NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 13-059

Bankruptcy Case No. 09-21945-JNF

ROBERT N. LUPO,
Debtor.

LISA JACOBS,
Appellant,

v.

JOSEPH B. COLLINS, Chapter 7 Trustee,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joan N. Feeney, U.S. Bankruptcy Judge)

Before
Lamoutte, Deasy, and Kornreich,
United States Bankruptcy Appellate Panel Judges.

Lisa Jacobs, Pro Se, on brief for Appellant.
Joseph B. Collins, Esq., and Andrea O'Connor, Esq., on brief for Appellee.

September 17, 2014

Per Curiam.

Lisa Jacobs ("Jacobs") appeals from the following orders of the bankruptcy court: (1) the November 25, 2013 order denying Jacobs' motion for permission to sue the chapter 7 trustee (the "November Order"); and (2) the December 6, 2013 order denying Jacobs' motion for reconsideration of the November Order (the "December Order"). For the reasons discussed below, we **AFFIRM**.

BACKGROUND

In December 2009, Robert N. Lupo ("Lupo") filed a petition for relief under chapter 11 and listed Jacobs as a disputed, unsecured creditor in his schedules. See In re Lupo, Case No. 09-21945-JNF, 2012 WL 3018053, at *1 (Bankr. D. Mass. July 23, 2012). In August 2010, a court-appointed examiner submitted a report in which he explained the assets of Lupo's estate included 32 parcels of real estate, many of which were rental properties. See In re Lupo, Case No. 09-21945-JNF, 2012 WL 5896473, at *4-5 (Bankr. D. Mass. Feb. 22, 2012). The court appointed a chapter 11 trustee in August 2010 and, in September 2010, it entered an order converting Lupo's case to chapter 7 and appointed Joseph B. Collins as the chapter 7 trustee (the "Trustee"). Id.

On October 20, 2010, Jacobs filed a seventeen-page emergency motion to remove the Trustee from the case. In it, she made numerous allegations against the Trustee, the bankruptcy judge, and the office of the U.S. Trustee, and in her very lengthy prayer for relief she included requests for their removal or recusal and for an order enjoining the banks from taking any action for six months. In his opposition, the Trustee asserted the motion was baseless and opined Jacobs' motive was to "extort money, employment and personal advantages" from the estate. He also asked for an order restraining Jacobs from continuing with her excessive, baseless

accusations and overwhelming filings on the grounds her actions were resulting in unnecessary costs. A week later, Jacobs filed a motion for a restraining order in which she again asserted numerous and wide-ranging allegations and requests for relief with respect to numerous parties. On December 14, 2010, the court entered an order restricting Jacobs' filings after it found she had "filed an incessant stream" of motions, "many of which are duplicative and frivolous" and which contained "defamatory allegations and incomprehensible requests for relief."

In several pleadings, Jacobs explained why she was entitled to compensation for her work as a real estate broker and property manager both pre- and post-petition. She sought reimbursement for these services, which relief the Trustee opposed. See In re Lupo, 2012 WL 3018053, at *2-4. In July 2012, after conducting an evidentiary hearing, the bankruptcy court issued an opinion in which it found that despite the lack of an agreement in writing or as to material terms, Jacobs had worked as both a property manager and salesperson for Lupo prior to the bankruptcy filing and was entitled to relief based upon quantum meruit. Id. The court specified that any damages Jacobs may have suffered due to gender discrimination were "suspect and speculative." Id. at *11. The court entered an order ruling Jacobs was entitled to an unsecured pre-petition claim in the amount of $23,701.47, but was not entitled to an administrative claim because neither Lupo nor the Trustee hired her post-petition (the "Claim Order"). Id. Jacobs did not appeal the Claim Order. In March 2013, Jacobs' attorney filed a notice of withdrawal of appearance and thereafter Jacobs has appeared pro se.

In July 2013, Jacobs filed a Motion for Relief, Etc. in which she sought a myriad of relief including a request for reconsideration of the Claim Order. Therein, Jacobs detailed why she believed the Trustee violated state real estate laws and requested authority to sue the Trustee under the "Bartone Doctrine." The Trustee objected to that part of the motion wherein Jacobs

sought authority to sue him as, inter alia, Jacobs failed to plead the elements of a prima facie case. On July 29, 2013, the court entered an order sustaining the Trustee's objection and denying the motion on the grounds it was a rehash of prior rejected arguments.

On November 12, 2013, Jacobs filed a Motion for Permission to Sue Trustee Joe Collins and to be Heard by Judge Other Than Judge Joan Feeney (the "Motion to Sue"). The Trustee did not file an objection. On November 25, 2013, the bankruptcy court issued the November Order denying the motion and an accompanying memorandum (the "Memorandum"). See In re Lupo, Case No. 09-21945-JNF, 2012 WL 6164497 (Bankr. D. Mass. Nov. 25, 2013). In the latter, the court listed both the several motions it was adjudicating and the several prior pleadings it considered relevant, including many of the motions to remove the Trustee, judge, and attorney for the U.S. Trustee from the case. The court did not specifically address Jacobs' request to sue the Trustee and instead focused on the fact that all of the referenced pleadings evidenced a four-year "course of filing frivolous motions and objections that contain irrational and barely comprehensible requests for relief that frequently include scandalous and defamatory accusations." Id. at *3. The court explained Jacobs' motions were "wholly without merit," filled with "repeated, baseless assertions," and a burden to the court and estate given the time and resources devoted to addressing them. Id. at *4. Jacobs' motions for reconsideration, the court explained, were "without cause and out of time." Id. In the Motion to Sue, Jacobs "inserted private, personal, and protected information" regarding the bankruptcy judge and the Trustee. Id. The court opined Jacobs had refused to "understand and accept the fiduciary obligations imposed on" the Trustee. Id.

Given these facts, the court concluded that in order to protect the integrity of the bankruptcy system and deter Jacobs' vexatious and disturbing litigation tactics, it would not only

deny the Motion to Sue but order it removed from the docket.[1] Id. at *4-5. Moreover, in the November Order, the court ordered that thereinafter Jacobs could only file pleadings if she first delivered, in person, a copy of the pleading to the clerk of the bankruptcy court accompanied by a request for leave to file the pleading. Upon receipt of the request for leave, the court would review the potential pleading in camera to determine if it could be docketed. Jacobs did not appeal this aspect of the November Order.

On December 5, 2013, Jacobs submitted a pleading to the clerk of the bankruptcy court in which she sought reconsideration of the November Order (the "Motion for Reconsideration"). The bankruptcy court treated the Motion for Reconsideration as both a request for reconsideration of the November Order as well as a motion for leave to file the request pursuant to the filing guidelines it had set forth in the November Order. On December 6, 2013, the bankruptcy court issued the December Order denying Jacobs' request for leave to file the Motion for Reconsideration on the grounds that the pleading contained no allegations of newly discovered evidence or errors of law. The court explained the Motion for Reconsideration was "merely a rehash of prior arguments" and contained "nonsensical statements and allegations."[2]

On December 19, 2013, Jacobs filed a notice of appeal of the November Order and the December Order.[3] Because three out of the four pleadings disposed of by the November Order

[1] For this reason, the parties did not designate the Motion to Sue for the record on appeal. The Motion to Sue is listed on the public docket but is not available for public viewing. The bankruptcy court provided a description of it in the Memorandum.

[2] Given the disposition of the Motion for Reconsideration, only the order appears on the docket. The motion is neither listed nor available on the public docket and the parties did not designate it for the record on appeal.

[3] Jacobs also listed an order dated November 12, 2013, in her notice of appeal. The court did not docket any orders on that date.

were interlocutory or moot, the Panel entered an order on January 24, 2014, limiting the scope of the appeal of the November Order and December Order to consideration of the denial of the Motion to Sue and the denial of the Motion for Reconsideration.

In February 2014, the Trustee filed with the Panel a Motion to Strike Jacobs' Designation of Record and a Motion to Strike Appellant's Statement of Issues on the grounds that, inter alia, Jacobs failed to submit a copy of the documents she sought to include on the record pursuant to Fed. R. Bankr. P. 8006, and that she listed multiple issues unrelated to the narrow issues on appeal. The Panel granted the Trustee's motion to strike and ruled the designated record would consist of only the items the Trustee listed in his designation of record.

Jacobs subsequently filed five emergency motions to, inter alia, file an additional record on appeal, request an extension of time, and withdraw the reference to the First Circuit. The Panel denied all of these motions.

JURISDICTION

A panel has jurisdiction to hear appeals from "final judgments, orders, and decrees [pursuant to 28 U.S.C §158(a)(1)] or with the 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). An order denying a motion for reconsideration is final if the underlying order is final and together the orders end the litigation on the merits. Garcia Matos v. Oliveras Rivera (In re Garcia Matos), 478 B.R. 506, 511 (B.A.P. 1st Cir. 2012). An order denying a motion for leave to sue a trustee is a final order. See In re USA Baby, Inc., 520 Fed. Appx. 446, 447 (7th Cir. 2013). Therefore, the order denying the Motion for Reconsideration is also final. Thus, the Panel has jurisdiction to hear this appeal.

STARDARD OF REVIEW

Appellate courts review a bankruptcy court's decision to deny a motion for leave to sue under the abuse of discretion standard. In re VistaCare Grp., LLC, 678 F.3d 218, 224 (3d Cir. 2012). The Panel reviews the bankruptcy court's decision to deny a motion for reconsideration of a previous judgment also for abuse of discretion. See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 132 (B.A.P. 1st Cir. 2004). "A court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." De Jounghe v. Lugo Mender (In re de Jounghe), 334 B.R. 760, 765 (B.A.P. 1st Cir. 2005). Abuse of discretion on the part of the bankruptcy court 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. Roman v. Carrion (In re Rodriguez Gonzalez), 396 B.R. 790, 797 (B.A.P. 1st Cir. 2008). The Panel can find an abuse of discretion only when the bankruptcy court's judicial actions are "arbitrary, fanciful or unreasonable," or if no reasonable person would take the view adopted by the court. United States v. Carey (In re Wade Cook Fin. Corp.), 375 B.R. 580, 589 (B.A.P. 9th Cir. 2007).

DISCUSSION

In her brief, Jacobs first asserts the bankruptcy court erred in denying the Motion to Sue because she should be able to sue the Trustee to recover on her claims for, inter alia, lost wages, sexual harassment, discrimination, negligence, breach of fiduciary duty, and intentional infliction of emotional distress. Without reference to the record, she offers that she is successfully pursuing state court actions against the Trustee. Heavily relying on the statutory exception to the Barton Doctrine, Jacobs argues she did not need to obtain leave of court to bring suit against the

Trustee based upon the exceptions set forth in 28 U.S.C. § 959(a) and 11 U.S.C. § 323(b). Jacobs appears also to argue that if leave were required, she established a prima facie case by pleading "cogent facts with respect to Collins acts and his transactions in carrying on business connected with such property" and by explaining her claims have survived motions to dismiss in state court.

The Trustee counters that Jacobs failed to "plead the elements of a prima facie case against the trustee" and therefore is not entitled to relief from the Barton Doctrine. Citing the pleading standard in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), the Trustee further argues Jacobs failed to articulate a single plausible claim for relief against him. The Trustee contends Jacobs' accusations are "false, baseless and defamatory", without "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." With respect to the December Order, the Trustee argues the bankruptcy court did not abuse its discretion because Jacobs failed to show newly discovered evidence or a manifest error or fact of law.

It is evident after reviewing the record and exploring the issue at oral argument that by the Motion to Sue, Jacobs was requesting the same relief she sought in the Motion for Relief, Etc. and related pleadings, namely damages from the Trustee on account of work she performed, and the alleged discriminatory and illegal actions of the Trustee, all during the bankruptcy proceeding. We arrive at this conclusion based upon our review of the record in this case, including:

> 1. The July 29, 2013 order in which the bankruptcy court sustained the Trustee's objection to Jacobs' request for permission to sue;
>
> 2. The Memorandum, in which the court explained Jacobs filed numerous motions for reconsiderations which were "repeated" and "baseless" indicating that Jacobs raised no

new grounds therein; and

3. The Trustee's representation at oral argument that he believed the two motions sought the same relief.

Because Jacobs raised the same issues in the Motion to Sue as she did in her Motion for Relief, Etc. and because the Motion for Relief, Etc. resulted in a final order, the order disposing of the earlier motion governs the disposition of the later motion under the law of the case doctrine. See, e.g., Ellis v. United States, 313 F.3d 636, 646 (1st Cir. 2002) (explaining doctrine provides decision rendered in case governs for remainder of litigation unless altered by appellate tribunal). While it appears that essentially the bankruptcy court applied the doctrine, the First Circuit explains we can apply it at this stage. See, e.g., United States v. Wallace, 573 F.3d 82, 90 n.6 (1st Cir. 2009) ("We therefore reject any intimation in our cases that we cannot raise the law of the case issue sua sponte if we deem it appropriate."). As such, the order denying the Motion for Relief, Etc. governed the Motion to Sue and the court correctly exercised its discretion in refusing to address the same issues yet again. Had Jacobs wanted a remedy, her recourse was to appeal the earlier order not to renew her request for the same relief despite earlier adverse dispositions.[4]

As the Motion to Sue is not part of the record in this appeal, however, we will give Jacobs the benefit of the doubt and refrain from deciding the appeal based solely on the law of the case doctrine. Accordingly, we will address the issues Jacobs presented and treat the arguments in her brief as reflective of the issues she raised in the Motion to Sue.

[4] Viewed slightly differently, the Motion to Sue could have been construed as a motion under Fed. R. Civ. P. 60(b)(1)-(6) ("Rule 60(b)"), made applicable by Fed. R. Bankr. P. 9024. On this basis, we could conclude the bankruptcy court did not abuse its discretion in denying the Motion to Sue because it appears nothing in the Motion to Sue addressed how Jacobs met that standard.

The first issue Jacobs raises is that the bankruptcy court abused its discretion in denying the Motion to Sue. In Barton v. Barbour, the Supreme Court held "before suit is brought against a receiver, leave of court by which he was appointed must be obtained." 104 U.S. 126, 128 (1881). Under the Barton Doctrine, an individual who wants to sue a trustee in a court other than the one charged with administering the estate must first seek leave from the court which appointed the trustee. See Muratore v. Darr, 375 F.3d 140, 143 (1st Cir. 2004); see also In re Linton, 136 F.3d 544, 545 (7th Cir. 1998) (doctrine applies as bankruptcy trustee is statutory successor to equity receiver). The Barton Doctrine applies to claims "based on alleged misconduct in the discharge of a trustee's official duties . . . ." Satterfield v. Malloy, 700 F.3d 1231, 1234 (10th Cir. 2012) (adopting similar holdings from the First, Sixth, Ninth, and Eleventh Circuits). The doctrine does not apply when a trustee acts outside the scope of authority. Id. at 1235. The doctrine also is inapplicable under the following statutory exception:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

28 U.S.C § 959(a).

In the event the Barton Doctrine pertains and the proposed plaintiff moves for an order authorizing suit against the trustee in another forum, most courts agree, as a threshold matter, the proposed plaintiff must plead the elements of a prima facie case against the trustee. See, e.g., In re VistaCare, 678 F.3d at 232; Spirtos v. Reitman (In re Spirtos), 171 Fed. Appx 5, 6 (9th Cir. 2006); Anderson v. United States, 520 F.2d 1027, 1029 (5th Cir. 1975); In re Nat'l Molding Co.,

230 F.2d 69, 71 (3d Cir. 1956) (explaining movant "must make a prima facie case against the trustee, showing that its claim is not without foundation."); Behrmann v. Nat'l Heritage Found., Inc. (In re Nat'l Heritage Found., Inc.), 510 B.R. 526, 537 (E.D. Va. 2014); Wagner v. Lankford (In re Vaughan Co., Realtors), A.P. No. 12-1139, 2014 WL 585288, at *2 (Bankr. D.N.M. Feb. 14, 2014).

The prima facie standard applicable to a motion to sue a trustee is similar to the standard courts employ in evaluating a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim, but involves a greater degree of flexibility. In re VistaCare, 678 F.3d at 232. To survive a motion to dismiss, the complaint has to state a plausible claim for relief, which contains sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted).

Several courts have further explained that even if the movant has established a prima facie case, the bankruptcy court may still exercise its discretion to deny leave to sue the trustee in another forum based on a balancing of the interests of all parties involved. See, e.g., In re VistaCare, 678 F.3d at 233; Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 976 (9th Cir. 2005). For support, these cases cite to Kashani v. Fulton (In re Kashani), 190 B.R. 875, 886 (B.A.P. 9th Cir. 1995) (ruling multi-factor test applicable to determination of whether movant can proceed in state court).

While in her brief Jacobs addresses both the Barton Doctrine and the statutory exception thereto, nothing in the record suggests Jacobs ever developed these arguments below other than summarily to cite them. We do not address issues raised for the first time on appeal. Noonan v. Rauh (In re Rauh), 119 F.3d 46, 51 (1st Cir. 1997) (ruling arguments raised for first time on

appeal permissible only in exceptional circumstances). Moreover, there is no evidence in the record regarding when and how the Trustee ran Lupo's business. See Blixseth v. Brown, 470 B.R. 562, 572 (D. Mont. 2012) ("The exception applies only to the trustee's ongoing or continuous operation of the debtor's business, and does not apply to a trustee's court ordered administration of the debtor's property or estate."); see also Muratore v. Darr, 375 F.3d at 144. We do note that any claims by Jacobs arising from the Trustee's operation of Lupo's business during the bankruptcy case were resolved against Jacobs in the Claims Order, which is now final.

We are also somewhat constrained in that the record does not make clear the bankruptcy court considered the Barton Doctrine. In her Motion for Relief, Etc. and his objection thereto, Jacobs and the Trustee addressed the Barton Doctrine. In the order denying that motion, the bankruptcy court sustained the Trustee's objection. In the November Order, the court wrote at length about how the motion is just one of many, many motions that were without foundation. Accordingly, it appears the court ruled that the Motion to Sue was without foundation.

Once again putting these issues aside given the complicated record, we note that courts considering whether the Barton Doctrine applies typically start by examining whether the actions complained of fall within the scope of the official functions of the trustee. See, e.g., Lunan v. Jones (In re Lunan), 489 B.R. 711, 725-28 (Bankr. E.D. Tenn. 2012) (reviewing case law addressing lawsuits against trustees based upon allegations of ultra vires acts including Eleventh Circuit precedent). In this case, it is difficult to pinpoint the specifics of Jacobs' allegations. Some of the actions to which Jacobs refers, her wage claims against Lupo or the Trustee, her claims against Lupo for other malfeasance, etc. were resolved by the Claim Order, which is now final. The additional claims against the Trustee that are unrelated to Jacobs' wage claims arise from her allegations he failed to use the best methods to sell the real estate and he discriminated

against her and harassed her. The former may involve acts while the Trustee was acting in his official capacity and the latter appear ultra vires and were largely resolved via the Claim Order. With respect to all of these claims, however, Jacobs offers only general allegations without the corresponding legal theories for her proposed complaints. While the bankruptcy court only implicitly ruled the Barton Doctrine applied, it does not appear this was an abuse of discretion given the record does not reflect Jacobs specifically and cogently argued below that her claims came within the recognized exceptions to the Barton Doctrine.

As it appears there was no abuse in applying the doctrine, the next question is whether the bankruptcy court erred in denying leave to sue. Again, the bankruptcy judge did not specify the basis for denying the Motion to Sue. The court denied the same motion a few months earlier based upon the Trustee's argument that Jacobs did not satisfy the Barton Doctrine. The memorandum accompanying the November Order indicates the court determined that all of the pleadings which it was then called upon to adjudicate were baseless, frivolous, and incomprehensible. The record further reflects Jacobs never provided any proposed complaints but rather rested on wide-ranging allegations many of which were previously resolved in the Claim Order.

To survive a motion to sue, a movant must present a prima facie case. The bankruptcy court found that Jacobs presented only frivolous allegations which were barely comprehensible and denied the motion. Given that her appellate pleadings, which are no different than those she presented to the bankruptcy court, are equally difficult to synthesize, we conclude Jacobs has not met her burden to establish an abuse of discretion.

Jacobs fares no better with respect to the Motion for Reconsideration. Because she filed that motion within fourteen days of the November Order, it is treated as a motion to alter or

amend the judgment Fed. R. Civ. P. 59(e) ("Rule 59(e)"), made applicable by Fed. R. Bankr. P. 9023. To prevail on a Rule 59(e) motion, the moving party must "either clearly establish a manifest error of law or must present newly discovered evidence." Markel Am. Ins. Co. v. Díaz-Santiago, 674 F.3d 21, 32 (1st Cir. 2012). Rule 59(e) motions are not appropriate "to repeat old arguments previously considered and rejected." Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990).

In the December Order, the bankruptcy court denied the Motion for Reconsideration because Jacobs "neither presented newly discovered evidence nor demonstrated any error of law in connection with the [November Order]." The court further described Jacobs' motion as "merely a rehash of prior arguments." Jacobs does not explain why this was an abuse of discretion. Given the consistency in Jacobs' pleadings and the court's description of this motion and because the Motion for Reconsideration only served a limited purpose and was not the proper vehicle for relitigating arguments the court previously rejected, Jacobs has failed to meet her appellate burden.

CONCLUSION

For the foregoing reasons, we **AFFIRM** both the November Order and the December Order.