United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Carol S. Dimeff v. Deborra S. Good**
Case Number: **01-01165**
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
Deborra S. Good,
Debtor.

No. 7-99-13657 MS

Carol S. Dimeff,
Plaintiff,
v.

Deborra S. Good,
Defendant.

Adv. No. 01-1165 M

ORDER ARISING OUT OF DISCOVERY CONFERENCE

On September 18, 2002, the undersigned judge ("the Court") conducted a discovery conference in this adversary proceeding. Appearing at the hearing were the Plaintiff Carol S. Dimeff (who was late in appearing for the hearing; however, the Court assessed no sanctions) and Debtor/Defendant's counsel George Moore. The Court informed the parties of its tentative conclusions concerning the adversary proceeding and the discovery disputes that it arrived at as a result of a review of the files in this adversary proceeding and in the preceding adversary proceeding no. 99-1190 (Dimeff v. Good filed October 1, 1999). The Court then heard extended presentations from Plaintiff and Defendant (through her counsel), asked questions and made comments during the presentations, and issued an oral ruling. This order is the

written ruling resolving, at least on an interim basis, the discovery disputes between the parties.

The Court's review of the files discloses that the first adversary proceeding (no. 99-1190) sought relief under both 11 U.S.C. § 727 and § 523, asserting among other things that the Debtor had made a false oath with respect to the schedules, statement of affairs and § 341 meeting. Debtor had filed her chapter 7 petition on July 16, 1999. Plaintiff filed the complaint in 99-1190 on October 1, 1999 (doc 1), and filed a supplemental complaint on February 3, 2000 (doc 7) addressing among other things the continued § 341 meeting of January 5, 2000. The first adversary proceeding was decided against Plaintiff, and a portion of that ruling was appealed to the Tenth Circuit Bankruptcy Appellate Panel, which affirmed the bankruptcy court's rulings. This, the second adversary proceeding, no. 01-1165, was filed August 7, 2001 (doc 1). The complaint in this adversary proceeding seeks the revocation of Debtor's discharge (entered in the main case on April 8, 2001 [doc 32]). The facts recited in the complaint focus on the events covered in the first adversary complaint (primarily calendar year 1999). And during the presentation at the hearing, Plaintiff argued alleged events and facts solely from the period covered by the first adversary

proceeding. Many of the factual allegations in the pleadings and in Plaintiff's oral presentation assert that during the course of the first adversary proceeding there was a failure to disclose accounts and related information, particularly an account at Los Alamos National Bank. For purposes of this decision, the Court has taken as proven the allegations in the complaint and in Plaintiff's oral presentation.

Although the complaint cites § 727(e)(1) as authority for the complaint (doc 1, opening paragraph), which subsection is only the time limit for filing an action for revocation, it is clear from paragraph 28 and the prayer for relief that the complaint in no. 01-1165 seeks relief under § 727(d)(1), (2) and (3). The complaint also seeks relief such as requesting the Court to take judicial notice of the file (something which the Plaintiff is entitled to as a matter of evidence, see Rule 201 of the Federal Rules of Evidence for United States Courts and Magistrates – "Judicial Notice of Adjudicative Facts" – but which is not something that constitutes a cause of action) and to require the disgorgement of fees paid counsel post petition as if the case had been a chapter 13 case and to elevate Plaintiff's claim to a priority status in the chapter 7 case. Given that the case was always a chapter 7 case, that therefore the fees paid by Debtor to her counsel were

presumably her own postpetition acquired property, and that there is no authority for directing disgorged fees to be paid to a specific unsecured creditor, that request also appears not to constitute a cause of action.

Section 727(d)(1) permits revocation if "such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until afer the granting of such discharge;..." In this case, the prior adversary proceeding makes clear that Plaintiff did know, or had reason to know, of the fraud.

In addition, however, Plaintiff's complaint in large part is an assertion that the discovery process in the first adversary proceeding failed; that is, there were numerous pieces of information, documents, etc. that she did not obtain for use during the first adversary proceeding. The problem with that argument is that the time for dealing with that failure was during the first adversary proceeding, not this one. If Debtor refused to provide discovery, then Plaintiff's remedy was to obtain an order from the presiding judge (Judge McFeeley) to deal with the problem. And if the presiding judge failed to provide the requisite order, then the remedy was to appeal. Relitigating those issues in a subsequent adversary proceeding is not the solution.

Plaintiff also argues that Debtor's failure to disclose information constituted fraud on the Court. Federal Rule of Civil Procedure 60(b) provides in part: "This rule does not limit the power of a court to entertain an independent action ... to set aside a judgment for fraud upon the court." To set aside a judgment for fraud on the court, however, one must show "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Bailey v. Internal Revenue Service, 188 F.R.D. 346, 355 (D. Az. 1999). The Courts refuse to apply this concept when the wrong was only between the parties and involved no direct assault on the judicial process. Id. at 356. Allegations of nondisclosure during pretrial discovery do not constitute grounds for an independent action for fraud upon the court under Fed.R.Civ.P. 60(b). Id.

Federal Rule of Civil Procedure 60(b)(3) also allows relief from a final judgment for fraud. Caselaw has broken down fraud as being either "extrinsic" or "intrinsic". Extrinsic fraud prevents a party from having an opportunity to present his claim or defense in court. Id. at 354. Intrinsic fraud is fraud which pertains to the issues involved in the original action and usually involves perjury or forged or altered documents. Id. Relief may be available for extrinsic

fraud; relief is generally not available for intrinsic fraud. Id. See also Muncrief v. Mobil Oil Company, 421 F.2d 801, 803 n. 2 (10th Cir. 1970). The sort of fraud that Plaintiff complains of relates to actions during the prior case and would be "intrinsic". It does not permit another trial if Plaintiff was unable to establish the fraud at the first trial.

Section 727(d)(2) permits revocation if “the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or entitlement to, such property, or to deliver or surrender such property to the trustee,...” Debtor’s alleged failure to disclose the Los Alamos National Bank account could have been discovered by Plaintiff in the first action; indeed, she concedes in the complaint that she sought discovery from that bank in preparation for the trial, and that evidence about the account came out during the trial. The doctrine of res judicata or issue preclusion requires that any matter that was litigated or could have been litigated in the first trial cannot be relitigated. See, e.g., Clark v. Haas Group, Inc., 953 F.2d 1235, 1238 (10th Cir.) cert. denied 506 U.S. 832 (1992):

> Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. "Stated alternatively", under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.

(Citations omitted.) All these matters, including Plaintiff's allegation that Debtor's actions constituted an attempt to hinder and delay her creditors (doc 1, paragraph 28; see § 727(a)(2)), could also have been litigated in that action and therefore are precluded from being litigated in this action. See id. See also Brown v. Felsen, 442 U.S. 127, 131 (1979)("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.")

Section 727(d)(3) denies a debtor a discharge if "the debtor has refused, in the case... to obey any lawful order of the court, other than an order to respond to a material question or to testify;...," incorporating § 727(a)(6). The remainder of the subsection deals with refusals to answer questions which the court directs a debtor to answer, with or without an invocation of the Debtor's Fifth Amendment rights. Plaintiff alleges, in paragraph 28, that Debtor "refus[ed] to obey a lawful order and answer a material question approved by

the court....” There is no recitation of an order issued by Judge McFeeley in the chapter 7 case that was not obeyed by Debtor. Nor is there an allegation that Debtor refused to answer a material question when directed by Judge McFeeley.

It is thus this Court’s conclusion that no further discovery demands should be imposed on Debtor, given that the complaint, based on this Court’s examination of the files and consideration of Plaintiff’s presentation at the hearing, should be dismissed. Therefore this Court will not order any further discovery to take place, pending the filing and disposition of a motion for summary judgment or other dispositive motion directed at the complaint.

IT IS THEREFORE ORDERED that Debtor/Defendant Good has no further obligation to respond to any further discovery demands until a further order of the presiding judge, presumably following an adjudication of whether Plaintiff may maintain this action.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on September 23, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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