

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. MW 98-005

**IN RE: PTP, INC.,
Debtor.**

**DEBRA AVERY,
Appellant,**

v.

**TRANSCONTINENTAL INSURANCE CO.,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
[Hon. James F. Queenan, Jr., U.S. Bankruptcy Judge]**

**Before
Goodman, Lamoutte, De Jesús, U.S. Bankruptcy Judges**

**Gerald A. Hamelburg, Esq. and Greenbaum, Nagel, Fisher & Hamelburg, on brief for the
Appellant.**

**Terrance J. Hamilton, Esq., Donna B. MacKenna, Esq. and Casner & Edwards, LLP, on brief
for the appellee.**

June 3, 1999

de Jesús, J.

Debra Avery appeals from the bankruptcy court's order denying her request for relief from judgment pursuant to Fed. R. of Civ. P. 60(b). We remand, allowing the bankruptcy court to state the reasons for denying the motion.

Background

Debra Avery (Avery) filed a complaint grounded in state law causes of action for sexual harassment against her former employer PTP, Inc. in the Massachusetts' state court. While this suit was pending, PTP, Inc. (Debtor) filed a Chapter 11 petition for bankruptcy. Avery filed a proof of claim for \$250,000.00, plus attorney's fees and punitive damages. Debtor asked the bankruptcy court to estimate Avery's claim against the estate. Avery filed a motion seeking relief from the automatic stay to continue prosecuting her suit against the Debtor in the state court.

Avery and Debtor settled.¹ The bankruptcy court approved the

¹"STIPULATION RELATING TO DEBTOR'S MOTION TO ESTIMATE CLAIM (DEBRA AVERY), CREDITOR DEBRA AVERY'S MOTION FOR RELIEF FROM AUTOMATIC STAY AND DEBTOR'S MOTION FOR AUTHORITY TO CONDUCT AN EXAMINATION PURSUANT TO RULE 2004.

It is hereby stipulated and agreed by the parties hereto as follows:

1. Debtor's motion to estimate the claims of claimant Debra Avery shall be allowed with the following endorsement: 'Claimant Debra Avery is allowed, by agreement, a general unsecured non-priority claim in the amount of \$2,500.00 on account of the Debtor's breach of an oral employment contract with the claimant plus an additional amount to be paid from insurance proceeds only in satisfaction of a judgment, if any, entered in a related state court civil action and not by the Debtor under any plan of reorganization

settlement allowing Avery's claim as an unsecured non priority claim in the amount of \$2,500.00, "plus an additional amount to be paid from insurance proceeds only in satisfaction of a judgment, if any, entered in a related state court civil action and not by the Debtor under any plan of reorganization herein". (Appellant's App. at 3.) The court also granted relief from stay, so she could pursue her suit pending in the state court.

Transcontinental Insurance Company (Transcontinental) insured

herein. The Court has no jurisdiction over the Claimant's claims under G.L.c.93, Sec. 102, under G.L.c. 151B alleging sexual harassment, and under C.L.c. 151B for aiding and abetting the sexual harassment, for intentional infliction of emotional distress, for negligent infliction of emotional distress, under G.L.c. 214, Sec. 1(c) for interference with Claimant's rights, under G.L.c. 12, Sec. 11I for violation of Claimant's rights, for estoppel, for negligence, for injunctive relief and for wrongful termination. The Court estimates those claims at \$0.00 solely for the purposes of voting under 11 U.S.C. Sec. 1129 (a) (11). The Court makes no finding as to the nature of the breach of contract.'

2. Claimant Debra Avery's motion for relief from the automatic stay, by which she is presently stayed, pursuant to 11 U.S.C. 326(a) [sic], from prosecuting her claims made against the Debtor in a civil action entitled Debra Avery v. PTP, Inc., et al., Middlesex Superior Court, Civil action No. MICV 94-1225 and commenced in Middlesex (Massachusetts) Superior Court is allowed for the purpose of permitting the Claimant to pursue her claims against the Debtor which are pending in said action and which evolve therefrom said alleged facts.

3. Upon the filing hereof and the entry of an Order of the Court incorporating this Stipulation as its [sic] said Order Debtor's Motion to Conduct an Examination of the Claimant Debra Avery pursuant to Rule 2004 shall be deemed to have been withdrawn."

(Appellant's App. at 3-4).

Debtor for certain occurrences defined in the commercial general liability insurance policy (the policy). Avery had not sued the insurance company. Instead, she was negotiating with Transcontinental in the hopes of settling the suit for sexual harassment. Transcontinental responded to these overtures by denying coverage, informing Avery it would file an adversary proceeding seeking confirmation of its position via a declaratory judgment in the bankruptcy court. (Appellant's App. at 108-113.) Transcontinental filed the proceeding against PTP, Inc. asking the bankruptcy court to declare it had no obligation under the policy to defend or indemnify the debtor for the claims Avery asserted before the state court. It did not include Avery as a party. It did not notify Avery of the proceeding.

Debtor filed a motion to dismiss the proceeding claiming: 1) the bankruptcy court lacked subject matter jurisdiction, and 2) Transcontinental failed to join Avery as a necessary party. After oral argument, the bankruptcy court ruled from the bench stating:

All right. I'm denying the motion to dismiss. Ms. Avery is not a necessary party. The contract is between the debtor and the insurance company. This court is the appropriate court to adjudicate rights of the debtor. The Superior Court cannot at this point in the pending litigation adjudicate rights of the debtor even if the stay were lifted because the debt - because the insurance company is not -- and the rights of the insurance company really -- the insurance company is not a party to that litigation.

(Appellant's App. at 126-127). The court memorialized the ruling in

a separate document by simply denying Debtor's motion. (Appellant's App. at 55.) The court then invited the parties to dispose of the issue via summary judgment. (Appellant's App. at 127.)

Transcontinental filed the motion for summary judgment. Debtor did not oppose it and did not appear at the hearing to consider the motion. At the hearing the bankruptcy court ruled in favor of Transcontinental stating:

All right, well, that makes for a very short hearing. It looked to me, from reading the policy, that the definition of personal injury was quite specific, and I did not see that this was included, and I guess he came to the same conclusion, right?

(Appellant's App. at 129). The court also memorialized this ruling by separate order, simply granting Transcontinental's motion. (Appellant's App. at 79.)

When Avery learned of this ruling, she filed a motion to vacate and/or motion for reconsideration. Transcontinental opposed this motion. The bankruptcy court denied Avery's motion by a marginal order. This appeal ensued.

Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal pursuant to 28 U. S. C. § 158. An order denying a motion under Rule 60(b) is final and appealable. *Pagán v. American Airlines, Inc.*, 534 F. 2d 990 (1st Cir. 1976).

Standard of Review

We review the bankruptcy court's order denying Avery's Rule

60(b) motion for abuse of discretion. *Cotto v. United States*, 993 F.2d 274, 277 (1st Cir. 1993); *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., Inc.*, 953 F. 2d 17, 19 (1st Cir. 1992); *Rodríguez-Antuna v. Chase Manhattan Bank Corp.*, 871 F. 2d 1, 3 (1st Cir. 1989); *Ojeda-Toro v. Rivera-Méndez*, 853 F. 2d 25, 28 (1st Cir. 1988). The First Circuit explains, "...[a]buse 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." *Coon v. Grenier*, 867 F. 2d 73, 78 (1st Cir. 1989) (citing *Independent Oil and Chemical Workers v. Procter & Gamble Mfg. Co.*, 864 F. 2d 927, 929 (1st Cir. 1988)).

Discussion

Transcontinental questions Avery's standing to appeal. We agree Avery must have standing to proceed with this appeal. "The right of appellate review... [is] limited to those persons whose interests are directly affected. ... A litigant qualifies as a 'person aggrieved', if the order diminishes his property, increases his burdens, or impairs his rights." *In re El San Juan Hotel*, 809 F. 2d 151, 154 (1st Cir. 1987) (citations omitted); *In re Kehoe*, 221 B.R. 285 (B.A.P. 1st Cir. 1998).

The following unique circumstances differentiate this case from the norm set by *In re Thompson*, 965 F. 2d 1136 (1st Cir. 1992). Here, the parties agreed to continue with the suit in the state courts

limiting recovery to the insurance proceeds. Here, Transcontinental did not notify Avery it filed the declaratory suit in the bankruptcy court. Here, Avery learned the declaratory suit had been filed after the bankruptcy court had ruled, precluding intervention. Here, there is no evidence of the existence of other claimants with rights to the policy proceeds. Here, Avery is the only individual directly affected by the complaint that sought a determination that her claims are not covered under the policy. Hence, the denial of the Rule 60(b) motion directly and pecuniarily affects Avery, making her an aggrieved party with standing to pursue this appeal.

Avery argues the bankruptcy court should have granted her Rule 60(b) motion because it lost jurisdiction over the declaratory judgment action upon execution of the stipulation limiting the estate's exposure to \$2,500.00 and terminating the estate's interest in the policy. Avery also claims she was a necessary party to the proceeding. Avery raises other arguments on the merits which we do not need to review.

"We recognize that trial courts have heavy calendars...[and] trial judges should not... be required to assemble an exhaustive record..." in the numerous rulings they enter on a daily basis. *In re Zeitler*, 221 B. R. 934, 939 (B.A.P. 1st Cir. 1998). However, if we are to evaluate this bankruptcy court's determination of Avery's Rule 60(b) motion, we need something more than the terse denial on record. Subject matter jurisdiction and abstention are material and

compelling factors in this case deserving attention. The bankruptcy court abused its discretion by disposing of Avery's claim of lack of jurisdiction without making specific findings, thereby creating an insufficient record for us to review.

Accordingly, this matter is **REMANDED** to the bankruptcy court so that the Judge may set forth the reasons for the denial of the Rule 60(b) motion.