

When new checks are ordered, the debtors shall see to it that the case number is printed on the checks.

A separate order shall issue.

Dated: January 24, 2011

By the Court,

Melvin S. Hoffman
U.S. Bankruptcy Judge