NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1239-MoPaMk
MELODY L. LARK, Ph.D.,	Bk. No. RS 98-34974-DN
Debtor.	Adv. No. RS 08-01066-PC
MELODY L. LARK, Ph.D.,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BOARD OF TRUSTEES OF THE, CALIFORNIA STATE UNIVERSITY OFFICE OF GENERAL COUNSEL,	
Appellee.	

Submitted Without Oral Argument on January 22, 2010

Filed - February 4, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Before: MONTALI, PAPPAS and MARKELL, Bankruptcy Judges.

The debtor filed an adversary proceeding requesting that her educational loans be excepted from discharge. Following trial,

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[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

the bankruptcy court entered a judgment denying the relief sought and dismissing the debtor's adversary proceeding "based upon the findings of fact and conclusions of law stated orally and recorded in open court[.]" The debtor appealed and we AFFIRM.

I. FACTS

In December 1998, Melody Leah Lark ("Debtor") filed a petition for relief under chapter 7.[2] In April 1999, Debtor received her discharge and her case was closed. In January 2008, Debtor filed a motion to reopen her case so that she could file a complaint under section 523(a)(8) to determine the dischargeability of a certain student loan debt owed to California State University ("CSU"). On February 1, 2008, the bankruptcy court entered an order reopening the case for that limited purpose.

On February 29, 2008, Debtor filed an adversary proceeding under section 523(a)(8) against CSU,[3] which in turn filed a motion to dismiss. At a hearing on May 5, 2008, the court granted the motion to dismiss but permitted Debtor to file an amended complaint. Debtor filed a first amended complaint, and CSU filed another motion to dismiss. On July 15, 2008, the bankruptcy court conditionally granted the motion to dismiss but permitted Debtor to amend the complaint again. Debtor filed a

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[2]Because the underlying bankruptcy case was filed in 1998, all chapter, section and rule references are (unless otherwise indicated) to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA).

[3]Debtor identified CSU as the Board of Trustees of the California State University, Office of the General Counsel.

second amended complaint, CSU filed another motion to dismiss, and on October 7, 2008, the bankruptcy court denied CSU's motion to dismiss the second amended complaint.[4]

The court held a trial on May 27, 2009, which it continued to June 29, 2009, solely for the purposes of announcing its findings of fact and conclusions of law. The court entered its oral findings and conclusions on the electronic record on June 29, 2009.

On July 2, 2009, the bankruptcy court entered a judgment dismissing the adversary proceeding "with prejudice" and denying Debtor's request to have her student loan declared dischargeable. The judgment was "based upon the findings of fact and conclusions of law stated orally and recorded in open court[.]" Debtor filed a timely notice of appeal on Monday, July 13, 2009.

On July 30, 2009, the clerk of the BAP issued a notice of deficient appeal ("NOD") and impending dismissal, noting that Debtor had failed to file the designation of record and statement of issues as required by Rule 8006 and had failed to order a transcript and make satisfactory arrangements for payment as required by Rule 8006 and 9th Cir. BAP Rule 8006-1. On August 11, 2009, Debtor filed with the bankruptcy court her designation of record, statement of issues and supplemental designation of record. She also filed a notice of transcript

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[4]In March 2008, Bankruptcy Judge Mitchel Goldberg entered an order transferring the adversary proceeding to Bankruptcy Judge David Naugle. Judge Naugle decided the first two motions to dismiss. On July 15, 2009, Judge Naugle transferred the adversary proceeding to Judge Carroll, who handled the third motion to dismiss, conducted the trial and entered the judgment on appeal.

requesting the transcripts for six hearings (including the trial and the announcement of the findings) but indicating that she was unable to pay for them.

Debtor filed her opening brief on September 14, 2009, stating multiple times that the court overlooked her statements at trial when making its findings and that her "statements throughout the Trial are in the Court Transcripts."[5] Debtor provided in her excerpts of record (but not in her pleadings filed in response to the NOD) six undated transcript order forms; all state that "Debtor cannot pay." CSU filed its responsive brief on October 5, 2009, requesting that the appeal be dismissed because Debtor had not provided the transcript of the trial or of the court's findings and conclusions.

On December 28, 2009, we issued an order directing Debtor to obtain (by January 12, 2010) the transcripts necessary to conduct a meaningful review of the issues on appeal. We stated in that order that we could affirm or dismiss the appeal if the transcripts were not provided.

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[5]See pages 2:24-25, 4:76-77, 7:120-123 and 130-133, 8:139-144 and 152-157, 9:163-170 and 178; 10:179-183 and 195-197; 11:203-206 and 212-216; 12: 223-225 and 231-234; 13:241-244 and 250-253; and 14:259-262 of Debtor's Opening Brief. On pages 7-14 of her Opening Brief, Debtor refers to documents that she did not file with the bankruptcy court (such as emails and correspondence) but which she "read" or "referred to" at trial.

In her excerpts, Debtor provides a list of her exhibits at trial. According to this list, she offered eight binders consisting of 53 exhibits at trial. On page 21 of her opening brief, Debtor states that she has invested "considerable effort in obtaining gainful employment," that she has maximized income and minimized expenses, and that she has demonstrated a good faith effort to repay the loan. As support for these contentions, she simply refers to the list of exhibits at Tab 23 of the excerpts; she has not provided the actual exhibits.

On January 7, 2010, Debtor filed a Reply to Order re Transcripts. Debtor requested us to waive the costs for the transcripts (estimated at $1,314.00). On January 8, 2010, we entered an order denying Debtor's request for waiver of transcript fees and cancelling oral argument.

II. ISSUE

Has Debtor demonstrated that the bankruptcy court erred in entering a judgment denying her request to have the student loan declared dischargeable?

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(I) and § 1334. We have jurisdiction under 28 U.S.C. § 158.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Craig v. Educ. Credit Mgmt. Corp. (In re Craig), 579 F.3d 1040, 1043-44 (9th Cir. 2009); Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 494 (9th Cir. BAP 2002).

V. DISCUSSION

The pre-BAPCPA version of section 523(a)(8) provided that educational loans extended by or with the aid of a governmental agency or nonprofit institution are nondischargeable, unless excepting the debt from discharge "will impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 523(a)(8). The Bankruptcy Code does not define "undue hardship," but the Ninth Circuit has adopted the "undue hardship" test set forth in Brunner v. N.Y. State Higher Educ. Servs.

Corp., 831 F.2d 395 (2d Cir. 1987), for determining the dischargeability of a student loan debt. Craig, 579 F.3d at 1044; Educ. Credit Mgmt. Corp. v. Nys (In re Nys), 446 F.3d 938, 947 (9th Cir. 2006); United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 111 (9th Cir. 1998); Carnduff v. U.S. Dep't of Educ. (In re Carnduff), 367 B.R. 120, 127 (9th Cir. BAP 2007).

The Brunner test requires Debtor to prove by a preponderance of the evidence[6] the existence of three elements: first, Debtor must establish that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; second, Debtor must show that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and third, Debtor must show that she has made good faith efforts to repay the loans. Craig, 579 F.3d at 1044; Nys, 446 F.3d at 947; Carnduff, 367 B.R. at 127. Debtor has the burden to prove all three prongs of the Brunner "undue hardship" test; if she fails to prove any one of the three prongs, the loan will not be discharged. Carnduff, 367 B.R. at 127. Here, the record does not support a finding or conclusion that Debtor has satisfied all three criteria of Brunner.

[6]The debtor bears the burden to prove by a preponderance of the evidence that he or she is entitled to a discharge of the student loan. See Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001).

As noted above, Debtor supports her argument by referring to oral statements that she made at trial[7] and to an exhibit list appended to her excerpts. Her excerpts do not include many of the exhibits referenced in that exhibit list and cited in the Argument section of her brief. Even if we were to conduct a de novo review of the bankruptcy court's judgment, Debtor failed to provide a sufficient record demonstrating that she cannot maintain a minimal standard of living if she repays the loan and that she has made a good faith effort to repay the loan. We could not conclude, on this record, that excepting the student loan from discharge would impose an "undue hardship."

More importantly, Debtor has the burden to demonstrate how the bankruptcy court's findings were clearly erroneous. To do so, she must provide us with the findings and show us how they were not supported by the record (i.e., the testimony and evidence upon which the court relied in issuing its ruling). Burkhart v. Fed. Dep. Ins. Corp. (In re Burkhart), 84 B.R. 658, 660 (9th Cir. BAP 1988) (an appellant has the burden of showing a

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[7]In her opening brief, Debtor repeatedly refers to documents that she did not provide to the bankruptcy court, but which she read or referred to at trial. To the extent the Debtor is now offering these documents as proof, we cannot consider them. Kirschner v. Uniden Corp of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988) (papers not filed or admitted into evidence by trial court prior to judgment on appeal were not part of the record on appeal and thus stricken; appellate court would not consider issues which were not supported by record on appeal); see also Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001) ("[e]vidence that was not before the lower court will not generally be considered on appeal"). As noted by the Ninth Circuit in Kirschner, "'We are here concerned only with the record before the trial judge *when his decision was made*.'" Kirschner, 842 F.2d at 1077, quoting United States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979) (affidavits that "were not part of the evidence presented" to the trial court would not be considered on appeal) (emphasis in Kirschner).

trial court's findings of fact are clearly erroneous). "The responsibility to file an adequate record also rests with the [appellant]." Id.; see also Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). "'Appellants should know that an attempt to reverse the trial court's findings of fact will require the entire record relied upon by the trial court be supplied for review.'" Kritt, 190 B.R. at 387, quoting Burkhart, 84 B.R. at 661.

Rule 8009(b)(5) requires that an appellant designate a record that includes the "opinion, findings of fact, or conclusions of law filed or delivered orally." Fed R. Bankr. P. 8009(b)(5). This requirement is mandatory, not optional. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999) ("Whenever findings of fact and conclusions of law are rendered orally on the record, it is mandatory that an appellant designate the transcript under Rule 8006. There is no other way for an appellate court to be able to fathom the trial court's action."). Rule 8006(b) requires an appellant to provide the "transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel." Fed. R. Bankr. P. 8006(b). The rules of this panel mandate the inclusion of transcripts "necessary for adequate review":

> The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. The Panel is required to consider only those portions of the transcript included in the excerpts of the record.

9th Cir. BAP R. 8006-1.[8]

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[8]Our rule is consistent with Federal Rule of Appellate

(continued...)

In order for us to determine that the bankruptcy court's findings were clearly erroneous, we must have access to the findings and to the evidence and testimony relevant to those findings. Debtor has not provided us with "the transcripts necessary for adequate review" of the bankruptcy court's findings and order. As noted in McCarthy, we must know the court's findings in order to review them. Absent a record setting forth the findings and demonstrating that such findings are clearly erroneous, we must affirm. Kritt, 190 B.R. at 387 (where appellant did not provide full transcript, it was "impossible" to review for clear error; panel therefore affirmed because debtor failed to show findings were clearly erroneous); Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991) (where appellant failed to provide a trial transcript, his contentions were "unreviewable" and "justifie[d] summary affirmance.")[9]

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[8](...continued)
Procedure 10(b)(2), which states that if "the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion."

[9]See also Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 789-90 (9th Cir. 1989) (court declined to review alleged error in contempt hearing where appellants did not provide a transcript of that hearing); Thomas v. Computax Corp., 631 F.2d 139, 143 (9th Cir. 1980) (dismissing appellant's pro se appeal when she failed to include in the record a transcript to support her claim that the trial court's finding and judgment were unsupported by the evidence).

As we provided notice to Debtor that the record was deficient and that the transcripts were necessary, this case is unlike Ehrenberg v. Cal. State Univ. (In re Beachport Ent.), 396 F.3d 1083, 1086-87 (9th Cir. 2005), where BAP did not provide notice of deficiencies in the record before dismissing the appeal and where "the record before the BAP appear[ed] to include everything necessary to address the merits of the appeal." Notwithstanding the deficiencies in this record, we scoured what
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After completion of the briefing, Debtor requested that we waive the fees and costs associated with transcript preparation. We cannot do so. Transcript expenses are ineligible for fee waiver because court reporters must be paid for transcription. Knutson v. Price (In re Price), 410 B.R. 51, 55 (Bankr. E.D. Cal. 2009). Even if the court record is digital, the transcriber must be paid. The United States will pay the costs of a transcript of an in forma pauperis party "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." 28 U.S.C. § 753(f). Here, Debtor has not been granted in forma pauperis status by the district court, and bankruptcy courts and BAP cannot grant in forma pauperis status under 28 U.S.C. § 1915(a). Price, 410 B.R. at 57. Moreover, Debtor has not obtained a certification from the bankruptcy court that the appeal is not frivolous. Thus, the Debtor is not entitled to have the United States pay for her transcripts.

Even if Debtor could obtain an order from the district court granting her in forma pauperis status and a certification from the bankruptcy court that the appeal is not frivolous, we believe that the time for satisfying these requisites of 28 U.S.C. § 753(f) has expired. Rule 8006 requires a party who has

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[9](...continued)
was available both in the excerpts and on the bankruptcy court's electronic docket in an effort to make an informed decision. In the absence of the transcript and much of the evidence cited by Debtor, summary affirmance is appropriate. Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187, 1189 (9th Cir. 2003) ("The BAP noted, correctly, that the duty of the court is 'not [to] develop debtor's arguments for him, find the legal authority to support those arguments, or guess at what part of the record may be relevant.'").

designated a transcript to "make satisfactory arrangements for payment of its cost" "immediately after filing the designation." Under the Bankruptcy Rules in effect at the relevant times of this appeal, the designation is to be filed by an appellant (such as Debtor) within ten days of filing the notice of appeal.

Debtor did not file a timely designation, but she did file the designation on July 11, 2009. She did not make satisfactory arrangements for payment at that time (even though she placed an order for the transcripts), nor did she file a motion for the transcript fees to be paid by the United States. In other words, she did not comply with the requirement that satisfactory arrangements for payment of transcripts be made "immediately after filing the designation."[10] See Barnes v. Barnes

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[10]Although "immediately" is not defined, the Federal Rules of Appellate Procedure and the Ninth Circuit's rules provide guidance. Federal Rule of Appellate Procedure 10(b)(1) provides that an appellant must order a transcript within 14 days of filing a notice of appeal or within 14 days of entry of an order disposing of a tolling motion; section (b)(4) states that "at the time of ordering," a party must make satisfactory arrangements with the reporter for paying the cost of the transcript. Similarly, Ninth Circuit Rule 10-3.1(d) requires an appellant to file a transcript order within 30 days of the filing of the notice of appeal, using the district court's transcript designation form. Subsection (e) of that rule requires the appellant to make arrangements for payment on or before filing the designation form. The transcript is considered ordered only after the appellant has made payment arrangements, including obtaining authorization for preparation of the transcript at government expense.

> (d) Ordering the Transcript. Within 30 days from the filing of the notice of appeal, appellant shall file a transcript order in the district court using the district court's transcript designation form. . . .
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> (e) Paying for the Transcript. On or before filing the designation form in the district court, appellant shall make arrangements with the court reporter to pay for the transcripts ordered. The United States Judicial Conference has approved the rates a reporter may charge

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(In re Barnes), 279 F. App'x 318 (5th Cir. 2008) (district court did not err in denying appellant's request for free transcript where appellant did not seek in forma pauperis status or a free transcript upon filing her appeal, delayed in requesting the free transcript until after the filing of the briefs, and did not establish the requisite indigency).

VI. CONCLUSION

Without having access to the bankruptcy court's findings and conclusions and to the record upon which such findings were based, we cannot reverse the findings as clearly erroneous. We therefore AFFIRM.

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[10](...continued)
for the production of the transcript and copies of a transcript. Appellant must pay for the original transcript.

The transcript is considered ordered only after the designation form has been filed in the district court and appellant has made payment arrangements with the court reporter or the district court has deemed the transcripts designated by appellee to be unnecessary and appellee has made financial arrangements. Payment arrangements include obtaining authorization for preparation of the transcript at government expense.

9th Cir. Rule 10-3.1(d) and (e) (emphasis added).

While these rules are inapplicable to this appeal, they indicate that the time for requesting free transcripts is not months after filing the notice of appeal (absent an unresolved tolling motion).