UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

United States of America v. AAPC, Inc., et al.

United States v. AAPC, Inc. (In re AAPC, Inc.), 277 B.R. 785 (D. Utah 2002) · No. Bankruptcy No. 00-33726 GEC; Adversary No. 01P-2099GEC · Decided March 15, 2002

SUMMARY

The United States Bankruptcy Court for the District of Utah addressed a motion concerning the Government's effort to substantively consolidate several non-debtor entities and individuals with AAPC, Inc.'s Chapter 11 bankruptcy proceeding. The court held that nunc pro tunc relief could not create jurisdiction that did not exist and that affected creditors were entitled to notice and an opportunity to be heard. The court granted partial summary judgment as to the nunc pro tunc request and required the Government to amend its complaint with specific, separately pleaded allegations and to provide notice to creditors.

CASE DETAILS

COURT	United States Bankruptcy Court for the District of Utah
WRITING FOR THE COURT	Glen E. Clark
JURISDICTION	Utah
DECIDED	March 15, 2002
DOCKET	Bankruptcy No. 00-33726 GEC; Adversary No. 01P-2099GEC
DISPOSITION	remanded
PROCEDURAL POSTURE	Old West moved to dismiss the Government's adversary proceeding under Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12(b)(1) and (6). Because the Government submitted thirty-seven exhibits outside the pleadings, the court converted the motion into one for summary judgment under Rule 56 and granted partial summary judgment concerning the requested nunc pro tunc consolidation.
STANDARD OF REVIEW	The court treated the Rule 12 motion as a Rule 56 motion for summary judgment because matters outside the pleadings were presented and admitted. The amended complaint was evaluated under the requirement that fraud-based allegations be pleaded with particularity under Federal Rule of Civil Procedure 9(b) and Bankruptcy Rule 7009(b).
PRECEDENTIAL VALUE	published bankruptcy court opinion

PARTIES	Old West Annuity and Life Insurance Company v. United States of America

TOPICS

chapter 11 · adversary proceedings · summary judgment · subject matter jurisdiction · pleadings

PRACTICE AREAS

bankruptcy · civil procedure · commercial litigation · corporate law

QUESTIONS PRESENTED

1. Whether the court could enter an order substantively consolidating nondebtor defendants into the debtor's Chapter 11 proceeding nunc pro tunc to the petition date.
2. Whether creditors whose rights could be affected by substantive consolidation were entitled to notice and an opportunity to be heard.
3. Whether the Government's amended complaint adequately pleaded the facts supporting substantive consolidation when the claim sounded in fraud.
4. Whether the court should resolve the Government's broader jurisdictional challenge concerning consolidation of nondebtor defendants at this stage.

HOLDINGS

1. A nunc pro tunc order may correct the record to reflect an action previously taken, but it may not operate as an order that was never previously entered or create jurisdiction that did not exist at the relevant time. The court therefore granted partial summary judgment against the Government's request to consolidate the defendants nunc pro tunc to November 29, 2000.
2. Creditors of entities proposed for substantive consolidation are parties in interest entitled to notice and an opportunity to be heard before consolidation is ordered.
3. Because the amended complaint sounded in fraud, it was required to plead the circumstances constituting fraud with particularity and to allege factual grounds separately and specifically as to each defendant.

KEY QUOTATIONS

> *"A lack of jurisdiction cannot be corrected by an order nunc pro tunc."* (789)

> *"The only proper purpose of a nunc pro tunc order is to correct a mistake in the records."* (789)

> *"Because creditors' rights may be affected, they must be given notice and an opportunity to be heard regarding consolidation."* (790)

FACTUAL BACKGROUND

AAPC, Inc., a Utah corporation, filed a Chapter 11 petition on November 29, 2000, and George H. Speciale was appointed trustee of its estate. The Government filed a tax-related proof of claim exceeding $3.4 million and later commenced an adversary proceeding seeking substantive consolidation of three related corporations and several individuals and entities into the debtor's bankruptcy proceeding, nunc pro tunc to the petition date. The Government's amended complaint added defendants, but there was no evidence that creditors of the nondebtor defendants had received notice of the amended complaint or the adversary proceeding. The complaint alleged only limited facts concerning some defendants, including corporate positions, execution of financing statements, and use of office space.

PROCEDURAL HISTORY

AAPC, Inc. filed a Chapter 11 petition on November 29, 2000. The Government later initiated an adversary proceeding seeking substantive consolidation of several related corporations and individuals into the debtor's bankruptcy case, including nunc pro tunc relief to the petition date, and filed a first amended complaint adding defendants. Old West moved to dismiss, arguing that nunc pro tunc consolidation was impermissible and that the court lacked jurisdiction over nondebtor defendants. The court granted partial summary judgment as to nunc pro tunc relief, required the Government to amend its complaint with particularized allegations and provide notice to creditors, and reserved the broader jurisdictional issue.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The Government was granted thirty days to amend its complaint with specific and separate factual allegations supporting substantive consolidation and thirty days to serve the amended complaint and scheduling order on all creditors of the defendants. If the Government failed to comply timely, the adversary proceeding would be dismissed upon Old West's filing of an affidavit and proposed order of dismissal. The court reserved the broader jurisdictional issue for a possible renewed motion.

CASES CITED

- Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956 (10th Cir. 2001)
- Crosby v. Mills, 413 F.2d 1273 (10th Cir. 1969)
- W.N.J. v. Yocom, 257 F.3d 1171 (10th Cir. 2001)
- Eastgroup Properties v. Southern Motel Ass'n, Ltd., 935 F.2d 245 (11th Cir. 1991)
- In the Matter of Gulfco Inv. Corp., 593 F.2d 921, 928 (10th Cir. 1979)
- Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)
- Bank of Marin v. England, 385 U.S. 99, 102 (1966)
- Turney v. Federal Deposit Ins. Corp., 18 F.3d 865 (10th Cir. 1994)
- Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990)
- Vicom, Inc. v. Harbridge Merchant Servs., 20 F.3d 771 (7th Cir. 1994)

- Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989)
- Radzanower v. Touche Ross, 426 U.S. 148 (1976)
- In re Gledhill, 76 F.3d 1070 (10th Cir. 1996)
- In re Albrecht, 233 F.3d 1258, 1260 n.4 (10th Cir. 2000)
- In re Alpex Computer Corp., 71 F.3d 353 (10th Cir. 1995)
- Nolan Bros., Inc. v. United States, 266 F.2d 143 (10th Cir. 1959)
- Grossman v. Novell, Inc., 120 F.3d 1112 (10th Cir. 1997)