

FEB 03 2012

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. AZ-11-1137-WiJuKi
)	
6	DARCOMM SUPPLY, INC.,)	Bk. No. 08-05755-GBN
)	
7	Debtor.)	
	_____)	
8	GARY COLVIN,)	
)	
9	Appellant,)	
)	
10	v.)	M E M O R A N D U M *
)	
11	DARCOMM SUPPLY, INC.; TRUDY A.)	
)	
12	NOWAK, Chapter 7 Trustee,)	
)	
13	Appellees.)	
	_____)	

Argued and Submitted on January 19, 2012
at Phoenix, Arizona

Filed - February 3, 2012

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Appellant Gary Colvin argued pro se; Lawrence D. Hirsch, Esq., of Deconcini McDonald Yetwin & Lacey, P.C., argued for Appellee Trudy A. Nowak, Chapter 7 Trustee.

Before: WILLIAMS,** JURY, and KIRSCHER, Bankruptcy Judges.

*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.

**Hon. Patricia C. Williams, Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 Creditor Gary Colvin (appellant) appeals the bankruptcy
2 court's decision denying appellant's motion for a new trial and
3 granting the motion for summary judgment and an award of attorneys'
4 fees of debtor Darcomm Supply, Inc. (appellee). The summary
5 judgment disallowed the proof of claim filed by appellant based
6 upon ARIZ. REV. STAT. ANN. ("ARS") § 47-3310, which provides that
7 if a cashier's check is taken for an obligation, the obligation is
8 discharged. We AFFIRM.¹

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 Originally, appellant and appellee were involved in a dispute
11 which was resolved by a settlement agreement which required the
12 appellee to pay \$12,000 to appellant in the form of a cashier's
13 check. Appellee did so on May 15, 2007. The issuing bank refused
14 to honor the cashier's check when presented a few days later. One
15 year later, the appellee commenced a bankruptcy proceeding and the
16 appellant filed a proof of claim for \$46,000 based upon the
17 dishonor of the cashier's check. The proof of claim referred to
18 "Breach of Settlement Agreement, fraud, check fraud."

19 The appellee objected to the proof of claim and an order was
20 entered denying the proof of claim on November 12, 2008. For some
21 reason not apparent in the record, on March 17, 2009, appellee
22 filed a motion for summary judgment arguing that the damage claim
23 portion of the proof of claim should be denied and that the
24 appellee should be awarded attorneys' fees.

25 The appellee's motion for summary judgment was heard on
26

27 ¹Unless specified otherwise, all chapter, code, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Bankruptcy Procedure are referred to as "FRBP."

1 May 18, 2009. According to the minute entry, at that time the
2 bankruptcy court denied allowance of the damage portion of the
3 claim, granted the summary judgment motion, reserved the issue of
4 attorneys' fees and admonished the parties that each had 10 days to
5 perfect an appeal with either the District Court or this court.
6 After further briefing, at the hearing on July 30, 2010, the
7 bankruptcy court awarded attorneys' fees and determined the amount.
8 No transcript of the July 30, 2010 hearing has been provided. On
9 September 22, 2010, the court entered the final order granting
10 summary judgment and awarding attorneys' fees. Darcomm Supply,
11 Inc. was converted from chapter 11 to chapter 7 on July 8, 2011.

12 **II. JURISDICTION**

13 Appellant filed a motion for a new trial, no copy of which is
14 in the record, but which appears to be related to the court's
15 July 30, 2010 ruling and September 22, 2010 order. At the hearing
16 for a new trial on March 10, 2011, the appellant again argued the
17 merits of the summary judgment motion and award of fees. The
18 appellee has not raised any issue concerning the timeliness of the
19 appeal. Despite the incomplete record, this appeal appears to be
20 timely. FRBP 8002(b).

21 The bankruptcy court had jurisdiction under 28 U.S.C.
22 §§ 157(b)(2)(K) and 1334. This court has jurisdiction under 28
23 U.S.C. § 158.

24 **III. ISSUES**

25 **A.** Have the issues regarding entry of the order denying a
26 new trial been waived by the appellant? In the alternative, did the
27 bankruptcy court abuse its discretion by denying the motion for a
28 new trial?

1 considered waived by the appellate court. An appellate court in
2 this circuit "will not review issues which are not argued
3 specifically and distinctly in a party's opening brief." City of
4 Emeryville v. Robinson, 621 F.3d 1251, 1261 (9th Cir. 2010). Even
5 if we did review the matter, we see no abuse of discretion by the
6 bankruptcy court in denying it.

7 The reasoning of the bankruptcy court for its ruling is
8 referenced in the transcript of the hearing held March 10, 2011,
9 which related to the appellant's motion for a new trial. The
10 transcript reflects that the motion, which is not part of the
11 record on appeal, sought alteration or modification of the order
12 granting summary judgment and awarding attorneys' fees.²

13 The bankruptcy court treated the motion as a post judgment
14 motion under FRBP 7052(b) and stated that the first ruling in May
15 2010 regarding summary judgment "stands on its own" and that on
16 July 30, 2010, the appellant's motion to amend that ruling had been
17 denied.

18 The bankruptcy court cited E.E.O.C. v. Sunfire Glass, Inc.,
19 2009 W.L. 2450472 (D. Ariz. Aug. 11, 2009), which states the
20 correct legal standard to be applied to a post judgment motion
21 under FRBP 7052(b) in which a party asks the court to correct on
22 the non-jury record any errors of law, mistakes of fact or
23 oversights that require correction. The following facts were
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26 ²The record does contain a Motion to Amend Bankruptcy Court
27 Finding filed May 28, 2010 and the response filed June 28, 2010,
28 which relates to the May 18, 2010 summary judgment hearing. The
record also contains a response to a motion for a new trial filed
October 25, 2010. It is apparent from the record that the
appellant has filed various motions seeking reconsideration and
repeatedly reargued the merits of the summary judgment.

1 articulated as the basis for the court's ruling: "I'll repeat my
2 early-the essentials of my earlier ruling, although the reality is
3 that that ruling in last May is-stands on its own, but I'll repeat
4 a brief summary." After reciting its prior analysis, the court
5 concluded "I believed in May and I believe now in March that the
6 debtor was entitled to summary judgment. The debtor's obligation
7 to Mr. Colvin was discharged when the debtor purchased the
8 cashier's check."

9 The bankruptcy court applied the correct legal standard and
10 its decision is not illogical, implausible or without support in
11 inferences that may be drawn from the facts in the record.³

12 **B.** The basis for the court's grant of summary judgment is
13 contained in the oral ruling of May 18, 2010. The court correctly
14 stated the standard for entry of a summary judgment. The movant
15 bears the initial responsibility of providing evidence. Once that
16 burden is met, the responding party has the burden of producing
17 evidence to the contrary, with the moving party bearing the
18 ultimate responsibility to establish the absence of a genuine issue
19 of material fact. In this case, the evidence presented by the
20 appellee as moving party was in the form of declarations of the
21 issuing bank and of the appellee and included bank records of the
22 appellee. The evidence presented by the appellant was his

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24 ³In his brief, appellant discusses at length issues regarding
25 the bankruptcy court's denial of the appellant's motion to dismiss
26 the bankruptcy proceeding which was also heard on March 10, 2011,
27 and the appellee has responded to those arguments. No appeal was
28 taken from the order denying the motion to dismiss. The appellant
argues that since the hearing on the motion to dismiss and the
hearing on the motion for a new trial occurred on the same day, the
court's denial of the motion to dismiss should also be part of this
appeal. The issues concerning that motion and order are irrelevant
to this appeal and will not be considered.

1 declaration stating that the issuing bank had refused to honor the
2 check. A copy of the cashier's check was part of the record before
3 the bankruptcy court. The cashier's check was drawn, not from the
4 account of the appellee, but from an account of the issuing bank.

5 ARS § 47-3104(G) defines a cashier's check as a draft with
6 respect to which the drawer and the drawee are the same bank or
7 branches of the same bank. The court determined that the
8 instrument constituted a cashier's check drawn upon the account of
9 the issuing bank and the evidence supports that conclusion. ARS
10 § 47-3104(G). ARS §§ 47-1101, *et seq.*, contains Arizona's
11 enactment of the Uniform Commercial Code. ARS § 47-3310
12 establishes the relationship between checks and the underlying
13 obligations for which the check is issued. Subpart (A) of that
14 statute reads in part:

15 A. Unless otherwise agreed, if a certified check,
16 cashier's check or teller's check is taken for an
17 obligation, the obligation is discharged to the same
18 extent discharge would result if an amount of money equal
to the amount of the instrument were taken in payment of
the obligation. . . .

19 The statute is not ambiguous. Appellee's obligation to pay
20 appellant \$12,000 was discharged when the cashier's check for that
21 amount was delivered to the appellant in May of 2007. Upon
22 delivery of the cashier's check, the appellant had no further claim
23 against the appellee. The appellant did not produce any evidence
24 which created a material issue of fact. The proof of claim filed
25 by appellant was properly disallowed.

26 Appellant also based the proof of claim upon ARS § 12-671
27 which provides:

28 A person who, for himself or for another, with intent to
defraud, makes, draws, utters or delivers to another

1 person or persons a check or draft on a bank or
2 depository for payment of money, knowing at the time of
3 such making, drawing, uttering or delivery, that he or
4 his principal does not have an account or does not have
5 sufficient funds in, or credit with, such bank or
6 depository to meet the check or draft in full upon
7 presentation, shall be liable to the holder of such check
8 or draft for twice the amount of such check or draft or
9 fifty dollars, whichever is greater, together with costs
10 and reasonable attorney's fees as allowed by the court on
11 the basis of time and effort expended by such attorney on
12 behalf of plaintiff.

13 The bankruptcy court found the statute inapplicable to appellee as
14 the cashier's check was drawn upon the account of the issuing bank.
15 Further, the appellant was unable to establish that at the time of
16 presentment, the appellee lacked sufficient funds in its account.
17 Moreover, the bank records indicated Darcomm Supply, Inc. had
18 sufficient funds in its account at the time the check was drawn.
19 Even assuming that mere delivery of the cashier's check by appellee
20 to appellant could give rise to a claim under ARS § 12-671, the
21 bankruptcy court held that the evidence failed to establish the
22 elements required by that statute.

23 The appellant also argues that he was deprived of his due
24 process rights as the appellee did not commence an adversary
25 proceeding to determine that the obligation was not subject to
26 discharge. Firstly, the bankruptcy court held due process had not
27 been denied as appellant had an opportunity to and did respond to
28 the objection to the proof of claim, which objection was filed on
29 August 13, 2008. Further, the appellant had been given ample
30 opportunity to argue the merits of his claim, including an
31 opportunity to depose bank representatives and conduct other
32 discovery. Secondly, the appellant cited 11 U.S.C. § 523(a) for
33 the proposition that the claim was not subject to discharge. That

1 waived issues relating to that motion. Alternatively, the record
2 shows that the bankruptcy court applied the correct legal standard
3 and based its ruling on facts which adequately supported its
4 decision. Therefore, the bankruptcy court did not abuse its
5 discretion in denying a new trial.

6 **B.** The granting of the appellee's motion for summary
7 judgment is AFFIRMED. The bankruptcy court applied the correct
8 legal standard for consideration of summary judgment motions. The
9 appellant was not denied due process and the undisputed facts
10 support the bankruptcy court's conclusions. Arizona law discharged
11 the appellee from any obligation to appellant upon issuance and
12 delivery of the cashier's check.

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