

**UNITED STATES COURT OF APPEALS
for the Fifth Circuit**

No. 92-9034

THE ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

No. 92-9052

IN THE MATTER OF: BAYLESS MILTON HESTER, III,
a/k/a B.M. HESTER,

Debtor,

ESTATE OF BAYLESS MILTON HESTER, III,
a/k/a B.M. Hester, and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

NCNB TEXAS NATIONAL BANK/Nations Bank/
FDIC, ET AL.,

Appellees.

No. 92-9053

IN THE MATTER OF: BAYLESS MILTON HESTER, III,
a/k/a B. M. Hester, and
EVALYNN JORDAN HESTER,

Debtors,

BAYLESS MILTON HESTER, III,
a/k/a B. M. Hester, and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORP.,

Appellee.

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No. 92-9054
Summary Calendar

IN THE MATTER OF: BAYLESS MILTON HESTER and
EVALYNN JORDAN HESTER,

Debtors,

BAYLESS MILTON HESTER and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

JOHN A. LEONARD, ET AL.,

Appellees.

No. 92-9055

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Debtors,

Appellants,

VERSUS

JOHN LEONARD, ET AL.,

Appellees,

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No. 92-9088

THE ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

No. 93-1020

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
a/k/a B.M. Hester and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III
a/k/a B.M. Hester and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

NCNB TEXAS NATIONAL BANK,
Bank/Nations Bank/FDIC, ET AL.,

Appellees.

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No. 93-1042

IN THE MATTER OF: BAYLESS MILTON HESTER, III and
EVALYNN HESTER,

Debtors,

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,

Appellee,

VERSUS

BAYLESS MILTON HESTER, III and
EVALYNN HESTER,

Appellants.

No. 93-1043

IN THE MATTER OF: BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

BAYLESS MILTON HESTER, III,
a/k/a B.M. Hester, and
EVALYNN JORDAN HESTER,

Debtors,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its Corporate Capacity,

Appellee.

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No. 93-1044

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
a/k/a B.M. HESTER, and
EVALYNN JORDAN HESTER,

ESTATE OF BAYLESS MILTON HESTER, III,
a/k/a B.M. Hester, and
EVALYNN JORDAN HESTER,

Debtors,

Appellants,

VERSUS

JOHN LEONARD, ET AL.,

Appellants,

No. 93-1068

EVALYNN JORDAN HESTER and
B.M. HESTER, III, Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL., Defendants-Appellees.

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No. 93-1135

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee.

No. 93-1136

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FLOYD STYLES,

Appellee.

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No. 93-1137

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

ST. CLAIR NEWBERN, III, JOHN A. LEONARD
and FLOYD STYLES,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(7:88 CV 0076 K, et al.)

August 31, 1993

Before DAVIS, JONES, and DUHE, Circuit Judges.

PER CURIAM:¹

I.

In 1987, Bayless Milton Hester, III (now deceased) and his wife, Evalynn Jordan Hester (jointly, "Hester"), filed a lender liability lawsuit against First RepublicBank Wichita Falls, N.A. and its president. Shortly thereafter, Hester filed a voluntary Chapter 11 bankruptcy petition. The FDIC, as receiver for the insolvent First RepublicBank, intervened in the lender liability suit and removed the case to federal district court.

In April 1991, over Hester's objections, the bankruptcy court confirmed a reorganization plan (the "Plan"). Among other provisions, the Plan called for the dismissal with prejudice of Hester's lender liability suit. Hester appealed the Plan confirmation. The district court dismissed Hester's appeal for want of prosecution, and this court affirmed the dismissal.

While Hester's appeal of the plan was pending, the district court in January 1992 closed the lender liability suit, but gave Hester the right to reopen the case if the claims were not resolved in the underlying bankruptcy proceeding. Hester appealed the dismissal to this court. Hester's appeal of the plan was still pending before us and we dismissed Hester's appeal from the order closing her lender liability suit for lack of jurisdiction.

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In March 1992, Hester filed an adversary complaint (styled as a "Combined Motion to Revoke" the Plan) alleging unspecified frauds on the part of attorneys and others involved in the bankruptcy case (the "fraud complaint"). The bankruptcy court, after granting a motion for more definite statement, eventually dismissed the fraud complaint with prejudice. The district court affirmed the dismissal.

The bankruptcy court also sanctioned Hester for violations of Bankruptcy Rule 9011. The district court affirmed the sanctions order. In addition, the district court issued several interlocutory orders aimed at restricting the volume of Hester's frivolous pleadings. Hester appeals the judgment of dismissal, the sanctions order and many of the interlocutory orders entered, both before and after the judgment of dismissal.

II.

Appellees have moved for dismissal of several of Hester's appeals on the ground that this court lacks jurisdiction. In three of Hester's appeals, nos. 93-1042, 93-9053, and 93-9054, Hester seeks to appeal several interlocutory docket control orders, none of which has been certified for appeal under 28 U.S.C. § 158(d). Because we lack jurisdiction to review these interlocutory orders, we grant appellees' motion to dismiss Hester's appeals in these three cases.

III.

Several of Hester's appeals involve issues resolved by the confirmed Plan. A confirmed chapter 11 plan is a final judgment for purposes of res judicata. **Eubanks v. FDIC**, 977 F.2d 166 (5th Cir. 1992). "Any attempt by the parties to relitigate any of the matters that were raised or could have been raised [in the bankruptcy court] is barred under the doctrine of res judicata." **In re Baudoin**, 981 F.2d 736, 739 (5th Cir. 1993) (*italics omitted*). Res judicata applies if: (1) both cases involve the same parties; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior decision was a final judgment on the merits; and (4) the same cause of action is at issue in both cases. **Id.** at 740.

Appeals 92-9034, 92-9088, and 93-1068 are barred by res judicata. These appeals all seek review of the district court's January 3, 1992 order (and subsidiary orders) closing Hester's lender liability lawsuit. The Plan resolved the issues underlying the lender liability suit; the lawsuit was an asset of the estate.

Hester's appeal from Plan confirmation has since been dismissed. Thus, the final judgment confirming the Plan resolved the issues Hester brings to us in this appeal. Hester's lender liability action is therefore clearly barred by res judicata. The appeal is dismissed as frivolous. We therefore do not reach Hester's other arguments in these three appeals.

The appeal in 93-1043 is dismissed for the same reason. The dispute underlying the district court's order closing the case which is the subject of this appeal was resolved by the order

confirming the Plan. The claim underlying that order is barred by res judicata.

IV.

We now address the merits of Hester's remaining claims.

A.

Case 93-1044 is an appeal from an order of the district court affirming the dismissal of Hester's fraud action against the attorneys, the trustee and others who participated in perfecting the Plan. Hester's "Combined Motion" to revoke the Plan alleged criminal wrongdoing as well as fraud on the part of various individuals involved in the bankruptcy case. The bankruptcy court held a hearing, at which Hester appeared to oppose appellees' motion to dismiss. The court dismissed Hester's criminal allegations as beyond the scope of bankruptcy jurisdiction, dismissed Hester's motion to revoke the Plan as untimely under 11 U.S.C. § 1144, and granted appellees' motion for more definite statement on the fraud claims. Hester refused to amend her complaint on grounds that to do so would subject her to the jurisdiction of the court. After nearly sixty days, the court dismissed the fraud action with prejudice. The district court then affirmed the dismissal of Hester's fraud action.

Given the history of this litigation, the bankruptcy court and the district court were justified in dismissing the fraud lawsuit for Hester's failure to follow court orders. Bankruptcy rule 7009 required Hester to plead her fraud counts with particularity. The bankruptcy court therefore correctly ordered her to amend her complaint and comply with this rule. When Hester adamantly

refused, for a frivolous reason, to follow the court's order, the bankruptcy court did not err in dismissing her complaint.

B.

Appeal 92-9055 challenges the district court's order affirming Bankruptcy Rule 9011 sanctions assessed against Hester. In addition, Hester challenges six orders of the district court in this appeal: (1) a November 20, 1992 order overruling Plan Administrator Floyd Styles's motion to combine appeals; (2) a November 13, 1992 order denying Hester's motion to file a reply; (3) a November 19, 1992 order mooted Hester's motion to object to the FDIC's appearance in appeals of the fraud action; (4) a November 19, 1992 order mooted Hester's motion to reply to the FDIC's response to a motion to postpone rulings; (5) a November 19, 1992 order mooted Hester's motion to reply to the FDIC's response to a motion to transfer the case; and (6) a November 3, 1992 order requiring Hester to obtain leave of the court before filing pleadings in the district court.

Following the dismissal of Hester's fraud action, the bankruptcy court held a hearing on appellees' request for sanctions. Hester did not appear at the hearing to contest the sanctions request. The bankruptcy court ordered Hester to reimburse appellees \$17,150.50 for their costs of contesting the fraud suit and further enjoined Hester from filing additional pro se claims in the bankruptcy court without prior leave of the court.

The district court affirmed, noting that Hester's failure to contest sanctions below was a procedural default. In addition, the court found no abuse of discretion in the sanctions order, given

Hester's admission that some of the allegations in her Combined Motion were well beyond the bankruptcy court's jurisdiction.

We agree with the district court that the bankruptcy court did not abuse its discretion in sanctioning Hester. Hester's complaint raised several issues that had been fully adjudicated in prior proceedings and other issues that were clearly beyond the bankruptcy court's jurisdiction. Those allegations were clearly frivolous, even for a pro se litigant. The sanctions order, which Hester did not contest in the bankruptcy court, was reasonably calculated to deter Hester's abuses of the judicial process. **See Cooter & Gell v. Hartmarx Corp.**, 496 U.S. 384 (1990); **Doering v. Union Cty. Bd. of Chosen Freeholders**, 857 F.2d 191, 194 (3d Cir. 1988).

The November 3, 1992 order required Hester to obtain prior leave of the court before she could file pleadings in the district court. The order, in the form of an injunction issued pursuant to the All Writs Act (28 U.S.C. § 1651), is within the district court's power "to enjoin litigants who are abusing the court system by harassing their opponents." **Harrelson v. United States**, 613 F.2d 114, 116 (5th Cir. 1980). Given the volume of Hester's frivolous pleadings,² the district court did not abuse its

² Some idea of the volume of the paper Hester filed in the district court is captured by the following statement in the district court's order:

Litigant Hester has made 32 submissions to this court this past week seeking appellate relief which add to the 16 appeals presently pending and do not include those appeals which have already been disposed. This multitude of appeals, written by a prolific pro se litigant Hester, are an unwarranted drain on the court's resources. No litigant has the right to monopolize judicial resources

discretion in enjoining Hester from future filings without leave of the court. **See Winslow v. Romer**, 759 F. Supp. 670 (D. Colo. 1991).

The remaining orders Hester complains of in this appeal are discretionary orders of the district court. We have reviewed those orders and find no error.

C.

Appeals 92-9052 and 93-1020 (consolidated) focus on a final order of the bankruptcy court holding Hester in contempt for failing to turn over tax records to the Plan Administrator. Hester complains primarily of the following orders: (1) a December 21, 1992 order dismissing for want of prosecution Hester's appeal from the bankruptcy court's contempt order; and (2) a January 21, 1993 memorandum opinion and order affirming the bankruptcy court's order to turn over tax records.³

Hester's lack of diligence in filing a proper brief justified the district court's dismissal of her appeal from the contempt

and thus indirectly obstruct other litigants asserting good faith claims and no other litigant in this court requires such special consideration.

³ These appeals also complain of a number of subsidiary orders: (1) an October 23, 1992 order dismissing Hester's interlocutory appeal from a show cause order entered after Hester refused to turn over the tax records; (2) a November 3, 1992 order restricting Hester's future filings in the district court; (3) a November 16, 1992 order denying Hester's motion for leave to file a brief in her appeal of the contempt order; (4) a November 20, 1992 order granting appellee's motion to combine appeals; (5) a December 3, 1992 order denying Hester's motion to transfer proceedings to Judge Robinson; (6) a December 8, 1992 order clarifying the district court's November 3 order; (7) a December 17, 1992 order prescribing filing instructions; and (8) a December 3, 1992 order denying Hester's motion to postpone rulings in the case.

order. Bankruptcy Rule 8009 grants an appellant 15 days to file a brief after the appeal is docketed. Hester filed her motion for leave to file an appellate brief on November 10, 1992, after the deadline for filing a brief had passed. The district court denied Hester's motion on November 16, not because the motion was untimely, but because Hester's brief, which contained rambling, irrelevant assertions, rehashed arguments on issues previously decided and did not adequately address the narrow issue on appeal. Hester did not seek leave of the court to file another brief. On December 21, the district court dismissed Hester's appeal for want of prosecution. The district court did not abuse its discretion in either refusing to accept Hester's noncomplying brief or in dismissing her appeal.

The January 21, 1993 memorandum opinion and order affirmed the bankruptcy court's order directing Hester to turn over the 1989 estate tax return to Floyd Styles, the Plan Administrator. Although Hester objected in writing to the motion to turn over property, she failed to appear in court to prosecute her objection. The district court concluded that Hester failed to meet her burden on appeal to show that the bankruptcy court committed prejudicial error in ordering the tax return turned over to Styles.

We find no abuse of discretion on the part of the district court in affirming the order to turn over tax records. Hester's chief argument against the order is that the bankruptcy court had no jurisdiction to enter the turnover order, because a stay of the reorganization plan was in effect on the date of the hearing, June 9, 1992. However, as the district court pointed out, the temporary

ex parte stay granted on July 24, 1991 was in the nature of a temporary restraining order. A TRO granted without a hearing expires in ten days. Fed. R. Civ. P. 65. Thus, no stay was in effect at the time of the turnover hearing, and the turnover order was valid.

The remaining orders complained of in this appeal are attempts by the district court to maintain control over its docket in the face of voluminous rambling, incoherent pleadings from Hester. So far, Hester has filed some thirty-five appeals in the district court and twenty-one appeals in this court. Contrary to Hester's assertions, the orders do not bar Hester's access to the federal courts. Rather, the orders are an appropriate exercise of the district court's discretion to manage its caseload and to prevent repetitious pleadings. **See Harrelson v. United States**, 613 F.2d 114 (5th Cir. 1980); **Ketchum v. Cruz**, 961 F.2d 916, 921 (10th Cir. 1992); **Cofield v. Alabama Pub. Serv. Comm'n**, 936 F.2d 512 (11th Cir. 1991); and **In re Martin-Trigona**, 763 F.2d 140 (2d Cir. 1985), **cert. denied**, 474 U.S. 1061 (1986). The district court did not err in issuing the orders.

D.

In appeals 93-1135, 93-1136 and 93-1137, Hester complains of discretionary rulings by the bankruptcy court which were affirmed by the district court. All of these rulings were well within the broad discretion granted the bankruptcy court, and the district court did not err in affirming those orders. Therefore, the orders appealed from in all of these cases are affirmed.

V.

For the reasons stated above, we dismiss appeals 93-1042, 92-9053, and 92-9054 for lack of appellate jurisdiction; we dismiss appeals 93-1043, 92-9034, 92-9088, and 93-1068 as frivolous; and we affirm the orders of the district court in appeals 93-1044, 92-9055, 92-9052, 93-1020, 93-1135, 93-1136, and 93-1137.

Most of these appeals are completely lacking in merit and/or are from orders that are non-appealable. But in light of Hester's pro se status we decline to impose monetary sanctions. We do, however, cast Hester for double costs under Federal Rule of Appellate Procedure 38. **See Garza v. Westergren**, 908 F.2d 27 (5th Cir. 1990); **George v. State of Texas**, 788 F.2d 1099 (5th Cir.), **cert. denied**, 479 U.S. 866 (1986). This court will not tolerate further frivolous appeals from Hester that unreasonably and vexatiously multiply this proceeding. We caution Hester that any further frivolous appeals will draw substantial sanctions.

In light of our disposition of these appeals, all outstanding motions filed by Hester are denied.