RECORD NO. 23-2084

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN RE: DEBORAH FAYE PARKER

Debtor.

DAN GREGORY MARTIN,

Plaintiff - Appellant,

v.

DEBORAH FAYE PARKER,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

REPLY BRIEF OF APPELLANT

SUBMITTED BY:

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SUMMARY OF REPLY ARGUMENT

The issues in this appeal are important and go to the very heart of the purposes underlying the Bankruptcy Code. This Court is asked to determine the degree of deference to be afforded to bankruptcy judges in their factual findings of fraudulent intent. Appellee, Deborah F. Parker ("Parker") wants the courts to bless her fraudulent behavior because she claims to be acting "out in the open" in running to bankruptcy to discharge her only true debt, when she is perfectly capable of satisfying it. (Appellee Response Br. at 22).

After trial on the merits, the Bankruptcy Court considered all the evidence before it and determined that the State Judgment debt was non-dischargeable, and excepted from discharge under the embezzlement exception of 11 U.S.C. § 523(a)(4). This was because, in the Bankruptcy

Court's judgment, Parker came into possession of Morton's assets lawfully, but converted them with fraudulent intent.

The Bankruptcy Court was clear in its factual finding that Parker acted with fraudulent intent in the Non-Dischargeability Order. JA 262.

Rather than give the required due regard to the Bankruptcy Court's opportunity to judge the credibility of witnesses in making its factual finding of Parker's fraudulent intent, the District Court improperly substituted its own judgment for that of the Bankruptcy Court, looking behind not only the Bankruptcy Court, but also the Virginia Circuit Court, and erred in its review. JA 589-607.

The District Court's ruling provides a veritable road map for future debtors to follow to obtain an improper discharge of a debt that they have means to pay, but simply do not want to pay. The Response Brief of Appellee ("Parker's Response Brief") does not attempt to provide any meaningful citation to the record or applicable case law for her sweeping and inaccurate statements, and confuses the issues on appeal.

The District Court should be reversed, and the Bankruptcy Court should be affirmed.

REPLY ARGUMENT

I. Parker's Response Brief Contains No Meaningful Citation to the Record, the Joint Appendix, or to Any Precedential Legal Authority, and is Full of Inaccuracy Regarding these Proceedings.

In her Response Brief, Parker includes only one single reference to the Joint Appendix (Appellee Response Br. at 15), and one citation to an out-of-circuit bankruptcy court case from Colorado (Appellee Response Br. at 21). By failing to comply with the requirements of Rule 28(b) of the Federal Rules of Appellate Procedure, Parker misleads this Court as to the facts and the record established below. Accordingly, this Court should reject Parker's unsupported factual assertions and erroneous legal conclusions as presented in her Response Brief.

Rule 28(b) of the Federal Rules of Appellate Procedure makes key elements of Rule 28(a) applicable to formal briefs filed by an appellee in federal court appellate proceedings. Specifically, Rule 28(b) provides that "[t]he appellee's brief must conform to the requirements of Rule 28(a)(1)-(8) and (10)," with exceptions made for those portions that are optional for an appellee to include in a formal brief. The Rules require that the argument "[section of the brief] . . . must contain . . . [the party's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies." Fed. R. App. P. 28(a)(8)(A); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (rejecting claims of appellant for failure to comply with Rule 28(a)(8) predecessor). If included, an appellee's statement of the case must also include "appropriate references to

the record" consistent with Rule 28(a)(6) and 28(e). Fed. R. App. P. 28(a)(6), 28(e), and 28(b). Parker's Response Brief fails in both regards.

a. Examples of Factual Inaccuracies in Parker's Response Brief.

Parker's Response Brief includes several statements that are directly contrary to the evidence in the record, and fails to provide any reference or citation to support her positions. For example, and without limitation, Parker states that "over a time period that spanned nearly two decades . . . Morton added [Parker] to a number of his bank accounts as a joint account holder." (Appellee Response Br. at 6). The record reflects that, in truth, Parker was added as a joint bank account holder on those accounts only after the death of Peggy, and at Parker's own request. JA 381-382. Parker also states, without any reference to the record, that "[s]he also testified that after a number of checks started arriving in the mail following her father's passing, that she called each bank/institution . . . [regarding] the proceeds that were sent to her . . . ." (Appellee Response Br. at 9-10). This factual assertion is not supported by the record. Indeed, there is no statement of any kind from her testimony referencing any such check(s) arriving to her in the mail, or that this supported any belief that she could keep the funds.[1] Parker's new factual claims are simply not in the record, and were not presented at trial.

[1] Appellant has searched the Joint Appendix, and Parker's testimony, for the words "check" or "mail" and concluded that Parker's assertion is not supported, and no such reference is contained therein. JA 369-424.

Parker further asserts that "[t]he [D]istrict [C]ourt agrees" with her arguments below "that Mr. Martin did not even plead embezzlement." (Appellee Response Br. at 11). Again, this is a misstatement of the facts and procedural posture of this case. The District Court explicitly did not reach Parker's first assignment of error in the first-level appeal below regarding whether Martin had pleaded embezzlement. JA 283, JA 594, n.6. Parker did not cross-appeal the District Court's failure to reach that issue, and it is not before this Court. Furthermore, Parker's repeated statements that the embezzlement exception was otherwise not "argued" by Martin's counsel at trial, or that Martin's counsel did not intend to pursue that exception is a mischaracterization of the trial record that exploits the fact that arguments of counsel are expressly excluded from the record on appeal in bankruptcy court proceedings in this jurisdiction.[2] *See*, E.D. Va., Local Bankruptcy Rule 8009-1.

Parker's misleading and incorrect statements that "the state judgment does not form the basis for Martin's claim against Parker in the bankruptcy case" or that "the bankruptcy court was not called upon to determine the dischargeability of a debt arising from a state court judgment" demonstrates a fundamental misunderstanding of bankruptcy law, and Parker cites no

[2] Were the closing argument portion of the trial transcript included in the record, it would demonstrate that Martin's counsel was amply prepared at trial to discuss applicable case law and elements for the embezzlement exception, and did so, arguing that the embezzlement exception to discharge applied.

authority for them. (Appellee Response Br. at 11, 17). On the contrary, the Fourth Circuit has very clearly stated that where a bankruptcy court is examining the dischargeability of a debt, and the underlying debt has been reduced to a state court judgment, then the only task the bankruptcy court is authorized or directed to do is determine the dischargeability of the judgment. *Heckert v. Dotson (In re Heckert)*, 272 F.3d 253, 257 (4th Cir. 2001) (bankruptcy court called upon and authorized "to determine whether or not the state judgment is dischargeable"). Indeed, where there is already a final state court judgment, the bankruptcy court "cannot issue its own judgment on the debt to replace the state court judgment previously obtained." *Id.* This is because all the bankruptcy court "is called upon, or authorized to do, is to determine whether or not the state judgment is dischargeable." *Id* That is precisely what the Bankruptcy Court did in this case.[3] JA 262.

Parker also asserts, without citation or reference, that Appellant's Opening Brief "is patently false" with regard to the District Court's independent review of the state court records and claims the "District Court did not pull any records." (Appellee Response Br. at 19). However, Parker ignores the District Court's own statements indicating that the independent review was, in fact, conducted *sua sponte* to reach state court filings not included in the evidence before the Bankruptcy Court. JA 590 at n.2 (District Court relying upon judicial notice to independently review additional state

[3] In this case, it is the District Court that issued its own judgment to replace the state court judgment and erred in doing so.

court records); JA 590 (District Court citing review of state court motion for summary judgment); JA 068-089 (state court motion for summary judgment not included with Plaintiff's evidence below).

b. Parker's Statements of Law are Unsupported by the Law in this Jurisdiction or Even by the Single Case She Cites.

Despite repeated references to words generally associated with criminal matters, such as "guilt" or "the accused," Parker's Response Brief only references a single bankruptcy court case from Colorado to support her interpretation of the elements of the embezzlement exception at issue here. (Appellee Response Br. at 21) *Citing MacArthur Co., v. Cupit (In re Cupit)*, 514 B.R. 42, 46 (Bankr. D. Colo. 2014). It is well established that unpublished or out-of-circuit opinions from other courts do not constitute binding precedent in the Fourth Circuit, and are of limited utility when there is otherwise already clear binding precedent on the issue. *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980).

Although it has been cited by some local courts for its analysis on the *fiduciary defalcation* exception, the *Cupit* case cited by Parker is of limited utility for this Court's analysis of the issues on this appeal, and is otherwise clearly distinguishable from the case at issue here. *See, e.g.*, *Liberty Mut. Ins. Co. v. Ward (In re Ward)*, 578 B.R. 541, 549 (Bankr. E.D. Va. 2017); *Chavis v. Mangrum (In re Mangrum)*, 599 B.R. 868, 876-78 (Bankr. E.D. Va. 2019); *Commercial Cash Flow, L.L.C., v. Matkins (In re Matkins)*, 605 B.R. 62, 103-

05 (Bankr. E.D. Va. 2019); and *Cincinnati Ins. Co., v. Chidester (In re Chidester)*, 524 B.R. 656, 661-662 (Bankr. W.D. Va. 2015).

The *Cupit* case does not support Parker's position because it is distinguishable in key areas. The court in *Cupit* specifically found that the debtor there, a roofing contractor, always intended to pay its obligation to the creditor. *In re Cupit*, 514 B.R. at 59 (Bankr. D. Colo. 2014). In that case, a roofing contractor who had been paid on several jobs had used funds received on certain projects to pay debts associated with older projects, and ultimately filed for bankruptcy protection as separate state court lawsuits mounted on unpaid jobs. *Id.* at 47-48. A supplier brought a non-dischargeability suit relying upon a Colorado statute imposing a special fiduciary duty on the holder of such funds. *Id.* The *Cupit* court found that the fiduciary defalcation exception applied as to the majority of the claim, relying on the Colorado statutory duty, and found that debt to be non-dischargeable.[4] *Id.* at 48-54.

Importantly, the *Cupit* court also found that a debtor is reasonably determined to be on notice once a lawsuit has commenced that there may be a legitimate contrary claim to the funds (such as a fiduciary trust imposed by statute), and where a debtor still uses the funds at issue in the lawsuit, the

[4] When the debtor in the *Cupit* case appealed the non-dischargeability determination, and failed to comply with the appellate rules or supply the required appendix and record, the District Court affirmed the bankruptcy court and refused to "of its own accord, remedy [debtor's] failure to provide a sufficient record" for the court to review on appeal. *In re Cupit*, 541 B.R. 739, 750 (D. Colo. 2015).

debtor demonstrates either willful blindness, or conscious disregard to the risk that the lawsuit may have an adverse outcome. *Id.* at 53.

The *Cupit* court also reviewed the embezzlement exception as to the balance of the supplier's claim, and found that the debtor there "fully intended to pay [supplier] at a later date," had actually made payments to supplier, and was using the funds to make payments on construction jobs, and therefore did not have an "intent to permanently deprive" creditor of its due. *Id.* at 59.

Here, Parker was absolutely on notice that Martin had made a colorable claim to the estate assets and funds, and her actions in continuing to make luxury purchases and transfers, while the State Court Lawsuit was proceeding (and especially after judgment had been entered against her) certainly demonstrate support in the record for the Bankruptcy Court's factual finding that she acted with fraudulent intent. JA 254-256, JA 411-412. Parker, unlike the debtor in *Cupit*, was clearly found by the Bankruptcy Court to have engaged in "wrongful" behavior, has not paid "one cent" on the debt owed to Martin, has admitted she has always had the ability to repay her single creditor in full, but filed bankruptcy to avoid paying, and was found to have demonstrated her fraudulent intent by her actions. JA 257-266.

Parker's assertions are therefore unsupported by the record on appeal and by applicable case law.

II. District Court Improperly Substituted its Judgment for that of Bankruptcy Court and Should be Reversed.

Parker's Response Brief makes no attempt to counter Martin's arguments regarding the limits of the District Court's role on appellate review, and provides no legal support for her stream-of-consciousness level statements on this issue.

The Bankruptcy Court's determination of non-dischargeability was well reasoned and supported by the record in this case. The Bankruptcy Court's finding of fraudulent intent on the part of Parker is supported in the record and is a finding of fact that should not have been disturbed except upon clear error. *Rish Equip. Co. v. Joe Necessary and Son, Inc. (In re Joe Necessary and Son, Inc.)*, 475 F. Supp. 610, 614 (W.D. Va. 1979) ("finding of . . . intent calls for a factual finding by the Bankruptcy Judge").

In reversing the Bankruptcy Court, the District Court indicated that it found clear error in the Bankruptcy Court's findings of fact regarding whether the funds were property of the Estate and whether Parker acted with fraudulent intent. JA 602-605.

"The clearly erroneous standard is a demanding one." *Bate Land Co. LP v. Bate Land & Timber LLC* (*In re Bate Land & Timber LLC)*, 877 F.3d 188, 198 (4th Cir. 2017). It is not clearly erroneous for a trial court to weigh evidence and reach a conclusion that another judge would have disagreed with *had it been sitting* in the place of the finder of fact. *Id.* The United States Supreme Court has set a clear standard for this analysis when it stated that

"[i]f the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court [sitting on appeal] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). This standard applies "even when the [trial] court's findings do not rest on credibility determinations, but are based on . . . documentary evidence or inferences from other facts." *Id.*

Clearly, the District Court has demonstrated that it would likely have weighed the evidence differently had it been sitting as the trial court, finder of fact, in the first instance. But that was not the role of the District Court in this case. In this case, the District Court was sitting in appellate review of the Bankruptcy Court, and failed to give proper deference to the finder of fact. "The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573.

The Bankruptcy Court, as the proper finder of fact, "may infer intent from the debtor's actions and surrounding circumstances" for the purposes of inquiry under Section 523(a)(4). *KMK Factoring, L.L.C., v. McKnew* (*In re McKnew)*, 270 B.R. 593, 632 (Bankr. E.D. Va. 2001). The Bankruptcy Court's inferences and factual findings are entitled to significant deference, and should not have been disturbed except upon a showing of clear error, not present here.

Here, although the Bankruptcy Court did not note an *explicit* finding of Parker's credibility (or lack thereof) in its Non-Dischargeability Order

(JA 252-267, JA 604), there is no requirement that a court use specific words in this regard. The Bankruptcy Court *did* explicitly find that she had acted with fraudulent intent, *despite* her personal testimony to the contrary. JA 262. It can be reasonably inferred from the Bankruptcy Court explicitly finding she acted with fraudulent intent that the Bankruptcy Court necessarily did *not* find Parker's testimony to be credible on this issue.

It was improper for the District Court to substitute its judgment for the Bankruptcy Court and find good faith and credibility where the Bankruptcy Court found fraudulent intent. The result sets a detrimental precedent, limiting the Bankruptcy Courts in this jurisdiction in the exercise of their discretion when making determinations regarding the credibility of witnesses, factual findings regarding intent or fraud under the Bankruptcy Code, and otherwise preserving the integrity of the bankruptcy process.

CONCLUSION

This is not an instance where an honest but unfortunate debtor is seeking a fresh start. Parker has been clear and brazen in her intent to use the skirts of the bankruptcy court to hide from the consequences of her fraudulent behavior. The Bankruptcy Court found fraudulent intent, and the District Court overstepped its appellate role in reversing that factual finding, and supplanting it with its own finding of good faith and credibility.

For the foregoing reasons, Plaintiff-Appellant requests that this honorable Court REVERSE the District Court and AFFIRM the Bankruptcy Court's Final Order and Judgment.

[*Remainder of page intentionally left blank.*]

RESPECTFULLY SUBMITTED,

DAN GREGORY MARTIN

Dated: April 16, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opening Brief of the Appellant is compliant with type-volume limits because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this brief was prepared with a proportionally spaced typeface (Times New Roman) using Microsoft Word in 14-point font, and contains 2,802 words.

By: */s/ Brian H. Richardson*
Counsel for Plaintiff-Appellant