

March 3, 2003

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION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

IN RE ANTHONY CARL SCHOTT, also
known as Tony Schott, and MICHELLE
DAWN SCHOTT, also known as Michelle
Dawn Weik, also known as Michelle Dawn
Graham, also known as Michelle Schott,

Debtors.

BAP No. WY-02-073

ANTHONY CARL SCHOTT and
MICHELLE DAWN SCHOTT,

Bankr. No. 98-10268
Chapter 7

Appellants,

v.

ORDER AND JUDGMENT*

WYHY FEDERAL CREDIT UNION,

Appellee.

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

Before PUSATERI, CLARK, and CORNISH, Bankruptcy Judges.

CLARK, 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.

Anthony Carl and Michelle Dawn Schott, the Chapter 7 debtors (“Debtors”),

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

have appealed two Orders of the United States Bankruptcy Court for the District of Wyoming. WyHy Federal Credit Union, the Appellee herein (“WyHy”), has moved to dismiss the appeal as it pertains to one of the Orders (“Motion to Dismiss”). For the reasons stated below, we DENY WyHy’s Motion to Dismiss, and AFFIRM the bankruptcy court.

I. Background

The Debtors borrowed \$20,130.37 from WyHy, and the debt was secured by two of the Debtors’ automobiles. The Debtors were required under a Note to make semi-monthly payments to WyHy in the amount of \$197.62. These payments were made by automatic withdrawal from the Debtors’ WyHy account. In conjunction with the Note, the Debtors purchased declining term life insurance, with a premium of \$658.08 to be paid over the term of the Note. The life insurance premium did not increase the amount of the Debtors’ semi-monthly payments, but rather increased the term of the Note from 130 months to 140 months.

After the Debtors filed their Chapter 7 petition, they reaffirmed the debt to WyHy pursuant to a Reaffirmation Agreement. This Agreement states that the reaffirmed debt is in the amount of \$14,431.94, and that the Debtors were required to make 90 payments in the amount of \$197.38.

The Debtors received a discharge, and remained current on their reaffirmed debt to WyHy. In keeping with its pre-Reaffirmation Agreement practice, WyHy deducted sums from the semi-monthly payments made by the Debtors to pay the life insurance premium.

After a period of time, the Debtors believed that they had paid the debt due under the Reaffirmation Agreement, but WyHy disputed this fact, indicating that the Debtors still owed it approximately \$3,000. The Debtors requested that the bankruptcy court hold WyHy in contempt for collecting a larger debt than they had reaffirmed in the Reaffirmation Agreement (“Contempt Motion”). In particular, the Debtors argued that

they had not reaffirmed the term life insurance debt, or any postpetition interest debt. The bankruptcy court denied the Motion for Contempt, holding that the Reaffirmation Agreement incorporated the entire debt due under the Note, including the interest and term life insurance premium. The Debtors appealed to this Court.

A panel of this Court affirmed the bankruptcy court in part, holding that it did not err in determining that the interest and life insurance premium debt were reaffirmed in the Reaffirmation Agreement.¹ The panel remanded one issue to the bankruptcy court, stated as follows:

Finally the Debtors argue that WyHy violated their discharge by making an additional monthly debit of up to \$13.32 more than the reaffirmed semi-monthly payment from their account. The bankruptcy court did not address this argument in its order. In the absence of any findings by the bankruptcy court, we cannot know the basis for its ruling and cannot consider the Debtors' arguments here. For this reason we remand to the bankruptcy court for findings on this issue.

For the Reasons set forth above, . . . We REMAND to the bankruptcy court for findings on the issue of whether WyHy violated the Debtors'[] discharge by debiting sums from the Debtors' account other than the payment authorized by the Reaffirmation Agreement.²

Based on evidence that had been introduced in conjunction with the Motion for Contempt, the bankruptcy court held on remand that WyHy was not in contempt because it had only collected debts reaffirmed under the Reaffirmation Agreement. It issued an "Order on Remand" stating:

The BAP remanded this case for a determination of whether WyHy violated the debtors' discharge by debiting sums from the debtors' account other than the payment authorized by the reaffirmation agreement.

The reason this court did not make that determination in the first instance is because WyHy did not debit the debtors' account for any sums in excess of the \$197.38 semi-monthly payments [authorized by reaffirmation]. The debtors' apparent representations to the BAP are in error.

The cost of the term insurance was prorated over the life of the loan. The amount of each monthly term insurance payment declined over

¹ In re Schott, 282 B.R. 1 (10th Cir. BAP 2002).

² Id. at 9.

the term of the reaffirmation agreement from \$13.72 to \$2.97. A careful review of the amortization schedule admitted into evidence at the hearing shows that there was no separate deduction for the term insurance. The monthly payment was advanced by WyHy and recouped from the next \$197.38 semi-monthly payments. That was accomplished by increasing the principal due on the note by the amount of the advance.

The term insurance premiums were not in excess of the payments stated on the reaffirmation agreement. A simple calculation of the term and payment amount contained in the reaffirmation agreement shows the debtors agreed to pay a total of \$17,764.20. WyHy introduced an amortization schedule at the hearing showing the total of all payments to principal, interest and insurance was \$17,631.97.

The term insurance was [as held by the BAP] reaffirmed as part of the contract, WyHy did not debit the account more than the reaffirmed amount of \$197.38 semimonthly, and there was no violation of the discharge injunction.³

The Debtors filed a “Motion to Amend” the Order on Remand, and this Motion was denied by the bankruptcy court (“Amendment Order”). The Debtors then filed a Notice of Appeal (“NOA”) and Corrected Notice of Appeal (“Corrected NOA”) with this Court.

II. Appellate Jurisdiction and WyHy’s Motion to Dismiss

This Court has “jurisdiction to hear appeals . . . from final judgments, orders and decrees[.]”⁴ A decision is ordinarily considered final and appealable under 28 U.S.C. § 158(a)(1) “only if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”⁵ This Court’s jurisdiction also is contingent on the absence of a timely election to have the appeal heard by the district court,⁶ and on the timely filing of a notice of appeal pursuant to Federal Rules of Bankruptcy Procedure 8001 and 8002.

³ Order on Remand at 2-3, *in* Appellants’ Appendix at 4-5.

⁴ 28 U.S.C. § 158(a)(1).

⁵ Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)), *quoted in* Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 768 (10th Cir. BAP 1997).

⁶ 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

We have jurisdiction to review the Order on Remand and the Amendment Order. Both Orders are “final orders” under § 158(a)(1). The parties have not elected to have the Debtors’ appeal heard by the United States District Court for the District of Wyoming. It is undisputed that the Debtors timely filed a Notice of Appeal from the Amendment Order. And, contrary to the arguments raised by WyHy in its Motion to Dismiss discussed below, we conclude that the Order on Remand was timely appealed by the Debtors.

Within ten days of the entry of the Order on Remand, the Debtors filed their Motion to Amend, thus tolling the time to file a Notice of Appeal from the Order on Remand until the tenth day after the entry of an order disposing of the Motion to Amend.⁷ On the tenth day after the entry of the Amendment Order denying the Motion to Amend, the Debtors timely filed their NOA.⁸ The NOA designates the Amendment Order as the order appealed, and the Amendment Order is attached thereto. No reference is made to the Order on Remand in the NOA. But, one day after they filed the NOA, the Debtors filed the Corrected NOA, designating both the Order on Remand and the Amendment Order as the Orders appealed. Because the Order on Remand was designated only in the Corrected NOA, which was filed eleven days after the entry of the Amendment Order, WyHy contends that the Order on Remand was not timely appealed by the Debtors. We disagree.

Federal Rule of Bankruptcy Procedure 8001(a), governing the content of notices of appeal, contains no requirement that appellants designate the order or judgment appealed. This Rule states: “The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their

⁷ See Fed. R. Bankr. P. 8002(a) & (b).

⁸ Id. at Rule 8002(a).

respective attorneys, and (3) be accompanied by the prescribed fee.”⁹ Official Form 17 is the Official Form referred to in Rule 8001(a), and that Form suggests that appellants “describe” the order, judgment or decree entered. As expressly recognized in Rule 8001(a)(1), however, strict adherence to Form 17 is not required.¹⁰ Failure to properly designate the order appealed, therefore, is not a jurisdictional bar to review.¹¹ Rather, under certain circumstances, the Court may decline to review an order that has not been listed in a notice of appeal or dismiss an appeal.¹² But, this case does not warrant such action because the Debtors filed their Corrected NOA expressly designating the Order on Remand for appeal only one day after they filed the timely NOA and prior to any briefing or dispositive action in the case.

Our analysis is supported by cases discussing Federal Rule of Appellate Procedure 3(c)(1)(B). This Rule, which applies to appeals filed in the United States Court of Appeals, states that appellants must “designate the judgment, order, or part thereof being appealed[.]”¹³ Thus, Rule 3(c)(1)(B) is stricter than Rule 8001(a) because it expressly requires appellants to designate the order being appealed.¹⁴ Despite the

⁹ Fed. R. Bankr. P. 8001(a); *compare* Fed. R. App. P. 3(c)(1)(B) (requiring a designation of the “judgment, order or part thereof being appealed”).

¹⁰ *See also* Fed. R. Bankr. P. 9009 (governing Official Forms).

¹¹ *See United States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 761 (9th Cir. 1994), *quoted in In re Dudley*, 249 F.3d 1170, 1174 (9th Cir. 2001).

¹² Fed. R. Bankr. P. 8001(a) (“An appellant’s failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the . . . bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.”)

¹³ Fed. R. App. P. 3(c)(1)(B).

¹⁴ This case is different than cases interpreting Fed. R. App. P. 3(c)(1)(A) and Fed. R. Bankr. P. 8001(a)(2), both of which involve the jurisdictional requirement that the parties to an appeal be listed in a notice of appeal. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988). The Tenth Circuit and this Court have held that Rule 8001(a)(2) is stricter than Rule 3(c)(1)(A) because Rule 8001 contains no provision similar to Rule 3(c)(4) forbidding the dismissal of an appeal for failure “to name a party whose intent to appeal is otherwise clear from the notice.” Fed. R. App.

(continued...)

stricter Rule, the Tenth Circuit liberally construes the contents of a timely-filed notice of appeal to include orders or judgments not specifically listed, provided that appellees are not misled or prejudiced.¹⁵ Also, the Tenth Circuit has held that when an appellant only designates an order denying a motion for a new trial in its timely-filed notice of appeal, it may nevertheless be appropriate to consider the judgment on the merits as the order appealed if the appellant's intent to appeal the judgment on the merits is clear.¹⁶

Accordingly, failure to designate the Order on Remand in the timely-filed NOA does not bar this Court's jurisdiction. We construe the Corrected NOA as a motion to amend the timely-filed NOA to include the Order on Remand as an Order appealed, and grant the construed motion. Such a result does not prejudice WyHy because the Corrected NOA was filed only one day after the NOA, and the Debtors' intent to appeal the Order on Remand was clear prior to any briefing or dispositive action in the case.¹⁷ Furthermore, WyHy has not alleged in its Motion to Dismiss any prejudice that it has incurred or will incur as a result of our review of the Order on Remand.

For the reasons stated, WyHy's Motion to Dismiss is denied. The Court has jurisdiction to review the bankruptcy court's Order on Remand and its Amendment Order. Each is considered below.

III. Discussion

¹⁴ (...continued)
P. 3(c)(4). Storage Tech. Corp. v. United States District Ct., 934 F.2d 244, 247-48 (10th Cir. 1991); Groetken v. Davis (In re Davis), 246 B.R. 646, 655-56 (10th Cir. BAP 2000), *aff'd in relevant part without published opinion*, 35 Fed. Appx. 826, 829 & n.2 (10th Cir. 2002). This analysis, however, does not apply to the designation of an order in a notice of appeal, particularly in light of the fact that Rule 8001(a) does not require such a designation.

¹⁵ See United States v. Morales, 108 F.3d 1213, 1223 (10th Cir. 1997).

¹⁶ See, e.g., Artes-Roy v. City of Aspen, 31 F.3d 958, 961 n.5 (10th Cir. 1994); Grubb v. FDIC, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989).

¹⁷ Cf. Fed. R. Bankr. P. 8002(c)(2) (appellants may seek extension of time to file a notice of appeal up to twenty days after time to appeal has expired on showing of excusable neglect).

1. The bankruptcy court did not err in entering its Order on Remand

The Debtors' appeal of the Order on Remand again disputes the inclusion of the life insurance premium in the reaffirmed debt. As noted above, another panel of this Court previously decided that the life insurance premium debt was reaffirmed by the Debtors in the Reaffirmation Agreement.¹⁸ We are thus bound by that decision,¹⁹ and will not reconsider the issue in this appeal.

The Debtors appear to take issue with the bankruptcy court's factual findings related to WyHy's computation and accounting of the life insurance premium. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous"²⁰ "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the evidence is left with the definite and firm conviction that a mistake has been committed."²¹ Our review of the entire record does not leave us with a definite and firm conviction that a mistake has been committed by the bankruptcy court. Therefore, the Order on Remand is affirmed.

2. The bankruptcy court did not abuse its discretion in entering the Amendment Order

The Debtors' Motion to Amend, filed within ten days of the Order on Remand, was a motion for relief under Federal Rule of Civil Procedure 59, made applicable in bankruptcy under Federal Rule of Bankruptcy Procedure 9023. Orders denying Rule 59 motions, such as the Amendment Order, are reviewed for abuse of discretion.²² Under this standard, the bankruptcy court's decision will not be disturbed unless we

¹⁸ Schott, 282 B.R. at 9.

¹⁹ In re Blagg, 223 B.R. 795, 804 (10th Cir. BAP 1998) (decision of one panel of the Court binds other panels).

²⁰ Fed. R. Bankr. P. 8013.

²¹ United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), *quoted in* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

²² Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1331 (10th Cir. 1996).

have “a definite and firm conviction” that the bankruptcy court made a “clear error of judgment”²³ Here, we do not have a definite and firm conviction that entry of the Amendment Order, denying the Debtors’ Motion to Amend, was an error of judgment, especially in light of the fact that the Debtors provided no grounds for relief under Rule 59.

IV. Conclusion

For the reasons stated herein, WyHy’s Motion to Dismiss is DENIED. The Order on Remand and the Amendment Order are AFFIRMED.

²³ Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation omitted).