

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN THE MATTER OF WILLIAM	:	
DAWLEY,	:	
	:	Bankruptcy No. 01-32215 (DWS)
Debtor.	:	Adversary No. 1-1148
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WILLIAM DAWLEY,	:	
	:	
Appellant,	:	CA 04-2140
	:	
v.	:	
	:	
ESTATE OF STANFORD HARRIS,	:	
	:	
Appellee.	:	

MEMORANDUM

BUCKWALTER, S. J.

January 11, 2005

Presently before the Court are Appellant’s Brief, Appellee’s Motion to Dismiss, Appellant’s Cross-Motion for Order, *Nunc Pro Tunc*, to Produce and File Trial Transcript and Response in Opposition to Motion to Dismiss, and Appellee’s Reply to Appellant’s Cross-Motion and Response. For the reasons set forth below, Appellee’s Motion to Dismiss is denied, and Appellant’s Cross-Motion is denied.

I. PROCEDURAL HISTORY

Appellant, William Dawley, filed his voluntary Chapter 7 bankruptcy petition on August 29, 2001. Appellee, the Estate of Stanford Harris, filed a Complaint objecting to Appellant’s discharge on November 20, 2001. Appellee sought an Order denying the discharge

of Appellant's debt pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4) or, in the alternative, an exception from discharge of Appellant's debt pursuant to 11 U.S.C. § 523(a)(4). Because Appellee was the sole remaining creditor of Appellant, if the Bankruptcy Court would have granted Appellee's objection to dischargeability under § 523, it would have had the same effect as refusing to discharge Appellant's debt under § 727. The Bankruptcy Court held a two day trial on the Complaint on January 14 and 16, 2004. The Bankruptcy Court entered an order on April 16, 2004, denying Appellant's discharge pursuant to § 727(a)(4).

Appellant filed a Notice of Appeal of the Bankruptcy Court's decision on April 21, 2004. On April 30, 2004, Appellant filed a Designation of Record on Appeal. Included among the documents listed on the Designation were the transcript of the trial and certain exhibits from the trial. Appellant filed a Designation of Additional Items on May 10, 2004. Appellant failed to provide the transcript and certain exhibits listed on the Designations.

On May 27, 2004, the Court granted Appellant's request for an extension of the deadline for filing his appellate brief, extending Appellant's deadline until July 2, 2004, with which Appellant complied. Appellee filed a Motion to Dismiss on July 14, 2004. By Order of July 20, 2004, the Court granted Appellee's request for a tolling of the briefing schedule pending the Court's disposition of Appellee's Motion to Dismiss. Therefore, Appellee has not filed an appellate brief, and Appellant has not filed a reply appellate brief. Coupled with Appellant's Reply to Appellee's Motion to Dismiss was a Cross-Motion Requesting the Court to Produce and File Trial Transcript.

II. DISCUSSION

A. Motion to Dismiss

Appellee filed a Motion to Dismiss Appellant's Appeal for violations of the Bankruptcy Rules, specifically Rules 8006 and 8010. To ascertain the proper standard to apply, the Court looks to the Third Circuit's opinion in In re Comer, 716 F.2d 168 (3d Cir. 1983). In Comer, the Third Circuit found no error in the district court's decision denying a motion to dismiss a procedurally deficient bankruptcy appeal. Id. at 177. At the district court level, the appellants failed to timely file the designation of contents of the record and a statement of the issues as required by the Bankruptcy Rules. Id. at 177. The district court found no prejudice to the appellees or bad faith on the part of the appellants, and the district court declined to dismiss the appeal. Id. at 177. The Third Circuit found no error in the district court's ruling and commented that "[n]ot every failure to follow procedural rules mandates dismissal of the appeal." Id. at 177. Courts in this district have followed the standard found in Comer, declining to dismiss appeals of bankruptcy court decisions for certain procedural defects absent prejudice or bad faith.¹

1. In re Beck-Rambaugh Associates, Inc., 80 B.R. 306 (E.D. Pa. 1987)(The district court refused to grant a motion to dismiss for the appellant's failure to properly request transcripts and appellant's failure to timely file its brief. Finding no prejudice, the district court suspended the requirements of Bankruptcy Rule 8009 pursuant to Bankruptcy Rule 8019 and gave the appellant thirty days to file the transcript, and the district court ruled both parties' briefs timely).

In re SB Properties, Inc., 185 B.R. 198 (E.D. Pa. 1995)(The decision involved a motion by the appellant to set aside the dismissal of bankruptcy appeal and to file its designation of the record and statement of the issues *nunc pro tunc*. Applying the principles of Comer, the district found that a forty day delay, without more, was an insufficient basis for dismissal. The district court went on to dismiss the appeal for a different reason, affirming the finding of the bankruptcy court that the debtor filed for bankruptcy in bad faith).

In re Bernat, 57 B.R. 1009 (E.D. Pa. 1986)(The appellee filed a motion to dismiss the appeal for failure to comply with Bankruptcy Rule 8006 because the appellant filed the designation of items and statement of issues

(continued...)

Bankruptcy Rule 8006 explicitly states that a litigant must make arrangements for payment of the costs of a transcript listed on its designation of record on appeal.² Fed. R. Bank. P. 8006. In the instant case, Appellant failed to make arrangements for the payment of the costs of the transcript listed on his initial Designation, and the transcript was not produced. As to why Appellant failed to adhere to the requirements of Bankruptcy Rule 8006, in Appellant's Reply and Cross-Motion, Appellant averred that the Bankruptcy Court Clerk's Office advised him that the designation was the only item he was required to file as the Bankruptcy Court Clerk would put together the remaining documents. According to Appellant, it was only after Appellee served his Motion to Dismiss that Appellant realized he was required to pay for the transcript. Although the Court will accept Appellant's excuse, it is important to remember the purpose of the transcript, which is to enable the parties to persuade the Court of the strengths and deficiencies of the Bankruptcy Court's decision and provide the Court with the information needed to properly render its decision. Appellant's Appellate Brief contains no reference to the trial transcript, only vague references to parts of the proceeding.³ Appellant should have requested the transcript in order to include the appropriate references in his Appellate Brief, and in requesting the transcript, Appellant would have learned of the requirements of Bankruptcy Rule 8006.

1. (...continued)

twenty days late. Because the district court found the appellee's rights were not prejudiced and there was no suggestion of bad faith, the district declined to dismiss the appeal).

2. Bankruptcy Rule 8006, entitled "Record and Issues on Appeal," reads in part, "[i]f the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost." Fed. R. Bank. P. 8006.

3. This constitutes a violation of Bankruptcy Rule 8010. The Court will address this violation later in the Memorandum.

Appellant violated Bankruptcy Rule 8006 in another way. Pursuant to Bankruptcy Rule 8006, “[a]ny party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense.” Fed. R. Bank. P. 8006. Appellant failed to provide the Bankruptcy Court Clerk with a copy of the exhibits listed on his Designations as required by Bankruptcy Rule 8006.

Appellant also failed to satisfy Bankruptcy Rule 8010. Pursuant to Bankruptcy Rule 8010, entitled “Form of Briefs: Length,” the litigant’s brief must “contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.” Fed. R. Bank. P. 8010. Because Appellant failed to procure the transcript, his Appellate Brief contained no citations to the trial transcript, only vague references.

Despite the fact that Appellant violated Bankruptcy Rules 8006 and 8010, the Court will deny this Motion to Dismiss for the following two reasons. The first reason is the Court, applying the test of Comer, finds no explicit evidence of bad faith on the part of Appellant or prejudice to the Appellee. With respect to the bad faith part of the test, although Appellant violated the Bankruptcy Rules, Appellant’s mistakes do not rise to the level of bad faith. As to whether Appellant’s failure prejudiced Appellee, the Court’s Order will demand that Appellant perfect his appeal and correct all errors so that Appellee is not prejudiced by this appeal.

The second reason is two contextual factors weigh heavily in favor of denying the Motion to Dismiss and allowing Appellant to pursue his appeal. First, dismissal of an appeal for a violation of a procedural rule is a harsh sanction to be imposed rarely. In re SB Properties, Inc.,

185 B.R. 198, 201 (E.D. Pa. 1995). As referenced *infra*, not every violation of the Bankruptcy Rules mandates dismissal of an appeal. Comer, 716 F.2d at 177. Second, concerning the Bankruptcy Court’s Order denying discharge, as the Third Circuit noted in Rosen v. Bezner, “total bar to discharge is an extreme penalty.” 996 F.2d 1527, 1534 (3d Cir. 1993).

Because dismissing this appeal would be a harsh sanction and the Court does not believe dismissal is warranted under the standard of Comer, the Court will provide Appellant the opportunity to pursue his appeal as long as he meets his obligations under the Bankruptcy Rules and follows the filing schedule outlined in the accompanying Order, which the Court enters pursuant to Bankruptcy Rule 8019.⁴

B. Motion Requesting Court to Produce Transcript

In his Cross-Motion, Appellant requested that the Court produce and file the transcript of the Bankruptcy Court trial held on January 14 and 16, 2004, because of his inability to pay the costs associated with the transcript. Because Appellant paid his appellate filing fee, the request should properly be considered a motion for partial *in forma pauperis* status. Even without consideration of the timeliness issue involved in Appellant’s Cross-Motion Requesting the Court to Produce Transcript, which was filed after Appellant submitted his Appellate Brief, the Appellant’s Cross-Motion is denied.

Bankruptcy Rule 8006 stipulates that a party including a transcript in his designation of record on appeal must make arrangements for the payment of the cost of the

4. Bankruptcy Rule 8019, entitled “Suspension of Rules in Part VIII,” reads “[i]n the interest of expediting decision or for other cause, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002 and 8013, and may order proceedings in accordance with the direction.” Fed. R. Bank. P. 8019.

transcript. Fed. R. Bank. P. 8006. 28 U.S.C. § 753 makes provisions for parties who cannot afford to pay for the transcripts and establishes a standard for courts to apply when considering a request. 28 U.S.C. § 753 (2005). Under 28 USC § 753(f), “[f]ees for transcripts furnished in other proceedings to persons permitted to appeal *in forma pauperis* shall also be paid by the United States if the trial judge or circuit judge certifies that the appeal is not frivolous (but presents a substantial question).” 28 U.S.C. § 753(f) (2005).

As mentioned above, Appellant’s request constitutes a motion for partial *in forma pauperis* status. In Walker v. People’s Express, the Third Circuit concluded that “transcripts may be secured at public cost by litigants who are granted partial *in forma pauperis* status.” 886 F.2d 598, 601 (3d Cir. 1989). Before a court may grant a litigant such status, the Third Circuit, echoing § 753, demanded that a court certify the appeal is not frivolous but presents a substantial question. Id. at 601. In a footnote in the Walker decision, the Third Circuit, commenting generally on *in forma pauperis* requests, wrote that the “petition asking for leave to forego a sum certain must be accompanied by an affidavit bearing particularized information with regard to the party’s financial status.” Id. at 602. This requirement parallels 28 U.S.C. § 1915, which concerns *in forma pauperis* applications and provides standards for judging an applicant’s qualifications. 28 U.S.C. § 1915 (2005). Particular to partial *in forma pauperis* status, the Third Circuit wrote “[w]e believe that, in order to qualify for partial *in forma pauperis* status, a litigant must similarly show that he is unable to pay the particular cost at issue. In determining the availability of partial *in forma pauperis*, a litigant’s ability to pay must be assessed in light of the magnitude of the proposed expenditure.” Walker, 886 F.2d at 601. Finally, when examining applications to proceed partial *in forma pauperis*, the Third Circuit demanded that a court must

be rigorous in its examination of *in forma pauperis* applications as the “treasury” must not be unduly imposed upon. Id. at 601.

Applying the partial *in forma pauperis* standard to the instant case, the Court must deny Appellant’s Cross-Motion because Appellant failed to file an affidavit which showed his inability to pay for the trial transcript. Instead of filing the requisite document with the requisite information, Appellant simply filed a motion which included general information as to Appellant’s inability to pay. In his Cross-Motion, Appellant estimated that the cost of producing the transcript will be more than \$1,000.00. Appellant also informed the Court that he owed his counsel more than \$30,000.00 in fees and costs, and he noted that the Bankruptcy Court froze his assets. The three references are the extent of Appellant’s argument as to his inability to pay for the transcript. To authorize the production of the transcript at the United States’ expense, the Court must have more than the three references provided by the Appellant; the Court must have particularized evidence as to Appellant’s inability to pay for the transcript.

As the Third Circuit articulated in Walker, the movant must show he cannot pay the costs of his suit. Id. at 601. Appellant failed to meet this burden because of his failure to submit an affidavit with information proving his inability to pay for the transcript. Therefore, the Court must deny his motion.

III. CONCLUSION

For the foregoing reasons, Appellee’s Motion to Dismiss is denied, and Appellant’s Cross-Motion for Order, *Nunc Pro Tunc*, to Produce and File Trial Transcript is denied. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN THE MATTER OF WILLIAM DAWLEY,	:	
	:	Bankruptcy No. 01-32215 (DWS)
Debtor.	:	Adversary No. 1-1148
<hr/>		
WILLIAM DAWLEY,	:	
	:	
Appellant,	:	CA 04-2140
v.	:	
ESTATE OF STANFORD HARRIS,	:	
	:	
Appellee.	:	

ORDER

AND NOW, this 11th day of January, 2005, upon consideration of Appellee's Motion to Dismiss, it is hereby **ORDERED** that Appellee's Motion is **DENIED**.

Upon consideration of Appellant's Cross-Motion for an Order, *Nunc Pro Tunc*, to Produce and File Trial Transcript, it is hereby **ORDERED** that Appellant's Motion is **DENIED**.

IT IS FURTHER **ORDERED** that Appellant shall produce and file the trial transcript by **January 25, 2005**.

IT IS FURTHER **ORDERED** that Appellant shall file the exhibits listed on his Designations of Record by **January 25, 2005**.

IT IS FURTHER **ORDERED** that Appellant shall re-file his Appellate Brief by **February 9, 2005**.

IT IS FURTHER **ORDERED** that Appellee shall file its Reply Brief by

February 24, 2005.

IT IS FURTHER **ORDERED** that Appellant shall file his Reply Brief by

March 6, 2005.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.