UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re

Case No. 6:99-BK-08433-KSJ
Chapter 7

JOSE LUIS WACZEWSKI,
SUSAN WACZEWSKI,

Debtors

_____/

MEMORANDUM OPINION DENYING SUSAN WACZEWSKI'S MOTION TO SET ASIDE SECOND COMPROMISE

Over three years ago this Court approved a compromise of controversy entered into by Leigh Meininger, the trustee in the debtors' Chapter 7 case,[1] settling a civil lawsuit[2] in which Mrs. Waczewski had alleged personal injury and wrongful termination claims against a former employer and other related defendants. The debtors have been trying to regain control of this lawsuit ever since, employing multiple strategies to that end.[3]

Most recently, Mrs. Waczewski filed a motion (the "Motion to Set Aside Compromise") (Doc. No. 183) seeking to set aside the Order Approving Compromise of Controversy (the "Compromise Order") (Doc. No. 49), entered by this Court on November 20, 2002. In the Motion to Set Aside Compromise, Mrs. Waczewski argues that the Compromise Order should not have been entered by this Court because, prior to the entry of the written order but after the oral ruling approving the trustee's compromise, she had filed a motion to convert her Chapter 7 case to a case under Chapter 13 pursuant to Bankruptcy Code[4] 706(a)[5] (the "Motion to Convert") (Doc. No. 42). Mrs. Waczewski then argues that her request to convert this case to a Chapter 13 case had the immediate effect of divesting the Chapter 7 trustee of his authority to settle the lawsuit.

Mrs. Waczewski's argument fails because of the appellate rulings by both the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit, which finally affirmed the trustee's approval of the settlement. The debtor also would have the Court excuse or ignore the debtor's failure to timely raise this argument before the appellate courts. Litigants who lose on appeal simply cannot return to the lower court after the higher court has ruled against them to request the lower court to belatedly "undo" the contested order based on a new legal theory not raised before the appellate courts.

The law in the Eleventh Circuit is well settled "that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed. The Federal Rules of Appellate Procedure plainly require that an appellant's brief 'contain, under appropriate headings and in the order indicated … a statement of the issues presented for review.'" Access Now, Inc., v. Southwest Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004) (citing Fed. R. App. P. 28(a)(5); AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305, 1308 (11th Cir.2004) ('BAS argued to the district court that it should have been included in the plaintiff class because it was a purchaser of Notes. It has declined to renew that argument on appeal, and the argument is deemed abandoned as to BAS.'); United States v. Nealy, 232 F.3d 825, 830 (11th Cir.2000) ('Parties must submit all issues on appeal in their initial briefs.'); (other citations omitted)). Specifically,

[1] Mrs. Waczewski and her husband, Jose Waczewski, filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on October 12, 1999. A discharge was entered on January 26, 2000 (Doc. No. 15).

[2] The claims asserted by the Waczewski's in this lawsuit have been described in detail in numerous prior orders of this Court. *See, e.g.*, Doc. No. 54.

[3] For example, they filed a motion requesting that the trustee abandon the lawsuit, or, in the alternative, that this Court dismiss Mrs. Waczewski from the bankruptcy case and permit her to resume control of the lawsuit but allow her husband to remain in the chapter 7 case (Doc. No. 37). The debtors also sought to dismiss both Mr. and Mrs. Waczewski from their jointly filed case (Doc. No. 43). They objected to the trustee's proposed settlement (Doc. No. 36), sought separate administration of their bankruptcy estates (Doc. No. 43), and sought a determination that the lawsuit was exempt and/or non-assignable such that it could not be settled by the trustee (Doc. No. 44).

[4] Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

[5] Bankruptcy Code Section 706(a) governs conversions and provides in relevant part as follows:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

> '[A] party seeking to raise a claim or issue on appeal must plainly and prominently so indicate. Otherwise, the issue-even if properly preserved at trial-will be considered abandoned….
>
> ….
>
> Our requirement that those claims an appellant wishes to have considered on appeal be unambiguously demarcated stems from the obvious need to avoid confusion as to the issues that are in play and those that are not.'
>
> If an argument is not fully briefed (let alone not presented at all) to the Circuit Court, evaluating its merits would be improper both because the appellants may control the issues they raise on appeal, and because the appellee would have no opportunity to respond to it. Indeed, evaluating an issue on the merits that has not been raised in the initial brief would undermine the very adversarial nature of our appellate system.

Access Now, 385 F.3d at 1330 (citing United States v. Jernigan, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003)).

A little background relating to the compromise, its approval, and the debtor's appeal is appropriate. Mr. Meininger first sought to settle the debtor's lawsuit over three years ago, on August 9, 2002, when he filed a Motion to Approve a Compromise of Controversy (Doc. No. 34). None of the debtor's creditors objected to the proposed compromise; however, on August 23, 2002, the debtors filed their own objection (Doc. No. 36) to the settlement. On November 5, 2002, the Court held a hearing on the debtor's objection, a contested matter. At the conclusion of this hearing, the Court rendered a formal oral ruling pursuant to Bankruptcy Rule 7052[6] finding that the proposed settlement met the standard for approval as articulated by the Court of Appeals for the Eleventh Circuit in Justice Oaks II., Ltd., 898 F.2d 1544 (11th Cir. 1990). After the oral ruling, Mrs. Waczewski filed her Motion to Convert this case to a Chapter 13 case. On November 20, 2002, the Court entered the written order approving the compromise (Doc. No. 49) (the "Compromise Order").

After the Court denied the debtor's motion to reconsider the approval of the compromise, the debtors timely filed a Notice of Appeal with the District Court (Doc. No. 55). In connection with the appeal, the debtors also sought a stay of the completion of the approved settlement, pending the resolution of the appeal (Doc. No. 60). This Court denied the debtors' request for a stay (Doc. No. 66), without prejudice so that the debtors could request a stay from the District Court, which they did. The District Court also denied the debtors' request for a stay.

However, the debtor's appeal on the underlying issue of whether the trustee could appropriately settle the lawsuit continued. On March 2, 2004, the District Court entered an order affirming the Compromise Order (Doc. No. 145). Nothing in the record indicates that the debtors ever asked the District Court to defer consideration of the appeal pending the final resolution of Mrs. Waczewski's Motion to Convert or argued that the trustee lacked the authority to enter into the compromise based on this rationale.

The debtors next timely appealed the District Court's order affirming the Compromise Order to the Eleventh Circuit (Doc. No. 152). In turn, the Eleventh Circuit Court of Appeals considered both this Court's and the District Court's orders approving and affirming the trustee's ability to settle the lawsuit. In an extensive opinion, addressing many other unrelated issues, the Eleventh Circuit, on April 5, 2005, affirmed the entry of the Compromise Order, finding that no error occurred (Doc. No. 173). Again, nothing in the record indicates that the debtors ever asked the Eleventh Circuit to defer consideration of the appeal pending the final resolution of Mrs. Waczewski's Motion to Convert or argued that the trustee lacked the authority to enter into the compromise based on this rationale. Indeed, the Eleventh Circuit ruled expressly on the trustee's authority to settle the lawsuit, stating, "[T]he trustee acted reasonably in rejecting it [the debtor's counteroffer] … The Bankruptcy Court, therefore, did not abuse its discretion in approving the compromise of controversy." (Doc. No. 173, pp. 23-24).

It is only after the debtors unfortunately lost their appeal that they now assert this new argument challenging the trustee's ability to enter into the compromise. The issue could have and should have been raised to the appellate courts. Failure to timely raise an issue on appeal constitutes a waiver of the

[6] Federal Rule of Bankruptcy Procedure 9014(c) provides that Bankruptcy Rule 7052 applies to contested matters. Bankruptcy Rule 7052 provides that Federal Rule of Civil Procedure 52 applies, which, in turn, provides in relevant part that "It will be sufficient if the findings of fact and conclusions of law are stated orally and reported in open court following the close of the evidence." Fed. R. Civ. P. 52(a).

argument. Certainly, this Court lacks the jurisdiction to "undo" an order affirmed by the Eleventh Circuit. The Compromise Order is final for all purposes.

Accordingly, Susan Waczewski's Motion to Set Aside Second Compromise (Doc. No. 183) is denied. A separate order consistent with this Memorandum Opinion shall be entered.

DONE AND ORDERED in Orlando, Florida, this 30th day of March, 2006.

/s/ Karen S. Jennemann
KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies furnished to:

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