

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

III,

IN RE: CUMBERLAND INVESTMENT CORPORATION,
Debtor

HAROLD F. CHORNEY,
Appellant,

C.A. No. 08-189ML

v.

JASON D. MONZACK and
JOHN F. CULLEN,
Appellees

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Harold F. Chorney's ("Chorney") appeal from orders of the United States Bankruptcy Court for the District of Rhode Island. For the reasons set forth below, Chorney's appeal is DENIED and the orders of the bankruptcy court are AFFIRMED.

I. Background

The bankruptcy proceedings of the Cumberland Investment Corporation ("CIC") began in 1989 when CIC involuntarily petitioned for bankruptcy. An outline of the relevant history follows.

The bankruptcy court issued an injunction against Chorney in July of 1991, citing his obstructive conduct and prohibiting him from intervening or "otherwise participat[ing] in proceedings relating to sales or other disposition of estate assets." In re Cumberland Investment Corp., BK No. 89-11051, slip op. at 1-2 (Bankr. D.R.I. July 3, 1991). The bankruptcy court

specifically found that “Chorney ha[d] deliberately and continuously acted in bad faith to obstruct and to hinder the efficient administration of the estate, which action has been very damaging, expense-wise, to the estate and its creditors.” *Id.* The bankruptcy court subsequently imposed a civil contempt sanction against Chorney in the amount of \$200,000 due to his bad faith and his abuse of the bankruptcy process. In re Cumberland Investment Corp., BK No. 89-11051, slip op. at 1-2 (Bankr. D.R.I. July 2, 1992), *aff’d sub nom. Chorney v. Weingarten*, 7 F.3d 218 (1st Cir. 1993), *cert. denied*, 510 U.S. 1200 (1994). In its order, the bankruptcy court found that Chorney “filed frivolous pleadings, willfully interfered with and obstructed the administration of the case, and generally and in bad faith abused the bankruptcy process, causing the estate and its creditors significant economic harm.” *Id.* According to the Appellees, this sanction has not yet been paid by Chorney.

On November 3, 2004, the bankruptcy court issued one of the orders that Chorney now appeals. That order imposes sanctions on Chorney and strikes Chorney’s “Motion To Clarify the Class Action Award [] and Require Chapter 7 Trustee Provide [*sic*] a Complete and Detailed Accounting of the Estate Assets,” as well as his “Second Request for Admissions.” In re Cumberland Investment Corp., No. 89-11051, 2004 WL 2616318 (Bankr. D.R.I. Nov. 3, 2004). The bankruptcy court found that Chorney lacked standing and that his “hyperactivity and ludicrous conduct throughout this case is marked by his incessant acts of bad faith and abuse of the system from the inception of this bankruptcy in 1989.” *Id.*, at *1. The bankruptcy court held that Chorney had directly violated the 1991 injunction by filing the motions. *Id.* The First Circuit has since dismissed Chorney’s appeal of that order for lack of jurisdiction, because he did not pursue a timely intermediate appeal to this Court or the Bankruptcy Appellate Panel. In re

Cumberland Investment Corp., No. 07-8038 (1st Cir. Aug. 5, 2008). Chorney concedes that he failed to timely appeal the order but contends that the bankruptcy court violated Fed. R. Civ. P. 60(b)(6) by precluding his access to the courts. Brief of Appellant, In re Cumberland Investment Corp., at 11-12 (No. 08-189).

Between July and October of 2007, both Edwards, Angell, Palmer and Dodge, LLP (“Edwards Angell”) and Trustee Cullen filed applications for final compensation, which prompted Chorney to file a “Motion to Clarify First and Final Application for Fees and Expenses of Edwards Angell Palmer & Dodge LLP” on February 14, 2008, and an “Offer of Proof Concerning Standing” on April 25, 2008.

In May of 2008, the bankruptcy court issued an order approving the first and final fee application of Edwards Angell, denying Chorney’s “Motion to Clarify First and Final Application for Fees and Expenses” of Edwards Angell, and holding that Chorney lacks standing to participate regarding claims of professional expenses against the bankruptcy estate. Chorney, filing *pro se*, subsequently filed this “Motion and Memorandum to Appeal and/or Amend Bankruptcy Orders Dated November 3, 2004 and May 8, 2008,” which this Court treats as an appeal.

II. Standard of Review

An aggrieved party may appeal to this Court “from the final judgments, orders, and decrees” of a bankruptcy court. 28 U.S.C. § 158(a)(1). In a bankruptcy appeal, this Court accepts the findings of fact by a bankruptcy court unless they are clearly erroneous. LaRoche v. Amoskeag Bank (In re LaRoche), 969 F.2d 1299, 1301 (1st Cir. 1992). A bankruptcy court’s

decision “may only be rejected if this Court has a ‘definite and firm conviction that a mistake has been committed.’” Forbes v. Four Queen Enterprises, Inc., 210 B.R. 905, 909 (D.R.I. 1997) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Rulings of law, however, are reviewed *de novo*. LaRoche, 969 F.2d at 1301 (citing Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988)).

III. Analysis

A. Standing

A primary issue in the case at hand is whether Chorney has standing to address the application for professional fees and expenses of Edwards Angell against the bankruptcy estate. The Bankruptcy Appellate Panel of the First Circuit has addressed bankruptcy standing standards, holding that it 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 Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004) (internal citations and quotations omitted). An appellant’s standing is a threshold jurisdictional issue. In re Shkolnikov, 337 B.R. 1, 4 (B.A.P. 1st Cir. 2006), *appeal dismissed*, 470 F.3d 22 (1st Cir. 2006). Whether an individual is aggrieved for purposes of appeal is “a factual determination generally made in the first instance by the bankruptcy court.” Id. (citing Spenlinhauer v. O’Donnell (In re Spenlinhauer), 261 F.3d 113, 118 (1st Cir. 2001)). This Court, then, reviews that factual determination for clear error. See LaRoche, 969 F.2d at

1301.

Chorney argues that he is an aggrieved party with some personal, non-corporate interest in some of the property seized. In his "Statement of the Issues", Chorney also contends that the \$200,000 sanction imposed by the bankruptcy court provides him with standing. He further argues that time records of the billing of Cullen and the billing of Mr. Edward Bertozzi of Edwards Angell from August 31, 1991 to December 22, 1993 are inconsistent with each other and with other billings. Chorney argues that this inconsistency provides the basis of his pecuniary interest, giving him standing to challenge the bankruptcy court's orders. The bankruptcy court did not rule on Trustee Cullen's application for expenses and fees in May of 2008 and thus Cullen's application is not a part of this appeal.

The Appellees argue that the determination on the fee application of Edwards Angell does not have any affect on Chorney, because he does not stand to receive any funds from the bankruptcy estate. Chorney did not file a proof of claim in this bankruptcy proceeding and thus lacks standing as a creditor. The Appellees contend that Chorney has only recently begun to argue that he has some personal interest in the estate, though the bankruptcy estate has been pending since 1989. Appellees further contend that Chorney's argument that his court-ordered sanctions constitute a pecuniary interest in the proceedings should be "dismissed out of hand." Brief of Appellee Monzack, In re Cumberland Investment Corp., at 6 (No. 08-189).

In its May 7, 2008 bench decision, the bankruptcy court adopted the Appellees' arguments against Chorney's standing in their entirety. Transcript of Record at 26:20 - 27:2, In re Cumberland Investment Corp., BK No. 89-11051 (May 7, 2008). This decision was incorporated by reference in the bankruptcy court's May 8, 2008 order, denying Chorney's

Motion to Clarify. In re Cumberland Investment Corp., BK No. 89-11051 (May 8, 2008).

This Court agrees with the bankruptcy court's finding that Chorney is not a person aggrieved for purposes of this appeal. Therefore this Court finds that the bankruptcy court's determination that Appellant Chorney lacks standing does not constitute clear error. Accordingly, the Appellant's appeal of the order of May 8, 2008, and the bench order of May 7, 2008, is denied.

B. The November 3, 2004 Bankruptcy Court Order

Chorney contends that the order of November 3, 2004 precludes his participation in the bankruptcy proceedings, in violation of his constitutional rights. A notice of appeal is timely if filed within ten days after the entry of the judgment. Fed. R. Bankr. P. 8002(a). Chorney failed to timely appeal this order. Instead, on November 3, 2007, Chorney filed a "Motion to Appeal and/or Amend Bankruptcy Order, Dated November 3, 2004" with the First Circuit. The First Circuit determined that it lacked jurisdiction over the appeal, as Chorney did not timely appeal the order to this Court or to the Bankruptcy Appellate Panel and failed to obtain certification under 28 U.S.C. § 158(d)(2). In re Cumberland Investment Corp., No. 07-8038 (Aug. 5, 2008).

Chorney has attempted to appeal the November 3, 2004 bankruptcy order with this appeal, filed initially with this Court on May 13, 2008. The filing of this appeal is three and a half years after the original order was entered. As a result, the appeal is untimely. The Appellant contends that "untimely request for relief is justified and in the public interest." This Court finds no legitimate support for such an untimely request.

Chorney further contends that the bankruptcy court's orders and judgments have

effectively precluded him from accessing the courts, violating Fed. R. Civ. P. 60(b)(6), which provides relief from a final judgment or order for “any other reason that justifies relief.” Rule 60 offers “the only avenue of relief from final civil judgments other than by appeal or independent action.” Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 648 (1st Cir. 1972). In particular, a party invoking Rule 60(b)(6) must assert a reason “*other* than those enumerated in 60(b)(1)-(5), and must be sufficient to justify the relief sought.” Id., at 651. Furthermore, “the residual clause, like Rule 60(b) generally, is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause.” Id. (footnote omitted). Having determined that Chorney’s appeal is untimely, this Court further finds that Chorney has failed to advance any legitimate reasons for relief under Rule 60.

The Appellant’s appeal of the November 3, 2004 bankruptcy order is accordingly denied.

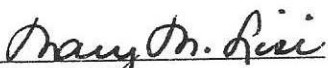
C. Arguments not part of this appeal

Chorney raises a number of other issues on appeal, including an alleged failure to disclose or produce materials in discovery which he argues constitutes a violation of Fed. R. Civ. P. 60(b)(3). These issues have been long settled. For example, Chorney’s request for an accounting of assets was denied in March of 2002 on the basis of lack of standing and the barring effect of prior final orders, and this determination was sustained on appeal and the United States Supreme Court denied certiorari. See In re Cumberland Investment Corp., No. 02-1976, 2003 WL 21435745 (1st Cir. June 20, 2003), *cert. denied*, 540 U.S. 1022 (2003). In any case, the relevant discovery was not at issue in May of 2008 and is not pertinent to this appeal.

IV. Conclusion

For the foregoing reasons, this Court concludes that the Appellant lacks standing and prior final orders and judgments bar his claims. Accordingly, Chorney's appeal is DENIED and the orders of the bankruptcy court are AFFIRMED.

SO ORDERED.


Mary M. Lisi
Chief United States District Judge
December 18, 2008