

August 7, 2003

**Barbara A.
Schmerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE GALEN BEACH and VICKIE
BEACH,

Debtors.

BAP No. KS-03-021

J. MICHAEL MORRIS,

Plaintiff – Appellee,

v.

GALEN BEACH and VICKIE BEACH,

Defendants – Appellants.

Bankr. No. 01-14473-7
Adv. No. 02-5246
Chapter 7

ORDER AND JUDGMENT*

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

Before BOHANON, CORNISH, and McNIFF, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

The parties did not request oral argument, and 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. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The Appellants appeal the bankruptcy court’s “Order on Motion for Default Judgment Against Defendants and Renewed Motion for Sanctions.” Because the bankruptcy court’s decision is not supported by evidence, we reverse the bankruptcy

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

court's order and remand the matter for further hearing on the Appellee's "Motion for Default Judgment Against Defendants and Renewed Motion for Sanctions."

I. Standard of Review

"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, 557-58 (1988). The issue here is primarily factual since it hinges on whether the evidence before the bankruptcy court supports its decision to revoke the Appellants' discharges. Regardless of the standard of review applied to the instant case, we must conclude that the bankruptcy court's decision is not supported by evidence.

II. Background

The Appellants are the debtors in the underlying Chapter 7 bankruptcy case. The Appellee, the Trustee, filed a motion to compel the Appellants to turn over copies of their 2001 federal and state income tax returns. (Appellee App. at 34.) Following a hearing on the Appellee's motion and the Appellants' response, the bankruptcy court entered an order granting the motion. (Appellee App. at 44-47.) The Appellants appealed that order to the Bankruptcy Appellate Panel for the Tenth Circuit ("BAP"), and the BAP affirmed the bankruptcy court. (Appellee App. at 48-54.)

The Appellee then brought a complaint to revoke the Appellants' discharges pursuant to 11 U.S.C. § 727(d)(3) and for sanctions. (Appellee App. 63-64.) In response, they filed a document entitled "Conditional Acceptance." (Appellee App. at 65-67.) Following a hearing, the bankruptcy court struck the Appellant's "Conditional Acceptance." (Appellee App. at 70-71.)

The Appellee then filed his motion for default judgment and renewed motion for sanctions, and the Appellants responded. (Appellee App. at 72-77 & 78-83.) The bankruptcy court conducted a hearing on the Appellee's motion for default judgment

and renewed motion for sanctions. (Appellee App. at 92.) The Appellants appeared at that hearing pro se. (Appellee App. at 92; Appellant App. at 19.)

At the hearing, the Appellee informed the bankruptcy court that he had received what appeared to be copies of the Appellants' 2001 tax returns; however, the record does not show that those documents were either offered or received into evidence. (Appellant App. at 20-22.) Apparently, based on the bare statement of the Appellee, the bankruptcy court warned the Appellants that, "[Y]ou've submitted a tax return copy to Mr. Morris that I haven't seen and is not in evidence, but it sounds to me like it is patently fraudulent. And if it is patently fraudulent, it is as though you have not obeyed my order yet." (Appellant App. at 22.)

The Appellee did not offer copies of the supposed tax returns into evidence at the hearing; however, he later filed them as a "Submission of Document." (Appellee App. at 84-90.) The Appellee also filed an affidavit of the Appellants presumably in support of the supposed tax returns.¹ (Appellee App. at 89-90.)

At the conclusion of the hearing on the Appellee's motion for default judgment and renewed motion for sanctions, the bankruptcy court granted the Appellee's motion. The Appellants' discharges were revoked, and the bankruptcy court ordered them to pay sanctions in the amount of \$ 2,288.44. The bankruptcy court entered a judgment to that effect on March 3, 2003, and it is that judgment that the Appellants now appeal. (Appellant App. at 26-27.)

III. Discussion

Upon review of the transcript of the hearing, we must conclude that the bankruptcy court's decision to revoke the Appellants' discharges and to order them to

¹ Included in the Appellee's Appendix at page 91 is what appears to be a letter from the Insolvency Section or the Department of Treasury dated June 4, 2003. That letter states that the Appellants had not filed a tax return for the period ending December 31, 2001. Clearly, this letter was not before the bankruptcy court when it rendered its decision to revoke the Appellants' discharges on March 3, 2003. The letter is dated after that date.

pay sanctions is not supported by evidence. In particular, we note that the Appellee offered no evidence to support his motion. For instance, the purported tax returns provided to the Appellee were neither offered nor received into evidence at the hearing, even though the record shows the Appellee later “filed” them with the bankruptcy court. Nonetheless, the bankruptcy court surmised that the supposed tax returns must be “patently fraudulent.” The supposed tax returns were not in evidence before the bankruptcy court when it entered its order.

Even though the Appellee contends in his brief that he made a proffer of evidence to the bankruptcy court, the transcript of the hearing does not support that contention. Nowhere in the transcript do we find mention of such a proffer.

Under these circumstances, it is unnecessary to progress further on the merits of the bankruptcy court’s decision. Our decision on this appeal should not be construed in any manner as requiring the bankruptcy court to render a particular decision on rehearing of the Appellee’s motion for default judgment and renewed motion for sanctions.

IV. Conclusion

Accordingly, we reverse the bankruptcy court’s order granting the Appellee’s motion for default judgment and renewed motion for sanctions and remand for further hearing on such motions.²

² The Appellee has filed a motion to file his brief out of time. That motion will be granted. However, his application for sanctions for bringing a frivolous appeal is denied.