NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 06-050

Bankruptcy No. 05-20542-JBH

JAMES ROWBOTHAM and
NANCY S. ROWBOTHAM,
Debtors.

CATHERINE NESBIT,
Appellant,

v.

JAMES ROWBOTHAM and
NANCY S. ROWBOTHAM,
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.

Catherine Nesbit, Pro Se, on brief for Appellant.

James Rowbotham and Nancy Rowbotham, Pro Se, on brief for Appellees.

March 22, 2007

Hillman, U.S. Bankruptcy Appellate Panel Judge.

Catherine Nesbit ("Nesbit"), a pro se creditor, appeals from the bankruptcy court's September 29, 2006 order denying her reconsideration of the court's September 21, 2006 order overruling her objections and approving the sale of a parcel of property. For the reasons set forth below, the Panel vacates and remands in part, but otherwise affirms the decision of the bankruptcy court.[1]

BACKGROUND

On April 20, 2005, James and Nancy Rowbotham (the "Debtors") filed a voluntary petition under Chapter 13 of the Bankruptcy Code.[2] The Debtors proposed a plan that was confirmed on July 21, 2005, which provided for regular monthly payments until the sale of the Debtors' property located at 18 Old Cape Road, Kennebunkport, Maine (the "Property"), and payment of creditors' claims in full. The Property consisted of a 3.2-acre parcel of land (the "3.2-acre parcel"), and a 2.4-acre parcel which included a 2000-square-foot house, garage and barn (the "2.4-acre parcel"). The bankruptcy court approved the sale of each parcel of the Property after contested proceedings.

On May 31, 2006, the court entered an order allowing for the sale of the 2.4-acre parcel. Nesbit objected to the May 31, 2006 order on June 6, 2006, six days after the entry of the order,

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[1]The Panel unanimously determined, after examination of the briefs and other materials submitted in this matter, that oral argument was not needed in this case because the facts and legal arguments were 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 B.A.P. 1st Cir. R. 8012-1(b).

[2]References to the Bankruptcy Code shall be to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, et seq., with the exception of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 that became effective immediately with cases filed on or after April 20, 2005.

and four days after the closing of the 2.4-acre parcel had taken place on June 2, 2006. Nesbit objected to this order based on her concern with how the sale affected her claims to the 3.2-acre parcel under a previous purchase and sale agreement, and $20,000 advanced by Nesbit to the Debtors in November, 2005.[3] The advance of these funds were not disclosed to or approved by the court. In the hearings that followed, the Chapter 13 Trustee was allowed to intervene and assist with negotiations between the Debtors and Nesbit in reaching a compromise regarding the funds Nesbit had advanced to the Debtors. On August 2, 2006, the Chapter 13 Trustee filed an interim report in the Debtors' case, in which he represented that all of the claims filed in the case had been addressed in accordance with the confirmed plan or other appropriate orders, and that the Debtors were entitled to a discharge. On August 14, 2006, the court approved the Debtors' motion to obtain a loan to repay $16,000[4] to Nesbit as a compromise in "full and final satisfaction of all claims" between the Debtors and Nesbit. The Debtors paid $16,000 to Nesbit on August 18, 2006.[5]

Despite the compromise and the payment, on August 24, 2006, Nesbit filed with the court an application for an administrative claim for legal fees, interest expense, costs and damages for emotional distress. In addition, on September 1, 2006, Nesbit filed two additional pleadings objecting to the sale of the 3.2-acre parcel and the Debtors' Chapter 13 discharge claiming, *inter*

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[3]Exactly what the terms of this "loan" was are unclear. No written documentation for the alleged loan appears in the record. It appears to have been an oral agreement which the parties characterize differently.

[4]Nesbit had been repaid $4,000 in June, 2006 with funds from the closing of the 2.4-acre parcel. The court approved the total borrowing in the amount of $50,000 to allow the Debtors to pay for some of their other costs, in addition to the $16,000 to Nesbit.

[5]There is no dispute that Nesbit received and accepted these funds.

alia, that the Debtors had not provided a HUD statement documenting the Debtors' use of previously received funds, paid creditors in full based upon the non-payment of her interest, fees and expenses, and signed a mutual release.[6] On September 20, 2006, in the presence of all of the parties, the court held another hearing. At this hearing, the counsel for the Debtors represented that the Debtors would be able to sign the mutual release prepared by Nesbit. Based upon the compromise, the agreement concerning the mutual release and the payment of $16,000 to Nesbit, in its order granting the Debtors' motion to sell the 3.2-acre parcel, the court disallowed Nesbit's administrative claim with prejudice, overruled Nesbit's objection to the sale and denied Nesbit's objection to the Debtors' discharge on September 21, 2006.[7]

On September 29, 2006, Nesbit filed another pleading entitled "Answer to Debtors [sic] Notice to Sell," which contained the following items: (1) the contention that the Debtors had failed to provide evidence to the court in the form of a HUD statement documenting allocation of the monies from the proceeds of the sale of the Property; (2) the contention that the Debtors had not paid their creditors in full, namely Nesbit's "legal fees, penalties and interest"; and (3) another request that the Debtors sign a mutual release. The court, on the same date, entered the following order: "To the extent Ms. Nesbit's pleading might be considered and [sic] objection to the sale that was the subject of the debtors' motion, it is overruled as untimely. The order approving sale entered September 21, 2006. To the extent it might be read as a motion to reconsider, it is denied." Nesbit timely filed a notice of appeal of the September 29, 2006 order

[6]The signing of a mutual release was not part of the original compromise agreement.

[7]The objection to the discharge was also denied because it was procedurally defective as it was not filed as an adversary proceeding as required by Fed. R. Bank. P. 7001.

to this Panel on October 6, 2006, but not of the September 21, 2006 order. In her statement of issues on appeal, Nesbit stated that the issues were (1) "[m]ultiple violations of the automatic stay by the Debtors"; and (2) "[m]ultiple willful acts to defraud creditors, including the intent to subdivide land to avoid Maine Real Estate Laws, based on a legal opinion from Jensen Baird and Gardiner."

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, 725-26 (B.A.P. 1st Cir. 1998).

In this case, Nesbit filed an amorphous pleading on September 29, 2006, against which the court entered its September 29, 2006 order. The September 29, 2006 order effectively denied further consideration of the court's September 21, 2006 order approving the Debtors' motion to sell. An order denying reconsideration is a final appealable order if the underlying order was a final appealable order and together the order denying reconsideration and the underlying order

end the litigation on the merits. See Kristan v. Patriot Growth Fund, L.P. (In re Kristan), slip copy, 2006 WL 53800, at *3 (B.A.P. 1st Cir. 2006) (citations omitted). The court's September 29, 2006 order was a final order since the September 21, 2006 order was a final order which approved the sale of the 3.2-acre parcel and ended further litigation in connection with the sale. See Indian Motocycle Co. Inc. et al. v. Sterling Consulting Corp. et al. (In re Indian Motocycle Co., Inc.), 289 B.R. 269, 280 (B.A.P. 1st Cir. 2003) (citing Jeremiah v. Richardson, 148 F.3d 17, 22 (1st Cir. 1998)) (a bankruptcy court's sale order authorizing the sale of assets is a final order).

Where an appellant has failed to designate in his motion for reconsideration the underlying order denying a motion, the scope of such an appeal is limited to review of the order denying the motion for reconsideration. Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 134 (B.A.P. 1st Cir. 2004). Since Nesbit did not timely appeal the bankruptcy court's September 21, 2006 order, the Panel does not have jurisdiction over the merits of that order. See Aybar v. Crispin-Reyes, 118 F.3d 10, 14-15 (1st Cir. 1997) (citations omitted); Aguiar, 311 B.R. at 134-35.

STANDARD OF REVIEW

The Panel reviews a trial court's order denying a motion for reconsideration of a previous judgment for manifest abuse of discretion. Vasapolli v. Rostoff, 39 F.3d 27, 36 (1st Cir. 1994) (citing Appeal of Sun Pipe Line Co., 831 F.2d 22, 25 (1st Cir. 1987)); Salem Five Cents Sav. Bank v. Tardugno (In re Tardugno), 241 B.R. 777, 779 (B.A.P. 1st Cir 1999); Neal Mitchell Assocs. v. Braunstein (In re Lambeth Corp.), 227 B.R. 1, 7 (B.A.P. 1st Cir. 1998)). The First Circuit has stated: "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." Granderson v. Carpenter (In re Granderson), 252 B.R. 1, 5 (B.A.P. 1st Cir. 2000) (quoting Independent Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)). The trial court has substantial discretion in deciding whether to allow the losing party to argue new material or a new theory. Appeal of Sun Pipe Line Co., 831 F.2d at 25 (citations omitted). When a lower court's order is unexplained, a reviewing court may affirm a correct result on "any independently sufficient grounds made manifest by the record" as it existed before the bankruptcy court.[8] In re Indian Motocycle Co., Inc., 289 B.R. at 278-79 (quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998)).

DISCUSSION

While a motion for reconsideration is not one that is recognized by the Federal Rules of Civil Procedure, it is well-settled policy that courts can treat a motion which asks the trial court to modify a prior ruling 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. Pabon (In re Pabon), 233 B.R. 212, 218-19 (Bankr. D.P.R. 1999), aff'd 17 Fed. Appx. 5 (1st Cir. 2001)). In addressing a post-judgment motion, a court is not bound by the label that the movant fastens to it. Vasapolli, 39 F.3d at 36. If circumstances warrant, the court may disregard the movant's taxonomy and reclassify the motion as the substance suggests. Id. (citing

[8]The Panel relied on the docket of the proceedings of the bankruptcy court below in order to be able to understand the court's rulings, to the extent that the briefs and record furnished in this appeal were unintelligible.

Vargas v. Gonzalez, 975 F.2d 916, 917 (1st Cir. 1992)). Here, although Nesbit did not explicitly label her pleading as a motion for reconsideration of the court's prior order under Fed. R. Civ. P. 59(e), since her pleading was filed within ten days of the entry of the bankruptcy court's September 21, 2006 order, and continued to question the correctness of that previous judgment, the bankruptcy court was well within its discretion to construe Nesbit's pleading as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). See Aybar, 118 F.3d at 14 n.3; Pabon, 233 B.R. at 219.

Fed. R. Civ. P. 59(e) "allows a party to direct the [trial] court's attention to newly discovered material evidence or a manifest error of law or fact and enables the court to correct its own errors and thus avoid unnecessary appellate procedures. The rule does not provide a vehicle for a party to undo its own procedural failure, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the [trial] court prior to the judgment." Aybar, 118 F.3d at 16 (citing Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996)). To succeed on a motion under Fed. R. Civ. P. 59(e), the moving party must either clearly establish a manifest error of law or must present newly discovered evidence. Pabon, 233 B.R. at 219 (citations omitted). The losing party cannot simply use a motion for reconsideration to repeat arguments previously considered and rejected by the trial court. National Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990); Berrios-Berrios v. Commonwealth of Puerto Rico, 205 F.Supp. 2d 1 (D.P.R. 2002).

Nesbit presented no newly discovered material evidence or any manifest error of law or fact in her motion for reconsideration of the September 21, 2006 order. The record amply

demonstrates that Nesbit raised all of the same contentions during the proceedings concerning the Debtors' motions to sell the Property, with nothing more. Nesbit was given every opportunity to present her claims to the court, and have them addressed. Each one of the arguments reiterated in Nesbit's September 29, 2006 pleading had previously been considered by the bankruptcy court prior to the entry of its order on September 21, 2006. Nesbit was not entitled merely to repeat arguments previously considered and rejected by the bankruptcy court.

First, Nesbit contended that the court's allowance of the sale of the Property even in the light of Debtors' failure to provide evidence to the court was in error. Second, Nesbit's contended that the Debtors had not paid its creditors in full, namely Nesbit's "legal fees, penalties and interest." She made these exact same arguments in her objection filed on September 1, 2006, which were heard and rejected by the court on September 20, 2006. See Nesbit's Limited Objection to Debtors [sic] Notice to Sell dated September 1, 2006, Doc. No. 108[9]; Creditor's Application for Payment of Administrative Claim filed by Catherine Nesbit, Doc. No. 104; Transcript of Hearing in re Debtors Motion to Sell Real Property dated September 20, 2006, Doc. No. 116 (hereinafter "Transcript of September 20, 2006") at 8-9. Nesbit had asserted that the HUD statements from the sale of the various parcels of the Property were necessary to determine whether there were any funds remaining to be administered by the trustee. But as the Chapter 13 Trustee represented that all claims in the Debtors' Chapter 13 case had been addressed, and Nesbit had been paid the $16,000 she agreed to accept pursuant to the compromise, it was evident that the court had made a determination that all claims had been

[9]All references to the docket are to the case of In re James E. Rowbotham, Nancy S. Rowbotham, No. 05-20542-JBH (Bankr. D. Me.).

appropriately resolved. At best, it appears that the bankruptcy court found Nesbit's argument for "evidence" disingenuous, since all creditors and Nesbit had been paid as agreed, yet Nesbit continued to seek additional fees. See Transcript of September 20, 2006 at 8-9. The bankruptcy court overruled her claim that she was entitled to any further "legal fees, penalties and interest" based upon the compromise with and payment by the Debtors. That Nesbit simply continued to question the correctness of the proceedings is not a basis which can compel a conclusion that the bankruptcy court abused its discretion in denying her motion for reconsideration.

The third item Nesbit raised by in her September 29, 2006 pleading was regarding the signing of a mutual release. The signing of the mutual release was agreed to by the parties before the court at the September 20, 2006 hearing. At that proceeding, counsel for the Debtors agreed that the Debtors had reviewed and could sign the releases. See Transcript of September 20, 2006 at 6, 8. To the extent that the bankruptcy court overruled the previous agreement regarding the mutual releases in its September 29, 2006 order, the court abused its discretion and that portion of the ruling only will be vacated and remanded.

Inexplicably, in her statement of issues on appeal, Nesbit stated that the issues are (1) "[m]ultiple violations of the automatic stay by the Debtors"; and (2) "[m]ultiple willful acts to defraud creditors, including the intent to subdivide land to avoid Maine Real Estate Laws, based on a legal opinion from Jensen Baird and Gardiner." Nesbit appears to now want to argue issues that were not properly brought before the bankruptcy court. No proper objection to discharge was filed in the bankruptcy court in accordance with Fed. R. Bankr. P. 7001, as the court ruled in its September 21, 2006 order. The September 21, 2006 order was also not appealed, and the Panel does not have jurisdiction to review the merits of these claims to the

extent they were contained within. See Aybar, 118 F.3d at 14-15 (citations omitted); Aguiar, 311 B.R. at 134-35. These additional matters were either not properly raised in the bankruptcy court or preserved for appeal, and are accordingly not properly before the Panel.

CONCLUSION

To the extent that the bankruptcy court failed to consider the prior agreement regarding the mutual releases, this matter is VACATED and REMANDED. In all other respects, for the reasons stated, the decision contained within the bankruptcy court's September 29, 2006 order is AFFIRMED.