NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 05-049

Bankruptcy No. 04-20328-JBH

FRANK J. KRISTAN,
Debtor.

FRANK J. KRISTAN,
Appellant,

v.

PATRIOT GROWTH FUND, L.P., et al., and
JOHN C. TURNER, Chapter 7 Trustee,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)

Before
Hillman, Rosenthal and Somma, United States Bankruptcy Appellate Panel Judges.

Frank J. Kristan, Pro Se, on brief for Appellant.

Jonathan Doolittle, Esq. and Stephen Morrell, Esq. on brief for Appellees.

January 11, 2006

ROSENTHAL, U.S. Bankruptcy Appellate Panel Judge.

Frank J. Kristan ("Debtor") appeals from the bankruptcy court's September 20, 2005, order denying his motion for reconsideration of the denial of his objection to the proof of claim filed by Patriot Growth Fund, L.P., et al ("Appellees"). For the reasons set forth below, the Panel affirms.[1]

STATEMENT OF THE CASE

On March 8, 2004, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code.[2] In May, 2005, the Appellees filed a proof of claim in the Debtor's case asserting an unsecured claim in the amount of $4,959,673.00 based on a Florida state court judgment. The Debtor objected to the proof of claim and a hearing was scheduled for August 3, 2005. After the hearing, the bankruptcy court entered an order denying the Debtor's claim objection. On August 12, 2005, the Debtor filed a motion for reconsideration and the Appellees objected. On September 20, 2005, without a hearing, the bankruptcy court issued an amended order denying the motion for reconsideration.

On September 29, 2005, the Debtor filed a Notice of Appeal "of the Order entered on September 20, 2005 denying the reconsideration of the Order allowing the claim of Patriot Growth Fund, L.P. et al." The Notice of Appeal did not identify the underlying order denying his claim objection. Although the Debtor primarily challenges the bankruptcy court's denial of his

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[1] The Panel unanimously determined, after examination of the briefs and appendices, that oral argument is not needed in this case because the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. See Fed. R. Bankr. P. 8012 and 1st Cir. BAP R. 8012-1(b).

[2] All references to the "Bankruptcy Code" or to specific sections are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, et seq.

claim objection, he did not identify that order in his notice of appeal. Therefore, the scope of this appeal is limited to review of the order denying his motion for reconsideration.[3] See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 134 (B.A.P. 1st Cir. 2004) ("Without an appeal of the initial order, when a party files a timely appeal of the denial of a motion for relief from that order, the reviewing court is limited to consideration of the denial of the motion for relief; the reviewing court cannot consider the merits of the underlying order) (citing Hoult v. Hoult, 57 F.3d 1, 3 (1st Cir. 1995)). However, even if the Panel determined that the Debtor properly appealed both the order denying reconsideration and the underlying order denying his claim objection, the Panel is unable to review either order as the Debtor failed to provide the Panel with a transcript of the hearing on the claim objection.

BACKGROUND

On July 7, 2003, the Twentieth Judicial Circuit Court for Collier County, Florida, entered a Final Judgment in favor of the Appellees and against the Debtor in the aggregate amount of $4,959,673.00, plus interest ("Final Judgment"). The Final Judgment was based on a stipulation of the parties following a trial and jury verdict entered in October, 2002. The Final Judgment was affirmed by the Florida District Court of Appeals on March 3, 2004.

[3] Bankruptcy Rule 8002 establishes a 10-day period to appeal the judgments, orders or decrees of the bankruptcy court. See Fed. R. Bankr. P. 8002(a). However, a motion to alter or amend a judgment tolls the appeal period and relates back to the underlying order when filed within the ten-day appeal period. See Fed. R. Bankr. P. 8002(b)(2). Here, the Debtor filed a motion for reconsideration within 10 days of entry of the underlying order, and therefore tolled the appeal period of the underlying order. However, the Debtor did not identify the underlying order in the notice of appeal, and therefore, the scope of this appeal is limited to review of the order denying the Debtor's motion for reconsideration. See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 134 (B.A.P. 1st Cir. 2004).

The Appellees filed the Florida judgment with the Superior Court in York County, Maine, pursuant to the Uniform Enforcement of Foreign Judgments Act. See Me. Rev. Stat. Ann. tit. 14, §§ 8001, et seq. The Debtor filed a motion for non-recognition of the judgment in the Maine Superior Court, arguing that the Florida court lacked jurisdiction over him and that, while his appeal of the Florida judgment was pending, the judgment could not be enforced against him in Maine. On October 31, 2003, the Maine Superior Court entered an order denying the motion for non-recognition of the judgment, determining the Final Judgment to be "a valid judgment that has not been stayed in Florida and whose enforcement in Maine cannot be stayed because of the failure of the [Debtor] to furnish the required security." The Debtor appealed. While the appeal was pending, the Maine Superior Court issued several writs of execution to enforce the judgment. Moreover, the Appellees commenced enforcement and collections efforts in the Maine District Court. The Debtor filed a motion to set aside the judgment in the Maine District Court, which was denied.

The Debtor filed his Chapter 7 petition on March 8, 2004. In April 2004, the bankruptcy court granted the Appellees relief from the automatic stay in order to commence or continue proceedings to enforce liens against the Debtor's property. On May 20, 2004, the Maine Superior Court judgment was ultimately affirmed by the Maine Supreme Judicial Court in an unreported memorandum decision.

In May, 2005, the Appellees filed their proof of claim. The Debtor objected, arguing that: (1) the Final Judgment was "stayed" pending appeal in the Second District Court of Appeal in Florida, and the appeal itself was automatically stayed by the bankruptcy filing, (2) because the Final Judgment was entered within one year prior to the bankruptcy filing, it was subject to

review and denial as a valid claim by the bankruptcy court, and (3) the Final Judgment was subject to setoff against claims of the estate. The Appellees filed a response to the Debtor's objection, and a hearing was scheduled for August 3, 2005. On that date, the Debtor filed a document entitled "New Evidence for Objection to Patriot Claim."

After a hearing on August 3, 2005, the bankruptcy court entered an order denying the Debtor's objection, concluding:

> Frank Kristan failed to prove he has standing to object to the proof of claim. Moreover, Mr. Kristan failed to demonstrate infirmities in the claim sufficient to overcome its prima facie validity and, further, in response to Mr. Kristan's objection, the claimant introduced evidence that its claim is based on a final Florida judgment.

The Debtor filed a motion for reconsideration on August 12, 2005, claiming (1) that the Appellees willfully violated the automatic stay by attempting to have their claim verified by the Florida courts, and (2) that he has standing to object because he has proposed a 100% plan of reorganization. The Appellees objected. On September 20, 2005, the bankruptcy court issued an amended order denying the motion for reconsideration. The Debtor filed a notice of appeal with respect to the order denying reconsideration on September 29, 2005.

JURISDICTION

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 omitted). 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 appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998).

An order denying reconsideration is a final appealable order if the underlying order was a final appealable order and together the order denying relief and the underlying order end the litigation on the merits. See Bradshaw v. I.R.S. (In re Bradshaw), 283 B.R. 814, 817 (B.A.P. 1st Cir. 2002); see also Fiffy v. Nickless (In re Fiffy), 293 B.R. 550, 554 (B.A.P. 1st Cir. 2003); Duro Indus., Inc. v. Official Committee of Unsecured Creditors (In re Duro Indus., Inc.), 293 B.R. 271, 277 (B.A.P. 1st Cir. 2003). In this case, the order denying reconsideration is a final appealable order because the underlying order is final. See Prestige Ltd. P'ship v. East Bay Car Wash Partners (In re Prestige Ltd. P'ship), 234 F.3d 1108, 1113-14 (9th Cir. 2000) (order overruling debtor's objection to lender's claim was final even though it did not rule on issue of amount of claim).

STANDARD OF REVIEW

The Panel reviews orders denying a motion for reconsideration for manifest abuse of discretion. See Aguiar, 311 B.R. at 131.

> 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.

Colon v. Rivera (In re Colon), 265 B.R. 639, 643 (B.A.P. 1st Cir. 2001) (citations omitted).

DISCUSSION

Although the Debtor requested "reconsideration" in his motion, it is a well-settled policy in this circuit that a motion which asks the trial court to a modify its earlier disposition of a case is properly treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) (made applicable by Fed. R. Bankr. P. 9023), or as a motion for relief from judgment under Fed. R. Civ. P. 60 (made applicable by Fed. R. Bankr. P. 9024). See Aguiar, 311 B.R. at 135 n.9 (citing Jimenez v. Rodriguez (In re Rodriguez), 233 B.R. 212, 218-19 (Bankr. D.P.R. 1999), aff'd, 17 Fed. Appx. 5 (1st Cir. 2001)). Because the Debtor's motion for reconsideration was filed within ten days after entry of the bankruptcy court's order denying his claim objection, it is properly treated as a motion for relief from judgment under Rule 59(e).[4] See Appeal of Sun Pipe Line Co., 831 F.2d 22, 24 (1st Cir. 1987); see also Aybar v. Crispin-Reyes, 118 F.3d 10, 14 n.3 (1st Cir. 1997) (regardless of how it is characterized, post-judgment motion made within ten days of entry of judgment that questions correctness of judgment is properly construed under Rule 59(e)).

To meet the threshold requirements of a successful Rule 59(e) motion, the motion "must demonstrate the reason why the court should reconsider its prior decision and must set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision." Rodriguez, 233 B.R. at 219. In order to be successful on a Rule 59(e) motion, the moving party

[4] Unless otherwise indicated, all references in this opinion to "Rule 59(e)" refer to Fed. R. Civ. P. 59(e) (made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9023).

must establish a manifest error of law or fact or must present newly discovered evidence. Id.; see also Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000). The moving party cannot use a Rule 59(e) motion to cure its procedural defects or to offer new evidence or raise arguments that could and should have been presented originally to the court. See Rodriguez, 233 B.R. at 219. Rule 59(e) motions are generally denied because of the narrow purpose for which they are intended. Id. at 220. In this case, the Debtor cannot demonstrate that his motion for reconsideration raised newly discovered evidence or a manifest error of law or fact because he has not provided the Panel with a clear record as to what evidence was before the bankruptcy court on the claim objection. Specifically, the Debtor has failed to provide the Panel with a transcript of the bankruptcy court's hearing on the claim objection.

Pursuant to Bankruptcy Rule 8006, "[t]he record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court." Id. The rule further provides: "If the record designated by any party includes a transcript of any proceeding . . . the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and *make satisfactory arrangements for payment of its cost*." Id. (emphasis added). Where the bankruptcy court's findings or conclusions of law were set forth on the record at a hearing, the appellant is required to provide a transcript of the hearing as part of the record on appeal. See Mountain Peaks Fin. Servs., Inc. v. Shepard (In re Shepard), 328 B.R. 601, 604 (B.A.P. 1st Cir. 2005).

The Debtor filed a "Notice of Items for Record on Appeal" with the bankruptcy court, specifically designating, among other things, "the transcript of the hearing held in Portland,

Maine on August 5, 2005, on the Objection to the Patriot Claims. . . ."[5] However, the Debtor failed to remit the $200 estimated fee for the transcript, despite instructions from the bankruptcy court to do so, and, consequently, the bankruptcy court did not process his request.[6] Accordingly, it does not appear that the hearing was ever transcribed; certainly, no transcript was provided to the Panel.

In order for the Panel to review whether the Debtor's motion for reconsideration presented newly discovered evidence, the Debtor must provide the Panel with an appellate record which is adequate to show what initial evidence was before the bankruptcy court when it denied the Debtor's claim objection. A transcript of the hearing is an essential part of the appellate record in this case. The Debtor's failure to provide the Panel with a copy of the transcript is fatal to his appeal. Without a copy of the transcript, the Panel is unable to determine the legal foundation of the bankruptcy court's rulings, or whether the bankruptcy court made any initial oral findings and rulings. Moreover, the Panel is unable to determine what evidence was before the bankruptcy court when it made its decision.

The Debtor's failure to provide a copy of the transcript thwarts any attempt by this Panel to apply the abuse of discretion standard, particularly when, as here, a claim is made that the bankruptcy court disregarded "newly discovered evidence." We have no basis on which to

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[5] The bankruptcy court did not hold a hearing on August 5, 2005. Therefore, we assume that the Debtor intended to designate the transcript of the August 3, 2005, hearing on his objection to the Appellees' claim.

[6] Although the Debtor filed a "Notice of Payment for Transcript" regarding a $56 payment to the Clerk's Office (Docket Entry #200), the docket entry indicates that the payment was actually for copying fees for documents designated in his Designation, and not the transcript fee. The docket states: "Email sent to debtor, this date, to clarify. Debtor was advised he must remit $200.00 as estimated fee for transcript as soon as possible (rmr,) (Entered: 10/31/2005)." It appears from the docket that the $200 fee was not paid and the transcript was not ordered.

evaluate the Debtor's argument because we do not know what evidence was before the bankruptcy court. "The responsibility for voids in the appellate record must reside with the party whose claim of error depends for its support upon any portion of the record of the proceedings below which was omitted from the designation of the record on appeal." In re Abijoe Realty Corp., 943 F.2d 121, 123 & n.1 (1st Cir. 1991). This rule applies equally to appellants who designate transcripts but fail to ensure that said transcripts are produced. See Jones v. University of Pittsburgh (In re Jones), 1996 U.S. App. LEXIS 2530, *2 n.1 (1st Cir. 1996); see also Greco v. Stubenberg, 859 F.2d 1401, 1404 (9th Cir. 1988) (upholding district court's dismissal of appeal due to appellant's failure to provide funds for transcripts). Moreover, courts in this circuit have repeatedly held that an appellate court will not review a claim of error if the appellant has failed to include a transcript of the pertinent proceedings in the record on appeal. See Shepard, 328 B.R. at 604 (quoting Ramirez v. Puerto Rico Fire Serv., 757 F.2d 1357, 1358 (1st Cir. 1985)) (explaining that Court of Appeals has repeatedly held it will not review factually dependent issues on appeal where appellant fails to provide transcript of pertinent proceedings below); see also Valedon Martinez v. Hospital Presbiteriano de la Comunidad, Inc., 806 F.2d 1128, 1135 (1st Cir. 1986).

CONCLUSION

Because the Debtor did not produce a transcript of the claim objection hearing, he cannot demonstrate that his motion for reconsideration raised newly discovered evidence or a manifest error of law or fact. Accordingly, the bankruptcy court's order denying the Debtor's motion for reconsideration is **AFFIRMED**.