UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. PR 00-009

IN RE: MARIO MERCADO JIMINEZ,
Debtor.

MARIO MERCADO JIMINEZ,
Appellant,

v.

UNITED STATES TRUSTEE, ADRIAN MERCADO JIMINEZ,
AND THE ESTATE OF JOSE R. MERCADO, HACIENDA BIG SUR, INC.,
AND CORPORACION AZUCARERA DE PUERTO RICO,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico,
(Hon. Sara DeJesus, U.S. Bankruptcy Judge)

Before
Votolato, Vaughn, and Deasy, U.S. Bankruptcy Judges

Modesto Bigas Mendez, Ponce, Puerto Rico, for the Appellant.

Edgardo Munoz, Hato Rey, Puerto Rico, for the Appellees.

August 25, 2000

Per Curiam.

Mario Mercado Jimenez ("Appellant") appeals an order of the bankruptcy court dismissing his Chapter 11 bankruptcy case. For the reasons set forth below, we conclude that the issue is moot and dismiss the appeal.

APPELLATE JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 158(a) and (c), and Rule 8001-1(d)(1) of the Local Rules for the Bankruptcy Appellate Panel for the First Circuit. 28 U.S.C. §§ 158(a) and (c) (1988 & Supp. 1998); 1ST CIR. B.A.P. R. 8001-1(d)(1) (1998). The parties, pursuant to Rule 8001-1, have not elected to have their appeal heard by the District Court for the District of Puerto Rico. 1ST CIR. B.A.P. R. 8001-1(d)(1). Further, this proceeding constitutes a separate proceeding within the context of the Debtor's bankruptcy case, and thus is appropriate for review. Smith v. Seaside Lanes (In re Moody), 825 F.2d 81, 85 (5th Cir. 1987).

BACKGROUND

The Appellant in this action has now filed four separate petitions in bankruptcy with the United States Bankruptcy Court

for the District of Puerto Rico. The two most recently filed cases are relevant to our disposition of the appeal before this Panel.

On August 18, 1999, the bankruptcy court held a hearing on confirmation in the Appellant's Chapter 11 case, which had been pending since 1996 (the "1996 Case"). The bankruptcy court previously ruled at a hearing on July 7, 1999 that, based on representations by the debtor at a March 2, 1998 hearing, if a plan of reorganization was not confirmed on August 18, 1999, the case would be considered voluntarily dismissed.[1] When the Debtor failed to produce the necessary votes for confirmation at the August 18, 1999 hearing, the bankruptcy court entered an order dismissing the case in reliance on the Debtor's representations from the July 7, 1999 and March 2, 1998 hearings that the case would be voluntarily dismissed if he had not obtained the requisite votes for confirmation.

The Appellant appealed to the Bankruptcy Appellate Panel on August 27, 1999, but when he failed to comply with the Bankruptcy

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[1] The court referred to statements made by the Debtor at a March 2, 1998 hearing on confirmation of the Chapter 11 plan at which the bankruptcy court entered an order denying confirmation of the plan for failure to secure sufficient votes. The Debtor inquired whether the order would be reconsidered if the votes were obtained within ten days. In his discussion with the bankruptcy judge, counsel for the Debtor stated that the case would be dismissed if the votes were not obtained within that period. See Supp. Appendix at 206-208. This colloquy serves as the basis for the bankruptcy court's finding that the case was voluntarily dismissed.

Appellate Panel's order requiring him to take steps to prosecute the appeal, the appeal was dismissed on November 17, 1999. In the meantime, however, the Appellant had filed a new Chapter 11 petition on October 13, 1999. A motion to dismiss was filed by creditors on October 14, 1999 asserting that the Appellant was barred by § 109(g)(2) of the Bankruptcy Code from filing a new petition within 180 days from the dismissal of the 1996 Case. The bankruptcy court entered an order on January 7, 2000, granting the motion to dismiss pursuant to § 109(g)(2), finding that the Appellant voluntarily dismissed his previous case on August 18, 1999, following the filing of a motion for relief from the automatic stay. Furthermore, the court barred the Appellant from filing a case for 180 days after December 17, 1999, the date the dismissal of the appeal to the Bankruptcy Appellate Panel pertaining to the 1996 case became final.

The Appellant now appeals the bankruptcy court's January 7, 2000 order. Specifically, he claims that the court abused its discretion in finding that he voluntarily dismissed the 1996 Case on August 18, 1999, and that § 109(g)(2) is therefore inapplicable to the present filing.

DISCUSSION

Section 109(g)(2) of the Bankruptcy code provides:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title

> who has been a debtor in a case pending under this title at any time in the preceding 180 days if –
> . . .
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g)(2). This provision bars a debtor from refiling for at least 180 days from the dismissal of another bankruptcy case. The bankruptcy court entered an order finding that the Appellant voluntarily dismissed his Chapter 11 case on August 24, 1999. The 180 day period began to run on August 24, 1999, prohibiting the Appellant from filing a new bankruptcy case until February 20, 2000.[2] The Appellant did not request a stay pending appeal of the August 24, 1999 order pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure.

Where there is no actual case or controversy in an appellate proceeding, the appeal is moot. See Carey v. Askenase (In re Carey), 221 B.R. 571, 572 (B.A.P. 1st Cir. 1998). "Mootness in bankruptcy appellate proceedings, as elsewhere, is premised on jurisdictional and equitable considerations stemming from the

[2] The bankruptcy court ordered that the 180 day period would run from the date the Bankruptcy Appellate Panel's order dismissing the appeal became final, December 17, 1999. We believe that the proper date on which the statutory period runs is the date the case was voluntarily dismissed, i.e. August 18, 1999. However, for the purpose of this appeal the date on which the 180 day period ran is immaterial, as 180 days has passed as to both dates.

impracticability of fashioning fair and effective relief." Id. (quoting Rochman v. Northeast Utils. Serv. Group (In re Public Serv. of New Hampshire), 963 F.2d 469, 471 (1st Cir. 1992). Here, more than 180 days have passed since the case was dismissed and, with no stay pending appeal, in effect the bankruptcy court's order is not reviewable. See In re Frieouf, 938 F.2d 1099, 1104 (10th Cir. 1991), *cert. denied,* 502 U.S. 1091, 112 S.Ct. 1161 (bankruptcy court's denial of all access to bankruptcy relief for 180 days not reviewable after 180 days have passed); Traveler's Ins. Co. v. Don-Lin Farms, 90 B.R. 48, 48 (W.D.N.Y. 1988)(appeal regarding bar against refiling imposed by § 109(g)(2) moot after 180 days passed since dismissal).

Because 180 days have passed since his bankruptcy case was dismissed, the Appellant cannot be barred by § 109(g)(2) from filing a new bankruptcy petition. Accordingly, the appeal is **DISMISSED** as moot.