UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE STANFORD MALZAHN ELLSWORTH, Debtor.	BAP No. UT-14-008
CAROL NAYLOR, Plaintiff – Appellee – Cross-Appellant, v. STANFORD MALZAHN ELLSWORTH, Defendant – Appellant – Cross-Appellee.	Bankr. No. 12-27213 Adv. No. 12-02354 Chapter 7 ORDER DISMISSING APPEAL AS MOOT September 3, 2014

Before MICHAEL, KARLIN, and JACOBVITZ, Bankruptcy Judges.

I. INTRODUCTION

In the physical world, a person can only be in one place at one time. The same cannot be said of an appeal of a bankruptcy court's decision. In this case, the bankruptcy court issued a decision that satisfied neither litigant. The ruling generated two appeals, one to a United States District Court, and one before this Court. Over thirty days ago, the district court dismissed the appeal brought before it for lack of prosecution and that order is now final. The appellant in this Court has received all the relief she is entitled to as a matter of law. As a result, there is nothing left for this Court to do. For this reason, this appeal must be dismissed as moot.

II. BACKGROUND

Carol Naylor ("Naylor") and Stanford Malzahn Ellsworth ("Ellsworth") were at one time husband and wife. After several years of wedlock, the parties stipulated in a legal proceeding that the marriage should be determined void ab initio and terminated by annulment (as opposed to dissolved through a decree of divorce).[1] A Utah state court ordered the marriage annulled.[2] As part of the annulment proceeding, judgment was subsequently entered in favor of Naylor and against Ellsworth in the amount of $216,853.53 plus $83,127.17 in pre-judgment interest, including attorneys' fees and costs, for damages incurred by Naylor as a result of Ellsworth's fraudulent behavior (the "State Court Judgment").[3]

Ellsworth filed a Chapter 7 petition and sought to discharge his obligations under the State Court Judgment. Naylor filed an adversary proceeding against Ellsworth, arguing that the State Court Judgment was not dischargeable under two separate theories. Naylor argued that the obligations represented by the State Court Judgment were incurred as a result of fraudulent representations, and were thus non-dischargeable under 11 U.S.C. § 523(a)(2)(A).[4] In the alternative, Naylor argued that the State Court Judgment represented an obligation owed to a "former spouse . . . incurred . . . in the course of a divorce or separation" and thus was non-dischargeable under § 523(a)(15). The bankruptcy court held the State Court Judgment non-dischargeable under § 523(a)(2)(A) as money obtained fraudulently, but rejected her theory that it was similarly non-dischargeable under

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[1] *Stipulation and Agreement to an Order of Bifurcation and Decree of Annulment*, *in* Appellant's App. at 70.

[2] *Order of Bifurcation and Decree of Annulment*, *in* Appellant's App. at 74.

[3] *Findings of Fact, Conclusions of Law and Judgment*, *in* Appellant's App. at 81.

[4] Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

§ 523(a)(15) as a domestic support obligation (the "Bankruptcy Court Order").

Ellsworth timely appealed the Bankruptcy Court Order and elected to have his appeal heard by the United States District Court for the District of Utah (the "District Court").[5] Naylor timely cross-appealed the Bankruptcy Court Order to this Court, arguing that the bankruptcy court erred in determining that the State Court Judgment did not fall within the scope of § 523(a)(15).

The District Court entered an order setting deadlines for the filing of a designation of record, statement of issues on appeal, as well as appellate briefs.[6] For reasons unknown, Ellsworth ignored the District Court, and failed to file any further documents. As a result, on June 24, 2014, the District Court entered an order to show cause why Ellsworth's appeal should not be dismissed for failure to prosecute and set July 15, 2014, as the deadline for a response.[7] Ellsworth again failed to respond. On July 28, 2014, the District Court dismissed the District Court Appeal.[8] The order dismissing the District Court Appeal is now final. As a result, the bankruptcy court's ruling that the State Court Judgment is non-dischargeable is no longer subject to attack.

III. DISCUSSION

Federal law dictates that an appeal is moot when some event has occurred post-appeal that makes it impossible for a court to grant any effectual relief.[9] As this Court has previously indicated,

[A] case is moot when the issues presented are no longer "live" or

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[5] *Case No. 2:14-cv-00131-CW (D. Utah) (the "District Court Appeal"), Docket No. 1.* The Court takes judicial notice of the pleadings and orders filed in the District Court Appeal on its own motion.

[6] *Id., Docket No. 2.*

[7] *Id., Docket No. 3.*

[8] *Id., Docket No. 4.*

[9] *In re Milk Palace Dairy, LLC*, 327 B.R. 462, 466-67 (10th Cir. BAP 2005).

> the parties lack a legally cognizable interest in the outcome. A controversy is no longer "live" if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position. . . . [I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed.[10]

Here, the bankruptcy court found the State Court Judgment non-dischargeable based on one of two alternate theories Naylor presented. Naylor's argument to this Court–that the bankruptcy court erred in not finding the debt was also non-dischargeable as a domestic support obligation under § 523(a)(15)– need not be reached because the finding that the State Court Judgment was non-dischargeable under § 523(a)(2)(A) is no longer subject to review. A ruling by this Court on the § 523(a)(15) issue adds nothing to the relief already granted to Naylor, and would constitute an advisory opinion. We are not in the business of rendering advisory opinions.

IV. CONCLUSION

The bankruptcy court granted Naylor all the relief she asked for–a determination that the State Court Judgment was not dischargeable. The ruling is not subject to reversal. There is no additional remedy this Court can grant, and nothing else this Court can or should do. Accordingly, it is HEREBY ORDERED that this appeal should be, and hereby is, dismissed as moot.

For the Panel:

Blaine F. Bates

Blaine F. Bates
Clerk of Court

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[10] *In re Egbert Dev., LLC*, 219 B.R. 903, 905 (10th Cir. BAP 1998) (citations and internal quotation marks omitted).