UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2051

Karen Gail Brainen Kleinman

Plaintiff - Appellant

v.

Honorable Judge Cynthia A. Norton

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:22-cv-03115-RK)

JUDGMENT

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

Appellant's motion for leave to proceed on appeal in forma pauperis is granted. The motion for waiver of PACER fees is denied.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

August 01, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KAREN GAIL BRAINEN KLEINMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 6:22-cv-03115-RK
	)	
HONORABLE JUDGE CYNTHIA NORTON,	)	
	)	
	)	
Appellee.	)	

ORDER

Before the Court is Appellee's motion to dismiss (Doc. 5). After review, this motion is **GRANTED**.[1]

Discussion

Appellant filed a pro se notice of bankruptcy appeal on May 5, 2022, naming as the sole Defendant Judge Cynthia Norton of the United States Bankruptcy Court for the Western District of Missouri. (Doc. 1.)

Appellant seeks judicial review, pursuant to 28 U.S.C. § 158 of rulings Judge Norton made on March 25, 2022, April 13, 2022, and April 26, 2022, in Kleinman's underlying bankruptcy action, *In re Kleinman*, Case No. 20-30252-ca-13 (Bankr. W.D. Mo.). Kleinman alleges, erroneously, that Judge Norton is a "party" to the bankruptcy action.

As Appellee notes, when an aggrieved party appeals a trial judge's adverse rulings, the general rule is the trial judge is not properly named unless the aggrieved party is seeking an extraordinary writ of mandamus and/or prohibition directly against the trial judge. *See Ex Parte Fahey*, 332 U.S. 258, 260 (1947). Put another way, a trial judge is not a proper party to an appeal that merely challenges her underlying decisions. *Cf. Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1340, 1343 (N. D. Cal. 1977) (in seeking "appellate review of trial court judgments, [an] appellant names his opponent below as appellee rather than the trial judge.").

[1] Appellant has not paid the $298 filing fee, nor has she moved for leave to proceed *in forma pauperis*. 28 U.S.C. § 1930(c). If Appellant makes any additional filings in this case, the Court will order her to pay the $298 filing fee. If Appellant moves for leave to proceed *in forma pauperis*, as she has done in another bankruptcy appeal from the same underlying cause (*Kleinman v. Fink et al*, 6:22-cv-03096-RK), that motion will be similarly denied.

Further, a judge is absolutely immune from liability if (1) the judge has subject-matter jurisdiction, and (2) the acts complained of were judicial acts. *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983). As to the first prong, the Court notes that subject matter jurisdiction over bankruptcy cases is conferred by statute on district courts, which may then refer those cases to bankruptcy judges. 28 U.S.C. §§ 157(a), 1334. As to the second prong, the Court notes that absolute judicial immunity "must be construed broadly." *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (citation omitted). Whether an act is judicial relates "to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his official capacity." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (citation omitted). Additionally, a "judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump*, 435 U.S. at 355-56 (citation omitted). Finally, "[j]udges performing judicial functions enjoy absolute immunity from § 1983 liability." *Robinson v. Freeze*, 15 F.3d 107, 108 (8th Cir. 1994).

Here, on review of the underlying bankruptcy case, it is evident that the acts Appellant complains of (managing Appellant's case) relate to the bankruptcy case over which Judge Norton had jurisdiction. *See Schottel v. Young*, 687 F.3d 370, 373 (8th Cir. 2012) (when a judge rules on a motion, it is an action taken in a judicial capacity). Plaintiff's unsupported allegations do not show that the judge's actions are outside of the management of her case. Thus, Plaintiff seeks relief from a defendant who is immune from relief.

Conclusion

Appellee's motion to dismiss (Doc. 5) is **GRANTED**, and this case is **DISMISSED**.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: May 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1953

Karen Gail Brainen Kleinman

Appellant

v.

Richard Fink; Honorable Judge Cynthia A. Norton

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:22-cv-03096-RK)

JUDGMENT

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

Appellant's motion for leave to proceed on appeal in forma pauperis is granted. The motion for waiver of PACER fees is denied.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

August 01, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI DIVISION

KAREN GAIL BRAINEN KLEINMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 6:22-cv-3096-RK
	)	
RICHARD FINK, et al.,	)	
	)	
Appellees.	)	

ORDER

Before the Court are Appellees' motions to dismiss (Docs. 6, 7). After review, these motions are **GRANTED**.[1]

Discussion

Appellant filed a pro se notice of bankruptcy appeal on April 19, 2022, naming as appellees (1) Richard Fink, a bankruptcy trustee, and (2) Judge Cynthia Norton of the United States Bankruptcy Court for the Western District of Missouri. (Doc. 1.)

Appellant seeks judicial review, pursuant to 28 U.S.C. § 158 of rulings Judge Norton made on March 25, 2022,[2] April 13, 2022,[3] and April 26, 2022,[4] in Kleinman's underlying bankruptcy action, *In re Kleinman*, Case No. 20-30252-ca-13 (Bankr. W.D. Mo.).

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[1] Appellant has not paid the $298 filing fee as ordered (and she has unsuccessfully appealed the order requiring her to do so). (Docs. 3, 24.) Nonetheless, for expediency and because the appeal from the bankruptcy court is plainly non-meritorious, the Court takes up Appellees' motions to dismiss.

[2] Order Granting in Part and Denying in Part Debtor's Response, Objection and Request for Clarification and Modifying the Order Denying Confirmation and Granting the Debtor an Additional 21 days to file an Amended Plan.

[3] Order: The Court considers the Debtor's combined Notice of Compliance & MOTION PURSUANT TO FED.R.BANKR.P. 7052 AND 9023 OBJECTING IN OPPOSITION AND DISBELIEF TO THE COURTS MISGUIDED AND DISINGENUOUS CONTENTION THAT IT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO THE ROOKER-FELDMAN DOCTRINE TO ADDRESS THE PROVISIONS OF DEBTORS CROSS-MOTION FOR JUDICIAL NOTICE AND SUMMARY JUDGMENT ON THE PLEADINGS AND REQUESTING THE COURTS COMPLIANCE WITH ITS MANDATORY DUTIES OF OBEDIENCE TO RENDER A DECISION CONSISTENT WITH THE U.S. CONSTITUTION, THE U.S. BANKRUPTCY CODE, THE RULE OF LAW AND STARE DECISIS.

[4] Order Denying Confirmation.

As to the order filed March 25, 2022, the appeal is untimely. Federal Rule of Bankruptcy Procedure 8002(a) provides that, to be timely, a notice of appeal must be filed within 14 days of the date of entry of the order. More than 14 days passed between March 25, 2022, and the date of the notice of appeal. The Court therefore does not have jurisdiction over an untimely appeal of this order.

As to the order filed April 13, 2022, the order is a nonfinal, interlocutory order. Appellant has not addressed the grounds for an appeal of an interlocutory order and has not sought or been granted leave to proceed with an appeal of an interlocutory order. This Court can exercise its discretion to certify this order for appeal. *See In re Machinery, Inc.,* 275 B.R. 303, 306 (8th Cir. BAP 2002). Certification under 28 U.S.C. § 1292(b) requires that: "(1) the question involved be one of law; (2) the question be controlling; (3) there exists a substantial ground for difference of opinion respecting the correctness of the [bankruptcy] court's decision; and (4) a finding that an immediate appeal would materially advance the ultimate termination of the litigation." *Id.* Granting leave to file interlocutory appeals is the exception, not the rule, and such appeals should be granted only where extraordinary circumstances exist which override the general policy against piecemeal litigation, or where ultimate determination of the entire litigation would be advanced. *Matter of Zech,* 185 B.R. 334, 336-37 (D.Neb.1995). The Court declines to exercise discretion to certify this order for appeal.

As to the order filed April 26, 2022, the Order Denying Confirmation, it is well settled that such order is not a final order subject to appeal. *In re Zahn*, 526 F.3d 1140 (8th Cir. 2008). "Such orders leave the way open for negotiations and approval of a modified plan." The Court will not consider an appeal from this order.

Even assuming the challenged orders were properly in front of this Court, the named parties are not proper parties. Trustee Richard Fink is named as an appellee. Fink, as trustee, would be an appropriate person to challenge a bankruptcy ruling (i.e., as an appellant) but is not an appropriate party to be named as an appellee.[5]

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[5] Relatedly, it appears Appellant does not have standing to bring this appeal. "Since chapter 7 debtors are divested of all right, title, and interest in nonexempt property through the creation of the bankruptcy estate at the commencement of their cases, these debtors generally lack any pecuniary interest in the trustee's disposition of that property; it is generally the trustee alone who possesses standing under the 'persons aggrieved' standard to appeal bankruptcy court orders concerning the sale of property of the estate." *In re Levitt*, 632 B.R. 527, 530 (B.A.P. 8th Cir. 2021) (numerous citations omitted). A debtor may still have standing if the debtor can show that one of two exceptions applies: (1) there is a reasonable

Kleinman additionally incorrectly alleges that Appellee Norton is a proper party. As Appellee Norton notes, when an aggrieved party appeals a trial judge's adverse rulings, the general rule is the trial judge is not properly named unless the aggrieved party is seeking an extraordinary writ of mandamus and/or prohibition directly against the trial judge. *See Ex Parte Fahey*, 332 U.S. 258, 260 (1947). Put another way, a trial judge is not a proper party to an appeal that merely challenges her underlying decisions. *Cf. Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1340, 1343 (N. D. Cal. 1977) (in seeking "appellate review of trial court judgments, [an] appellant names his opponent below as appellee rather than the trial judge").

Further, a judge is absolutely immune from liability if (1) the judge has subject-matter jurisdiction, and (2) the acts complained of were judicial acts. *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983). As to the first prong, the Court notes that subject matter jurisdiction over bankruptcy cases is conferred by statute on district courts, which may then refer those cases to bankruptcy judges. 28 U.S.C. §§ 157(a), 1334. As to the second prong, the Court notes that absolute judicial immunity "must be construed broadly." *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (citation omitted). Whether an act is judicial relates "to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his official capacity." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (citation omitted). Additionally, a "judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump*, 435 U.S. at 355-56 (citation omitted). Finally, "[j]udges performing judicial functions enjoy absolute immunity from § 1983 liability." *Robinson v. Freeze*, 15 F.3d 107, 108 (8th Cir. 1994).

Here, on review of the underlying bankruptcy case, it is evident that the acts Appellant complains of (managing Appellant's case) relate to the bankruptcy case over which Appellee Norton had jurisdiction. *See Schottel v. Young*, 687 F.3d 370, 373 (8th Cir. 2012) (when a judge rules on a motion, it is an action taken in a judicial capacity). Appellant's unsupported allegations

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possibility – not just a theoretical chance – that a successful appeal would entitle the debtor to the distribution of a surplus under 11 U.S.C. § 726(a)(6); or (2) the appealed order impacts the terms of the debtor's bankruptcy discharge. *Id.* (citation omitted). The appellant asserting standing to appeal bears the burden of proving the appellant qualifies as a "person aggrieved." *Id.* Here, Appellant as not met her burden of establishing she has standing.

do not show that the judge's actions are outside of the management of Appellant's bankruptcy case. Thus, Appellant seeks relief from a defendant who is immune from relief.

Conclusion

Appellees' motions to dismiss (Docs. 6 & 7) are **GRANTED**, and this case is **DISMISSED**.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: September 27, 2022

Additional material from this filing is available in the Clerk's Office.