UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. MB 00-095

IN RE: RICHARD P. SOUSA,
Debtor.

UNITED STATES OF AMERICA,
Appellant,

v.

RICHARD P. SOUSA,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)

Before
LAMOUTTE, VAUGHN, CARLO, U.S. Bankruptcy Appellate Panel Judges

---

Donald K. Stern, D. Patrick Mullarkey and Karen A. Smith, for the Appellant.

Mary Jeanne Stone and Belford & Stone, for the Appellee.

July 19, 2001

PER CURIAM.

The issue before the panel is whether the bankruptcy court erred in refusing to grant the United States' motion for reconsideration of her order allowing the debtor's objection to claim, where the debtor admits he did not properly serve the United States with notice of the objection.

Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel has jurisdiction to review final decisions of the bankruptcy court pursuant to 28 U.S.C. § 158(a) and (b). The bankruptcy court's findings of fact are reviewed under a clearly erroneous standard, while its legal conclusions are reviewed *de novo*. Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995); In re SPM Mfg. Corp., 984 F.2d 1305 (1st Cir. 1993).

Background

The debtor filed his chapter 13 petition on October 25, 1999. The IRS filed a timely proof of claim on March 20, 2000. On June 9, 2000, debtor filed an objection to the proof of claim filed by the IRS. The objection was served upon the Special Procedures Function of the IRS. On or about June 26, 2000, the debtor served notice of the evidentiary hearing on the Special Procedures Function. Neither the objection nor the notice of hearing were served on the U.S. Attorney's Office or the Department of Justice. The IRS did not respond to the objection

nor appear at the hearing. On July 17, 2000, the bankruptcy court held the hearing and entered an order sustaining the debtor's objection to the proof of claim filed by the IRS. On July 25, 2000, the IRS filed a motion for reconsideration, asking that the court set aside the order, allow the IRS to file a response to the objection, and schedule a hearing. The debtor replied to the motion, admitting that he did not serve the U.S. Attorney's Office nor the Attorney General. On September 11, 2000, the bankruptcy court held a hearing, at which it denied the motion for reconsideration because the IRS had actual notice of the hearing on the objection to claim. The United States filed a notice of appeal on September 20, 2000.

Discussion

Debtor's objection to the claim filed by the IRS is a contested matter within the purview of Rules 3007 and 9014 of the Federal Rules of Bankruptcy Procedure. See Kowal v. Malkemus (In re Thompson), 965 F.2d 1136, 1147, n. 14 (1st Cir. 1992). The IRS argues that the bankruptcy court lacked jurisdiction over it to enter the order sustaining the objection to claim because it was not properly served. According to the IRS, an objection to claim is a contested matter, and therefore must be served in accordance with the Federal Rules of Bankruptcy Procedure, which require service upon the U.S. Attorney and the Attorney General. Further, the IRS argues that granting relief from judgment

pursuant to Federal Rule of Civil Procedure 60(b) is mandatory where the judgment or order complained of is void.

The debtor argues that, although it did not serve the IRS in accordance with the bankruptcy rules, the IRS had actual knowledge of the hearing because the debtor spoke with Mr. Frank Killoy, an IRS representative, who indicated that an attorney would be at the hearing. The IRS acknowledges that Mr. Killoy did speak with debtor's attorney, but argues that knowledge of the objection is insufficient.

Fed. R. Bankr. P. 9014 provides that a contested matter should be served in the manner provided in Fed. R. Bankr. P. 7004 for the service of a summons and complaint. Rule 7004(b)(4) and (5), which governs service of process upon any agency of the United States, provides that, in addition to serving the agency, service must be made by mail upon the United States Attorney in the district where the action is brought, and also upon the Attorney General of the United States in Washington, D.C.

At the hearing on the motion for reconsideration, the bankruptcy judge found that, since the debtor had spoken with a representative of the IRS, it had actual knowledge of the filing of the objection, the response deadline, and the hearing. She admonished the attorney for the IRS "next time you've got to show up", and denied the motion for reconsideration for "no cause shown". Appendix, transcript of 9/11/00 at p. 7.

The Bankruptcy Appellate Panel's previous decision in United States v. Laughlin (In re Laughlin), 210 B.R. 659 (B.A.P. 1st Cir. 1997) is squarely on point. The panel in In re Laughlin held that when a party seeks relief against the IRS through an adversary or contested matter, the United States is the real party in interest and must be properly served. Id. at 660. The court rejected the trustee's argument therein that the IRS had actual notice of the motion in time to avoid default. The court specifically noted that "[n]otice to the IRS through its local Special Procedures Staff does not cure the jurisdictional defect." 210 B.R. at 661. If proper service is not effectuated, personal jurisdiction over the United States is lacking, and any judgment entered prior to proper service is void. Id. at 661. Furthermore, if the judgment or order complained of is void, relief under Fed. R. Civ. P. 60(b)(4) is mandatory. Id. at 659.

Conclusion

The issues before this panel were resolved in Laughlin in favor of the United States. The bankruptcy court's order was found to be void because of the failure to properly serve the United States pursuant to Fed. R. Bankr. P. 7004(f); relief under Fed. R. Civ. P. 60(b)(4) was found to be mandatory; and the bankruptcy court's order was reversed. In view of the foregoing, the bankruptcy court's order denying the motion for reconsideration is hereby reversed and the matter is remanded for further proceedings consistent with this opinion.