

JUL 28 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of: ASTARTE DAVIS-
RICE,

Debtor.

No. 08-60007

BAP No. NC-07-1352-MkMcPa

MEMORANDUM*

ASTARTE DAVIS-RICE,

Appellant,

v.

KATHLEEN CLEMENTS,

Appellee.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Markell, McManus, and Pappas, Bankruptcy Judges, Presiding

Submitted July 14, 2009**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: SCHROEDER, THOMAS, and WARDLAW, Circuit Judges.

Astarte Davis-Rice appeals pro se from an order of the Bankruptcy Appellate Panel (“BAP”) affirming the bankruptcy court’s summary judgment on an adversary complaint based on the finding that Kathleen Clements’s state court judgment debt against Davis-Rice is non-dischargeable under 11 U.S.C. § 523. We have jurisdiction pursuant to 28 U.S.C. § 158(d). We review de novo the BAP’s decision, *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1222-23 (9th Cir. 1999), and we affirm.

After a careful review of the record and briefs, we affirm for the reasons stated in the BAP opinion filed March 11, 2008.

Because Clements’s request for sanctions for a frivolous appeal was not separately filed, we deny the request without prejudice to refile a separate motion. *See* Fed. R. App. P. 38 (“[I]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”); *see also Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 (9th Cir. 2004) (“A request made in an appellate brief does not satisfy Rule 38, and thus the motion [should be] denied without prejudice.”) (internal quotation marks

and citation omitted).

AFFIRMED.