[NOT FOR PUBLICATION]

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 08-041

Bankruptcy Case No. 04-20328 JBH

FRANK J. KRISTAN,
Debtor.

FRANK J. KRISTAN,
Appellant,

v.

JOHN C. TURNER, Chapter 7 Trustee,
and PHOEBE MORSE, U.S. Trustee,
Appellees.

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

Before
Lamoutte, de Jesús, and Vaughn,
United States Bankruptcy Appellate Panel Judges.

Frank J. Kristan, *pro se,* on brief for Appellant.

Jonathan R. Doolittle, Esq., on brief for Appellee, John C. Turner, Chapter 7 Trustee.
Richard King, Esq., Ramona Elliot, Esq., and P. Matthew Sutko, Esq.,
on brief for Appellee, Phoebe Morse, U.S. Trustee.

December 15, 2008

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de Jesús, United States Bankruptcy Appellate Panel Judge.

The *pro se* debtor, Frank J. Kristan (the "Debtor"),[1] appeals from the bankruptcy court's order approving the final report filed by John C. Turner, chapter 7 trustee ("Trustee"), and the disbursement of the remaining estate monies to the Trustee and his counsel as payment for their

[1] Notwithstanding his *pro se* status, the Debtor is an experienced litigant and is familiar with the bankruptcy appellate process, as this is the ninth of ten appeals to the Bankruptcy Appellate Panel that he has filed in connection with this bankruptcy case as summarized below:

BAP Case No.	Order Appealed	Disposition/Status
05-030	order denying Debtor's motion to convert case to chapter 11	dismissed for failure to file designation of record and statement of issues on appeal
05-049	order denying reconsideration of order overruling objection to claim filed by Patriot Growth Fund, LP	affirmed by BAP, and subsequently affirmed by Court of Appeals
06-063	order approving compromise with Patriot Growth Fund, LP	withdrawn
07-032	order denying Debtor's motion to hold post-petition creditor in violation of automatic stay	affirmed by BAP, and subsequently affirmed by Court of Appeals
08-002	order granting chapter 7 trustee's motion for sanctions under Bankruptcy Rule 9011	dismissed as interlocutory
08-003	order denying debtor's motion to revoke denial of discharge	affirmed by BAP
08-009	second appeal from now-final order granting trustee's motion for sanctions under Bankruptcy Rule 9011	affirmed by BAP
08-010	order granting trustee's application for compensation	affirmed by BAP
08-041	order approving trustee's final report	this appeal
08-050	order granting trustee's motion to show cause why debtor should not be held in contempt	appeal pending before BAP

commission and attorneys' fees. For the reasons set forth below, we conclude that the Debtor lacks standing to bring this appeal, and award the Trustee attorneys' fees and costs incurred in defending this appeal as sanctions against the Debtor.

BACKGROUND

In March, 2004, the Debtor filed a chapter 7 petition, and the Trustee was duly appointed. Three months later, the bankruptcy court authorized the Trustee to employ Verrill & Dana LLP as his counsel in connection with this case. Then, in February, 2005, the bankruptcy court entered an order denying the Debtor's discharge pursuant to § 727(a)(2)(A)[2] ("Order Denying Discharge"), based on his transfer of assets into an Australian trust with the intent to hinder, delay or defraud his creditors. The Debtor did not appeal that order.

On March 3, 2008, the Trustee filed the Final Report and Account Before Distribution, Request for Compensation and Report on Claims/Proposed Distribution ("Final Report"). According to the Final Report, the estate received funds totaling $3,634,003.07,[3] made court-approved disbursements amounting to $3,507,203.71,[4] and had a balance (as of September 26, 2007) of $126,799.36. The Final Report also showed that the following claims were filed against

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[2] Unless otherwise noted, all references to the "Bankruptcy Code" or to statutory sections herein are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

[3] These funds came from three principal sources: (1) the sale of real estate located in Kennebunkport, Maine, in the amount of approximately $3,500,000; (2) proceeds from the settlement of certain litigation in the amount of $20,000; and (3) the sale of stock in the amount of $120,000.

[4] The court-approved disbursements included payments to secured parties and disbursements to administrative creditors, such as interim fees to the Trustee and his professionals.

the estate: (1) administrative claims in the amount of $256,936.39;[5] (2) priority claims in the amount of $1,600; (3) secured claims totaling $3,724,525.15; and (4) general unsecured claims for $5,450,642.89. Because the Debtor's debts exceeded the fair value of the estate's assets, the Debtor was insolvent under the definition afforded by the Bankruptcy Code.[6]

The Final Report also contained the Trustee's application for chapter 7 fees and administrative expenses. Since the amount of unpaid trustee and attorneys' fees exceeded the amount remaining in the estate, the Trustee requested that $126,799.36 be disbursed to the Trustee and his counsel in partial satisfaction of their administrative claims. Consequently, neither priority nor general unsecured creditors would receive any dividends from the estate. No creditors objected to the Final Report.

The Debtor objected to the Final Report, arguing that he had standing to object, that the Final Report was incomplete because the Trustee had not filed estate tax returns nor included copies of bank statements and canceled checks with the Final Report, and that the Trustee had acted fraudulently, as the Final Report did not propose to pay any dividends to unsecured creditors. The U.S. Trustee filed a response to the Debtor's objection, asserting that the Debtor lacked standing to object to the Final Report. The U.S. Trustee also noted that the Trustee had,

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[5] At the time the bankruptcy court approved the Trustee's Final Report, the only administrative expenses outstanding were the Trustee's commission and his counsel's fees.

[6] The Bankruptcy Code defines "insolvency" with respect to a corporate entity as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of . . . property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors . . . and property that may be exempted from property of the estate under section 522 . . . ." 11 U.S.C. § 101(32).

in fact, filed a tax return with the IRS showing no tax due, and that he had provided copies of the tax return, bank statements, and canceled checks to the Debtor.

After a hearing, the bankruptcy court entered an order approving the Final Report. The Debtor appealed. He did not seek a stay of the order pending appeal, and the Trustee's counsel stated at oral argument that the funds have been disbursed to the Trustee and his counsel.

JURISDICTION

The 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). The Panel is "duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants." Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004); see also Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998).

Generally, a bankruptcy court's order approving a trustee's final report and proposed distribution of the bankruptcy estate's assets is a final, appealable order. See Hollingsworth v. Kaler (In re Hollingsworth), 331 B.R. 399 (B.A.P. 8th Cir. 2005); Carr v. King (In re Carr), 321 B.R. 702, 703 (E.D. Va. 2005). Although the order at issue here did not discharge the Trustee and close the case, it adjudicated the Debtor's opposition to the Final Report and approved the Trustee's administration and proposed distribution of the estate's assets. Since the

order effectively resolved all of the issues relating to the Final Report, it is a final, appealable order. See Caterpillar Fin. Servs. Corp. v. Braunstein (In re Henriquez), 261 B.R. 67, 70 (B.A.P. 1st Cir. 2001); see also Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553, 558 (1st Cir. 1986) (citations omitted).

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). "We review fee awards deferentially, according substantial respect to the trial court's informed discretion. We will disturb such an award only for mistake of law or abuse of discretion." Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 336 (1st Cir. 1997) (citations omitted); see also Garb v. Marshall (In re Narragansett Clothing Co.), 210 B.R. 493, 495 (B.A.P. 1st Cir. 1997). An abuse of discretion 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." Foster v. Mydas Assocs., Inc., 943 F.2d 139, 143 (1st Cir. 1991) (citations omitted).

DISCUSSION

I. Standing

We first consider the threshold question of the Debtor's standing to challenge the bankruptcy court's approval of the Final Report. See Great Road, 304 B.R. at 550. The burden is on the party asserting standing to establish it. Spenlinhauer v. O'Donnell (In re Spenlinhauer), 261 F.3d 113, 118 (1st Cir. 2001).

"Bankruptcy standing is narrower than Article III standing. Only a 'person aggrieved' has standing to challenge a bankruptcy court order; the challenged order must directly and adversely affect the appellant's pecuniary interests. A 'person aggrieved' is one whose property is diminished, burdens are increased, or rights are impaired by order on appeal." Great Road, 304 B.R. at 550 (citations omitted).

It is well established that a chapter 7 debtor of an insolvent estate generally lacks standing to challenge an order concerning the distribution of estate assets. See id.; see also Spenlinhauer, 261 F.3d at 118. Accordingly, to show standing to appeal from an order distributing estate assets, a chapter 7 debtor must proffer sufficient evidence to demonstrate that the challenged order directly and adversely affected his pecuniary interest, notwithstanding the fact that he no longer has title to the property. Spenlinhauer, 261 F.3d at 119. A chapter 7 debtor meets this standard by showing either (1) a reasonable possibility of a surplus if the order on appeal is defeated, or (2) the appealed order adversely affects his discharge. Id.

The Debtor argues that he has standing because "he had a surplus in the estate of more than $20 million that was wiped out by the actions of [the Trustee] in breaching [his] fiduciary duties." Although the Debtor asserts the Trustee breached his fiduciary duties by settling the claims worth $20 million against Janssens for $20,000, he fails to recognize that the settlement agreement was approved by the bankruptcy court after notice and a hearing. Moreover, Debtor voluntarily withdrew his appeal of the order approving the settlement agreement. (See BAP No. 06-063). Therefore, the settlement order is final and cannot now be challenged by the Debtor's "illegitimate collateral attack." See In re Robinson, 373 B.R. 612, 632 (Bankr. E.D. Ark. 2007).

While the Debtor refers to a "surplus," he simply has not shown the reasonable possibility of a surplus. As noted above, the estate in this case is administratively insolvent, so that a reduction or disallowance of the fees and expenses awarded to the Trustee and his counsel would not create surplus funds from which the Debtor might receive a distribution. In addition, as the Debtor has already been denied a discharge, he cannot show that the approval of the Final Report adversely affected his discharge. Accordingly, the Debtor has not met his burden of showing that the order on appeal directly or adversely affects his pecuniary interests, or that he is "aggrieved" by it.

For the reasons set forth above, we conclude that the Debtor lacks standing to pursue this appeal.[7]

II. Motion for Expenses and Damages Under Bankruptcy Rule 8020

The Trustee has filed a separate motion under Bankruptcy Rule 8020 seeking damages, including attorneys' fees and double costs arising from this appeal. The Debtor has not filed a response to the motion. Bankruptcy Rule 8020 provides:

> If a . . . bankruptcy appellate panel determines that an appeal . . . is frivolous, it may, after a separately filed motion . . . and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

[7] Because the funds have been fully disbursed, this appeal may also be moot, at least in part. Generally, an appeal of a bankruptcy court's order authorizing the distribution of bankruptcy funds is moot if the estate funds have been disbursed to creditors who are not parties to the appeal. See Halkas v. Grigsby (In re Halkas), 2007 U.S. Dist. LEXIS 4477 (D. Md. Jan. 22, 2007); see also Ring v. Rameker (In re Ring), 2006 U.S. Dist. LEXIS 64923 (W.D. Wis. Aug. 30, 2006). In this case, the Trustee is a party to the appeal; his counsel is not. As the funds have been fully disbursed, the appeal is moot at least as to the distributions made to the Trustee's counsel.

Fed. R. Bankr. P. 8020. Imposing sanctions under Bankruptcy Rule 8020 is a "two-step process." Maloni v. Fairway Wholesale Corp. (In re Maloni), 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002). The Panel must determine: (1) whether the appeal is frivolous; and (2) whether the moving party has fulfilled the procedural requirements of Bankruptcy Rule 8020. Id.

After a careful review of the record and considering Debtor's arguments, the Panel concludes that this appeal is frivolous and sanctions are warranted. First, as noted above, the Debtor clearly lacked standing to challenge the bankruptcy court's approval of the Final Report. Moreover, the Debtor asserted no valid legal or factual arguments to justify the relief sought, as set forth below.

A. Procedural Requirements

Bankruptcy Rule 8020 requires that a party must request sanctions in a separately filed motion and that the person or party targeted by the motion or notice must be given notice and an opportunity to respond. Fed. R. Bankr. P. 8020. The Trustee filed a separate motion, served it on the Debtor, and provided him an opportunity to respond. Thus, the procedural requirements have been met.

B. Frivolous Appeal

While there is no formula for determining whether an appeal is frivolous, courts generally consider several factors, including: the appellant's bad faith, whether the argument presented on appeal is meritless *in toto*, and whether only part of the argument is frivolous. See Great Road, 304 B.R. at 552. Additionally, a court may consider whether the appellant's argument addresses the issues on appeal, fails to cite any authority, cites inapplicable authority, makes unsubstantiated factual assertions, asserts bare legal conclusions, or misrepresents the record. Id.

"Generally, 'sanctions will be imposed regardless of the motive of the appellant because the rule seeks to compensate an appellee who has had to waste time defending a meritless appeal.'" Maloni, 282 B.R. at 734 (citations omitted). Thus, a finding of bad faith is not required to impose sanctions under Bankruptcy Rule 8020. See Great Road, 304 B.R. at 552 n.5.

1. Incomplete or Premature Final Report

The Debtor argues that the Final Report was incomplete because it did not include certain bank statements and payments. However, as the U.S. Trustee noted in her brief and in her response to the Debtor's objection to the Final Report, the subject bank statements and canceled checks were forwarded to the Debtor. Moreover, the Final Report detailed all receipts and disbursements made by the Trustee and, therefore, the bank statements were not necessary to determine what passed through the Trustee's account.

The Debtor also asserts that the Final Report was incomplete because the Trustee did not file tax returns for the years 2005 and 2007. However, because the estate was administratively insolvent and had no tax liability, the Trustee was not required to file tax returns for those years.[8] Moreover, the issue is moot as the Trustee stated at oral argument that he subsequently filed tax returns for 2005 and 2007 during the pendency of this appeal, although he had no obligation to do so.

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[8] A chapter 7 trustee is responsible for filing tax returns throughout the duration of the bankruptcy proceeding. See 26 U.S.C. § 6012(b)(4); see also 11 U.S.C. § 704(8). Under 26 U.S.C. § 6012(a)(9), ". . . every estate of an individual under Chapter 7 . . . , the gross income of which for the taxable year is not less than the sum of the exemption amount plus the basic standard deduction under [26 U.S.C.] § 63(c)(2)(D)," must file a tax return on behalf of the bankruptcy estate. Accordingly, a chapter 7 trustee has a general obligation to file tax returns on behalf of the bankruptcy estate if it "realizes the threshold amount of gross income required to trigger the filing of a return." In re Pflug, 146 B.R. 687, 689 (Bankr. E.D. Va. 1992). The Debtor has offered no evidence that the estate's gross income exceeded the amount required to trigger the filing of a return, and has offered no other viable argument to persuade this Panel that the Trustee was required to file such tax returns.

Finally, the Debtor claims that the Trustee's Final Report should not have been presented and approved until all outstanding issues (such as those subject to other pending appeals filed by the Debtor) have been resolved. This argument also lacks merit. None of these appeals impact the distributions proposed in the Final Report and, therefore, the filing of the Final Report was not premature.

2. Excessive Compensation and Expenses

The Debtor contends that the Trustee's compensation and expenses were excessive. Section 330(a) authorizes the bankruptcy court to award reasonable compensation to a trustee. 11 U.S.C. § 330(a)(1). However, an award under § 330 is subject to the limitation provided in § 326, which caps a trustee's compensation by means of a formula applied to the actual amounts disbursed to the estate's claimants. See 11 U.S.C. § 326(a). "[T]he cap of § 326(a) is implicated only when the compensation is reasonable, and reasonableness is a determination that must begin with 11 U.S.C. § 330." Connolly v. Harris Trust Co. of California (In re Miniscribe Corp.), 309 F.3d 1234, 1241 (10th Cir. 2002) (citing In re Butts, 281 B.R. 176, 178 (Bankr. W.D.N.Y. 2002)).

Section 330(a)(3) requires the bankruptcy court to examine the nature, extent, and value of the services for which compensation is sought and to make a determination of the amount of reasonable compensation based on such factors as:

1. The time spent on such services;
2. The rates charged for such services;
3. Whether the services were necessary to the administration of the case or were beneficial at the time at which the services were rendered;
4. Whether the services were performed within a reasonable amount of time; and

5. Whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

See 11 U.S.C. § 330(a)(3). Once the bankruptcy court determines the reasonable fees according to the above criteria, a trustee's fees are reduced, if required, to the statutory maximum. See 11 U.S.C. § 326(a).

It is the trustee's burden "to demonstrate that the services for which renumeration is sought involve compensable service." Prebor v. Collins (In re I Don't Trust), 143 F.3d 1, 4 (1st Cir. 1998). Those services "must be 'sufficiently identified and explained.'" Id. (citation omitted). Whether or not the Trustee's request for compensation was reasonable in light of the services performed is a factual determination made in accordance with established law. As the bankruptcy court was in the best position to make this determination, it should not be overturned absent an abuse of discretion. See In re Botelho, 8 B.R. 305, 306 (B.A.P. 1st Cir. 1981).

The Debtor claims the award for compensation and expenses was excessive and should have been denied because the services of the Trustee and his counsel did not benefit the estate. However, he has offered no legal or factual arguments to persuade the Panel that the bankruptcy court abused its discretion in approving the Trustee's request for compensation. Rather, the evidence shows that the Trustee performed the duties required of a chapter 7 trustee, see 11 U.S.C. § 704, and he was entitled to compensation for his services. The Debtor has failed to identify any services that he claims were not compensable, offering only broad statements that the Trustee's claims were "excessive."

Lastly, Debtor argues that the bankruptcy court abused its discretion by approving the distribution of all the remaining funds in the estate to the Trustee and his counsel as

compensation, leaving nothing left for distribution to creditors. This argument also lacks merit. Trustee compensation is an administrative expense of the estate. See 11 U.S.C. § 503(b)(2). The Bankruptcy Code provides the right to a trustee and the trustee's attorney to request payment for their administrative expense under § 503(a), and the bankruptcy court to order payment for the same under § 503(b)(2). Sections 726(a)(1) and 507 give priority to the payment of administrative expenses under § 503(b). See 11 U.S.C. §§ 726(a)(1), 507(a)(1).

As the Debtor has asserted no valid legal or factual arguments to justify the relief sought, we find that this appeal is frivolous and that sanctions are warranted.

C. Sanctions Amount

The Panel may impose "just damages" and single or double costs as sanctions. See Fed R. Bankr. P. 8020. Damages may either be in the form of a lump-sum monetary penalty or attorneys' fees. Single or double costs are calculated under the provisions of Bankruptcy Rule 8014. See Fed. R. Bankr. P. 8014. Here, we agree that the Trustee is entitled to reasonable attorneys' fees and costs incurred in defending this appeal.

CONCLUSION

Because we conclude the Debtor lacks standing, this appeal is **DISMISSED.**

We **GRANT** the Trustee's motion for expenses and damages for reasons set forth above, and order that the Trustee and his counsel file and serve a Statement of Fees and Costs describing the services rendered and costs incurred in defending this appeal, with attached time sheets, within 14 days. The Debtor may file and serve an opposition within 10 days from service of the Statement.