FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 8, 2001
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN-MICHAEL C. ZIMMERLE, Debtor.	BAP No. UT-99-075
DIANE L. COUNTRYMAN, Plaintiff - Appellant, v. JOHN-MICHAEL C. ZIMMERLE, Defendant - Appellee.	Bankr. No. 98-22598 Adv. No. 98-2230 Chapter 7 ORDER AND JUDGMENT*

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

Before PUSATERI, CORNISH, and MICHAEL, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

Appellant Diane Countryman (Plaintiff) appeals the order of the bankruptcy court granting the motion for summary judgment filed by Appellee John-Michael Zimmerle (Debtor), dismissing Plaintiff's complaint to determine a debt nondischargeable and to deny Debtor's discharge. For the reasons set forth below, the order of the bankruptcy court is AFFIRMED.

I. Background.

Before he filed for bankruptcy, Debtor was a tenant in Plaintiff's house for

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

approximately 18 months. The parties agreed that Debtor would complete remodeling and repairs on Plaintiff's home. No written agreement existed that set forth the terms of the remodeling and repair arrangement. After Debtor moved out, he no longer continued to perform the remodeling and repair work. Plaintiff was dissatisfied with the work performed by Debtor and in February 1998, obtained judgment against him in the small claims department in Utah state court in the amount of $3,848 plus costs.

Also before his bankruptcy, Debtor apparently borrowed approximately $5,400 from his girlfriend, Kathy Noall, to purchase a 1989 Pontiac Firebird, with the understanding that the loan would be repaid within a very short time. Title to the Firebird was issued to the Debtor on April 5, 1996. Debtor and Noall were married on May 6, 1996. Debtor was unable to repay the loan and in June 1996, transferred the vehicle title to Noall in satisfaction of the debt owed to her by executing the assignment of title by registered owner. Noall sold the Firebird in July 1998 for $4,000.

Debtor filed for relief under Chapter 7 in March 1998. The transfer of title to the Firebird from the Debtor to Noall was not listed as a transfer in the Debtor's statement of affairs because he believed the transfer was outside the one-year period within which transfers must be reported.[1]

In preparing to file for bankruptcy Debtor completed an intake packet furnished by his attorney that listed the names and addresses of his creditors. The address of the Plaintiff on those documents was correct, but a clerical error was made by Debtor's counsel's office, which transposed the numbers in Plaintiff's address. Nevertheless, Plaintiff received actual notice of the bankruptcy filing, attended the regularly scheduled meeting of creditors, and questioned the Debtor.

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[1] See 11 U.S.C. § 548(a)(1); Official Bankruptcy Form 7, "Statement of Financial Affairs," Question 10.

In June 1998, Plaintiff filed an adversary proceeding seeking to have the debt owed to her deemed nondischargeable. In December 1998, Plaintiff amended her complaint to seek denial of Debtor's discharge. Debtor filed and later amended a motion for summary judgment seeking to dismiss Plaintiff's complaint, and Plaintiff responded. Neither Debtor's original or amended motion for summary judgment nor Plaintiff's response is included in the appendix to the appeal.

The bankruptcy court held a hearing on the motion for summary judgment in October 1999. A transcript of the hearing is included in Plaintiff's appendix. Plaintiff did not appear at the hearing. The court dismissed the 11 U.S.C. § 523(a)(6)[2] claim because Plaintiff failed to prove that Debtor had specific intent to injure the Plaintiff or her home. The court also rejected Plaintiff's argument that the small claims judgment was res judicata to a determination of nondischargeability under § 523(a)(6). The court dismissed Plaintiff's § 727(a)(4)(A) claim that Debtor made a false oath because the address to which bankruptcy notice was sent was incorrect, since the error was made by the attorney's office and because Plaintiff "obviously" had actual notice of the bankruptcy because she appeared at the first meeting of creditors. The court dismissed Plaintiff's claim for relief under § 544, as only the trustee has standing to bring such an action for the benefit of all creditors. The court also dismissed Plaintiff's cause of action under § 727(a)(2) because the transfer of the Firebird was outside the one-year period required by that provision and Debtor did not retain and conceal an interest in the Firebird. Finally, the court denied Plaintiff's claim for relief under the Utah Uniform Fraudulent Transfer Act.

This appeal followed. Debtor filed a Motion to Recalculate Reply Due

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[2] Future references are to Title 11 of the United States Code unless otherwise indicated.

Date, which has been referred to the merits panel and which the Court now denies.

II. Discussion.

We have jurisdiction over this appeal. The order from which Plaintiff appeals is final for purposes of appeal, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001-8002; 10th Cir. BAP L.R. 8001-1; see Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (order is final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'") (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

This Court examines de novo the bankruptcy court's decision granting Debtor's motion for summary judgment. Woodcock v. Chemical Bank (In re Woodcock), 144 F.3d 1340, 1342 (10th Cir. 1998). Under Bankruptcy Rule 7056, which adopts Federal Rule of Civil Procedure 56, summary judgment is permitted where there are no genuine issues of material fact before the court, and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (applying Fed. R. Civ. P. 56); Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992) (same).

Plaintiff asks this Court to find that the bankruptcy court's dismissal of her complaint by granting Debtor's motion for summary judgment was in error. Plaintiff's extensive appendix does not, however, contain a copy of the motion for summary judgment or Plaintiff's response thereto.[3] "'[I]t is counsel's

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[3] After oral argument, Plaintiff mailed additional documents to each Judge's chambers, under the impression that the copies of the appendix originally filed along with her brief were "lost." In fact, the Court received Plaintiff's appendix as originally filed; the appendix was not lost but rather is deficient. The Court did not consider the additional documents that were mailed directly to chambers in violation of 10th Cir. BAP L.R. 8018-2(c), which provides: "All

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responsibility to see that the record on appeal is sufficient for consideration and determination of the issues on appeal.'" Roberts v. Roadway Exp., Inc., 149 F.3d 1098, 1105 n. 3 (10th Cir. 1998) (quoting 10th Cir. R. 10.3). This responsibility extends to an appellant's appendix. See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1237 n. 15 (10th Cir. 1999). Pro se litigants must follow the same rules of procedure as other litigants. Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994).

The Court may decline to review an issue where counsel does not fulfill the responsibility to provide a document necessary for consideration and determination of the issue. See Gowan v. United States Dept. of Air Force, 148 F.3d 1182, 1192 (10th Cir.), cert denied, 525 U.S. 1042 (1998); see also Rios v. Bigler, 67 F.3d 1543, 1553 (10th Cir. 1995) ("It is not this court's burden to hunt down the pertinent materials. Rather, it is Plaintiff's responsibility as the appellant to provide us with a proper record on appeal."). Here, Plaintiff challenges the bankruptcy court's determination that summary judgment was proper and dismissal of her complaint. This Court cannot review the bankruptcy court's determination that summary judgment was proper without reviewing the motion for summary judgment, with its specific verified facts and accompanying affidavits[4], and Plaintiff's response thereto. See, e.g., United States v. Vasquez, 985 F.2d 491, 494 (10th Cir. 1993) ("When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue."). Therefore, by failing to include the motion for summary judgment and response as part of her appendix, Plaintiff

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[3] (...continued)
communications to and filings with the court must be addressed to the Clerk."

[4] A copy of Debtor's "Affidavit Relating to Motion for Summary Judgment" was included in the appendix, independent of the motion for summary judgment itself.

waived any claims concerning the bankruptcy court's finding that summary judgment was proper.[5] See Schupper v. Fourth Jud. Dist. Att. Office, No. 99-1402, 2000 WL 979111 (10th Cir. July 17, 2000).

III. Conclusion.

Debtor's Motion to Recalculate Reply Due Date is DENIED. For the reasons stated, the order of the bankruptcy court is AFFIRMED.

[5] Although we premise our affirmance of the bankruptcy court's ruling that summary judgment was proper and dismissing Plaintiff's complaint on her failure to provide an adequate record for review, we have, to the extent possible, considered Plaintiff's arguments, and we find them to be without merit.