FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
September 28, 1999
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE GLENN E. SCHOTTLER, also known as G. E. Schottler, also known as Glen E. Schottler, Debtor.	BAP No. KS-99-026
CAROLYN M. SCHOTTLER, Plaintiff–Appellee, v. GLENN E. SCHOTTLER, also known as Glen E. Schottler, also known as G. E. Schottler, Defendant–Appellant, MARK SCHOTTLER, Defendant.	Bankr. No. 97-14687 Adv. No. 98-5029 Chapter 7 ORDER AND JUDGMENT*

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

Edgar Wm. Dwire and Warren G. Jones of Malone, Dwire and Jones, Wichita, Kansas, for Defendant–Appellant.

Joy Kay Williams of Ray Hodge & Associates, L.L.C., Wichita, Kansas, for Plaintiff–Appellee.

Before McFEELEY, Chief Judge, CORNISH, and MATHESON, Bankruptcy Judges.

* 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.

MATHESON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

In this dispute between former spouses, the Court affirms the order of the bankruptcy court determining that a certain debt due from the husband to the wife is nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

I. Jurisdiction and Standard of Review.

With the consent of the parties, a Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments and orders of Bankruptcy Courts within the circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As neither party has opted to have this appeal heard by the United States District Court for the District of Kansas, each is deemed to have consented to the jurisdiction of the Bankruptcy Appellate Panel. 10th Cir. BAP L.R. 8001-1(d).

A Bankruptcy Appellate Panel may affirm, modify or reverse a Bankruptcy Court's judgment or order, or remand for further proceedings. Conclusions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552 (1988). Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; *First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir. 1985). Factual findings, even those based on stipulated facts presented by the parties, are subject to a "clearly erroneous" standard of review. *Adair State Bank v. American Cas. Co.*, 949 F.2d 1067, 1072 (10th Cir. 1991); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985). "A finding of fact is 'clearly erroneous' if 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." *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985)

(citation omitted).

II. Background.

At the time of their divorce the parties entered into a property settlement agreement that was incorporated into their divorce decree. That agreement specified, in pertinent part:

> The parties agree that as a property settlement agreement that the Respondent - wife shall be granted a judgement [sic] against the Petitioner - husband in the sum of ($20,000) twenty thousand dollars which sum shall bear no interest. This sum represents the Respondent's interest in the real estate situated at 4717 South Greenwood, Wichita, Kansas.
>
> The Respondent shall receive the amount of her judgment upon either the sale of 4717 S. Greenwood, Wichita, Kansas, or upon the death of the Petitioner, Glenn E. Schottler, whichever occurs first.

Subsequently, the husband conveyed the property to the wife by quitclaim deed. A few months later, the wife reconveyed the property to the husband, also by quitclaim deed. Sometime thereafter, the husband conveyed the property to his son by a previous marriage. The husband filed bankruptcy, and the wife commenced this adversary proceeding seeking a determination that the judgment debt is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2), (a)(5), (a)(6), or (a)(15), or, in the alternative, that the husband's discharge should be denied pursuant to 11 U.S.C. § 727.

The bankruptcy court dismissed the claims under section 727 and under sections (a)(2), (a)(5) and (a)(6) of 523, but held that the debt is nondischargeable under section 523(a)(15). This appeal followed. No cross appeal has been filed. Thus, our consideration is limited to the issues assigned as error by the husband.

III. Discussion.

In his answer to the adversary complaint, the husband alleged:

> 4. In response to paragraph 13 of Plaintiff's complaint, Glenn E. Schottler denies that said $20,000.00 was never satisfied and alleges that said judgment was satisfied when, on December 15, 1993, the Defendant Glenn E. Schottler, quit claimed the property at 4717 S. Greenwood, Wichita, Kansas, to Carolyn Schottler, in satisfaction of said debt . . . ; that on March 1, 1994, Carolyn Schottler quit claimed

> the said property . . . back to Glenn Schottler . . . ; and that said transactions satisfied the said $20,000.00 judgment.

This issue was again asserted by the husband in the pretrial order wherein the husband contended that "the quit claim transactions between the parties discharged the judgment imposed by the Decree of Divorce." (R. 160.) The husband now contends that the bankruptcy court erred in not determining that the judgment was satisfied by the quitclaim deed given by the wife to the husband.

The initial problem with the husband's argument in this Court is that, while the issue was asserted in the pleadings and the pretrial order, it was never argued to the bankruptcy court at the time of, or after, trial. Thus, the bankruptcy court never was requested to rule on this issue. It is not the province of this Court to take up or rule on issues that were not presented to and ruled upon by the trial court. *Rademacher v. Colorado Ass'n of Soil Conservation Dists. Med. Benefits Plan,* 11 F.3d 1576, 1571 (10th Cir. 1993); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992); *O'Connor v. City & County of Denver,* 894 F.2d 1210, 1214 (10th Cir. 1990); *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421 (10th Cir. 1987).

Beyond the procedural deficiency of the argument, it is not meritorious. The evidence was in conflict. First, the wife testified that she did not intend to take the property in satisfaction of the judgment and that, upon the reconveyance, the husband explicitly acknowledged his obligation to pay the wife the $20,000, plus an additional $10,000. Then, the husband testified that he did not recall this undertaking. The bankruptcy court concluded that the husband had done so. This factual finding is supported by the evidence and is certainly not clearly erroneous.

The husband argues that the wife, by deeding the property back to the husband, "voluntarily and intentionally renounced her right to the property." The problem with the argument is that it assumes that what the wife had by reason of the judgment was solely an interest in specific real property. There is nothing in

the record to support this argument. What the wife had, by the terms of the property settlement agreement, was a money judgment for $20,000, payable when and if the property was sold or upon the death of the husband. There is no evidence to show that the judgment was even a lien on the property. There also is no evidence in the record to indicate that the property ever could have been sold for enough to satisfy the wife's judgment and, indeed, the terms of the property settlement agreement do not condition payment of the judgment on the realization of $20,000 from the sale of the property. Given the state of the record, there is clearly no "manifest error" that this Court must correct on this issue. *See Sac & Fox Nation v. Hanson,* 47 F.3d 1061, 1063 (10th Cir. 1997) (appellate court will not review issues raised for the first time on appeal "except for the most manifest error" (internal quotation marks omitted)).

The second point of error asserted by the husband pertains to the court's findings and conclusions under 11 U.S.C. § 523(a)(15). He argues that the bankruptcy court erred in finding that the husband had failed to show that he would be unable to pay the $20,000 judgment owed the wife.

In addressing the issue of which party has the burden of proof of each element in section 523(a)(15), the bankruptcy court analyzed the authorities that have interpreted that section and concluded that the court would follow the majority rule. Under that rule, the party asserting that the debt is nondischargeable must first establish that there is a debt that was incurred in the course of a marital dispute. Once that showing is made, the burden of proof shifts to the debtor who then must prove either an inability to pay the debt under section 523(a)(15)(A) or, under section 523(a)(15)(B), that the discharge would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. While the question of how section 523(a)(15) should be applied has not been determined in this jurisdiction, the parties assert no error in the court's

analysis and application. We, therefore, accept that interpretation without further consideration.

In its findings, the bankruptcy court concluded that it could not determine the husband's disposable income "since he did not present any evidence regarding expenses and his testimony regarding his income was not credible." (R. 191.) In light of the payment terms of the judgment, the court doubted the applicability of the disposable income test in any event and concluded that the husband "has not presented this Court with any evidence that he is unable to pay this debt or that the benefit he would receive from the discharge of this debt outweighs the detriment to the Plaintiff." (R. 192.)

The husband testified at trial that his current income is less than $1,000 a month, testimony that the judge did not find to be credible. There was no evidence presented of the husband's expenses. Now, on appeal, the husband argues that his Schedule J, Current Expenditures of Individual Debtors, showed that his monthly expenses exceeded his income and that it was error for the bankruptcy court to have not considered this evidence.

Rule 201(c) of the Federal Rules of Evidence permits a judge to take judicial notice, whether requested or not, and it has been held that it is not error for a court to take judicial notice of related proceedings and records in cases before the court. *Florida Bd. of Trustees of the Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.,* 514 F.2d 700, 704 (5th Cir. 1975). Further, a court shall take judicial notice "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). In this case the record does not reflect that the husband ever requested that the court take judicial notice of the schedules, nor was any argument made that the schedules would support the husband's case. Thus, no error can be predicated on the failure of the bankruptcy court to take judicial notice of documents that were not called to the court's

attention. Neither is it appropriate for this Court to consider the Schedule J information, which has now been included in the record on appeal, inasmuch as it was never presented to nor considered by the bankruptcy court. *Magnum Foods, Inc. v. Continental Cas. Co.,* 36 F.3d 1491, 1502 n.12 (10th Cir. 1994).

Further consideration by this Court of the husband's Schedule J information would not profit the husband's arguments in this appeal. That the husband may, today, not be earning a positive income is not proof that he will not be able to satisfy the judgment at some time in the future when the property is sold, or that his estate may not be able to satisfy the debt at his death. The bankruptcy court's findings in this regard are clearly correct.

IV. Conclusion.

For the foregoing reasons, the judgment of the bankruptcy court is AFFIRMED.