UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT
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January 25, 2000

TO: All Recipients of the Captioned Order and Judgment
RE: BAP No. UT-99-036, In re Christensen
Filed December 16, 1999; Hon. Richard L. Bohanon, authoring

Please be advised of the following correction to the captioned decision:

Page 1, caption: "Plaintiff – Appellant" is amended to read "Plaintiff – Appellee", and "Defendant – Appellee" is amended to read "Defendant – Appellant".

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By:
Deputy Clerk

FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 16, 1999
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DEAN H. CHRISTENSEN, Debtor.	BAP No. UT-99-036
STEPHEN W. RUPP, Trustee, Plaintiff – Appellee, v. GLYNDA ANN CHRISTENSEN, Defendant – Appellant.	Bankr. No. 97-24587 Adv. No. 98-2031 Chapter 11 ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, BOHANON, and ROBINSON, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

This court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this court's jurisdiction in that they have not elected to have the appeal heard by the United States District Court for the District of Utah. *Id.* § 158(c); 10th

* 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.

Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely, and the bankruptcy court's order is final within the meaning of § 158(a)(1). *See* FED. R. BANKR. P. 8001-8002.

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. FED. R. BANKR. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

The complaint on appeal arises out of a transfer made by Dean Christensen ("Debtor") to his wife, Glynda Ann Christensen ("Appellant"), which the Trustee-Appellee ("Trustee") sought to avoid under 11 U.S.C. §§ 547 and 548. The bankruptcy court granted the Trustee's Motion for Summary Judgment, voided the transfer under § 547(b), and authorized the Trustee to sell the estate's interest in the property under 11 U.S.C. § 363(h). Appellant contends that the bankruptcy court erred in its decision because: 1) collateral estoppel precludes the judgment; and 2) there was a genuine issue as to a material fact.

For the reasons stated in this opinion, the decision of the bankruptcy court is affirmed.

I. FACTS

In 1974, the Debtor and his wife, the Appellant, purchased a home, taking title jointly. In 1996, the Debtor signed a deed transferring his half interest in the home to his wife. This deed was not recorded until March 1997. In May 1997, the Debtor filed his petition for bankruptcy. Since less than ninety days had passed since Ms. Christensen recorded the deed, the Trustee filed a complaint seeking to avoid the transfer.

Subsequently, a default judgment was entered against the Appellant due to her failure to attend a pretrial conference. The United States District Court for the District of Utah reversed the judgment on the ground of excusable neglect. In its decision, the court stated that "[a]lthough the defendant's case has significant weaknesses, there appears to be enough in dispute under §547 that the matter should be further explored. In particular, there is evidence in the record that the deed was signed and delivered more than ninety days prior to Mr. Christensen filing bankruptcy and there may in fact be a valid transfer of real property."

II. DISCUSSION

A. Collateral Estoppel

Based on the district court's statement concerning the transfer, the Appellant argues that the Trustee was estopped from bringing his motion for summary judgment.

The Trustee responds that since this issue was not presented to the bankruptcy court, the Appellant is precluded from arguing it on appeal. However, because the Appellant did address the issue in the "undisputed facts" portion of her response to the Trustee's Motion for Summary Judgment, this court will review the question of collateral estoppel.

Collateral estoppel "is a doctrine which states that where an issue of fact or law is litigated and established by a valid and final judgment, the issue cannot be relitigated between the parties even though it arises in an action based on a different claim." *Tway v. Tway (In re Tway)*, 161 B.R. 274, 276 (Bankr. W.D. Okla. 1993).

The only issue before the district court was whether the default judgment should be set aside for excusable neglect. One of the many elements it considered was whether the defendant had a meritorious defense. The court's statement concerning delivery of the deed was not a final decision on the merits of the

complaint. It was an evaluation of whether equitable factors, including Appellant's defense, favored setting aside the default judgment for excusable neglect. Since the district court did not decide the delivery issue, its decision did not prevent the Trustee from later bringing a motion for summary judgment. Therefore, the bankruptcy court was not precluded from considering the Trustee's complaint based on the evidence submitted by the parties on the motion for summary judgment.

B. Summary Judgment

Since collateral estoppel does not apply, this court must now examine, de novo, the bankruptcy court's decision. *Woodcock v. Chemical Bank*, 144 F.3d 1340 (10th Cir. 1998); *Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172 (10th Cir. 1996).

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 such that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Mares v. ConAgra Poultry, Inc.*, 971 F.2d 492, 494 (10th Cir. 1992); *Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 994-95 (10th Cir. BAP 1997); *Bearden v. United States ex rel. IRS (In re Bearden)*, 216 B.R. 951, 954 (Bankr. W.D. Okla. 1997).

Appellant argues that summary judgment was inappropriate because an issue of material fact was in dispute. In particular, she argues that under a trust agreement, the property was transferred to her in trust, which would raise factual issues precluding summary judgment. The record, however, contains no evidence of any trust agreement.

While this agreement is not in the record, the Appellant alludes to it in her brief. However, her deposition testimony, which is part of the record, is

sufficient to show that her husband's interest in the property was transferred to her in an individual capacity.

Summary judgment is appropriate if a party can demonstrate, by evidence in the record, an absence of a genuine issue of material fact. Thus, since the Trustee has carried this initial burden, by demonstrating the absence of a genuine issue of material fact, then the Appellant was required to go beyond the pleadings and demonstrate, with admissible evidence, that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. at 323-24; *Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 995 (citing *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995)).

In determining a motion for summary judgment, neither this court nor the trial court looks beyond the record before it. Federal Rule of Civil Procedure 56(c), adopted by Bankruptcy Rule 7056, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. BANKR. P. 7056.

Granted, when evaluating a motion for summary judgment, the facts presented by the evidence are to be construed in the light most favorable to the non-moving party. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Zuchel v. Spinharney*, 890 F.2d 273, 275 (10th Cir. 1989); *Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 995. However, mere allegations do not establish a genuine issue of material fact. FED. R. CIV. P. 56; FED. R. BANKR. P. 7056. *See Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 995.

At oral argument, Appellant's counsel adamantly, but incorrectly, argued that *Pico* allows unverified information contained in a pleading[1] to defeat a properly documented summary judgment motion. On the contrary, *Pico* repeatedly reinforces the need for admissible evidence. The Court, referring to a previous decision, stated that, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in the affidavits, attached exhibits, and depositions submitted . . . must be viewed in the light most favorable to the party opposing the motion." *Pico*, 457 U.S. at 863. The Appellant failed to provide any such evidence. Rule 56(e) of the Federal Rules of Civil Procedure is also clear. It states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party **may not rest upon the mere allegations or denials of the adverse party's pleading**, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e) (emphasis added).

Genuine issues of material fact are established only by admissible evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1985); *Baker v. Penn Mut. Life Ins. Co.*, 788 F.2d 650, 653 (10th Cir. 1986); *Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 995. Admissible evidence, other than affidavits, must be authenticated, unless it is part of the depositions, answers to interrogatories, or admissions on file. *Harris v. Beneficial Okla., Inc. (In re Harris)*, 209 B.R. at 995 (citing 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.10(4)(c)(i) (3d ed. 1997) and 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2722, at 58-60 (2d ed. 1983)).

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[1] Even if *Pico* did stand for such a proposition, the document Appellant's counsel was referring to at the oral argument was merely a brief, not a pleading. The Appellant's answer was silent as to the existence of a purported trust.

In his motion for summary judgment, the Trustee apparently relied on deposition transcripts, the deed, and affidavits. The record on appeal, however, contains only the complaint, answer, and selected excerpts of deposition testimony. However, this evidence alone reflects that: 1) the deed was transferred to the Appellant individually for her benefit; 2) the deed was recorded in March 1997 while the Debtor was insolvent; 3) the transfer was in consideration of an antecedent debt; and 4) as an unsecured creditor, she received more than she would have received in a case under chapter 7. This evidence establishes a prima facie case under § 547(b).

The Appellant merely set forth unverified and unsubstantiated allegations in her briefs. The record on appeal shows that she offered no affidavits or other admissible evidence to refute the Trustee's evidence.

Appellant further argues that, under *Deseret Salt Co. v. Tarpey*, 142 U.S. 241 (1891), the time of transfer occurs at the time of delivery of the deed, rather than the date of recording.[2] However, this reliance is misplaced. The Bankruptcy Code provides that a "transfer of real property other than fixtures . . . is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). Utah law provides that an unrecorded conveyance is void as against a subsequent bona fide purchaser. UTAH CODE ANN. § 57-3-103. Thus, it is clear that, for the purposes of § 547, the transfer took place when the deed was recorded in March 1997.

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[2] Since Appellant is an insider, as defined in 11 U.S.C. § 101(31), the date would extend from 90 days to one year prior to the petition. Thus, even if the transfer did take place in August or September 1996, § 547 would still be applicable. Absolutely nothing in the record before us supports Appellant's claim of a 1994 transfer. This appears to be a fabrication on appeal.

Based on the evidence in the record, examined in a light most favorable to the Appellant, there is ample support for the trial court's ruling.

III. CONCLUSION

Accordingly, for the reasons set forth in this order and judgment, the decision of the bankruptcy court is AFFIRMED.