NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 08-025

Bankruptcy Case No. 03-11854-WCH

ROBERT J. PINGARO,
Debtor.

ROBERT J. PINGARO,
Appellant,

v.

AMERIQUEST MORTGAGE COMPANY and
DOREEN B. SOLOMON, Chapter 13 Trustee,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Haines, Votolato and Tester,
United States Bankruptcy Appellate Panel Judges.

Robert J. Pingaro, *pro se,* on brief for Appellant.

Dudley C. Goar, Esq., on brief for Appellee, Ameriquest Mortgage Company.

August 14, 2008

Per Curiam.

Robert J. Pingaro ("Debtor") appeals *pro se* from the bankruptcy court's February 21, 2008 order denying his emergency motion to reopen his Chapter 13 case. For the reasons set forth below, we **AFFIRM.**

BACKGROUND

The Debtor and his wife defaulted on mortgage payments due Ameriquest Mortgage Company ("Ameriquest") pursuant to a promissory note and mortgage on their residence in Saugus, Massachusetts (the "Property"). Ameriquest commenced foreclosure proceedings.

On March 7, 2003, just before the foreclosure sale, the Debtor filed a Chapter 13 petition, staying foreclosure proceedings. Thereafter, in August, 2004, the Debtor's amended plan was confirmed.

In March, 2003, Ameriquest moved for relief from the automatic stay and for *in rem* relief. The bankruptcy court denied Ameriquest's motion and its subsequent motions for reconsideration. Ameriquest appealed to the U.S. District Court for the District of Massachusetts.[1] On August 18, 2004, the district court remanded the matter to the bankruptcy court for "reassignment and reconsideration." Following reassignment, the bankruptcy court vacated all prior orders with respect to Ameriquest's motions for relief from stay and set the matter for an evidentiary hearing.

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[1] The history is rather complicated, but it appears that the bankruptcy court initially denied Ameriquest's motion for failure to demonstrate lack of equity under § 362(d)(2) and failure to demonstrate "cause" under § 362(d)(1). Ameriquest moved for reconsideration and the bankruptcy court set the matter for an evidentiary hearing. However, for various reasons, neither party submitted any evidence and the bankruptcy court, treating the reconsideration motion as a new motion for relief from the automatic stay, denied the motion on September 24, 2003. The bankruptcy court also issued an order dated September 24, 2003, allowing the parties' oral motion to approve a stipulation that the value of the Property was $16,000.

After a hearing on February 15, 2005, the bankruptcy court granted Ameriquest's motion and authorized it to "exercise its state and federal law remedies over the property as defined in the Motion" The bankruptcy court also vacated the Debtor's plan confirmation "as improvidently granted." On February 24, 2005, the bankruptcy court granted the Chapter 13 trustee's motion to dismiss the chapter 13 case due to the Debtor's failure to make plan payments. Although the Debtor filed notices of appeal of both the relief from stay order and the dismissal order, both were dismissed as untimely. The bankruptcy case was closed finally on May 9, 2005.

Ameriquest proceeded with a foreclosure sale of the Property in April, 2005. In March, 2006, Ameriquest commenced eviction proceedings against the Debtor in Lynn District Court. The Debtor continues to challenge his eviction in state court and still resides at the Property.[2]

On February 19, 2008, almost three years after his bankruptcy case's dismissal, the Debtor filed an Emergency Motion to Reopen Chapter 13 Case ("Motion to Reopen"). The bankruptcy court denied the Motion to Reopen, citing Massachusetts Dep't of Revenue v. Crocker (In re Crocker), 362 B.R. 49, 53 (B.A.P. 1st Cir. 2007). The Debtor appealed.

JURISDICTION

As a preliminary matter, a bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). 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,

[2] Between August, 2006 and the present, the Debtor has filed at least five actions against Ameriquest in both state and federal court alleging fraud and perjury in connection with the mortgage, and seeking to stay the eviction proceedings. Two state court actions are pending, subject to Ameriquest's motions to dismiss on *res judicata* grounds; the others were unsuccessful.

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). The Panel has jurisdiction over this appeal from the final order of the bankruptcy court denying the Debtor's motion to reopen his bankruptcy case. See Dworsky v. Canal St. Ltd. P'ship (In re Canal St. Ltd. P'ship), 269 B.R. 375, 379 (B.A.P. 8th Cir. 2001).

STANDARD OF REVIEW

The Panel generally reviews findings of fact for clear error and conclusions of law *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719 n.8 (1st Cir. 1994). Section 350(b) of the Bankruptcy Code gives the bankruptcy court broad discretion in deciding whether to reopen a case, and the decision to grant or deny a motion to reopen shall not be overturned unless the court abused its discretion. See In re Crocker, 362 B.R. at 53; see also In re Canal St., 269 B.R. at 379; In re Herzig, 96 B.R. 264, 266 (B.A.P. 9th Cir. 1989).

DISCUSSION

Section 350 of the Bankruptcy Code governs the closing and reopening of bankruptcy cases. That section provides:

> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350.

"It is well settled that the decision to reopen a case is within the sound discretion of the bankruptcy court." Crocker, 362 B.R. at 53 (citing In re McGuire, 299 B.R. 53, 55 (Bankr. D.R.I. 2003) (citations omitted)). "This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy proceedings." Id. (citations omitted); see also Finch v. Coop (In re Finch), 378 B.R. 241, 245 (B.A.P. 8th Cir. 2007) ("A bankruptcy court's decision to reopen a case is within the court's discretion, based on the particular circumstances and equities of the particular case").

Since the Debtor does not contend that there are additional assets to be administered, the case can only be reopened if it is necessary to accord him additional relief, or for other "cause." 11 U.S.C. § 350(b). As the moving party, the Debtor had the burden of demonstrating "cause" for reopening the case. See In re Otto, 311 B.R. 43, 47 (Bankr. E.D. Pa. 2004); In re Carter, 38 B.R. 636, 638 (Bankr. D. Conn. 1984). The Bankruptcy Code does not define "other cause" for purposes of § 350, but bankruptcy courts generally consider a variety of factors when deciding whether to reopen a case, including:

> the length of time that the case was closed. . .; whether a non-bankruptcy forum, such as state court, has the ability to determine the issue sought to be posed by the debtor. . .; whether prior litigation in bankruptcy court implicitly determined that the state court would be the appropriate forum to determine the rights, post bankruptcy, of the parties; whether any parties would be prejudiced were the case reopened or not reopened; the extent of the benefit which the debtor seeks to achieve by reopening; and whether it is clear at the outset that the debtor would not be entitled to any relief after the case were reopened.

In re Otto, 311 B.R. at 47 (citations omitted).

The Debtor filed his motion almost three years after this case was dismissed. Although the motion is not clear, he seems to argue that the case should be reopened to accord relief (i.e.,

reinstating his Chapter 13 plan, enjoining Ameriquest's eviction proceedings, overturning a state court judgment, compelling Ameriquest to produce documents, and reinstating his Chapter 13 case) and for other cause (i.e., to remedy the alleged wrongs committed by Ameriquest).

The Debtor misunderstands the availability of § 350(b) reopening. Only cases closed after full administration may be reopened under § 350(b). See In re King, 214 B.R. 334, 336 (Bankr. W.D. Tenn. 1997). A case which is dismissed (say, on a trustee's motion on account of nonpayment) is not one that has been fully administered. Although a dismissed case may be reported to the judiciary's Administrative Office as "closed" for statistical purposes, virtually all courts recognize that a bankruptcy case that has been dismissed is not closed within the meaning of § 350(b), and, therefore, may not be reopened. See id. (citing cases). The Debtor's case was dismissed under § 1307(c) on the Chapter 13 trustee's motion. It cannot be reopened under § 350(b).[3]

A dismissal can be set aside only by appeal or a motion under either Fed. R. Civ. P. 59(e) (via Fed. R. Bankr. P. 9023 and) or Fed. R. Civ. P. 60(b) (via Fed. R. Bankr. P. 9024). See id.; see also In re King, 214 B.R. at 336. The Debtor failed to timely appeal the order granting Ameriquest relief from stay, the dismissal of his bankruptcy case, and the order vacating confirmation of his plan. Since the Debtor failed to seek relief from any of those orders under

[3] Moreover, reopening a case usually occurs "in order to take care of some detail that was overlooked or left unfinished at the time the case was closed. It was not designed as an opportunity to create, and then enforce, rights that did not exist at the time the case was originally closed." In re Finch, 378 B.R. at 246 (citing In re Bartlett, 326 B.R. 436, 438 (Bankr. N.D. Ind. 2005)). Here, what the Debtor really seeks is to have dismissal of his case set aside and the eviction proceedings stayed.

Rules 59(e) or 60(b),[4] he cannot now obtain relief from the consequences of said orders by reopening this case almost three years after its dismissal. The bankruptcy court's refusal to reopen was not an abuse of discretion.[5]

CONCLUSION

For the reasons set forth above, we **AFFIRM** the bankruptcy court's February 21, 2008 order denying the Debtor's emergency motion to reopen his Chapter 13 case.

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[4] Even if we construed the Debtor's motion to reopen as a request for relief from the subject orders under Rule 60(b), we could not conclude that the bankruptcy court abused its discretion in denying the motion. To prevail on a Rule 60(b) motion, the movant must demonstrate: (1) timeliness, (2) exceptional circumstances justifying relief, and (3) the absence of unfair prejudice to the opposing party. See Eastern Sav. Bank v. Lafata (In re Lafata), 344 B.R. 715, 723 (B.A.P. 1st Cir. 2006), aff'd, 483 F.3d 13 (1st Cir. 2007). The Debtor filed the motion almost three years after his case was dismissed and, therefore, it was not timely. Moreover, although he has generally asserted "fraud" and "perjury" by Ameriquest, he has not provided either an affidavit or evidence to support those allegations.

[5] We note, however, that it appears the Debtor is appropriately pursuing his rights in other venues.