6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 30 2004
CLERK, U.S. DISTRICT COURT
By _____ CB
Deputy

IN RE:	)	
	)	BANKRUPTCY CASE NO.
MELVIN RAY HASSELL and	)	
NELDA JO HASSELL,	)	02-37307-HDH-7
	)	
Debtors.	)	
----------	)	
MELVIN RAY HASSELL and	)	
NELDA JO HASSELL,	)	
	)	CIVIL ACTION NO.
Appellants,	)	
	)	3:04-CV-0494-G
VS.	)	
	)	CONSOLIDATED WITH
UNITED STATES OF AMERICA	)	3:04-CV-1013-G
(INTERNAL REVENUE SERVICE),	)	3:04-CV-1469-G
	)	3:04-CV-1585-G
Appellee.	)	

MEMORANDUM ORDER

This is a consolidated appeal by Melvin and Nelda Jo Hassell (collectively, the "Hassells") from various orders and judgments of the bankruptcy court. For the reasons stated below, three of the Hassells' appeals are dismissed for failure to prosecute. The remaining appeal, from the bankruptcy court's final judgment in favor of the United States, is affirmed for the reasons stated below.

I. BACKGROUND AND PROCEDURAL HISTORY

On or about August 26, 2002, the Hassells filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. This case was converted, on October 21, 2002, from a Chapter 11 case to a Chapter 7 case.

On September 4, 2002, in a separate civil action, this court entered a judgment in favor of the United States against the Hassells for taxes owed, declaring the transfer of their residence to a third party fraudulent and ordering foreclosure of the United States' tax lien against the Hassells' residence. *United States v. Hassell*, No. Civ. 3:02-CV-0112-G, Default Judgment (N.D. Tex. Sep. 4, 2002). The Hassells appealed to the Fifth Circuit, which affirmed this judgment. *United States v. Hassell*, 82 Fed. Appx. 372 (5th Cir. 2003).

To allow the court-ordered foreclosure to proceed, the United States moved the bankruptcy court to lift the automatic stay so that this court could issue orders relating to administration of the foreclosure. On February 20, 2004, the bankruptcy court granted the United States' motion and ordered that the automatic stay be lifted. *In re Hassell*, No. 02-37307, Order Lifting Stay (Bankr. N.D. Tex. Feb. 20, 2004).

In September 2002, the Hassells brought an adversary action against the United States seeking a determination by the bankruptcy court that their debt to the United States was dischargeable. On June 27, 2003, the United States moved for

summary judgment on the issue of the dischargeability of the Hassells' debt. On August 28, 2003, the bankruptcy court issued an order granting in part and denying in part the United States' motion for summary judgment. In accordance with the summary judgment, the bankruptcy court entered a final judgment in favor of the United States on December 16, 2003. *In re Hassell*, Bankr. Adv. No. 02-3377, Final Judgment in Favor of United States on Tax Adversaries (Bankr. N.D. Tex. Dec. 16, 2003) (hereinafter, "Final Judgment for United States"). On April 19, 2004, the bankruptcy court entered a final judgment in favor of John C. Wilhite, another creditor of the Hassells. *In re Hassell*, Bankr. Adv. No. 02-3377, Final Judgment (Bankr. N.D. Tex. Apr. 20, 2004). Each of these final judgments is the subject of one of the Hassells' four appeals now before this court.

During the course of the adversary proceedings, the bankruptcy court found Melvin Hassell ("Mr. Hassell") to be in civil contempt of court. *In re Hassell*, Bankr. Adv. No. 02-3377, Order Holding Melvin Ray Hassell in Civil Contempt of Court (Bankr. N.D. Tex. May 25, 2004). Mr. Hassell filed a motion requesting that the bankruptcy court, under Federal Rule of Civil Procedure 60(b)(4), set aside as void its order finding him in civil contempt. On June 15, 2004, the bankruptcy court denied Mr. Hassell's motion. *In re Hassell*, Bankr. Adv. No. 02-3377, Order on Melvin R. Hassell's Motion under F.R.C.P. 60(b)(4) (Bankr. N.D. Tex. June 14, 2004). Mr.

Hassell appeals the bankruptcy court's June 15, 2004 order denying his motion to set aside the earlier order holding Mr. Hassell in civil contempt.

With respect to the Hassells' appeal of the bankruptcy court's final judgment entered in favor of the United States, the Hassells timely filed their notice of appeal on December 24, 2003. The record on appeal was received by the clerk of this court on March 9, 2004. The Honorable Barefoot Sanders, United States Senior District Judge ordered the Hassells to file their appellate brief by April 19, 2004. On April 19, 2004, the Hassells filed a brief and complaint for declaratory relief, wherein Mr. Hassell requested two additional days to amend, correct, and complete the filing due to health problems. On April 23, 2004, the Hassells filed another brief and complaint for declaratory relief, in which a similar request to amend or supplement was made by Mr. Hassell.[1] No further amended briefs were filed by the Hassells. The United States filed its appellee's brief on May 7, 2004. No reply brief has been filed.

With respect to the Hassells' appeal of the bankruptcy court's final judgment entered in favor of John Wilhite, the notice of appeal was timely filed on April 28, 2004. The record on appeal was transmitted to the clerk of this court on May 11,

---

[1]In light of Mr. Hassell's request for leave to amend the brief and the similarity of the content of the second-filed brief, the court will consider the brief and complaint for declaratory relief filed on April 23, 2004 as the "appellants' brief." To the extent necessary, attachments made to the first brief will be considered along with the appellants' brief.

2004. On June 7, 2004, this case was transferred to the undersigned judge from United States District Judge David C. Godbey. That same day, this court ordered Mr. Hassell to file his appellate brief by June 28, 2004. To this date, no brief has been filed regarding the Hassells' appeal of the final judgment in favor of Wilhite.

With respect to Mr. Hassell's appeal of the bankruptcy court's order denying his motion under Federal Rule of Civil Procedure 60(b) to declare void its previous order finding Mr. Hassell in civil contempt, Mr. Hassell timely filed his notice of appeal on June 24, 2004. The record on appeal was received by the clerk of this court on July 7, 2004. This court ordered Mr. Hassell to file his appellate brief by July 28, 2004. To date, however, no appellate brief has been filed regarding Mr. Hassell's appeal of the bankruptcy courts order denying Mr. Hassell's motion to void the bankruptcy court's civil contempt order.

With respect to the Hassells' appeal of the bankruptcy court's order lifting the automatic stay, the Hassells timely filed their notice of appeal on March 1, 2004. On August 3, 2004, this court ordered the Hassells to file their appellate brief by August 23, 2004. To date, no appellate brief regarding the order lifting the stay has been filed.

This court has ordered the four appeals discussed above to be consolidated. Consolidation Orders dated July 6, 2004 and August 5, 2004.

II. ANALYSIS

A. Jurisdiction

This court exercises jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001. 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8001.

B. Standard of Review

When reviewing a decision of the bankruptcy court, the district court "functions as an appellate court and applies the standard of review generally applied in federal court appeals." *Matter of Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992); *Matter of Coston*, 991 F.2d 257, 261 n.3 (5th Cir. 1993) (citing *Matter of Hipp, Inc.*, 895 F.2d 1503, 1517 (5th Cir. 1990)). Conclusions of law are reviewed *de novo*. *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). Findings of fact, on the other hand, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses." *Webb*, 954 F.2d at 1104; FED. R. BANKR. P. 8013. "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.'" *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948)). Finally, mixed

questions of law and fact are reviewed *de novo*. *Matter of National Gypsum Company*, 208 F.3d 498, 504 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000).

C. Dismissal for Failure to Prosecute

As stated above, the Hassells failed to file an appellate brief in three of the four appeals. Rule 8001(a) of the Federal Rules of Bankruptcy provides that the "failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court... deems appropriate, which may include dismissal of the appeal." Fed. R. Bankr. P. 8001(a). Moreover, Rule 8009(a) provides that, "[u]nless the... court... excuses the filing of briefs or specifies different time limits," an appellant shall serve and file a brief within 15 days after entry of the appeal. Fed. R. Bankr. P. 8009(a)(1). As evinced by the court orders in each of the appeals, the local rules for this district extend the filing deadline from 15 to 20 days. N.D. Tex. L. Bankr. R. 8009.1.

This court established date specific deadlines for filing the appellants' brief in each of the pre-consolidated appeals. To this date, the only appellate brief that has been filed by the Hassells relates to the appeal of the bankruptcy court's final judgment in favor of the United States. The Hassells failed to file appellate briefs for the three remaining appeals, for which the deadlines were June 28, 2004, July 28, 2004, and August 23, 2004.

A district court hearing an appeal of a judgment of the bankruptcy court has discretion to dismiss an action if the appellant has failed to take steps to prosecute his appeal. See *Matter of Braniff Airways, Inc.*, 774 F.2d 1303, 1304-05 (5th Cir. 1985); see also *Nicoladze v. Lawler*, 86 B.R. 69, 73 n.12 (N.D. Tex. 1988). Therefore, the court exercises its discretion to dismiss, for failure to file an appellate brief, the Hassells' appeals from (1) the bankruptcy court's order granting the United States' motion for relief from the automatic stay; (2) the bankruptcy court's final judgment in favor of John C. Wilhite; and (3) the bankruptcy court's order denying Mr. Hassell's motion, under Federal Rule of Civil Procedure 60(b)(4), to vacate the bankruptcy court's May 25, 2004 order finding Mr. Hassell in civil contempt.

D. Appeal from the Bankruptcy Court's Final Judgment in Favor of the United States

1. *Issues on Appeal*

The remaining appeal in this case is the Hassells' appeal of the bankruptcy court's final judgment in favor of the United States. The appellants' brief fails to list the issues on which the Hassells base their appeal. However, a liberal reading of the appellants' brief indicates that there are three issues on which the Hassells focus their arguments: (1) the subject matter jurisdiction of this court in the prior action wherein a default judgment was entered against the Hassells; (2) the subject matter jurisdiction of the bankruptcy court; and (3) the sufficiency of the factual evidence on which the bankruptcy court's final judgment relied.

2. *Subject Matter Jurisdiction*

The Hassells appear to challenge the subject matter jurisdiction of the bankruptcy court, as well as this court's subject matter jurisdiction over the action in which the default judgment was entered against them. Appellants' Brief at 10-12. In their brief, the Hassells state that "Judge A. Joe Fish's and Harlin D. Hale's Courts does [sic] not have... subject matter jurisdiction." *Id.* at 10 (emphasis omitted).

The Hassells cannot, in this bankruptcy appeal, launch a collateral attack on the subject matter jurisdiction of this court to grant the default judgment in favor of the United States against them. *Royal Insurance Company of America v. Quinn-L Capital Corporation*, 960 F.2d 1286, 1293 (5th Cir. 1992). "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not... reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations -- both subject matter and personal." *Id.* (quoting *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982)).

The Hassells argued in a motion to dismiss the earlier case that this court lacked jurisdiction. *United States v. Hassell*, No. Civ. A. 3:02-CV-0112, Defendant's Motion to Dismiss and Motion for Oral Argument (filed Aug. 6, 2002). This court denied that motion, however, *Id.*, Order Denying Motion to Dismiss (Aug. 20, 2002), and the Hassells failed to adequately present the issue to the Fifth Circuit on appeal.

Therefore, the Hassells cannot raise the issue of this court's jurisdiction to grant the default judgment in this appeal because the jurisdictional issue was litigated in the earlier case and it could have been properly raised in their appeal to the Fifth Circuit.

The bankruptcy court has jurisdiction over "all cases arising under Title 11" of the United States Code. 28 U.S.C. § 157(a). This action arises under Title 11, in that it deals with the dischargeability of Hassell's debt to the United States. 28 U.S.C. § 157(b)(2)(I). Therefore, the bankruptcy court had subject matter jurisdiction over this case.

2. *Sufficiency of the Factual Evidence*

The Hassells apparently argue that the only evidence before the bankruptcy court were the arguments made by counsel for the United States in support of its motion for summary judgment. Appellants' Brief at 2-6.

In its final judgment, the bankruptcy court held that the Hassells' debt to the United States was non-dischargeable under 11 U.S.C. § 523(a)(1)(C) because "the Summary judgment record... more than establishes that the Debtors have 'willfully attempted in any manner to evade or defeat' their tax obligations to the United States." Final Judgment for United States at 2. Section 523(a)(1)(C) of the bankruptcy code provides an exception to discharge "for a tax... with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(C). The bankruptcy court's final judgment

was based upon its order granting the United States' motion for summary judgment on the issue of non-dischargeability, in which the bankruptcy court stated, "[w]ithout limitation, the Judgment of the Honorable A. Joe Fish, which determines that the [Hassells] made a fraudulent transfer of their house at a time after which their tax obligations arose[, was sufficient evidence of the Hassells'] wilful attempt to evade or defeat the collection of their tax obligations." *Hassell v. United States*, Adversary No. 02-3377, Order on United States' Motion for Summary Judgment at 2 (Bankr. N.D. Tex. Aug. 25, 2003) (citing *United States v. Hassell*, No. Civ. 3:02-CV-0112-G, Default Judgment (N.D. Tex. Sep. 4, 2002)).

This court can reverse the factual findings of the bankruptcy court only if the findings are clearly erroneous. *Webb*, 954 F.2d at 1104; FED. R. BANKR. P. 8013. The bankruptcy court's reliance on this court's judgment holding that the sale of the Hassell home was fraudulent, a judgment that was affirmed by the Fifth Circuit, cannot be said to be clearly erroneous. Therefore, the bankruptcy court's final judgment in favor of the United States is affirmed.

III. CONCLUSION

For the reasons stated above, the bankruptcy court's final judgment in favor of the United States is **AFFIRMED**. Additionally, the Hassells' remaining appeals from judgments and orders of the bankruptcy court are **DISMISSED** for failure to prosecute.

SO ORDERED.

November 30, 2004.

A. Joe Fish

A. JOE FISH
CHIEF JUDGE