

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SUSAN MESSERSCHMITT,

Appellant,

DECISION AND
ORDER

v.

94-CV-6587L

GEORGE M. REIBER, TRUSTEE,

Appellee.

BACKGROUND

Appellant, Susan Messerschmitt ("Messerschmitt"), appeals from a decision of the United States Bankruptcy Court, Western District of New York, (Ninfo, J.) dated September 29, 1994, that denied her motion pursuant to Rule 9024 of the Bankruptcy Rules¹ for an order vacating the Bankruptcy Court's dismissal of her Chapter 13 case. For the reasons discussed, *infra*, the Bankruptcy Court's order is, in all respects, affirmed.

¹Bankruptcy Rule 9024 incorporates Rule 60 of the Federal Rules of Civil Procedure, with certain exceptions not applicable here.

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FACTS

Messerschmitt, the owner of a small floral business filed a Chapter 13 bankruptcy petition on June 30, 1992. The Chapter 13 Plan ("the Plan"), which was confirmed on August 5, 1992, required Messerschmitt to pay \$297.00 per month to the Trustee for a period of sixty months.

On or about February 19, 1993, the Trustee sent Messerschmitt a letter notifying her that her Plan was in default due to her failure to maintain the required payments. As of that date, the Trustee had received only a single payment of \$297.00, posted on October 12, 1992.

In September, 1993, when Messerschmitt was almost ten payments in arrears, the Trustee brought a motion before the Bankruptcy Court to dismiss the Plan pursuant to 11 U.S.C. § 1307(c) for failure to make the required payments under the Plan. The Bankruptcy Court granted the relief and entered a conditional order dismissing the case unless Messerschmitt satisfied certain conditions. The order required Messerschmitt to pay all arrears under the plan within sixty days and further provided for the automatic dismissal of the case if any future Plan payment was delinquent for more than ten days.

Although Messerschmitt did pay the arrears within the required sixty days, she failed to make regular monthly payments thereafter. Between December, 1993 and August, 1994, Messerschmitt made only one \$600.00 payment to the Trustee. In light of Messerschmitt's violation of the conditional order, the Trustee submitted a final order of dismissal to the Court in August, 1994, and that order was entered on August 24, 1994.

Messerschmitt never appealed the dismissal order. However, on September 12, 1994, she moved for reinstatement of her Chapter 13 Plan by making a motion for relief from the final dismissal order under Rule 9024. The Bankruptcy Court denied the motion, finding that there was no basis for the court to vacate the final order of dismissal. Notice of entry of the order denying reinstatement of the Chapter 13 Plan was filed on October 3, 1994. This appeal followed.

DISCUSSION

I. Standard of Review

Bankruptcy Rule 8013 states: "On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceeding. Findings 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 witness." Bankruptcy Rule 8013.

In reviewing a decision of the bankruptcy court, this Court "must accept the Bankruptcy court's findings of fact unless clearly erroneous', and will reverse the Bankruptcy court 'only if [it is] left with the definite and firm conviction that a mistake has been committed.'" In re Schubert, 143 B.R. 337, 341 (S.D.N.Y. 1992), citing, In re Mansville Forest Prods. Corp., 896 F.2d 1384, 1388 (2d Cir. 1990). Conclusions of law are reviewed de novo. In re Mansville, 896 F.2d at 1388, citing Brunner v. New York State Higher Educ. Services, Corp., 831 F.2d 395, 396 (2d Cir. 1987).

II. Dismissal of Chapter 13 case pursuant to 11 U.S.C. § 1307(c)

Messerschmitt contends that the Bankruptcy court wrongfully dismissed her Chapter 13 case pursuant to 11 U.S.C. § 1307(c)(6) without proof of a material default. I decline to consider the merits of this contention. The issue of whether the final order of dismissal was improperly granted is not before this Court because Messerschmitt did not timely appeal the final order of dismissal.

Bankruptcy Rule 8002(a) provides that a notice of appeal of an order must be filed within 10 days of the date of entry of the order being appealed. While Bankruptcy Rule 8002(b) does provide that if a party makes a timely motion under Bankruptcy Rule 9024, the time for appeal runs from the date of entry of the order disposing of the motion. However, this provision only applies if the Rule 9024 motion was filed no later than 10 days after entry of the judgment.

In the present case, the Bankruptcy court entered its final order of dismissal on August 24, 1994. Messerschmitt never filed an appeal from that decision, and she filed her Rule 9024 motion on September 12, 1994, 19 days after entry of the final dismissal order.

Messerschmitt now requests this Court to review the propriety of the final order of dismissal under the guise of a Rule 9024 motion. Rule 9024 should not be used as a substitute for appeal. Such relief is granted only when exceptional circumstances prevented the moving party from seeking redress through the usual channels. In re Zimmerman, 869 F.2d 1126 (8th Cir. 1989). There is nothing in the record to indicate the presence of any extraordinary circumstances that prevented Messerschmitt from filing an appeal of the order of dismissal.

Another basis for refusing to consider the issue of the materiality of the default is that Messerschmitt never raised this issue in the Bankruptcy court. During the hearing on Messerschmitt's Rule 9024 motion, Messerschmitt admitted that plan payments were not made. However, there is no indication from the transcripts of the hearing that she contended that the default in payment was not material. Since this issue was not argued in front of the Bankruptcy court and was not a basis for its decision, the issue should not be examined on appeal. Haile v. N.Y.S. Higher Education Services Corp., 90 B.R. 51, 56 (W.D.N.Y. 1988).

Thus, the only issue before this Court is whether the Bankruptcy court abused its discretion in denying Messerschmitt's Rule 9024 motion for relief from the final order of dismissal.

III. Bankruptcy Court's Denial of Debtor's Motion for Relief from Order Pursuant to Rule 60 of the Federal Rules of Civil Procedure

Messerschmitt objects to the Bankruptcy Court's denial of her motion pursuant to Rule 9024 for relief from the Bankruptcy Court's final dismissal order. Rule 9024 incorporates Rule 60, Fed. R. Civ. P. Messerschmitt argues that the Bankruptcy Court considered Rule 60(b)(1)-(5) but did not consider Rule 60(b)(6)² in its denial of her motion. Messerschmitt contends that the totality of the circumstances warrants relief from the final order of dismissal.

²Rule 60(b)(6) provides that a court may relieve a party from an order for "any other reason justifying relief from the operation of the judgment."

Reading the transcript of the hearing on Messerschmitt's motion, dated September 19, 1994, it is the opinion of this court that the Bankruptcy Court did take Rule 60(b)(6) into consideration. In fact, Judge Ninfo specifically stated that he did not see any basis to exercise his discretion to vacate the final order of dismissal.

It is well settled that motions under Rule 60(b) are addressed to the sound discretion of the court and are generally granted only upon a showing of exceptional circumstances. Mendell on behalf of Viacom, Inc. v. Gollust, 909 F.2d 724 (2d Cir.), cert. granted 498 U.S. 1023, aff'd 501 U.S. 115 (1991). Appellate review of a decision to grant or deny relief under this rule is restricted to determining whether the court abused its discretion. In the Matter of Emergency Beacon Corporation, 666 F.2d 754 (2d Cir. 1981). Messerschmitt had several opportunities to demonstrate her ability to comply with the Chapter 13 Plan's requirements. Her substantial default on the original plan prompted the Trustee to petition the Court for dismissal. Judge Ninfo gave plaintiff yet another opportunity when his dismissal order was entered conditionally. That order required Messerschmitt to pay the arrears, which she did, and make timely monthly payments, which she failed to do. It was not a case where plaintiff was guilty of a minor breach. She failed to make payments pursuant to the conditional order for several months. Under the circumstances, plaintiff was given every opportunity to proceed under the Chapter 13 Plan.

Based on the record, I find that the Bankruptcy Court did not abuse its discretion in denying Messerschmitt's motion for relief from the final order of dismissal of her Chapter 13 bankruptcy case.

CONCLUSION

The decision of the Bankruptcy Court denying Messerschmitt's motion for relief from the final order of dismissal is affirmed and the appeal is dismissed.

IT IS SO ORDERED.



DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
May 5, 1995.