

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
DIVISION

In re)
)
SHARON L. HORSFALL,) Case No. 98-44559-293
) Chapter 7
)
Debtor.)
LESLIE A. DAVIS, Trustee,)
)
)
)
Plaintiff,)
)
-v-) Adv. No. 99-4213-293
)
SHARON L. HORSFALL,)
)
)
Defendant.)

ORDER

This case is before the Court on the motion of Sharon L. Horsfall ("Debtor") for relief from this Court's order dated October 25, 2001 revoking her discharge under 11 U.S.C. § 727(d) (the "Revocation Order"). Debtor seeks relief from the Revocation Order under Fed. R. Civ. P. 60(b)(6), made applicable to this adversary proceeding by Bankr. R. 9024, because she contends that her former attorney's conduct in representing her in the case amounted to gross negligence. Because Rule 60(b)(6) is not the proper vehicle for addressing an attorney's misconduct under binding Eighth Circuit precedent, the Court will deny Debtor's motion.

Before analyzing the substantive issues in dispute, the Court notes that Debtor's attorney's office notified the Court that he would not be able to attend the hearing on the motion because he would be a trial in a different court. The office also stated that another attorney would appear at the hearing and request

a continuance of the matter. That other attorney, however, failed to appear at the hearing to request such a continuance. The Court further observes that Trustee and his attorney did appear at the hearing. This Court is most reluctant to proceed, when an attorney is in trial in another court and is thus unavailable. However, given the fact that binding Eighth Circuit precedent conclusively disposes of Debtor's argument as a matter of law, the Court will deny Debtor's motion and thus avoid additional cost to all parties that would result if the court continued Debtor's Motion.

Trustee filed an adversary proceeding against Debtor requesting that the Court revoke Debtor's discharge for failing to disclose the existence of an executory contract for the sale of her home on her schedules and failing to disclose the execution of that contract to the Trustee. The Court entered judgment in favor of Trustee on the adversary complaint and revoked Debtor's discharge in the Revocation Order.

Debtor's attorney then filed a breach of contract action in state court against Debtor for his attorney's fees arising out of the main bankruptcy case and the adversary proceeding. Debtor filed a negligence counterclaim against the attorney. The basis of Debtor's malpractice claim is that the attorney's advice not to disclose the executory contract to Trustee constituted malpractice.

Debtor has now filed a motion for relief from the Revocation Order pursuant to Fed. R. Civ. P. 60(b)(6), made applicable to this adversary by Bankr. R. 9024. Debtor argues that she is entitled to relief from the Revocation Order under Rule 60(b)(6) because her attorney was grossly negligent in advising her not to disclose the existence of the executory contract and the execution of that contract. The Court will deny Debtor's motion.

The basis of Debtor's argument is that she is entitled to relief from the Revocation Order under Rule 60(b)(6) because her attorney's conduct in representing her constituted gross negligence. Debtor relies heavily on the Ninth Circuit's opinion in Cnty. Dental Serv. v. Tani, 282 F.3d 1164 (9th Cir. 2004). In Tani, a divided panel of the Ninth Circuit held that a litigant is entitled to relief from a judgment under Rule 60(b)(6) if she can demonstrate that her attorney's conduct in the representing her constituted gross

negligence. Id. at 1169.

The Eighth Circuit, however, has consistently held that because the attorney/client relationship creates a voluntary agency relationship, a litigant is bound by her attorney's actions and Rule 60(b)(6) is not a vehicle to remedy her attorney's incompetence. Inman v. Am. Home Furniture Placement, 120 F.3d 117, 118-19 (8th Cir. 1997). This is the outcome even if the attorney's conduct constitutes gross negligence provided that the attorney was acting within the scope of the agency relationship. Heim v. Comm'r., 872 F.2d 245, 247-48 (8th Cir. 1989). In fact, the majority opinion in Tani expressly rejected the Eighth Circuit's rule of not granting a litigant relief from a judgment under Rule 60(b)(6) for her attorney's gross negligence as "harsh and inequitable." Tani, 282 F.3d at 1169 n. 11.

Here, even accepting Debtor's allegation that her attorney's conduct constituted gross negligence, there is no dispute that the attorney was acting within the scope of the agency relationship when he advised her not disclose the executory contract and the subsequent execution of the contract. Therefore, under the Eighth Circuit's decision in Heim, Debtor is not entitled to relief from the Revocation Order under Rule 60(b)(6). Accordingly,

IT IS HEREBY ORDERED that Debtor's Motion for Relief from the Revocation Order under Rule 60(b)(6) (Motion No. 29) is **DENIED**.

DATED: August 31, 2005

St. Louis, Missouri



David P. McDonald
United States Bankruptcy Judge

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