

March 23, 2010

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CHEYENA HOUSTON
KLEINHANS, also known as Cheyena
Houston,

Debtor.

BAP No. CO-09-028

DANIEL A. HEPNER, Trustee,

Plaintiff – Counter-
Defendant – Third-Party-
Defendant – Appellee,

v.

CHEYENA HOUSTON KLEINHANS,

Defendant – Counter-
Claimant – Third Party-
Plaintiff – Appellant,

v.

BRETT HILL, ALDEN HILL, HILL &
HILL LLC, MICHAEL BOND, and
ALASCO INVESTMENTS, LTD.,

Third-Party-Defendants.

Bankr. No. 07-19376-SBB
Adv. No. 07-01782-SBB
Chapter 7

OPINION*

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

Before CORNISH, Chief Judge, KARLIN, and BOULDEN¹, Bankruptcy Judges.

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Judith A. Boulden, United States Bankruptcy Judge, United
(continued...)

CORNISH, Chief Judge.

Debtor Cheyena Kleinhans² (“Debtor”) appeals the bankruptcy court’s judgment denying her discharge pursuant to 11 U.S.C. § 727(a)(2)(B).³ Following a trial on the merits, the bankruptcy court entered detailed findings of fact, including its finding that Debtor was not a credible witness. On appeal, Debtor raises for review 96 issues in her Statement of Issues and 22 issues in her Appeal Briefs. Although Debtor objects to combining any of these issues for review, this Court summarizes them into three general assertions of error: 1) the bankruptcy court erroneously determined that she possessed the requisite knowledge and intent to hinder, delay, or defraud her creditors or an officer of the estate; 2) the bankruptcy court’s evidentiary rulings deprived her of due process; and 3) the bankruptcy court’s decisions were the result of its bias and prejudice against her.⁴ After oral argument and review of the record before us, we AFFIRM.⁵

¹ (...continued)
States Bankruptcy Court for the District of Utah, sitting by designation.

² Debtor is also known as Cheyena Houston Perry and so identified herself in the briefs filed with this Court and during oral argument.

³ All future references to “Section” or “§” are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, unless otherwise noted.

⁴ Debtor raised an additional issue of whether the bankruptcy court erred in denying her post-judgment motion for reconsideration. This issue is not properly before this Court since Debtor did not amend her notice of appeal to include the order on the post-judgment motion, as required by Federal Rule of Bankruptcy Procedure 8002(b).

⁵ This Court heard oral argument in this case in Denver, Colorado on January 26, 2010. Accordingly, the Appellee Daniel A. Hepner’s Motion for Oral Argument, filed October 15, 2009, is GRANTED *nunc pro tunc* as of that date.

I. Factual Background⁶

Debtor is a paralegal who was employed by the Larimer County Public Defender's Office in Fort Collins, Colorado during the pendency of her bankruptcy case. At the center of this appeal is a 1968 mobile home (the "Mobile Home") that Debtor acquired from her then-fiancé, Robert Perry ("Perry") on August 7, 2007, in satisfaction of a debt Perry owed her.⁷ A certificate of title in Debtor's name was issued by the State of Colorado on August 31, 2007, but no liens were noted on the title. The Mobile Home was located in a mobile home park in Fort Collins, owned by Alasco Investments, Ltd. ("Alasco"). Neither the Debtor nor Perry ever lived in the Mobile Home.⁸

Prior to Debtor filing bankruptcy, and prior to Perry transferring the Mobile Home to Debtor, Alasco instituted an eviction action in state court against Debtor and Perry to gain possession of the Mobile Home, and was granted an Order of Possession. Perry asserted counterclaims against Alasco in the eviction action. After Perry transferred his interest in the Mobile Home to Debtor, Alasco moved to dismiss Perry's counterclaims for lack of standing. The state court set a hearing on the dismissal of Perry's counterclaims for October 19, 2007.

Debtor filed for relief under Chapter 7 on August 23, 2007. She listed the Mobile Home as exempt property on Schedule C, pursuant to § 522(b)(2), with a

⁶ On September 9, 2009, Appellant's Appendix, filed August 31, 2009, was referred to us for consideration as to whether Appellant satisfied the requirements of Tenth Circuit BAP Local Rule 8009-1(b)(3). We note that Appellant filed an Amended Appendix on September 10, 2009, and it to that compliant Amended Appendix that we cite herein. The following description of the facts is taken from the bankruptcy court's *Memorandum Opinion and Order* at 1-8, in Appellant's Amended App. at 269-276, as well as other documents included in the Amended Appendix, as referenced herein.

⁷ Debtor stated that she and Perry were married in September 22, 2007, but are now legally separated.

⁸ *Transcript of October 12, 2007, 341 Meeting ("Transcript")* at 19, ll. 10-14, in Appellant's Amended App. at 338.

value of \$4,000, but she did not include it as personal property on Schedule B. Shortly before her meeting of creditors, Debtor amended Schedule B to include the Mobile Home, valued at \$4,000. Schedule D was also amended to add Perry as a secured creditor with a claim of \$50 secured by the Mobile Home.

Debtor's meeting of creditors was held on October 12, 2007, at which Debtor was present. At the meeting, appellee Daniel Hepner, Chapter 7 Trustee ("Trustee"), told Debtor that the Mobile Home was property of the estate. Debtor stated that she knew this.⁹ Debtor also testified that she prepared most of the bankruptcy paperwork but was assisted by Perry.¹⁰ Trustee informed Debtor that he did not believe the Mobile Home was exempt property and that he would attempt to sell the Mobile Home as an asset of the bankruptcy estate if it had value.¹¹ Perry also attended the meeting of creditors and informed the Trustee that he was a secured creditor by virtue of a promissory note for \$50 executed by Debtor and secured by the Mobile Home. He also showed Trustee a reaffirmation agreement with the Debtor that he prepared.¹² Trustee told Perry that the automatic stay prevented Perry from enforcing or perfecting any lien he asserted against the Mobile Home.¹³

Shortly after her meeting of creditors, Debtor amended Schedule C to claim the Mobile Home as exempt under Colorado law. On October 18, 2007, one day before the state court hearing on the dismissal of Perry's counterclaims in Alasco's eviction action, Debtor transferred ownership in the Mobile Home to

⁹ *Id.* at 8, ll. 10-12, in Appellant's Amended App. at 327.

¹⁰ *Id.* at 9-10, ll. 13-25 & 1-5, 12, ll. 3-15, in Appellant's Amended App. at 328-329, 331.

¹¹ *Id.* at 25, ll. 1-25, in Appellant's Amended App. at 344.

¹² *Id.* at 16, ll. 11-25, in Appellant's Amended App. at 335.

¹³ *Id.* at 26, ll. 15-20, in Appellant's Amended App. at 345.

Perry, and a new certificate of title was issued in Perry's name. Perry executed a promissory note, dated October 18, 2007, which stated that Debtor's transfer to him was only temporary and that the Mobile Home was to be transferred back to her "as soon as possible after the October 19, 2007 hearing."¹⁴ The bankruptcy court found that Debtor did not notify Trustee of this transfer.

On October 19, 2007, the state court rejected Perry's claims against Alasco and ordered Perry to surrender title to the Mobile Home. A few days later, on October 25, 2007, a reaffirmation agreement between Debtor and Perry was filed in the bankruptcy court, identifying Debtor as the owner of a 1968 vehicle that secured a promissory note to Perry of \$50, payable in monthly installments of \$1. The bankruptcy court declined to approve the reaffirmation agreement.

Trustee objected to Debtor's claim of exemption for the Mobile Home, and the bankruptcy court disallowed Debtor's exemption. On December 6, 2007, Trustee instituted this adversary proceeding, seeking a denial of Debtor's discharge pursuant to § 727(a)(2)(B) based upon her postpetition transfer of the Mobile Home to Perry. Trial was held on January 15, 2009.

The bankruptcy court entered its order and judgment denying Debtor's discharge on May 29, 2009.¹⁵ The court made extensive findings of fact, including the critical facts that: 1) Debtor transferred the Mobile Home to Perry to preserve his counterclaims against Alasco; 2) Debtor never advised Trustee of this transfer; 3) Trustee had negotiated an agreement to sell the Mobile Home to Alasco for \$3,500; and 4) Trustee was forced to retain counsel to assist him in recovering the Mobile Home from Perry for the bankruptcy estate.¹⁶ The bankruptcy court also found that neither Debtor nor Perry were credible

¹⁴ *Promissory Note* at ¶ 4, in Appellant's Amended App. at 308.

¹⁵ *Memorandum Opinion and Order*, in Appellant's Amended App. at 269-77.

¹⁶ *Id.* at 6-7, in Appellant's Amended App. at 274-275.

witnesses, and that they engaged in “repeated, continuous, conscious, and deliberate efforts to hinder and delay the [Trustee’s] administration of the Mobile Home [as an asset of the bankruptcy estate].”¹⁷ The bankruptcy court concluded that Debtor’s transfer of the Mobile Home to Perry and her vigorous efforts to prevent Trustee from administering an asset of the estate were actions taken with the intent to hinder and delay her creditors, warranting a denial of her discharge pursuant to § 727(a)(2)(B).

Debtor filed both a motion for the bankruptcy court to reconsider the judgment and a notice appealing the judgment to this Court on June 8, 2009. Her appeal was premature, but the defect was cured on June 26, 2009, when the bankruptcy court denied the motion to amend the judgment.¹⁸

II. Appellate Jurisdiction and Standards of Review

This Court has jurisdiction over this appeal. Debtor timely filed her notice of appeal from the bankruptcy court’s final order.¹⁹ The parties have consented to this Court’s jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Colorado.²⁰

We review the factual findings of the bankruptcy court for clear error and its legal findings *de novo*.²¹ A bankruptcy court’s finding regarding the requisite element of intent under § 727(a)(2) is a factual determination reviewed under the

¹⁷ *Id.* at 7, *in* Appellant’s Amended App. at 275.

¹⁸ Fed. R. Bankr. P. 8002(b). Debtor did not file an amended notice of appeal, therefore the bankruptcy court’s order denying the post-judgment motion is not properly before this Court.

¹⁹ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002(a).

²⁰ 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

²¹ *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

clearly erroneous standard.²² A factual finding is “clearly erroneous” when “it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.”²³

III. Analysis

As appellant, Debtor has the burden of providing this Court with an adequate record for appellate review.²⁴ As part of that record, Debtor is required to include in her appendix the transcript of the trial upon which she bases her appeal. Pursuant to Federal Rule of Bankruptcy Procedure 8009(b) and Tenth Circuit BAP Local Rules 8006-1(a) and 8009-1(b), Debtor is required to bring all documents necessary for appellate review before this Court in an appendix to her brief, including the transcript: “The appendix must contain all transcripts, or portions of transcripts, necessary for the court’s review.”²⁵ Similarly, Rule 10(b)(2) of the Federal Rules of Appellate Procedure provides:

Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.²⁶

Debtor included neither the trial transcript nor the trial exhibits in her Amended

²² *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 788 (10th Cir. BAP 1997) (bankruptcy court’s findings concerning intent are factual and reviewable under clearly erroneous standard).

²³ *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (internal quotation marks omitted).

²⁴ *Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756, 760-61 (10th Cir. BAP 2006).

²⁵ 10th Cir. BAP L.R. 8009-1(b)(5).

²⁶ Fed. R. App. P. 10(b)(2).

Appendix.²⁷

To deny a debtor's discharge under § 727(a)(2)(B), the movant must establish by a preponderance of the evidence that the debtor transferred or concealed property of the estate after the bankruptcy petition was filed with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of the property.²⁸ Determining a debtor's intent is a question of fact that we can review only by examining the testimony and evidence presented to the bankruptcy court.²⁹ "[A]n appellant who provides an inadequate record does so at his peril."³⁰ Without a transcript and exhibits from the trial, this Court cannot conduct a meaningful review of the bankruptcy court's factual findings and may summarily affirm the decision of the bankruptcy court.³¹

Debtor attempted to submit a second amended appendix consisting of seven additional volumes, including a transcript of her trial and the trial exhibits. However, she did so on December 30, 2009, well after briefing had been completed. By Order entered on January 7, 2010, this Court determined that the second amended appendix would be disregarded as untimely, since briefing was completed on November 9, 2009, none of the briefs contained any reference to her

²⁷ Debtor did include transcripts from: 1) the meeting of creditors; 2) a non-evidentiary hearing on the Trustee's objection to her exemption claims; 3) a June 5, 2008, oral argument; 4) a pre-trial conference; and 5) the trial in another adversary proceeding in her bankruptcy case involving the Mobile Home (*Hepner v. Perry*, Case No. 08-01067-SBB). That adversary proceeding is the subject of BAP Appeal No. CO-09-029.

²⁸ 11 U.S.C. § 727(a)(2)(B).

²⁹ *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 788 (10th Cir. BAP 1997).

³⁰ *Burnett v. Sw. Bell Tel., L.P.*, 555 F.3d 906, 908 (10th Cir. 2009) (internal quotation marks omitted).

³¹ *See Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000).

trial transcript, and the matter had been set for oral argument.³² Debtor was certainly aware that her failure to include the trial transcript and exhibits could be fatal to her appeal since a considerable portion of Trustee's brief was devoted to the argument that this Court must affirm when the transcript is not included in the record on appeal. Debtor was granted an extension of time within which to file a reply to Trustee's Response yet even with notice of the defect she did not attach the transcript or make reference to it in her Reply Brief. Debtor did not seek an extension of time to allow her to order and submit the transcript. Instead, she waited until after briefing was completed and the case was set for oral argument before attempting to submit the transcript. As explained by the Tenth Circuit, it is well established that "we have no obligation to go further and examine documents that should have been included" in the appendix.³³ Since Debtor did not provide the trial transcript or trial exhibits in a timely fashion, nor reference them in her appeal briefs, there is no evidentiary support for her claims that the bankruptcy court's findings of fact were in error.

Debtor argues to this Court that she completely relied upon Perry to advise her and thus could not have formed the requisite intent to hinder and delay her creditors to result in a denial of discharge under § 727(a)(2)(B). She further argues Trustee never made his intentions clear to her that he intended to sell the Mobile Home, but that she believed he wanted her to transfer the property to Perry postpetition. She also claims that the bankruptcy court was biased against her and Perry, and that its evidentiary rulings denied her due process. However, the alleged errors Debtor raises are not corroborated by what little meaningful record she did provide. In fact, the weak record on appeal supports the bankruptcy court's ultimate decision that Debtor's actions served to hinder and

³² *Order Striking Second Amended Appendix*, Docket No. 64746.

³³ *Burnett*, 555 F.3d at 907.

delay her creditors.

Contrary to Debtor's assertions, her statements made under oath in the meeting of creditors indicate that she was an active participant in preparing her bankruptcy schedules. She stated that she filled out all the worksheets, and was assisted by Perry in preparing her bankruptcy petition and schedules.³⁴ She testified that she and Perry prepared post-nuptial agreements purporting to assign all debt associated with the Mobile Home to Debtor.³⁵ It is also evident from that transcript and the record provided from the state court eviction action that well before she filed bankruptcy, Perry and Debtor were engaged in a determined effort to hinder and delay Alasco from gaining possession of the Mobile Home. The bankruptcy court found the pre- and postpetition transfers of the Mobile Home were a continuation of that effort, and the record before this Court supports that finding.

At the § 341 meeting, Trustee clearly stated to Debtor that the Mobile Home was property of the bankruptcy estate, that she was not entitled to an exemption for it, and that he intended to sell the Mobile Home if he determined that it had value.³⁶ He did not state that he had decided to abandon it, and he clearly indicated to Debtor that it was his job to administer property of the bankruptcy estate.³⁷ Thus, her postpetition transfer to Perry appears to have been with full knowledge that Trustee would be opposed to the transfer. Debtor claims that, during the meeting of creditors, she offered to go home and get the title to

³⁴ *Transcript* at 9-10, *ll.* 13-25 & 1-5, 12, *ll.* 3-15, *in* Appellant's Amended App. at 328-29, 331.

³⁵ *Id.* at 18-19, *ll.* 6-25 & 1, *in* Appellant's Amended App. at 337-38.

³⁶ *Id.* at 25, *ll.* 1-25, *in* Appellant's Amended App. at 344. Debtor claims Trustee turned off the recorder during the meeting of creditors, but there is no indication of that in the transcript she provided.

³⁷ *Id.* at 8, *ll.* 10-13, and 25, *ll.* 21-25, *in* Appellant's Amended App. at 327, 344.

the Mobile Home and bring it back to Trustee, but that he declined her offer. This, she argues, supports her belief that he was not interested in the Mobile Home and indicates his tacit approval for her to dispose of assets as she saw fit. Besides the fact that the Bankruptcy Code prohibits a debtor's disposal of assets from a bankruptcy estate without court permission or proper abandonment by a trustee, the transcript of the meeting of creditors contains no such offer from Debtor nor refusal from Trustee.

The record provided also demonstrates that the bankruptcy court dealt fairly with Debtor, without bias or prejudice. The transcript of Debtor's March 11, 2008, hearing on her claim of exemptions reveals that the bankruptcy court was concerned that the problems in the case may delay the entry of Debtor's discharge.³⁸ The bankruptcy court patiently and clearly communicated to Debtor that her actions were making it difficult for the Trustee to administer the estate, which would delay the entry of her discharge, and that legal counsel would be beneficial to her. The bankruptcy court even delayed a deadline for a pleading Debtor was to file, as well as a hearing, until after she received her next paycheck so that she would have funds available to obtain legal counsel.³⁹ The record does not support Debtor's assertions of error.

IV. Conclusion

Without a transcript or exhibits from Debtor's trial, this Court cannot conclude that any findings of the bankruptcy court were clearly erroneous. Therefore, the bankruptcy court's Memorandum Opinion and Order and its Judgment denying Debtor's discharge pursuant to § 727(a)(2)(B) are affirmed.

³⁸ *Transcript of March 11, 2008, Non-Evidentiary Hearing on Trustee's Objection to Debtor's Claims of Exemption* at 12-13, ll. 3-25 & 1-5, in Appellant's Amended App. at 362-63.

³⁹ *Id.* at 14-17, ll. 16-25, 1-25, 1-25 & 1-4, in Appellant's Amended App. at 364-67.