UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. RI 00-081

IN RE: ANTHONY MARTIN,
Debtor.

KATHIE FALLON,
Appellant,

v.

ANTHONY MARTIN and SHERYL SERREZE, TRUSTEE,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Rhode Island
(Hon. Arthur N. Votolato, U.S. Bankruptcy Judge)

Before
KENNER , FEENEY, BOROFF, U.S. Bankruptcy Appellate Panel Judges

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Jeffrey C. Blake and Damon M. D'Ambrosio, on brief for the Appellant.

Russell D. Raskin and Raskin & Berman, on brief for the Appellee Anthony Martin.

February 2, 2001

Per Curiam:

Creditor Kathie Fallon appeals from a bankruptcy court judgment that overruled her objections to the Debtor's discharge under 11 U.S.C. §§ 727(a)(3) (for concealment or destruction of financial documents without justification) and 727(a)(4)(A) (for knowingly and fraudulently making a false oath in the bankruptcy schedules) and rejected her complaint for a determination that the Debtor's debt to her was excepted from discharge under 11 U.S.C. §§ 523(a)(2)(A) (as a debt for credit obtained by fraud)[1] and 523(a)(6) (as a debt for willful and malicious injury).[2] On appeal, Fallon argues that the bankruptcy judge improperly gave preclusive effect to prior inconsistent statements that she, and attorneys acting on her behalf, had made in an affidavit and a complaint they filed in state court proceedings between the parties. In essence, Fallon contends, the bankruptcy

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[1] The complaint includes no count under § 523(a)(2)(A), but during the trial both parties made repeated references to a count under that subsection, the court indicated that its conclusion (that Ms. Fallon had not sustained her burden of proof) applied to a count under § 523(a)(2)(A), and the appellant discusses the elements of that exception from discharge on appeal. Accordingly, we assume for purposes of this opinion that the matter adjudicated below included a count under § 523(a)(2)(A).

[2] The Bankruptcy Appellate Panel has jurisdiction over this appeal by virtue of 28 U.S.C. § 158(c)(1). We note that the judgment at issue did not resolve a pending motion by the defendant, against Ms. Fallon and her original counsel, for sanctions under F.R.BANKR.P. 9011. We hold that the judgment was nonetheless final for purposes of appellate jurisdiction under 28 U.S.C. § 158(a). *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 199, 108 S.Ct. 1717, 1720, 100 L.Ed.2d 178 (1988) ("A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."); *U.S. v. Kouri-Perez*, 187 F.3d 1, 13 (1st Cir. 1999) (per *Budinich,* interlocutory sanction order against defendant's attorney for abuse of discovery was separately appealable from judgment on merits); *Turnbull v. Wilcken*, 893 F.2d 256 (10th Cir. 1990) (order that resolved all substantive issues on merits was final for purposes of appeal, even where issues regarding award of sanction remained unadjudicated); *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205, 208 (5th Cir. 1989) (a judgment disposing of the merits is final despite postponement of a motion for attorney fees as sanctions); and *Cleveland v. Berkson*, 878 F.2d 1034, 1036 (7th Cir. 1989) (the pendency of motions for sanctions under Rule 11, when the district court definitively and completely has disposed of the entire case on the merits, does not render the district court's judgment nonfinal).

judge held that, as a matter of law and not merely of credibility, the prior statements estopped her from proving facts to the contrary on her objections to discharge and dischargeability. The allegation at issue—that the Debtor had given Fallon a mortgage—was crucial to the success of each of her counts; the prior statements indicated that he had never given her a mortgage.

On appeal, "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." F.R.BANKR.P. 8013. Upon full review of the record, we find that the estoppel theory was, at best, only an alternate and unnecessary basis for the judgment below.[3] The bankruptcy judge not only permitted Fallon to adduce her evidence but also considered her evidence and found that she had failed to carry her burden of proof on all significant issues.[4] These findings of fact were not clearly erroneous but amply justified; and, standing alone and without benefit of the estoppel theory, they fully support the disposition below. Accordingly, the judgment of the bankruptcy court is AFFIRMED.

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[3] It is not clear whether the bankruptcy judge relied on this theory at all. He did not state that Ms. Fallon was so estopped, only that "there's *almost* an estoppel situation from having parties come in to disavow actions and . . . pleadings that have been filed in behalf of clients while the attorney-client relationship exists." (Decision transcript, p.5, emphasis added.) Because we rule that the judgment below is sound even without recourse to this theory, we need not determine whether the bankruptcy judge adopted the theory as a ruling of law and, if so, whether the ruling was in error.

[4] Judge Votolato stated: "[O]n the issues where Fallon bears the burden of proof to support the basis for her claim, i.e., that she made this loan only after Martin had executed a real estate mortgage in her favor, as to this and all the surrounding detail there's a total failure by the plaintiff to come even close to sustaining her burden of the evidence." (Transcript of Decision, pp. 3-4) Later he added: "In conclusion Fallon also loses because her prior inconsistent statements, both by herself and her attorneys, pretty much do her in on the merits of the adversary proceeding, and she also cannot prevail as she simply hasn't met her burden of proof as to any significant issue."