

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)
)
NanoLume, Inc.,) Case No. 08-80663C-7D
)
Debtor.)
)

ORDER

This case came before the court on September 24, 2009, for a hearing regarding a motion to vacate order for private sale filed by James Johansen. Appearing at the hearing were James Johansen ("Movant"), Sara A. Conti, Chapter 7 Trustee, and James F. Jordan, appearing on behalf of Quantum Confined, Ltd.

Pursuant to a scheduling order entered by the court on September 17, 2009, the only issues to be addressed at this time are the Movant's standing to pursue the motion to vacate and the jurisdiction of this court to hear and determine the motion to vacate. Although not clear from the motion to vacate, the Movant has confirmed that his motion seeks relief pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure. For the reasons that follow, the court has concluded that the Movant does have standing to seek relief pursuant to Rule 9024 and that the court has jurisdiction to hear the motion.

BACKGROUND

On May 1, 2009, NanoLume, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 7 of the U.S. Bankruptcy Code. The Debtor's assets consisted primarily of various equipment and

related intellectual property. After attempting to market the property, the Trustee presented to the court an offer by Nick Edgington to purchase the Debtor's assets for \$12,000 in a private sale pursuant to 11 U.S.C. § 363. On the petition date, Mr. Edgington was an employee and shareholder of the Debtor. No objections were filed to the sale, and the court entered an order approving the sale on August 5, 2008.

On August 3, 2009, Movant filed his motion to set aside the sale of the Debtor's assets ("the Motion"). In support of the Motion, Movant alleges that there was pre-sale collusion between Mr. Edgington and other potential bidders which he asserts resulted in the assets being sold at a suppressed price. Movant is an officer, director and shareholder of the Debtor, who holds priority and general unsecured claims against the estate owing from back salary and other expenditures. While Movant had not previously expressed interest in purchasing the assets, in his Motion he offers \$50,000 for their purchase. The assets are presently owned by Quantum Confined Ltd. ("Quantum"), which acquired them from the initial purchaser, Nick Edgington.

The Motion was first heard on August 28, 2009. At that time, an issue was raised as to whether Movant had standing to request that the sale be set aside. Quantum has since objected to the court's exercise of jurisdiction to hear and determine this matter insofar as it relates to Quantum. Quantum also asserts that the

Motion was untimely.

ANALYSIS

Rule 9024 of the Federal Rules of Bankruptcy Procedure makes Rule 60 of the Federal Rules of Civil Procedure applicable in bankruptcy proceedings. Most relevant to this case is Rule 60(b)(3), which provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."

The cases involving Rule 60(b)(3) movants who were not parties to the order at issue have focused on the nature of the impact of the order upon the movant's interests in deciding whether such movants have standing to invoke Rule 60(b)(3). When the judgment or order "directly affects" the movant's interests, the movant has standing to challenge the judgment or order under Rule 60(b). Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir. 1994) ("[A] nonparty may seek relief from a judgment procured by fraud if the nonparty's interests are directly affected."); accord Kem Mfg. Corp. v. Wilder, 817 F.2d 1517, 1522 (11th Cir. 1987) ("barring extraordinary circumstances . . . a nonparty only has standing to raise a challenge of fraud on the court if the nonparty's interests are directly affected by the final judgment."); see also In re Sierra Financial Serv., Inc., 290 B.R. 718, 729-31 (B.A.P. 9th Cir.

2002) (extending Eyak Native Village to apply to a non-fraud subsection of Rule 60(b), and holding that property owners "may move pursuant to Rule 60(b)(4) to vacate orders that may directly and pecuniarily affect their interests").

Other cases have reached a similar result without using the "directly affected" language. See Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051-52 (2d Cir. 1982) (allowing standing based on the movant being "sufficiently connected and identified with the . . . suit"); see also Grace v. Bank of Leumi Trust Co., 443 F.3d 180, 188 (2d Cir. 2006) (applying a "sufficiently connected and identified with" standard to allow standing, but characterizing it as "an exceedingly narrow exception" to the general rule against non-party standing).

Still other cases, based on the analogous circumstances involved in standing to move to vacate an order and in standing to appeal from an order, have utilized the standing to appeal criteria in deciding whether there is standing for a Rule 60(b) motion. See Cedar Island Builders, Inc. v. South County Sand & Gravel Co., 151 B.R. 298, 301 (D. R.I. 1993) ("A district court faced with a motion by a nonparty to vacate a judgment should apply the same standards it would apply in deciding whether a nonparty has standing to challenge a judgment on appeal." (citing Citibank Int'l v. Collier-Traino, Inc., 809 F.2d 1438, 1440-41 (9th Cir.1987))). Standing to directly appeal a bankruptcy order extends to all

"persons aggrieved" by the order. U.S. Trustee v. Clark (In re Clark), 927 F.2d 793, 795 (4th Cir. 1991). In general, a "'person aggrieved' has been construed to mean a party 'directly and adversely affected pecuniarily.'" Id.; see also 1 COLLIER ON BANKRUPTCY ¶ 5.06 (15th ed. rev. 2009). Under these cases, a person aggrieved by an order, i.e., whose pecuniary interests are directly and adversely affected by the order, has standing to seek relief under Rule 60(b)(3).

Under either line of the foregoing decisions, the Movant has standing in this proceeding. The Movant holds a priority claim in the amount of \$8,884.62 and a general unsecured claim in the amount of \$79,152.88 and thus has a pecuniary interest at stake in this case. Clearly, if virtually all of the assets in the estate were sold at a depressed price as contended by the Movant, his pecuniary interest would be directly and adversely affected since such a sale necessarily would reduce the Movant's dividend in this case. In a bankruptcy case, when an order affects the potential payout to a creditor, that creditor is a person aggrieved by the order. In particular, "creditors may appeal from orders disposing of property of the estate because such orders affect the res to which creditors look for payment of their claims." 1 COLLIER at ¶ 5.06 (citing Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, (9th Cir. 1999)). It follows that the Movant has standing to seek relief regarding the sale order pursuant to

Rule 60(b)(3).

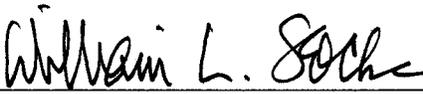
The remaining issue is whether the court has jurisdiction over Quantum, who holds the assets at issue. When a grant of relief under Rule 60(b) would require an order compelling action by a non-movant third party, the court must have personal jurisdiction over that third party. Obviously, personal jurisdiction may be established by means of an independent adversary proceeding in which the party holding the assets is served with a summons and complaint. That has occurred in this case. Since filing the Motion, Movant has filed an adversary proceeding against Quantum seeking the recovery of the assets that it acquired from Mr. Edgington. This court has jurisdiction, however, apart from the filing of the adversary proceeding. If a third party appears and opposes a Rule 60(b) motion, that party has submitted to the jurisdiction of the court and waives any personal jurisdiction objection. See Chief Freight Lines Co. v. Local Union No. 886, 514 F.2d 572, 577 (10th Cir. 1975) (noting that in the context of a Rule 60(b) motion, "unless the adverse party waives notice or otherwise submits to the court's jurisdiction, notice of the motion must be given"); see also Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580-581 (1946) (companies who sought to vacate a judgment avoided "subject[ing] themselves to the court's jurisdiction" by funding the actual movants rather than making an appearance themselves). Here, on August 24, 2009, Quantum filed

a "Notice of Appearance and Response to Motion to Set Aside Sale" asserting that the Motion was untimely, reserved for the trustee by 11 U.S.C. § 363(n), or a mere unsubstantiated allegation. The notice of appearance and response did not raise or otherwise preserve an objection to the court's exercise of jurisdiction. Quantum thus waived any objection to lack of personal jurisdiction.

Based upon the foregoing, the court overrules Quantum's objection to the Motion to the extent that such objection is based upon lack of standing and lack of jurisdiction. The court also overrules Quantum's objection that the Motion is untimely because the facts have not been sufficiently developed for a determination of whether the Motion was not timely, but does so without prejudice to Quantum raising timeliness at a later stage of this proceeding.

IT IS SO ORDERED.

This 6th day of October, 2009.



WILLIAM L. STOCKS
United States Bankruptcy Judge