IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO

The Honorable Michael E. Romero

In re: MATTHEW CURTIS WITT, Debtor.	Case No. 17-17630 MER Chapter 7
REKON, LLC, Plaintiff. v. MATTHEW CURTIS WITT, Defendant.	Adv. Case No. 17-01548 MER

ORDER

THIS MATTER comes to be heard on the motion to intervene in this proceeding filed by Noel West Lane, III ("Lane") on May 3, 2019.[1]

Lane seeks to intervene in these proceedings pursuant to Fed. R. Civ. P. 24, which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7024. Fed. R. Civ. P. 24 states:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

---

[1] ECF No. 76 ("**Motion to Intervene**").

(b) Permissive Intervention.

(1) *In General.* On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or

made under the statute or executive order.[2]

Lane does not specify whether he seeks to intervene pursuant to Fed. R. Civ.P. 24(a) or 24(b). In any event, whether the Motion to Intervene is timely or not, Lane fails to show why he can or may intervene in this proceeding.

First, Lane does specify any federal statute under which he is given an unconditional right to intervene under Fed. R. Civ. P. 24(a)(l), or a conditional right to intervene under Fed. R. Civ. P. 24(b)(l)(A). Therefore, intervention cannot be granted under either of those subsections.

Second, Lane has not demonstrated an interest related to the property or transaction that is the subject of this proceeding under Fed. R. Civ. P. 24(a)(2). This element is "a practical guide to disposing of lawsuits by involving as many apparently

concerned persons as compatible with efficiency and due process."[3] "The movant's claimed interest is measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court."[4]

---

[2] Fed. R. Civ. P. 24(a), (b).

[3] San Juan County v. U.S., 503 F.3d 1163, 1195 (10th Cir. 2007).

[4] WildEarth Guardians v. Nat'l Park Serv., 604 F.3d 1192, 1198 (10th Cir. 2010);

Utah Ass'n of Ctys. v. Clinton, 255 F.3d 1246, 1252 (10th Cir. 2001) ("The interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether Lane's only involvement in this proceeding relates to the 44 boxes of documents of which the plaintiff and defendant herein have sought discovery via subpoenas. As soon as the parties complete their review and duplication

of document they deem relevant to this proceeding, Lane's involvement ceases. No allegations of fraud, conspiracy, or violations of the Federal Communications Act of 1934 will change that. To the extent Lane believes he has claims against these or other non-parties, such claims do not appear to have any relation to Rekon, LLC's judgment against Matthew Witt. The Court finds Lane has simply failed to demonstrate what, if any, interest he has that would support intervention under Fed. R. Civ. P. 24(a). Therefore, Lane has not shown he is allowed to intervene as a matter of right under Fed. R. Civ. P. 24(a).

Third, the Court finds permissive intervention is not appropriate under Fed.R. Civ. P. 24(b) because permitting Lane to intervene under Fed. R. Civ. P. 24(b) would cause undue delay and prejudice to the parties in this proceeding. The plain language of Fed.

R. Civ. P. 24(b)(3) requires the Court to "consider whether the intervention will unduly delay or prejudice adjudication of the original parties' rights."[5] "Additional parties always take additional time that may result in delay and that thus may support the denial of intervention."[6] The U.S. Court of Appeals for the Tenth Circuit has explained if the movant's intervention "clutter[s] the action" without aiding the current parties or issues, the motion may be denied in the Court's discretion.[7] Such is the case here. The myriad of allegations, new claims, and new causes of action Lane conjures against the parties hereto, and non- parties to this proceeding, would undoubtedly clutter the Court's determination under§ 523. Nor would those actions appear to aid in the Court's determination. Accordingly, the Court finds permissive intervention under Fed. R. Civ. P. 24(b) to be inappropriate.

Fourth, Lane is not a government officer or government agency. Therefore, Fed. R. Civ. P. 24(b)(2) does not apply.

---

the interest the intervenor claims is related to the property that is the subject of the action.") (emphasis original).

[5] Fed. R. Civ. P. 24(b)(3).

[6] United States v. N. Colorado Water Conservancy Dist., 251 F.R.D. 590, 599 (D. Colo. 2008) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1913 (3d ed.2007)).

[7] Arney v. Finney, 967 F.2d 418, 421-22 (10th Cir. 1992).

Fifth, the Motion to Intervene is procedurally defective because it is not "accompanied by a pleading that sets out the claim or defense for which intervention is sought," as required by Fed. R. Civ. P. 24(c).

Although the Court denies Lane's request to intervene as a party in this case, the Court finds denial of the motion should not preclude Lane from being heard with respect to discovery issues surrounding the 44 boxes of documents. On April 10, 2019, the Court ordered Lane to turnover the boxes of documents to an independent third-party for examination by Rekon, LLC and Matthew Witt.[8] To the extent a discovery dispute arises in connection with those boxes of documents, Lane, Rekon, LLC, and Matthew Witt may seek a hearing from the Court under the Local Bankruptcy Rule 7026-l(d). The Court shall forewarn all parties that this is not the appropriate forum for adjudication of disputes relating to ownership of the boxes of documents, or any non-party disputes concerning, arising from, or otherwise having any relationship with the boxes of documents.

For the foregoing reasons,

IT IS HEREBY ORDERED Lane's Motion to Intervene is DENIED.

Dated June 3, 2019 BY THE COURT:

Michael E. Romero, Chief Judge
United States Bankruptcy Court

---

[8] ECF No. 70.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO

The Honorable Michael E. Romero

In re: MATTHEW CURTIS WITT, Debtor.	Case No. 17-17630 MER Chapter 7
NOEL WEST LANE, Ill Plaintiff. v. MATTHEW CURTIS WITT, SILVER LEAF MORTGAGE, INC., NICOLE WITT, ALL AMERICAN RECORDS	Adv. Case No. No. 21-01100 MER

MANAGEMENT,

DELTA SOLUTIONS,

TORREY LIVENICK,

LIVENICK LAW,

MILLER & LAW, P.C.,

DAVID B. LAW, DAVID

OPPENHEIMER,

GLENN MERRICK,

GLENN MERRICK &

ASSOCIATES, AND

FIVE DOES,

Defendants.

ORDER

The present proceeding is the most recent attempt made by Noel West Lane, III ("**Lane**") to air his grievances against Debtor Matthew Curtis Witt ('Witt") and a number of other players involved in

previous litigation before this Court, albeit some only tangentially. Before the Court is a slew of filings by every party in this action. Having reviewed the matters presented, the Court dismisses the instant action.

BACKGROUND

Lane initiated this proceeding against a number of individual and entity defendants.[1] Generally, Lane alleges approximately 44 boxes of evidence (the "Boxes") were willfully destroyed, with the named defendants either directly involved in

---

[1] For the sake of simplicity, the Court will refer to the defendants as follows: Witt, Nicole Witt, and Silver Leaf Mortgage, Inc. as the '**Witt Parties**"; All American Records Management as "**AARM**"; Delta Solutions as "**Delta**"; David Kahn as "Kahn"; Torrey Livenick and Livenick Law as the "**Livenick Parties**"; Miller & Law, P.C. as "**Miller & Law**"; David B. Law

as "**Law**"; David Oppenheimer [sic] as "Oppenheim" (the Court notes Mr. Oppenheim indicated Lane incorrectly identified him as Mr. Oppenheimer); and Glenn Merrick and Glenn Merrick & Associates as the "**Merrick Parties**."

the destruction or with knowledge of the destruction, in violation of Lane's rights under the United States Constitution and Colorado law. Lane asserts the following claims for relief:

1) "Violation of C.R.C.P. as Amended through Rule Change 2021(3) effective March 29, 2021, Rules 1.2, 1.7, 1.9, 3.3 and 4.1" against Miller & Law, Law, Oppenheim, and the Merrick Parties;

2) "Violation of C.R.C.P. as Amended through Rule Change 2021(3) effective March 29, 2021, Rule D 1.2" against the Livenick Parties;

3) "Violation of C.R.C. Title 18, Criminal Code§ 18-8-610" against AARM;

4) "Violation of C.R.C. Title 18, Criminal Code§ 18-8-610" against Kahn, Delta, the Livenick Parties, and the Witt Parties;

5) "Tampering with Evidence, A Class 6 Felony" against Kahn, Delta, the Livenick Parties, the Witt Parties, and AARM;

6) "Spoliation of the Evidence" against Witt;

7) "Violation of the Power of the Bankruptcy Court as granted under Bankruptcy Code § 105, to utilize Bankruptcy Code § 542 and Bankruptcy Code § 543" against Defendant Matthew Witt;

8) "Violation of the Power of the Bankruptcy Court as granted under Bankruptcy Code § 105, to utilize Bankruptcy Code § 542 and Bankruptcy Code § 543" against Kahn, Delta,

the Livenick Parties, the Witt Parties, and AARM; and

9) "Spoliation of Evidence" against Kahn, Delta, the Livenick Parties, the Witt Parties, and AARM.[2]

Every defendant in this matter has filed a Motion to Dismiss or a Joinder to one or more Motions to Dismiss. The first motion was filed by the Merrick Parties. [3] The Merrick Motion notes the alleged wrongdoing asserted by Lane does not involve property of Witt's bankruptcy estate, and no recovery would benefit the estate. The Merrick Motion likewise highlights Witt received a discharge in January of 2018, and any pre-petition claim of Lane was discharged. As such, the Merrick Parties argue this Court lacks subject matter jurisdiction to adjudicate Lane's claims under 28 U.S.C.

§ 1334 insofar as the claims are not created by the Code, exist outside of the bankruptcy, or will impact the handling and administration of Witt's Chapter 7 case.

---

[2] ECF No. 7 (Amended Complaint).

[3] ECF No. 9 ("Merrick Motion"). In the Merrick Motion, the Merrick Parties state Glenn Merrick & Associates and Glenn W. Merrick, Merrick, Shaner and Bernstein LLC as named in the Amended Complaint do not exist.

Miller & Law's Motion to Dismiss, on the other hand, does not raise this Court's subject matter jurisdiction to hear Lane's claims, but instead moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated herein by Fed. R. Bankr. P. 7012.[4] Specifically, the Miller Motion highlights any claim of Lane against Witt based on mortgage fraud was discharged and as a result Lane could claim no damages resulting from the destruction of the Boxes,

assuming the allegations in the Amended Complaint are true. Additionally, Miller & Law notes the Colorado Rules of Professional Conduct do not give rise to private rights of action, and any claim for legal malpractice is barred by the statute of limitations.

AARM's Motion to Dismiss5 highlights the multiple cases cited by Lane, stating there were no orders entered in any of them that would require it to maintain the Evidence, and specifically in Case No. 2019-CV-30951, the Jefferson County District Court ("**State Court**") ordered AARM to turn over the Boxes in its possession to Witt. AARM moves for dismissal for lack of subject matter jurisdiction under 28 U.S.C.

§ 1334(b) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated herein by Fed. R. Bankr. P. 7012. Additionally, AARM notes Lane

lacks the authority to pursue violations of the Colorado Code of Professional Conduct and Colorado criminal statutes.

The Livenick Parties' Motion to Dismiss[6] argues the claims against them fail as a matter of law based on issue preclusion. Specifically, the Livenick Parties highlight Lane's previous unsuccessful efforts to access the Boxes in his State Court litigation, noting the final orders and similar parties and relief sought in the instant matter.

Finally, the Witt Parties' Motion to Dismiss[7] also seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(6), arguing the factual basis upon which Lane's claims are based, namely the destruction of the Boxes, is demonstrably false. Additionally, the Witt Parties state there is no private cause of action under the criminal statute pled by Lane, and he likewise has no authority to assert a claim under 11 U.S.C. §§ 542 or

543. The Witt Parties request the Court sanction Lane pursuant to Fed. R. Bankr. P. 9011.

Lane moved to strike the Merrick Motion, Miller Motion, and Livenick Motion, [8] but also filed substantive responses to the Merrick Motion, Witt Motion, and the AARM

---

[4] ECF No. 10 ("**Miller Motion**"). Law joined the Miller Motion and also noted the defendant identified as "David B. Law, Miller & Law, P.C." does not exist. See ECF No. 11. Similarly, Oppenheim joined the Miller Motion and noted the defendants "David Oppenheimer, Miller & Law, P.C." and "David Oppenheimer, David S. Oppenheimer Law" do not exist. See ECF No. 12.

5 ECF No. 19 ("**AARM Motion**").

[6] ECF No. 25 ("**Livenick Motion**").

[7] ECF No. 46 ("**Witt Motion**"). The Merrick Motion, Miller Motion, AARM Motion, Livenick Motion, and Witt Motion shall be collectively referred to as the "**Motions**."

8 ECF Nos. 16 (Merrick Motion), 17 (Miller Motion), and 38 (Livenick Motion).

Motion.[9] Generally, Lane noted the parties who moved for dismissal did not deny the allegations set forth in the Complaint. Additionally, despite the filing of the Witt Motion and Kahn's joinder to all of the Motions,[10] Lane moved for entries of default against both Witt and Kahn.[11]

ANALYSIS

A. The Motions to Strike

Lane's Motions to Strike are directed at the Miller Motion and the Livenick Motion and are primarily focused on Lane's assertion attorneys within a law firm cannot represent the law firms in this matter.[12] Lane cites C.R.S. § 13-1-127 and Weston v. T & T, LLC13 for this proposition.

While Lane is correct C.R.S. § 13-1-127(2) provides a "closely held entity" may only be represented by an

officer of the entity when the amount in controversy is less than $15,000, he overlooks subsection (6) of the same statute, which provides "Nothing in this section shall be interpreted to restrict the classes of persons who, or circumstances in which persons, may be represented by other persons, or may appear in person, before Colorado courts or administrative agencies." Accordingly, the prohibition against officers representing a closely held entity in the circumstances described in C.R.S. § 13-1-127(2) cannot be read as a prohibition against an attorney who is also an officer representing the entity. Additionally, the Court has reviewed Weston and finds it does not support Lane's assertion. Weston merely confirms C.R.S.

§ 13-1-127(2) requires an attorney's representation of an entity in certain cases but does not stand for the

proposition such attorney must be "outside" counsel.[14] As such, the Motions to Strike are denied.

B. The Court's Subject Matter Jurisdiction

The Court turns next to the substance of the Motions. Because at least one of the Motions questioned this Court's subject matter jurisdiction to hear Lane's claims, the Court will consider this issue first. To be sure, even in the absence of any Motions, because federal courts have limited jurisdiction, a federal court may, and also has a

---

[9] ECF No. 23 (to the Merrick Motion), 30 (to the AARM Motion), and 47 (to the Witt Motion).

[10] ECF No. 56.

[11] Hee ECF Nos. 51 and 57.

[12] The Motion to Strike directed at the Miller Motion also contains what appear to be substantive objections to the Motion to Dismiss.

[13] 271 P.3d 552 (Colo. App. 2011).

[14] Id.

duty to, inquire into its own jurisdiction sua sponte.[15] Accordingly, the Court will consider its jurisdiction over all claims asserted by Lane.

"Federal courts are courts of limited jurisdiction; they are empowered to hear only those causes authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress."[16] A plaintiff generally bears the burden of demonstrating the court's jurisdiction to hear his or her claims.[17] Fed. R. Civ. P.12(b)(l), made applicable to adversary proceedings by Fed. R. Bankr. P. 7O12(b)(l), allows a party to raise a defense of the court's "lack of jurisdiction over the subject matter" by motion. [18]

Section 1334(b)[19] provides: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or

related to cases under title 11."[20] The terms "arising under," "arising in" and "related to" are unambiguous and well established terms of bankruptcy art. [21] "A proceeding 'arises under' the Bankruptcy Code if it asserts a cause of action created by the Code, such as exemption claims under 11 U.S.C. § 522, avoidance actions under 11 U.S.C. §§ 544, 547, 548, or 549, or claims of discrimination under 11 U.S.C. § 525."[22] "Proceedings 'arising in' a bankruptcy case are those that could not exist outside of a bankruptcy case, but that are not causes of action created by the Bankruptcy Code."[23] "If a proceeding 'could have been commenced in federal or state court independently of the bankruptcy case, but the 'outcome of that proceeding could conceivably have an effect on the estate being administered in bankruptcy,' it is 'related to' a bankruptcy case."[24]

---

[15] See Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented.").

[16] Henry v. Office of Thrift Supervision, 43 F.3d 507, 511 (10th Cir. 1994) (citations omitted).

[17] Gerald v. Locksley, 849 F.Supp.2d 1190, 1206 (D.N.M. 2011) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998) ("[T]he party invoking federal jurisdiction bears the burden of establishing its existence.")).

[18] Fed. R. Civ. P. 12(b)(l).

[19] Unless otherwise specified, all references herein to "Section" and "§" refer to Title 28 of the United States Code, 28 U.S.C. § 1, et seq.

[20] 28 U.S.C. § 1334(b).

[21] In re Excel Storage Products, L.P., 458 B.R. 175, 181 (Bankr. M.D. Pa. 2011).

[22] In re Sunbridge Capital, Inc., 454 B.R. 166, 169 (Bankr. D. Kan. 2011) (quoting In re Midgard Corp., 204 B.R. 764, 771 (10th Cir. BAP 1997)).

[23] Id.

[24] Id.

Even if the Court may exercise "related to" jurisdiction over a dispute, however, abstention from hearing the proceeding may be required or appropriate in some circumstances. Section 1334(c) sets forth provisions for mandatory and discretionary abstention. With respect to discretionary abstention, § 1334(c)(l) provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.[25]

Courts apply several factors in analyzing whether to exercise such discretion, including: 1) the effect or lack thereof on the efficient administration of the

estate if a Court recommends abstention; 2) the extent to which state law issues predominate over bankruptcy issues; 3) the difficulty or unsettled nature of the applicable law; 4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; 5) the jurisdictional basis, if any, other than§ 1334; 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 7) the substance rather than form of an asserted "core" proceeding; 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; 9) the burden of the bankruptcy court's docket;
10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; 11) the existence of a

right to a jury trial; and 12) the presence in the proceeding of nondebtor parties.[26]

"Courts often look to the mandatory abstention provisions as a guide to whether they should exercise discretionary abstention. If most of the elements of mandatory abstention are present, they are inclined to exercise abstention."[27] As to mandatory abstention, § 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11, but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely

adjudicated, in a State forum of appropriate jurisdiction. [28]

---

[25] 28 U.S.C. § 1334(c)(l).

26 In re Schempp Real Estate, LLC, 303 B.R. 866, 876 (Bankr. D. Colo. 2003) (internal citatior omitted).

[27] In re Clayter, 174 B.R. 134, 141 (Bankr. D. Kan. 1994) (citing See Counts v. Guaranty Savings & Loan Assoc. (In re Counts), 54 B.R. 730, 736 (Bankr. D. Colo. 1985); also citing Braucher v. Continental Illinois Nat. Bank & Trust (In re Illinois-California Express, Inc.), 50 B.R. 232, 240-41 (Bankr. D. Colo. 1985)).

[28] 28 U.S.C. § 1334(c)(2).

Mandatory abstention applies when all of the following elements are met: 1) the motion to abstain was filed timely; 2) the action is based on state law; 3)

an action has been commenced in state court; 4) the action can be timely adjudicated in state court;
5) there is no independent basis for federal jurisdiction other than bankruptcy;
6) the matter is non-core.[29]

As to the substance of the Court's inquiry, the Court notes Lane's seventh and eighth claims at least appear to "arise in" the Code insofar as Lane alleges "violation[s] of Bankruptcy Code§ 105." The same cannot be said for Lane's first five claims.
Where, as here, the claims do not directly affect the property of the bankruptcy estate and constitute state law causes of action, to the extent such claims can even be asserted by a private individual, they cannot be said to "arise in" or "arise under" the bankruptcy proceedings. [30] Subject matter jurisdiction therefore rests on whether the claims are "related to" the bankruptcy proceedings.

> The United States Court of Appeals for the Tenth Circuit has explained
>
> "[T]he test for determining whether a civil proceeding is related in bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate. [31]

In reviewing these claims, the Court determines they do not pass the "related to" hurdle. While Lane purports to be a creditor in Witt's bankruptcy case, he did not file a proof of claim for amounts owed. Witt

has long since received a discharge,32 and Lane did not file any action under 11 U.S.C. § 523 or§ 727 to enable his claim to survive the bankruptcy. Witt's "rights, liabilities, options or freedom of action" are not impacted by the Lane's claims and the claims will not impact the handling or administration of the bankruptcy estate. Without any pending litigation involving Lane before this Court, save the present action, and no pre-petition claim of Lane against Witt surviving the discharge, such claims cannot properly be characterized as "related to" the bankruptcy case sufficient to confer jurisdiction upon this Court.

Even if the Court were to find Lane's claims were "related to" the bankruptcy case, the Court finds discretionary abstention is warranted. There would be little effect on the efficient administration of the estate if the Court recommends abstention. As

---

[29] In re Midgard Corp., 204 B.R. 764, 776-80 (10th Cir. BAP 1997).

[30] See LAR MPH Holding, LP v. Mordini (In re Mordini), 491 B.R. 567, 570 (Bankr. D. Colo. 2013).

[31] Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990)

(quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis

omitted)) (additional citations omitted).

[32] See Case No. 17-17630 at ECF No. 70.

explained above, Witt's discharge has already been entered, discharging any pre-petition claim Lane had against him. Any recovery is not sought for the benefit of the bankruptcy estate, but for Lane individually. With respect to the claims for spoliation of the Boxes, the Court reiterates Lane has no pre-petition claims against Witt which survived the discharge. Additionally, as is readily apparent from the claims, state law issues predominate over bankruptcy issues. Specifically, Lane asserts multiple claims for

violations of the Colorado Rules of Professional Conduct and the Colorado Criminal Statutes. The issues to be presented to a state court, to the extent Lane has standing to do so, involve well-developed principles of Colorado law. There is nothing difficult or unsettled about the Colorado state law under which these claims are presented.

With respect to the presence of a related proceeding commenced in state court or other nonbankruptcy courts, there was at least one case dealing with the possession of the Boxes in question pending in State Court as referenced above, and this Court can take judicial notice of the State Court's holding the Boxes belonged to Witt. Although Lane filed a motion with respect to the Boxes in another adversary proceeding before this Court, such motion was denied as moot. 33 There is no independent basis for this Court's jurisdiction over the claims, and there

is a high degree of remoteness of these claims to the main bankruptcy case, particularly in light of the status of the administrative case. As such, the Court finds sufficient grounds to abstain from hearing the claims, and the same shall be dismissed.

C. Lane's Seventh and Eighth Claims for Relief

Lane's Seventh and Eighth Claims allege Witt "utilized Bankruptcy Code§ 542 and Bankruptcy Code§ 543 to liquidate contract disputes and caused spoliation and destruction of [the Boxes]," thus "violating" 11 U.S.C. § 105, while other named defendants conspired with and assisted him.

Section 105 of the Bankruptcy Code describes bankruptcy courts' powers. Specifically, among other things, it provides for the issuance of orders necessary or appropriate to carry out the provisions of the Code. It is unclear how any party could "violate" this Court's powers under the Code, or how Lane would be able to

pursue an individual cause of action for any such "violation." Additionally, as noted in the Witt Motion, in the context of Witt's bankruptcy, the power to request turnover as described in 11 U.S.C. §§ 542 and 543 is limited to the Chapter 7 Trustee. With respect to the Boxes in question, early in Adversary Proceeding No. 17-1548 styled Reckon v. Witt, this Court specifically ordered as follows:

> The Court shall forewarn all parties that this is not the appropriate forum for adjudication of disputes relating to ownership of the boxes of documents, or any non-party disputes concerning, arising from, or otherwise having any relationship with the boxes of documents.[34]

---

[33] See Adv. Pro. No. 17-1548 MER at ECF No. 161.

[34] Id. at ECF No. 79.

Additionally, the Court vacated part of an Order which directed the return of the Boxes to Lane, pending the ruling of the State Court.35 As such, because Lane has failed to assert a cognizable claim for which relief can be granted, the Court dismisses his remaining claims.

D. Request for Sanctions

Finally, the Court must address the request for sanctions made by multiple defendants in having to defend themselves in this matter. Fed. R. Bankr. P. 9011(c) provides, in relevant part, "A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004." Because no separate motions for sanctions against Lane were filed by any of the parties, the Court will not

entertain such requests. To the extent parties wish to renew these requests under the proper procedural mechanisms, the Court will consider the requests at such time.

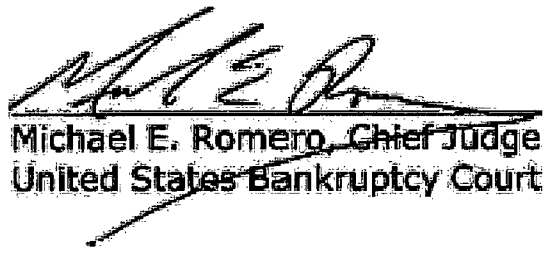
CONCLUSION

Having reviewed the allegations and claims asserted by Lane, the Court finds it appropriate dismiss Claims One through Six in exercise of this Court's discretion to abstain, and to dismiss Claims Seven and Eight for failure to state a claim for which relief can be granted. The Court again emphasizes its Order from over two years ago: disputes relating to the Boxes are more appropriately heard by the State Court.

Accordingly, IT IS HEREBY ORDERED The Motions to Strike are DENIED.

Lane's Amended Complaint is DISMISSED. All other pending motions are DENIED AS MOOT.

Dated November 24, 2021 BY THE COURT:



---

[35] Id. at ECF No. 92.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO

The Honorable Michael E. Romero

In re: MATTHEW CURTIS WITT, Debtor.	Case No. 17-17630 MER Chapter 7
NOEL WEST LANE, Ill Plaintiff. v. MATTHEW CURTIS WITT, SILVER LEAF MORTGAGE, INC., NICOLE WITT, ALL AMERICAN RECORDS	Adv. Case No. 21-01100 MER

MANAGEMENT,

DELTA SOLUTIONS,

TORREY LIVENICK,

LIVENICK LAW,

MILLER & LAW, P.C.,

DAVID B. LAW, DAVID

OPPENHEIMER,

GLENN MERRICK,

GLENN MERRICK &

ASSOCIATES, AND

FIVE DOES,

Defendants.

ORDER

THIS MATTER comes before the Court on two Motions for Sanctions[1] filed by Defendants Matthew Curtis Witt, Nicole Witt, and Silver Leaf Mortgage Company, Inc. (together the **'Witt Parties"**) and

Torrey Livenick, Torrey Livenick, Esq., and Livenick Law, LLC (together, the "**Livenick Parties**") pursuant to Bankruptcy Rule 9011 against Plaintiff Noel West Lane, III ("**Lane**").[2]

---

[1] ECF Nos. 70 (the 'Witt Motion") and 7 4 (the "Livenick Motion") (together, the "Sanctions Motions"). See also ECF Nos. 73 and 75 (response and reply to the Witt Motion), and ECF Nos. 82 and 83 (response and reply to the Livenick Motion).

[2] References to "Bankruptcy Rules" mean the Federal Rules of Bankruptcy Procedure.

BACKGROUND

As explained in this Court's previous order, [3] Lane initiated this proceeding based on his allegations of the destruction, or involvement in the destruction, of 44 boxes of "evidence" (the "**Boxes**").[4] Lane asserted nine claims under both federal and Colorado law, all of which were dismissed based on the Court's exercise of discretionary abstention pursuant to 28 U.S.C. §

1334 or for failure to state a claim upon which relief can be granted.[5]

Both the Witt Parties and the Livenick Parties assert Lane should be sanctioned for his litigation conduct in the instant matter for failing to exercise due diligence as to whether the claims he asserted had any basis in law or in fact. The Livenick Parties also assert Lane's conduct in this proceeding, including his Motion to Strike Livenick as counsel, was done to unnecessarily increase the cost of litigation for the Livenick Parties, insofar as he was advised by the Livenick Parties his position was not supported by the law. The Witt Parties request the Court sanction Lane in the amount of their attorneys' fees and costs and enjoin him from further filings without prior Court approval, while the Livenick Parties request a sanction of $1,500 for attorneys' fees and costs.

Because the Sanctions Motions are generally based on the same violations of Bankruptcy Rule 9011, Lane's responses also share the same common themes. Lane claims he presumed this Court was the proper forum in which to assert his claims based on the fact this Court granted Lane relief from the automatic stay to proceed with certain claims against Witt in Jefferson County District Court and also because this Court had jurisdiction over Adversary Proceeding No. 17-1548 MER, Rekon v. Witt (the "**Rekon Adversary**").[6] Additionally, Lane asserts he did investigate the facts underlying his claims, stating he spoke with representatives of All American Records Management who provided facts supporting his conclusion the "chain of custody was broken" with respect to the Boxes and thus, in Lane's view, supporting his claim of spoliation and other claims.[7] Lane also maintains he investigated the legal merits

of his claims using online research, and emphasizes his prose status and legal inexperience.[8]

---

[3] See ECF No. 76.

[4] ECF No. 7 (Amended Complaint).

[5] ECF No. 76.

[6] ECF No. 73 at p. 4; ECF No. 82 at p. 4. See Case No. 17-17630 MER at ECF No. 105.

[7] ECF No. 73 at p. 6; ECF No. 82 at pp. 11-12.

[8] ECF No. 73 at p. 8; ECF No. 82 at p. 4.

ANALYSIS

Bankruptcy Rule 9011(b) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed

after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. [9]

Based on the Court's review of the filings in this matter, the Court determines sanctions against Lane are warranted. The Court previously denied Lane's request to intervene in the Rekon Adversary and stated "this is not the appropriate forum for adjudication of disputes relating to ownership of the boxes of documents, or any non- party disputes concerning, arising from, or otherwise having any relationship with the boxes of documents."[10] Nonetheless, Lane filed the instant proceeding which is based precisely on disputes concerning, arising from, and related to the Boxes.

Based on the Court's previous Order, it is clear the present action was filed for an improper purpose in violation of Bankruptcy Rule 9011(b)(l), insofar as the Court was clear it would not hear such claims. The filing of the present action before this Court, despite its Order, resulted in the Witt Parties and Livenick Parties needlessly expending time and incurring legal fees in moving for the dismissal of Lane's claims, as well as responding to motions to strike and, with respect to the Witt Parties, a motion for default judgment. As such, sanctions are appropriate.

The initial Order in the Rekon Adversary should have put Lane on notice of potential sanctions should he continue to make arguments already refused to be heard by this Court absent some nonfrivolous or non-sanctionable basis for doing so. The Court is cognizant of Lane's pro se status, but Bankruptcy Rule 9011 applies not only to

[9] Fed. R. Bankr. P. 9011(b).

[10] Adv. Pro. No. 17-1548 MER at ECF No. 79.

legal practitioners, but to pro se litigants as well. Additionally, as is clear from this Court's docket in this matter, the underlying case, and the Rekon Adversary, Lane is no stranger to litigation and he is not immune from sanctions.

The Court notes, however, even though sanctions under Bankruptcy Rule 9011 are warranted, the measure of sanctions is not necessarily the attorneys' fees and costs incurred by the Witt Parties and Livenick Parties, but rather "the least severe sanction adequate to deter and punish the [offender]."11 Therefore, having carefully considered the totality of the circumstances in this case, the Court finds a sanction in the amount of $2,000, with $1,000 to be awarded to the Witt Parties and $1,000 to be awarded

to the Livenick Parties, is sufficient to accomplish the remedial objectives of Bankruptcy Rule 9011. Any greater award would serve no purpose except to excessively punish, which is neither appropriate under the rules nor proportionate to the severity of the underlying conduct.

Accordingly,

IT IS HEREBY ORDERED the Sanctions Motions are granted, in part, with $1,000 to be paid to the Witt Parties and $1,000 to be paid to the Livenick Parties within 30 days of the date of this order.

Dated March 9, 2022 BY THE COURT:

Michael E. Romero, Chief Judge
United States Bankruptcy Court

---

[11] White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO

The Honorable Michael E. Romero

In re: MATTHEW CURTIS WITT, Debtor.	Case No. 17-17630 MER Chapter 7
NOEL WEST LANE, Ill Plaintiff. v. MATTHEW CURTIS WITT, et al., Defendants.	Adv. Case No. 21-01100 MER

ORDER DENYING MOTION

THIS MATTER comes before the Court on Plaintiff Noel West Lane Ill's Request to 1) Stay Results and 2) Schedule a Reconsideration Hearing Pursuant to 28 U.S.C. 59 (the "Motion"). The Court finds the Motion fails to set forth adequate grounds to grant the requested relief. Accordingly,

THE COURT DENIES the Motion.

Dated April 15, 2022 BY THE COURT:

Michael E. Romero, Chief Judge
United States Bankruptcy Court

App. 5

January 25, 2023

Blaine F. Bates Clerk

NOT FOR PUBLICATION[1]

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

In re: MATTHEW CURTIS WITT, Debtor.	
NOEL WEST LANE, Ill Plaintiff - Appellant. v. MATTHEW CURTIS WITT, NICOLE WITT,	BAP No. CO-22-007 Bankr. No. 17- 17630 Adv. No. 21-01100 Chapter 7 OPINION

TORREY LIVENICK,

and LIVE NICK LAW,

Defendants - Appellees.

Appeal from the United States Bankruptcy Court for the District of Colorado

---

Submitted on the briefs.[2]

Before **HALL**, **LOYD**, and **THURMAN**, Bankruptcy Judges.

---

1 This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8026-6.

2 After examining the briefs and appellate record, the Court determined unanimously that oral argument would not materially assist in the determination of this appeal, and

therefore granted Appellant's request for a decision on the briefs without oral argument. See Order Submitting Appeal on the Briefs (BAP ECF No. 52). The case is therefore submitted without oral argument.

LOYD, Bankruptcy Judge.

Timing is everything-especially in the law. Here, Appellant, a chapter 7 creditor, seeks reversal of the Bankruptcy Court's orders dismissing his adversary proceeding, imposing sanctions, and denying his motion for reconsideration. However, because Appellant did not comply with certain timing requirements under the Federal Rules of Bankruptcy Procedure, this Court has jurisdiction to review only the Bankruptcy Court's order denying his motion for reconsideration. We affirm.

I. Background

For many years, Noel Lane has sought to prove that Matthew Witt and Commercial Capital, Inc. ("CCI") defrauded him by committing mortgage fraud. The first effort stems from CCI's bankruptcy filing in 2009. There, one of CCI's creditors, David Kahn, obtained certain boxes of documents that contained information related to Witt's business dealings. Lane wanted access to these boxes because he believed they contained information he needed to prove Witt defrauded him and owed him money.

In 2016, after Kahn gained possession of the boxes, Lane entered into an agreement with him, whereby Lane would share possession of the boxes and split any recovery Lane obtained from Witt. Lane then took possession of the boxes. However, despite insisting Witt committed mortgage fraud, Lane never filed a suit against Witt after obtaining the boxes. Instead, Lane made regular demands for payment.

In 2017, Witt filed a petition for relief under chapter 7. Notwithstanding notice of Witt's bankruptcy, Lane never filed a proof of claim. Lane also never filed a complaint to determine dischargeability of any purported debt. It was only after one of Witt's creditors filed an adversary proceeding against Witt that Lane attempted to intervene to protect the boxes from discovery requests. The Bankruptcy Court denied Lane's request to intervene (the "June 3, 2019 Order"), and warned that it was not the proper forum for disputes seeking to adjudicate ownership of the boxes, or any other non-party disputes related to the boxes.[3]

Consequently, Witt filed a replevin action in state court seeking possession of the boxes, which the state court granted. After Witt gained possession of the boxes, Lane resumed his efforts to pursue his fraud claim against Witt outside of court. In response, Witt

told Lane he destroyed the boxes, even though he had not. Soon after, Lane filed an adversary proceeding in Witt's bankruptcy asserting nine claims and naming fifteen defendants-including Witt, Witt's wife, and Torrey Livenick-alleging Witt and others destroyed, or were involved in the destruction of the boxes of documents. [4] The defendants collectively filed or joined in five motions to dismiss, some of which included requests for sanctions against Lane. In a single order (the "Dismissal Order"), the Bankruptcy Court granted the motions to dismiss and dismissed the adversary proceeding.[5] In the Dismissal Order, the Bankruptcy Court also advised the parties that

---

[3] June 3, 2019 Order at 4, in Appellant's App. at 22 ("The court shall forewarn all parties that this is not the appropriate forum for adjudication of disputes relating to ownership of the boxes of documents, or any non-party disputes concerning, arising from,

or otherwise having any relationship with the boxes of documents.").

[4] Why Livenick was named as a defendant in the adversary proceeding remains unclear.

[5] Corrected Order, in Appellant's App. at 1203-11 ("Dismissal Order").

Federal Rule of Bankruptcy Procedure 9011[6] requires a sanction request be made by separate motion. [7] After the dismissal, the Witts and Livenick filed motions for sanctions. The Bankruptcy Court granted the motions on March 9, 2022, concluding Lane's adversary proceeding was filed for an improper purpose, and imposed a $2000 sanctions award (the "Sanctions Order") against Lane.[8]

In response, on March 22, 2022, Lane filed a motion to extend the time to file a motion for reconsideration of the Sanctions Order (the "Motion to Enlarge").[9] He did not request an extension of time to file an appeal of the Sanctions Order. The Bankruptcy

Court granted the Motion to Enlarge, 10 and Lane then filed *Plaintiff Noel West Lane Ill's Request to 1) Stay Results and 2) Schedule a Reconsideration Hearing Pursuant to 28* U.S.C. 59 on April 6, 2022 (the "Motion for Reconsideration").11 The Bankruptcy Court

---

[6] All future references to Rule or Rules shall mean the Federal Rules of Civil Procedure when followed by two-digit numbers and Federal Rules of Bankruptcy Procedure when followed by four-digit numbers.

[7] Dismissal Order at 9, in Appellant's App. at 1211.

[8] Sanctions Order at 4, in Appellant's App. at 13.

[9] Lane titled his pleading: Plaintiff's Notice of Motion and Motion for Enlargement of Time to Request Stay of Results and to Request Scheduling of a Reconsideration Hearing. Lane's motion contends he did not receive notice of the Sanctions Order. The Bankruptcy Court's certificate of service providing notice contains Lane's correct email address.

[10] Proposed Order Granting Plaintiff's Notice of Motion and Motion for Enlargement of Time to Request Stay of Results and to Request Reconsideration Hearing, in Appellee's Supp. App. at 8080-81.

11 Lane did not call his motion a Rule 9023 motion or motion for a new trial, but did request relief under "28 U.S.C. § 59" and cites Rule 59. See Appellant's App. at 277. The Tenth Circuit has held that "regardless of how it is styled or construed . . . , a motion filed within ten days of the entry of judgment that questions the correctness of the judgment is properly treated as a Rule 59(e) motion." Phelps v. Hamilton, 122 F.3d 1309,

denied the Motion for Reconsideration (the "Order Denying Reconsideration").[12] Lane appealed.

II. Jurisdiction

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless a party elects to have the district court hear the appeal.[13] Lane filed a timely notice of appeal of the Order Denying Reconsideration, which is a final

order.[14] No party elected to have the district court hear the appeal. Accordingly, this Court has jurisdiction to hear this appeal.

III. Issues on Appeal and Standard of Review

Lane presents numerous issues on appeal, but because Lane did not timely appeal either the Dismissal Order or the Sanctions Order, only two issues are ripe for our review.

1323 (10th Cir. 1997) (quoting *Vreeken v. Davis*, 718 F.2d 343, 345 (10th Cir. 1983). A motion will be considered under Rule 59(e), "when it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (quoting *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 17 4 (1989)). Even though Lane did not timely file the Motion for Reconsideration, because it questions the "correctness of the judgment" and cites the language of Rule 59, we have construed the Motion for Reconsideration as a motion under Rule 59.

[12] Order Denying Reconsideration, in Appellant's App. at 194.

[13] 28 U.S.C. § 158(a)(l), (b)(l), and (c)(l); Fed. R. Bankr. P. 8003, 8005.

[14] See In re Boydstun, N. 19-20, 2020 WL 241492, at *1 (10th Cir. BAP Jan. 16, 2020) (unpublished) ("An order denying a motion under Rule 59(e) or Rule 60(b) is final for purposes of appellate review if the underlying order from which relief is sought was also final.") (citing *Stubblefield v. Windsor Cap. Grp.*, 7 4 F.3d 990, 993 (10th Cir. 1996)); In re *Onyeabor*, No. 14-47, 2015 WL 1726692, at *3 (10th Cir. BAP Apr. 15, 2015) (unpublished) (citing In re *Ewing*, No. 07-47, 2008 WL 762458, at *1 & n.4 (10th Cir. BAP Mar. 24, 2008) (unpublished)) (concluding order resolving Rule 59(e) and Rule 60(b) motions was final).

First, whether Lane properly preserved appellate review of the Dismissal Order and the Sanctions Order,[15] and if so, whether the Bankruptcy Court erred in entering such orders, which we review for abuse of discretion.[16] Second, whether the Bankruptcy

Court erred in entering the Order Denying Reconsideration, which we also review for abuse of discretion.[17] An abuse of discretion occurs when the bankruptcy court "based its ruling

---

[15] Lane identified only the Order Denying Reconsideration in his notice of appeal. An appeal from the denial of a timely Rule 59 motion will be sufficient to permit review of the merits of the underlying judgment, if the appeal is "otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced." Artes-Roy v. City of Aspen, 31 F.3d 958, 961 (10th Cir. 1994). See also Hawkins v. Evans, 64 F.3d 543, 546 (10th Cir. 1995) (An appeal from the denial of a motion to reconsider construed as a Rule 59 motion permits consideration of the merits of the underlying judgment, while an appeal from the denial of a Rule 60(b) motion does not preserve the underlying judgment for appellate review.); In re Jones, 381 B.R. 417, 2007 WL 3268431, at *3 (10th Cir. BAP 2007) (unpublished) ("An appeal from a ruling on a Rule 59(e) motion raises the bankruptcy court's underlying judgment for review by this court."). As discussed below, Lane did not timely

file the Motion for Reconsideration to permit review of the merits of the underlying judgment.

[16] In re Nursery Land Dev., Inc., 91 F.3d 1414, 1415 (10th Cir. 1996) ("We review the bankruptcy court's decision to impose sanctions for abuse of discretion .. . which is shown if the bankruptcy court 'based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" (first citing In re Cascade Energy & Metals Corp., 87 F.3d 1146, 1149-50 (10th Cir.1996); then quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). See also In re Cascade Energy., 87 F.3d at 1149 (concluding "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination" to a district court's review of a bankruptcy court's imposition of Rule 9011 sanctions).

[17] *See Hayes Fam. Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1004

(10th Cir. 2017) ("We generally review the [trial] court's ruling on a Rule 59(e) motion for abuse of discretion.") (citing *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1275 (10th Cir. 2005)). See also *York v. Am. Tel. & Tel. Co.*, 95 F.3d

948, 958 (10th Cir. 1996) ("We review a [trial] court's ruling on a motion for a new trial for abuse of discretion.") (citing *Sheets v. Salt Lake Cnty.*, 45 F.3d 1383, 1390 (10th Cir. 1995)).

on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[18]

IV. Analysis

A. The Dismissal Order and the Sanctions Order

i. Lane did not timely file a notice of appeal to preserve appellate review of the Dismissal Order and the Sanctions Order.

Rule 8002 governs the time for filing a notice of appeal, which requires a party to file the notice of appeal within fourteen days after entry of judgment, order, or decree.[19] It is well established that Rule 8002 "'is strictly construed and requires strict compliance,' and the failure to timely file a notice of appeal is 'a jurisdictional defect barring appellate review.'"[20]

Although Rule 8002(b) provides that certain motions, including a Rule 9023 motion, will toll the time to file a notice of appeal,[21] Rule 9023 requires a party to file a motion for reconsideration within 14 days of entry of judgment.[22] Rule 9006(b)(2) does not allow a court to enlarge the time to file a Rule 9023 motion.[23]

---

[18] *Nursery Land Dev.*, Inc., 91 F.3d at 1415 (quoting *Cooter & Gell*, 496 U.S. at

[19] Fed. R. Bankr. P. 8002(a)(l).

[20] *Lopez v. Long (In re Long)*, 255 B.R. 241, 243 (10th Cir. BAP 2000) (quoting *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir. 1992)). See generally *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)) (timely appeal is jurisdictional prerequisite).

[21] *See* Fed. R. Bankr. P. 8002(b)(l)(C).

[22] *Id.*

[23] *Id.* 9006(b)(2) ("[t]he court may not enlarged the time for taking action under Rule□ 9023."). Additionally, many courts, including the Tenth Circuit, have held that

an untimely Rule 9023 motion is ineffective to toll the time to file a notice of appeal under 28 U.S.C. § 158(c)(2) and Rule 8002(a) regardless of whether the bankruptcy court

A timely Rule 9023 motion will toll the time to file a notice of appeal. [24] If no such motion is filed, however, the Rules provide the only means to obtain an extension of time to file a notice of appeal is by motion before the deadline to file the notice of appeal, or after such time, by a showing of excusable neglect. [25]

The Dismissal Order filed on January 10, 2022 triggered the fourteen-day period to file a notice of appeal. [26] Lane did not file a notice of appeal until April 20, 2022. He did not file a notice of appeal from either the Dismissal Order or the Sanctions Order

disposes of the untimely motion on the merits or whether an opposing party raises a timeliness objection during the bankruptcy court's consideration of the motion. *See Banner Bank u. Robertson (In re Robertson)*, 774 F. App'x 453, 467 (10th Cir. 2019) (unpublished) ("[G]iven our affirmance that Rule 8002(a)(l)'s time limit is jurisdictional, we conclude that the BAP had authority to consider sua sponte whether [the] Rule 9023 motion was timely filed for purposes of determining whether the BAP had jurisdiction over his appeal); *Henderson ex rel. Henderson u. Shinskei*, 562 U.S. 428, 434 ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); In re *Harth*, 619 F. App'x. 719, 721 (10th Cir. 2015) (unpublished) (concluding an untimely motion for rehearing with the BAP did not toll the time to appeal). *See* also *Browder*, 434 U.S. at 265 (concluding an untimely post-judgment motion could not toll the time to appeal whether or not the opposing party objected); *Panhorst u. United States*, 241 F.3d 367, 369-70 (4th Cir. 2001)
(same);

Garcia-Velazquez u. Frito Lay Snacks Caribbean, 358 F.3d 6, 8-11 (1st Cir. 2004)

(same); *Lizardo u. United States*, 619 F.3d 273, 278 (3d Cir. 2010) (same); *Overstreet u. Joint Facilities Mgmt., L.L.C.* (In re Crescent Res., L.L.C.), 496 F. App'x 421, 424

(5th Cir. 2012) (unpublished) (same); *Blue u. Int'l Bhd. of Elec. Workers Local Union* 159, 676 F.3d 579, 582-85 (7th Cir. 2012) (same).

[24] *See* Fed. R. Bankr. P. 8002(b)(l)(C).

[25] *See id.* 8002(d).

[26] An initial dismissal order was entered on November 24, 2021. Lane's time for filing a notice of appeal, motion to extend the time for appeal or motion for new trial as to the dismissal order was December 8, 2021.The Dismissal Order, which corrected a clerical error, was entered on January 10, 2022. Lane's deadline to file a notice of appeal, motion to extend the time for notice of appeal or motion for new trial on the Dismissal Order was January 24, 2022.

within fourteen days of the entry of either order, and he did not timely file any motion that would have

extended the period for taking an appeal from the Dismissal Order.

Because these time limits are mandatory and jurisdictional, this Court clearly lacks jurisdiction to review the Dismissal Order dismissing the adversary.

The appeal of the Sanctions Order is somewhat more nuanced. The Sanctions Order was entered on March 9, 2022. Therefore, the fourteen-day period to extend the time to file a notice of appeal, a motion to extend the time for appeal, or file a motion for new trial expired on March 23, 2022. On March 22, 2022, within 14 days of the entry of the Sanctions Order, Lane filed the Motion to Enlarge. On March 24, 2022, the Bankruptcy Court entered an order granting Lane's motion and extending to April 6, 2022, the time within which to file his "Request Stay of Results and to Request Reconsideration Hearing."

On April 6, 2022, Lane filed the Motion for Reconsideration. On April 15, 2022, the Court entered its Order Denying Reconsideration finding that "the Motion fails to set forth adequate grounds to grant the requested relief."[27] Lane's April 20, 2022 notice of appeal listed only the Order Denying Reconsideration as the order appealed.

Even though Lane filed the notice of appeal five days after the entry of the Order Denying Reconsideration, the question presented is whether the Bankruptcy Court's granting of Lane's Motion to Enlarge extended the time for Lane to file a notice of appeal of the Sanctions Order. Rule 9023 states, "A motion for a new trial or to alter or

---

[27] Order Denying Reconsideration, in Appellant's App. at 194.

amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after

entry of judgment." Bankruptcy Procedure 9006(b)(2) provides that "the court may not enlarge the time for taking action under Rule□ 9023." In other words, the Bankruptcy Court had no discretion, nor do the Rules grant it authority, to extend Lane's time to file his request for reconsideration beyond the March 23 deadline imposed by Rule 9023 and hear the Motion for Reconsideration on its merits.

The Bankruptcy Court's error in granting Lane an extension to file the Motion for Reconsideration under Rule 9023 did not absolve Lane of his failure to timely file a notice of appeal. Many courts, including the Tenth Circuit, have held that an untimely Rule 9023 motion is ineffective to toll the time to file a notice of appeal under [28] U.S.C. § 158 (c)(2) and Rule 8002(a) regardless of whether the bankruptcy court disposed of the untimely motion on the merits.28 Accordingly,

Lane did not properly preserve appellate review of the Sanctions Order.

---

[28] See Banner Bank, 774 F. App'x at 466-67 ("[W]e hold that an untimely Rule 9023 motion is ineffective to toll the time to file a notice of appeal under 28 U.S.C. § 158(c)(2) and Bankruptcy Rule 8002(a) regardless of whether the bankruptcy court disposes of the motion on the merits or whether an opposing party raises in the bankruptcy court a timeliness objection to that court's consideration of the motion."); In re Harth, 619 F. App'x at 721 ("We therefore agree with those circuits holding that a lower court's discretionary election to deny an untimely post-judgment motion on the merits (an equitable action without jurisdictional import in that court) does not re-invest that motion with a tolling effect for purposes of appellate jurisdiction."). See also In re Browder, 434 U.S. at 264-65 (concluding that an untimely post-judgment motion could not toll the time to appeal whether or not the opposing party objected.) (citing Blue, 676 F.3d at 582-83 (holding that untimely post-trial motions for new trial or to alter or amend judgment did not toll the period within which movant was entitled to file appeal from underlying judgment); Lizardo,

619 F.3d at 280 (while Rule 59(e) is a claim-processing, rather than a jurisdictional, rule, an untimely Rule 59 motion does not toll the time to file a notice of appeal); Panhorst, 241 F.3d at 369-70 (untimely motion for rehearing, which

ii. Even if Lane had properly preserved appellate review of the Sanctions Order, the Bankruptcy Court did not abuse its discretion by entering it.

Even assuming Lane had properly preserved appellate review of the Sanctions Order, the Bankruptcy Court did not abuse its discretion by entering it. Rule 9011(c) provides a Bankruptcy Court discretion to issue sanctions after notice and a reasonable opportunity to respond when a party violates Rule 9011(b)[29] by presenting a pleading for an improper purpose.[30]

The Supreme Court has prescribed an abuse of discretion standard to be applied by an appellate court in reviewing a lower court's imposition of Rule

11 sanctions.[31] Thus "a [bankruptcy] court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the [bankruptcy] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[32]

A review of the record shows that the Bankruptcy Court had a firm basis for

---

is not permitted under the rules, did not extend period for filing notice of appeal); In re *Crescent Res., L.L.C.,* 496 F. App'x. at 424 ("An untimely Rule 59(e) motion .

. . will not toll the notice of appeal period, even if the district court addressed the late-filed motion on the merits.").

[29] Fed. R. Bankr. P. 9011(b) ("When either a represented or pro se party signs a pleading, that party represents, among other things, that the pleading is "not being presented for any improper purpose[.]").

[30] *Id.* 9011(c).

[31] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) ("No dispute exists that the appellate courts should review the district

court's selection of a sanction under a deferential standard. In directing the district court to impose an 'appropriate' sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion.").

[32] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991)); Nursery Land Dev., Inc., 91 F.3d at 1415.

imposing sanctions on Lane. He had been clearly warned by the Bankruptcy Court in a prior, but related, adversary that "this is not the appropriate forum for the adjudication of disputes relating to ownership boxes of documents, or any non-party disputes concerning, arising from, or otherwise having any relationship with the boxes of documents."[33]

Notwithstanding the Bankruptcy Court's admonition in the prior adversary, Lane persisted in filing and prosecuting the present adversary, the focal point of which was the boxes of documents. The Bankruptcy Court made no clear error in finding

Lane's continued prosecution of his claims ran afoul of Rule 9011(b)(l)'s prohibition against filing pleadings "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" or subsection (2) requiring that any "claims, defenses, and other legal contentions therein are warranted by existing law or nonfrivolous argument for the extension, modification, or reversal of existing law[.]"[34] The Bankruptcy Court did not abuse its discretion to award the sanctions in the form of a minimal award of $1000 in attorney's fees to each of the two defendants.

Lane also contends the Bankruptcy Court abused its discretion by not conducting a hearing to review Appellees' sanctions requests. We disagree. The law is clear that a Rule 9011 question can be decided on the basis of the pleadings. A party that is the target of a sanctions request has a due process right to "notice

that such sanctions are being considered by the court and a subsequent opportunity to respond" before final

---

[33] June 3, 2019 Order at 4, in Appellant's App. at 22. [34] Fed. R. Bankr. P. 90ll(b)

judgment.[35] However, an opportunity to be heard does not require an oral or evidentiary hearing on the issue. The opportunity to fully brief the issue is sufficient to satisfy due process requirements.[36]

Lane had notice and submitted responsive pleadings to Appellees' motions for sanctions. The Bankruptcy Court based its ruling on the clear notice it provided Lane in the June 3, 2019 Order. The Bankruptcy Court did not base the Sanctions Order "on an erroneous view of the law or on a clearly erroneous assessment of the evidence,"37 and due process was satisfied. Accordingly, the Bankruptcy

Court did not abuse its discretion by issuing the Sanctions Order.

---

[35] *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987) (en bane).

[36] Id. at 1515; *In re Blagg*, 223 B.R. 795, 807 (10th Cir. BAP 1998). See Fed. R. Civ. P. ll(b) advisory committee's note to 1993 amendment (noting that whether the matter "should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend upon the circumstances."); *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1359 (3d Cir. 1990) ("[W]e think a district court in the exercise of its sound discretion must identify and determine the legal basis of each sanction charge sought to be imposed, and whether its resolution requires further proceedings, including the need for an evidentiary hearing."); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) ("due process must be afforded .

. . [but] [t]his does not mean, necessarily, that an evidentiary hearing must be held. At a minimum, however, notice and an opportunity to be heard is required."); In re Figueroa Alonso, 546

B. R. 1, 7 (Bankr. D.P.R. 2016) ("[W]hen a bankruptcy court considers a motion for sanctions, a 'full evidentiary hearing is not required; the opportunity to respond by brief or oral argument may suffice.'") (quoting *In re Emanuel*, 422 B.R. 453, 464 (Bankr. S.D.N.Y. 2010)).

[37] *In re Nursery Land Dev.*, Inc., 91 F.3d 1414, 1415 (10th Cir. 1996).

B. The Bankruptcy Court did not abuse its discretion by entering the Order Denying Reconsideration.

Rule 59 governs new trial motions and provides that in a nonjury trial, a court may grant a new trial "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court."[38] The Tenth Circuit has articulated that "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice" may be reasons to grant a motion for a new trial. [39] Thus, a

motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law.40 It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing. [41]

Lane's briefs focus on the merits of the Sanctions Order and not the Order Denying Reconsideration. Lane contends the Sanctions Order was a result of judicial bias against pro se litigants and violated his due process rights. Lane asserts the new trial was warranted because the Bankruptcy Court actively concealed criminal activity despite its duty to report alleged criminal acts. Appellees contend the Motion for Reconsideration did not reference any new evidence, assert there was a change in the controlling law, or suggest the Bankruptcy Court committed clear error.

[38] Fed. R. Civ. P. 59(a)(l)(B).

[39] *See Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

[40] *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[41] *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

In the Order Denying Reconsideration, the Bankruptcy Court found Lane "did not set forth adequate grounds to grant the requested relief."[42] We agree. A review of Lane's Motion for Reconsideration confirms what the Bankruptcy Court found: there were no grounds to grant it. Lane's Motion for Reconsideration just rehashes the arguments, which he made in his response to Appellees' motions for sanctions. Those arguments focused on alleged violations of his constitutional rights arising out of issues relating to the boxes of documents. In fact,

despite the Bankruptcy Court's previous rulings regarding the boxes of documents which gave rise to the imposition of sanctions against him, Lane doubles-down on his argument that the boxes not only are at the center of entitling him to relief in the adversary proceeding, but also the basis of his defense to the imposition of sanctions. Accordingly, Lane has failed to demonstrate the Bankruptcy Court abused its discretion by entering the Order Denying Reconsideration.

V. Conclusion

Because Lane did not properly preserve appellate review of the Dismissal Order or the Sanctions Order, and because the Bankruptcy Court did not abuse its discretion in denying the Motion for Reconsideration, we AFFIRM the Bankruptcy Court.

---

[42] Order Denying Reconsideration, in Appellant's App. at 194.

App. 6

FILED

United States Court of Appeal Tenth Circuit

December 8, 2023

Christopher M. Wolpert Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MATTHEW CURTIS WITT, Debtor.	
NOEL WEST LANE, Ill Plaintiff. v. MATTHEW CURTIS WITT; NICOLE WITT;	No. 23-1035 (BAP No. 22-007-CO) (Bankruptcy Appellate Panel)

TORREY LIVENICK;

LIVENICK LAW,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **EID, CARSON**, and **ROSSMAN**, Circuit Judges.

Noel West Lane, III, appearing pro se, appeals the judgment of the United States Bankruptcy Panel of the Tenth Circuit (BAP). The BAP concluded it lacked jurisdiction over Lane's appeal of two bankruptcy court orders because his notice of appeal was untimely. The BAP also affirmed the bankruptcy court's denial of Lane's motion for reconsideration. Exercising jurisdiction under 28 U.S.C. § 158(d)(l), we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

A dispute between Lane and defendant Matthew Curtis Witt has a nearly fifteen-year history that we need not recount. For our purposes, it is enough to know that Lane has long sought relief (unsuccessfully) from Witt, including through numerous judicial proceedings, for alleged mortgage fraud that allegedly caused Lane's bankruptcy.

This appeal arises from one of Lane's efforts to secure relief from Witt-an adversary proceeding Lane

brought in Witt's bankruptcy case naming multiple defendants, including Witt and an attorney for a third party, Torrey Livenick. Lane alleged Witt and others were involved in the destruction of forty-four boxes of Witt's business documents Lane believe were pertinent to the alleged mortgage fraud. The defendants filed motions to dismiss the adversary proceeding. The bankruptcy court granted those motions by order dated November 24, 2021, see R. at 478-86, and a corrected order filed on January 10, 2022, see R. at 1424-32 (Dismissal Order).

On March 9, 2022, the bankruptcy court granted motions for sanctions Witt and Livenick filed. The court concluded Lane had filed the adversary proceeding for an improper purpose (the court had warned Lane in a prior adversary proceeding that Witt's bankruptcy case was an improper forum for litigating disputes related to the boxes of business

documents) and imposed $2,000 in sanctions. See R. at 231-34 (Sanctions Order).

On March 22, Lane filed a motion to extend the time to file a motion related to the Sanctions Order, but he did not request an extension of time to appeal the Sanctions Order. See R. at 176-78. The bankruptcy court granted the motion to enlarge. See R. at 183. On April 6, Lane filed a motion seeking to stay the Sanctions Order until the bankruptcy court held a hearing to reconsider the sanctions (Motion for Reconsideration). R. at 497-502. On April 15, the bankruptcy court denied the Motion for Reconsideration, finding it "fail[ed] to set forth adequate grounds to grant the requested relief." R. at 415 (Order Denying Reconsideration).

On April 20, 2022, Lane filed a notice of appeal to the BAP, identifying the order denying his Motion for Reconsideration as the subject of the appeal. See

Rat 1775. In his amended appeal brief, however, Lane also sought reversal of the Dismissal Order and the Sanctions Order. See R. at 1748-49, 1760.

The BAP concluded that Lane's notice of appeal was untimely as to both the Dismissal Order and the Sanctions Order, and therefore the BAP lacked jurisdiction to review those orders. See R. at 16-19; see also 28 U.S.C. § 158(c)(2) (bankruptcy appeals to be taken "in the time provided by [Bankruptcy] Rule 8002"); Fed. R. Bankr. P. 8002(a)(l) (subject to certain exceptions, "a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed"); Emann v. Latture (In re Latture), 605 F.3d 830, 832 (10th Cir. 2010) ("[T]he failure to file a timely notice of appeal from a bankruptcy court's order constitutes a jurisdictional defect.").

The BAP explained that Lane's notice of appeal from the Dismissal Order was due by January 24, 2022, but he had filed no timely notice of appeal or any motion that might have tolled the time to appeal that order. Consequently, the BAP concluded, it lacked jurisdiction to review that order. See R. at 17-18.

Turning to the Sanctions Order, the BAP reasoned as follows: Federal Rule of Bankruptcy Procedure 9023 provides a fourteen-day time period to file a motion to reconsider. Federal Rule of Bankruptcy Procedure 9006(b)(2) precludes the bankruptcy court from enlarging that time period. Therefore, the bankruptcy court erred in granting Lane an extension of time to file the Motion for Reconsideration. But despite that error, Lane was still obligated to file a notice of appeal within fourteen days of the Sanctions Order yet failed to do so. And because Lane's Motion

for Reconsideration was not filed within Rule 9023 's fourteen-day time limit, it was untimely and therefore did not toll the time to file a notice of appeal of the Sanctions Order, regardless of the bankruptcy court's disposition of that motion on the merits. See R. at 19 & n.28 (citing, inter alia, Banner Bank v. Robertson (In re Robertson), 774 F. App'x 453, 466 (10th Cir. 2019), which held "that an untimely Rule 9023 motion is ineffective to toll the time to file a notice of appeal under 28 U.S.C. § 158(c)(2) and Bankruptcy Rule 8002(a) regardless of whether the bankruptcy court disposes of the motion on the merits or whether an opposing party raises in the bankruptcy court a timeliness objection to that court's consideration of the motion."). [1]

As to the Order Denying Reconsideration, the BAP concluded the notice of appeal was timely, R. at 14, but affirmed that order on the merits because the

Motion for Reconsideration merely rehashed arguments Lane made in opposition to the motions for sanctions, R. at 23-24.

Lane filed a timely appeal from the BAP's judgment. R. at 8-9.

II. Discussion

We afford Lane's pro se filings a liberal construction. See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). Even so, we discern no argument in his opening brief that the BAP erred in concluding the bankruptcy court did not abuse its discretion in denying the Motion for Reconsideration. Lane has therefore waived appellate review of that ruling. See Sawyers v. Norton, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

Next, we perceive only three arguments in Lane's opening brief that can be construed as touching on the BAP's conclusion that Lane failed to file a timely appeal from either the Dismissal Order or the Sanctions Order. We begin with the first two. First, Lane contends his untimely notice of appeal should be excused because he identified the incorrect order from which to measure the time to appeal.

---

[1] In the alternative, the BAP determined the bankruptcy court did not abuse its discretion by entering the Sanctions Order. R. at 20-22.

See Aplt. Opening Br. at 13, 17. Second, Lane appears to contend he confused Bankruptcy Rule 8002(a)(l)'s fourteen-day period for filing a notice of appeal with Federal Rule of Appellate Procedure 4(a)(l)(A)'s thirty-day period (although he does not cite either rule). *See id.* at 11-12 & n.13.

Neither of these arguments is sufficiently developed to invoke appellate review. Although we make "some allowances" for pro se litigants' "failure to cite proper legal authority," "confusion of various legal theories," "poor syntax and sentence construction," and "unfamiliarity with pleading requirements," we still expect them to follow the same procedural rules "that govern other litigants." *Garrett*, 425 F.3d at 840 (internal quotation marks omitted). And "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* As we have said, "[t]he first task of an appellant is to explain to us why the district court's decision was wrong." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Thus, Rule 28(a)(8)(A) requires an appellant's opening brief to contain "the argument, which must contain ... appellant's contentions and the reasons for them, with

citations to the authorities and parts of the record on which the appellant relies." "Under Rule 28, which applies equally to pro se litigants, a brief must contain more than a generalized assertion of error, with citations to supporting authority." *Garrett*, 425 F.3d at 841 (ellipsis and internal quotation marks omitted). "When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." Id. (brackets and internal quotation marks omitted).

Although Lane does cite to the record, his arguments regarding the BAP's conclusion that it lacked jurisdiction over his appeal from the Dismissal and Sanctions Orders are conclusory and unsupported by any legal authority. Nor does Lane explain why his asserted confusion demonstrates that the BAP erred. We are thus left to guess what legal theories he might

be invoking. And even if we guessed (and guessed correctly),[2] it is Lane's job, not ours, to develop the argument and at least attempt to support it with pertinent legal authority.

In his third argument, Lane accuses the courts in Colorado (apparently, both state and federal courts) of institutional bias against pro se litigants, arguing that they apply procedural rules and regulations in order to curtail pro se litigants' constitutional rights to due process and equal protection. As one alleged example of

---

[2] For example, his arguments could be construed as suggesting that his confusion about which order triggered the time to file a notice of appeal amounts to excusable neglect under Bankruptcy Rule 8002(d)(l)(B), which permits the bankruptcy court to extend the time to appeal when a party files a motion and demonstrates excusable neglect. But Lane filed no motion for an extension of time to appeal let alone argue excusable neglect. Moreover, Lane

fails to grapple with the general rule that excusable neglect does not include "inadvertence, ignorance of the rules, or mistakes construing the rules," Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380,392 (1993). Even further, the extra sixteen days he claims to have thought he had under Federal Rule of Appellate Procedure 4(a)(l)(A) to file a notice of appeal does not account for the more than three months between the Dismissal Order and his notice of appeal or the forty-two days between the Sanctions Order and his notice of appeal.

bias in this case, Lane points to the BAP opinion's opening remark: "Timing is everything-especially in the law." R. at 11.

As noted, we have long held that procedural rules apply equally to pro se and counseled litigants. See Garrett, 425 F.3d at 841. And the equal application of procedural rules to all litigants does not amount to a due process or equal protection violation when those rules are applied to a pro se litigant. Furthermore, our review of the rulings pertinent to this appeal

discloses no unfair treatment due to Lane's pro se status. To the contrary, both the bankruptcy court and the BAP provided thorough and well-reasoned explanations of the bases for their rulings, free of any bias against Lane on account of his pro se status or otherwise. Lane's contrary contentions are unfounded and abusive. In particular, the BAP's remark concerning the importance of timing in the law was an objectively accurate observation, not evidence of an unfair application of timing rules to a pro se litigant.

Accordingly, because Lane has failed to adequately brief the jurisdictional issues and has leveled baseless accusations at the courts, we decline to consider the merits of the BAP' s conclusion that it lacked jurisdiction over Lane's appeal from the Dismissal Order and the Sanctions Order.

III. CONCLUSION

We affirm the Bankruptcy Appellate Panel's

judgment.

Entered for the Court

Joel M. Carson III Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT Byron White United States

Courthouse

1823 Stout Street Denver, Colorado 80257

(303) 844-3157

Clerk@ca10.us.courts.gov

Christopher M. Wolpert, Clerk of Court

Jane K. Castro Chief Deputy Clerk

December 08, 2023

Mr. Noel West Lane

1060 Ingalls Street

Lakewood, CO 80214

RE: 23-1035, Lane v. Witt, et al

Dist/ Ag docket: 22-007-CO

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely

Christopher M. Wolpert

Clerk of Court

cc: Kelsey Jamie Buechler

Torrey Livenick

CMW/sds

App. 7

FILED

United States Court of Appeals Tenth Circuit

January 31, 2024

Christopher M. Wolpert Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MATTHEW CURTIS WITT, Debtor.	(Bankruptcy Appellate Panel)
NOEL WEST LANE, Ill Plaintiff - Appellant. v. No. 23-1035 (BAP No. 22-007-CO) MATTHEW CURTIS WITT, et al., Defendants -Appellees.	Adv. Case No. 21-01100 MER

ORDER

Before **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

Appellant's revised petition for rehearing is denied.

The petition for rehearing en bane was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. The second motion to extend time to file petition for rehearing is denied as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

App. 8

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

Scott S. Harris

Clerk of the Court

(202) 479-3011

February 8, 2024

Clerk

United States Court of Appeals for the Tenth Circuit

Byron White Courthouse

1823 Stout Street

Denver, CO 80257

Re: Noel West Lane, III

v. Matthew Curtis Witt, et al. Application No. 23A735

(Your No. 23-1035)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on February 8, 2024, extended the time to and including June 29, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

NOTIFICATION LIST

Mr. Noel West Lane, III

1060 Ingalls Street

Lakewood, CO 80214

Clerk

United States Court of Appeals for the Tenth Circuit

Byron White Courthouse

1823 Stout Street

Denver, CO 80257

Up-dated May 2019

Up-dated at http://www.ncsc.org/cje

Self-represented litigants and the code of judicial conduct

Rule 2.2 of the 2007 American Bar Association Model Code of Judicial Conduct provides: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 to that rule explains: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

35 jurisdictions (34 states and the District of Columbia) have added a version of comment 4 to their codes of judicial conduct.

- 16 state supreme courts have adopted comment 4 from the model code exactly or with only minor language changes: **Arizona, Connecticut, Georgia, Hawaii, Kentucky, Minnesota, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, Tennessee, Utah, Washington, West Virginia,** and **Wyoming.**
- 3 jurisdictions have adopted comment 4 and additional commentary.
    - The Colorado code includes the model comment 4 to Rule 2.2 and adds a new comment 2 to Rule 2.6 that provides:

        > The steps that are permissible in ensuring a self-represented litigant's

right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

- The **D.C.** code includes the model comment 4 to Rule 2.2 and adds a reference to

Comment [lA] to Rule 2.6. Comment lA to Rule 2.6 states:

> The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. Pursuant to Rule 2.2, the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. In some

circumstances, particular accommodations for self-represented litigants may be required by decisional or other law. Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5} explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.

- **Iowa** includes the model comment 4 to Rule 2.2 and adds: "By way of illustration, a judge may: (1) provide brief information about the proceeding; (2) provide information about evidentiary and foundational requirements; (3) modify the traditional order of taking evidence; (4) refrain from using legal jargon; (5) explain the basis for ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case."
- 5 states have adopted the model comment 4 to Rule 2.2 but added a caveat.
  - The **Idaho** code includes the model comment 4 to Rule 2.2 but adds: A judge's ability to make reasonable accommodations for self-represented litigants does not oblige a judge to overlook

a self-represented litigant's violation of a clear order, to repeatedly excuse a self-represented litigant's failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.

- The **Kansas** code includes the model comment 4 to Rule 2.2 but adds:

  > On the other hand, judges should resist unreasonable demands of assistance that might give an unrepresented party an advantage. If an accommodation is afforded a self-represented litigant, the accommodation shall not relieve the self-represented litigant from following the same rules of procedure and evidence that are applicable to a litigant represented by an attorney.

In addition, a comment to Rule 2.6 of the Kansas code states:

> Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to ensure a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an advantage. If the judge chooses to make a reasonable accommodation, such accommodation shall not relieve the self-represented litigant from following the

same rules of procedure and evidence that are applicable to a litigant represented by an attorney.

- The Maryland code provides: "Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not

require a judge to make any particular accommodation."

- The **Nebraska** code includes the model comment 4 to Rule 2.2 but adds, "on the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage,"
- The **New Mexico** codes includes the model comment 4 to Rule 2.2 version but adds: "When pro-se litigants appear in court, they should comply with the rules and orders of the court and will not be treated differently from litigants with counsel."
- 8 states have included in the text of Rule 2.2, not as a comment: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to

be fairly heard." That version was proposed by the Conference of Chief Justices and the Conference of State Court Administrators in a 2012 resolution (https://tinyurl.com/lgyp4rz). The resolution also suggests that states modify the comments "to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants."

- The **Arkansas** code includes the CCJ/COSCA version (although it uses the term "accommodations" rather than efforts) and adds a comment that explains:

> The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and

court rules, to ensure that all litigants are fairly heard. Examples of accommodations that may be made include but are not limited to (1) making referrals to any resources available to assist the litigant in the preparation of the case; (2) liberally construing pleadings to facilitate consideration of the issues raised; (3) providing general information about proceeding and foundational requirements; (4) attempting to make legal concepts understandable by using plain language whenever possible; (5) asking neutral questions to elicit or clarify information; (5) modifying the traditional order of taking evidence; and (6) explaining the basis for a ruling.

- The **Indiana** code includes the CCJ/COSCA version and adds a comment that explains:

> A judge's responsibility to promote access to justice, especially in cases involving self-represented litigants, may warrant the exercise of discretion by using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take, but in no way is required to take, include: (a) Construe pleadings to

facilitate consideration of the issues raised. (b) Provide information or explanation about the proceedings. (c) Explain legal concepts in everyday language. (d) Ask neutral questions to elicit or clarify information. (e) Modify the traditional order of taking evidence. (f) Permit narrative testimony. (g) Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. (h) Inform litigants what will be happening next in the case and what is expected of them.

- The **Louisiana** code includes the CCJ/COSCA version and adds a comment that explains:

  Steps judges may consider in facilitating the right of self-represented litigants to

be heard, and which {they might find) are consistent with these principles include, but are not limited to: making referrals to any resources available to assist the litigant in preparation of the case; providing brief information about the proceeding and evidentiary and foundational requirements; asking neutral questions to elicit or clarify information; attempting to make legal concepts understandable by minimizing use of legal jargon; and explaining the basis for a ruling.

- The **Maine** codes includes a version that states in the text of the rule:

  A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an

unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.

- The **Massachusetts** code includes the CCJ/COSCA version in the text and adds comments that explain:

  [1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

(1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or

other law. In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2} provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants

(April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard.

- The **New Hampshire** code includes the CCJ/COSCA version and adds a comment that explains:

  The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard.

- The **Ohio** code includes the CCJ/COSCA version and adds a reference to a comment to Rule 2.6 that explains:

The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources

available to assist the litigant in the preparation of the case.

- The **Wisconsin** code includes the CCJ/COSCA version, and the state supreme court published but did not adopt a new comment that, it stated, "may be consulted for guidance in interpreting and applying the rule."

> A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such

discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate consideration of the issues raised. 2. Provide information or explanation about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn

testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.

- 3 states have adopted other comments regarding judges' treatment of self-represented litigants.
  - The **California** code states: "When a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard."
  - The **Missouri** code states in a comment: "A judge may make reasonable accommodations to afford litigants the

opportunity to have their matters fairly heard."

- The **Montana** code states in a comment:

> A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

A comment to Rule 2.5, which requires competent diligent disposition of judicial and administrative duties, states:

> In accomplishing these critical goals in the increasing number of cases involving self-represented litigants, a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.

The significance of Colorado Courts' abridgement of pro se rights is shown in the ratio of pro se cases brought to discovery and trial in Colorado Courts in 2021 v. pro se cases filed in Colorado Courts in 2021; 31 pro se cases out of 518,810 pro se cases. Colorado Judicial Branch, Cases and Parties without Attorney Representation in Civil Case, Fiscal Year 2021

(*See* Appellate Case 23-1035 Document: 010110894797 Page 20)