

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20229

In the Matter of: WHITNEY N. BROACH,

Debtor - Appellant

v.

DAVID G. PEAKE, Chapter 13 Trustee

Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion June 25, 2018 , 5 Cir., _____, _____ F.3d _____)

Before STEWART, ELROD, and HIGGINSON Circuit Judges.

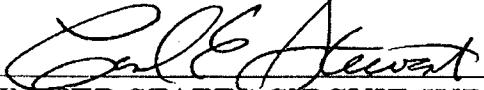
PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

No. 17-20229
Summary Calendar

FILED

June 25, 2018

Lyle W. Cayce
Clerk

In the Matter of: WHITNEY N. BROACH,

Debtor - Appellant

v.

DAVID G. PEAKE, Chapter 13 Trustee

Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-2561

Before STEWART, Chief Judge, and ELROD and HIGGINSON, Circuit
Judges.

PER CURIAM:*

After reviewing the applicable law and considering the arguments made
by the parties, we find no reversible error. AFFIRMED. *See* 5TH CIR. R. 47.6.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

ENTERED

March 06, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re: §
WHITNEY N. BROACH, § **CIVIL ACTION NO. 16-2561**
Debtor/Appellant. § Bankruptcy Case No. 16-30848
§

MEMORANDUM AND ORDER

Debtor/Appellant Whitney N. Broach filed this appeal from United States Bankruptcy Judge Jeff Bohm's "Order Dismissing This Pending Chapter 13 Case" [Doc. # 25 in Bankruptcy Case No. 16-30848],¹ "Order Denying Motion of Whitney Broach for Permission to File Bankruptcy Case" [BR Doc. # 34], and "Findings of Fact and Conclusions of Law Regarding Motion for Expedited Rehearing" [BR Doc. # 42]. After receiving an extension of the deadline, Appellant filed her Appellant's Brief [Doc. # 9] on December 20, 2016. Appellant later filed an Amended Appellant's Brief [Doc. # 11] on January 11, 2017, and a "Supplemental Summary" to her Amended Appellant's Brief [Doc. # 13] on January 25, 2017. The Bankruptcy Trustee filed an Appellee's Brief [Doc. # 20] on March 2, 2017, and Appellant filed her Reply Brief [Doc. # 24] on March 6, 2017.

¹Documents from Bankruptcy Case No. 16-30848 are cited hereinafter as "BR Doc. # ____."

Also pending is Appellant's Motion to Invoke or Enforce the Automatic Stay [Doc. # 12], seeking a stay pending the completion of the appeal. Appellant also filed a "Reply" to the Motion to Invoke or Enforce the Automatic Stay [Doc. # 18], and filed two letters [Docs. # 16 and # 17] regarding an upcoming foreclosure scheduled for March 7, 2017. Because the Court herein affirms the Orders issued by the Bankruptcy Court, there is no basis for the automatic stay to be invoked or enforced. This motion is **denied**.

Also pending is Appellant's Motion for Disqualification and/or Recusal of Judge Jeff Bohm [Doc. # 15]. Appellant requests that, if this case is remanded to the Bankruptcy Court, that it be assigned to a Bankruptcy Judge other than Judge Bohm. Because this bankruptcy case will not be remanded to the Bankruptcy Court, this motion is moot.

The Court has reviewed the full record, and heard oral argument on the appeal and on the pending motions on March 3, 2017. Based on its consideration of the record, the statements at the March 3 hearing, and the applicable legal principles, the Court **affirms** the Bankruptcy Court's rulings and **denies** the pending motions.

I. STANDARDS OF REVIEW

The Court reviews a bankruptcy judge's conclusions of law *de novo* and findings of fact under the "clearly erroneous" standard. *In re Thaw*, 769 F.3d 566,

368 (5th Cir. 2014). Mixed questions of law and fact are reviewed *de novo*. *In re Positive Health Mgmt.*, 769 F.3d 899, 903 (5th Cir. 2014); *In re TMT Procurement Corp.*, 764 F.3d 512, 519 (5th Cir. 2014).

A factual finding is clearly erroneous only if on the entire record, the court has “the definite and firm conviction that a mistake has been made.” *In re McClendon*, 765 F.3d 501, 504 (5th Cir. 2014) (internal quotations and citation omitted). Stated differently, a factual finding is not clearly erroneous if it “is plausible in light of the record taken as a whole,” even if the reviewing court would have weighed the evidence differently. *In re Bradley*, 501 F.3d 421, 434 (5th Cir. 2007). “Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous. *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). The district court must “be particularly mindful of the opportunity of the bankruptcy court to judge the credibility of witnesses.” *Id.*

Matters within a bankruptcy judge’s discretion are reviewed for an abuse of discretion. See *In re Mandel*, 578 F. App’x 376, 391 (5th Cir. Aug. 15, 2014) (citing, *inter alia*, *In re Vallecito Gas, LLC*, 771 F.3d 929, 932 (5th Cir. 2014) (evidentiary rulings)). “A bankruptcy court abuses its discretion when it applies an improper legal standard or rests its decision on findings of fact that are clearly erroneous.” *In re TWL Corp.*, 712 F.3d 886, 891 (5th Cir. 2013).

This Court “may affirm if there are any grounds in the record to support the judgment, even if those grounds were not relied upon by the courts below.” *In re Scotia Pacific Co., LLC*, 508 F.3d 214, 218-19 (5th Cir. 2007).

II. BACKGROUND

Beginning in June 1997, Appellant and her husband repeatedly filed separate bankruptcy cases. Appellant’s husband filed six bankruptcy cases between June 1997 and December 1999. Appellant has filed seven bankruptcy cases; her first was filed in May 1999.

On April 9, 2009, Appellant’s fourth Chapter 13 bankruptcy case, Bankruptcy Case No. 09-30073, was dismissed by Judge Bohm. In the April 9, 2009 Order, Appellant was permanently barred from filing bankruptcy without first obtaining permission. On August 18, 2010, Appellant filed a Motion for Permission to File Bankruptcy Case, but withdrew the motion on September 24, 2010. On September 26, 2012, Appellant again filed a Motion for Permission to File Bankruptcy Case. The Bankruptcy Court, after two hearings on the Motion, conditionally granted the Motion by Order issued December 21, 2012. The Bankruptcy Court required that Appellant, through a licensed attorney certified in consumer bankruptcy law, file a new motion for leave to file a Chapter 13 bankruptcy petition. The Bankruptcy Court required also that Appellant attach various schedules and statements to the new motion. Appellant

failed to obtain counsel and, on September 10, 2015, the Bankruptcy Court denied permission to file a new bankruptcy petition.

On November 13, 2015, Appellant filed a Chapter 13 petition, Bankruptcy Case No. 15-36025, without seeking or obtaining permission. This was Appellant's fifth bankruptcy case. Notice of deficiencies was provided to Appellant, and the deficiencies were not cured. As a result, the case was dismissed by Order entered December 29, 2015.

On January 14, 2016, Appellant filed another Chapter 13 petition, Bankruptcy Case No. 16-30247, without seeking or obtaining leave of Court. This was Appellant's sixth bankruptcy case, and it was similarly dismissed by Order entered February 2, 2016.

On February 19, 2016, Appellant filed her seventh bankruptcy case, Bankruptcy Case No. 16-30848, again without seeking or obtaining permission. It is from the dismissal of this bankruptcy case that Appellant filed the pending appeal. On April 8, 2016, following a hearing on April 7, 2016, the Bankruptcy Court dismissed the case as filed in violation of the April 9, 2009 Order.

On May 2, 2016, Appellant filed a Motion for Permission to File Bankruptcy Case. The Bankruptcy Court conducted a hearing on May 12, 2016. Thereafter, the Bankruptcy Court issued its Order Denying Motion for Permission to File Bankruptcy

Case [BR Doc. # 34]. On May 21, 2016, Appellant filed a Motion for Rehearing. On August 8, 2016, the Bankruptcy Court issued its Findings of Fact and Conclusions of Law [BR Doc. # 42], denying Appellant's request for rehearing.

On August 19, 2016, Appellant filed a timely Notice of Appeal. Asserting 41 points of error, Appellant challenges Judge Bohm's Order Dismissing This Pending Chapter 13 Case [BR Doc. # 25], Order Denying Motion of Whitney Broach for Permission to File Bankruptcy Case [BR Doc. # 34], and Findings of Fact and Conclusions of Law Regarding Motion for Expedited Rehearing [BR Doc. # 42].

This Court heard oral argument in this case on March 3, 2016. At that time, Appellant was given a full opportunity to present her arguments regarding the appeal and the pending motions. The appeal and other pending motions are now ripe for decision.

III. ANALYSIS

A. Prior Orders

In Points of Error 8, 9 and 41, Appellant challenges the April 9, 2009 Order precluding her from filing additional bankruptcy petitions without leave of Court, and the December 21, 2012 Order requiring that any bankruptcy petition be filed on Appellant's behalf by a licensed attorney who is certified in consumer bankruptcy law. These orders have long been final and non-appealable. *See* FED. R. BANKR. P. 8002;

see also Schmidt v. Van Buren, 243 F. App'x 803, 804 (5th Cir. June 13, 2007) (challenge to prior preclusion order not reviewable in appeal from denial of permission to file new petition). Moreover, Appellant complied with the requirement that she retain board-certified legal counsel. Consequently, Appellant may not in this appeal challenge the April 9, 2009 Order or the December 21, 2012 Order.

B. Allegations of Attorney Negligence

In Points of Error 1, 10-12, 14-15, 21, 26, and 39, Appellant argues that the Bankruptcy Court erred by attributing to her various errors committed by her attorney. For example, in Points of Error 10-12, Appellant argues that it was her attorney's fault that three bankruptcy cases in a four-month period were filed without prior permission from the Court. In Points of Error 14-15, 21, 26 and 39, Appellant argues that it was her attorney's fault that the petition in Bankruptcy Case No. 16-30848 did not list all of her prior bankruptcy cases.

The Debtor, however, is bound by her attorney's negligent actions. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993); *see also United States v. Villanueva-Diaz*, 634 F.3d 844, 851 n.4 (5th Cir. 2011) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)). As a result, the Bankruptcy Court neither erred nor abused his discretion by holding Appellant responsible for the misstatements in the bankruptcy petition in the underlying bankruptcy case.

Appellant's request for reversal of the Bankruptcy Court's orders on this basis is denied.

C. Challenges to Findings of Fact

In Points of Error 2-7, 13, 16, 23-24, 28, 29, 36-38 and 40, Appellant challenges the Bankruptcy Court's Findings of Fact. In Points of Error 2-7, 13, and 40, Appellant argues that the Bankruptcy Court should not have considered bankruptcy petitions filed by her husband. In Points of Error 16 and 36, Appellant challenges the Bankruptcy Court's characterization of the procedural history of her prior bankruptcy cases. In Points of Error 23, 24 and 28, Appellant challenges the Bankruptcy Court's determination that she lacked credibility. In Point of Error 29, Appellant disputes the Bankruptcy Court's statement that she claimed to need to file a new bankruptcy petition because she had suffered personal calamities. In Points of Error 37 and 38, Appellant challenges the Bankruptcy Court's characterization of her association with attorneys Marjorie Britt and Veronica Polnick in Bankruptcy Case No. 09-30073.

The Court has reviewed the record. The Bankruptcy Court's Findings of Fact are fully supported. Indeed, many of the challenged findings are direct quotes from the record. For example, in Point of Error 29, Appellant challenges Finding of Fact 60, in which the Bankruptcy Court found that Appellant alleged that she needed to file a new Chapter 13 petition because of personal calamities. In the Motion for

Rehearing filed in the underlying bankruptcy case, Appellant stated that she had “suffered many calamities which were not caused by the debtor” and that “[t]hese calamities are the reason the debtor is seeking permission to file bankruptcy.” See Motion for Rehearing [BR Doc. # 40], ¶ 12. As another example, Appellant challenges Finding of Fact 37 regarding attorney Veronica Polnick. Finding of Fact 37 is a direct quote from Attorney Polnick’s Response to Debtor’s Motion to Set Hearing, Doc. # 82 filed in Appellant’s Bankruptcy Case No. 09-30073.

This is not a case in which there are two permissible views of the evidence. Instead, the record fully supports the challenged Findings of Fact by the Bankruptcy Court. Appellant has not demonstrated that the Findings of Fact are clearly erroneous and, as a result, the Court denies Appellant’s request to reverse the Bankruptcy Court’s Orders on this basis.

D. Other Alleged Errors

In Points of Error 17, 18-20, 22, 25, 27, and 30-35, Appellant asserts that the Bankruptcy Court’s Orders should be reversed for a variety of alleged errors. In Point of Error 17, Appellant argues that the Bankruptcy Court erred in dismissing Bankruptcy Case 16-30848. In Point of Error 27, Appellant complains that the Bankruptcy Court refused to accept a *nunc pro tunc* motion for permission to file Bankruptcy Case No. 16-30848. It is undisputed that the case was filed without the

permission required by the April 9, 2009 Order. As a result, the Bankruptcy Court did not err or abuse his discretion in dismissing the case and requiring Appellant to file a motion seeking leave to file the new bankruptcy case.

In Points of Error 18-20, Appellant argues that the Bankruptcy Court erred in connection with the May 2016 hearing. Specifically, Appellant asserts that the Bankruptcy Court denied her request to interrupt the Trustee's cross-examination so she could consult with her attorney, and failed to allow her attorney to question her fully. The transcript of the May 2016 hearing, however, refutes these assertions. Appellant's attorney was permitted to make a full proffer of Appellant's direct testimony, and Appellant stated under oath that the proffer was true. *See Transcript of May 2016 Hearing [BR Doc. # 37]*, pp. 6-7. During cross-examination by counsel for the United States Bankruptcy Trustee, Appellant repeatedly answered that she did not know the answer to straight forward questions such as "How far behind are you [on your car payment]?" *See id.* at 8. Appellant also provided inconsistent answers, such as providing various answers regarding when her last mortgage payment was paid. *See id.* at pp. 8-9. Appellant admitted that she listed \$10,000 as the amount owed to Gleannloch Storage, but could not explain why she listed that amount. *See id.* at pp. 9-12. Appellant testified that she was not paying the Municipal Utility District fees because they were for water and she only used bottled water in her house.

See id. at 13. Eventually, the Bankruptcy Court stopped the Trustee's cross-examination of Appellant.² *See id.* at 15. The Bankruptcy Court neither abused his discretion nor committed any legal error in connection with the May 2016 hearing.

In Point of Error 25, Appellant complains that her bankruptcy case was originally assigned to one bankruptcy judge and then was transferred to Judge Bohm, to whom Appellant's prior Bankruptcy Case No. 09-30073 had been assigned. It is not uncommon for judges, in both bankruptcy and district court, to reassign related cases to the judge who handled the prior related case. There was no abuse of discretion or legal error in reassigning Appellant's bankruptcy case to Judge Bohm.

In Points of Error 30-33, Appellant argues that Judge Bohm erred in determining that he had the Constitutional authority to deny the Motion for Rehearing and to do so without conducting another hearing. Appellant cites no legal authority for her challenge to Judge Bohm's Constitutional authority to issue the challenged Orders without a second hearing. To the extent certain rulings were within the

²Appellant asserts in her Amended Appellant's Brief and in her Motion for Disqualification and/or Recusal of Judge Jeff Bohm [Doc. # 15] that she has a medical condition that affects her ability to speak quickly and also affects her facial expressions. The Bankruptcy Court did not find that Appellant lacked credibility because she answered questions slowly or without expression. The Bankruptcy Court explained that his credibility decision was based on Appellant's inability to answer simple questions and on the inconsistency of her answers.

Bankruptcy Court's discretion, this Court finds no abuse of that discretion. The Court has reviewed the Bankruptcy Court's legal rulings *de novo* and finds no error.

In Points of Error 22, 34, and 35, Appellant raises certain equitable arguments in support of her appeal. In Point of Error 22, Appellant argues that the dismissal of her bankruptcy case resulted in creditors not being paid. In Point of Error 34, Appellant asserts that the Bankruptcy Court erred in stating that the Orders did not result in any injustice, asserting specifically that there is injustice because Appellant wants to install a new \$25,000.00 roof on her house. In Point of Error 35, Appellant argues that the Bankruptcy Court erred in applying the "clean hands" doctrine. The Court has reviewed the Bankruptcy Court's rulings on these matters and finds neither an abuse of discretion nor legal error.

Appellant has failed to identify any factual, legal or equitable basis for this Court to reverse the Orders issued by the Bankruptcy Court.

IV. CONCLUSION AND ORDER

Appellant was subject to the final, non-appealable Order entered in April 2009 that required her to request and obtain permission before filing any bankruptcy petition. She was aware of the April 2009 Order and, indeed, filed motions seeking permission to file new bankruptcy petitions in 2010 and 2012. Nonetheless, Appellant

filed, without permission, three Chapter 13 bankruptcy petitions in a four-month period in late 2015 and early 2016.

Appellant was also subject to the final, non-appealable Order entered in December 2012 that required, *inter alia*, that she be represented by an attorney who was certified in consumer bankruptcy law. Appellant complied with this Order, and retained a board-certified attorney who represented her in the underlying bankruptcy case. Appellant, through her attorney, filed a Motion for Permission to file a bankruptcy petition. After a hearing on the Motion, Judge Bohm denied leave to file the petition. Appellant, through her attorney, filed a Motion for Rehearing, which was also denied.

The Court has carefully reviewed this record and considered the arguments presented orally and in writing. The Findings of Fact issued by the Bankruptcy Court are not clearly erroneous and are, indeed, well supported in the record. The Bankruptcy Court did not abuse its discretion in any manner, and its Conclusions of Law, reviewed *de novo*, are correct. As a result, it is hereby

ORDERED that the Bankruptcy Court's rulings in Bankruptcy Case No. 16-30848 are **AFFIRMED**. It is further

ORDERED that Appellant's Motion to Enforce or Invoke the Automatic Stay [Doc. # 12] is **DENIED**. It is further

ORDERED that Appellant's Motion for Disqualification and/or Recusal of Judge Jeff Bohm [Doc. # 15] is **DENIED**.

The Court will issue a separate Final Order.

SIGNED at Houston, Texas, this 6th of **March, 2017**.



Nancy F. Atlas
NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**