UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

MARCEL'S TANNING SALONS, INC. Appellant vs. TANYA C. BENNETT, Appellee	Case No. 3:08-CV-00103-PPS On appeal from the United States Bankruptcy Court, the Honorable Harry C. Dees, Jr., Chief Judge

BRIEF OF APPELLANT

William L. Wilson, Atty. No. 16245-71
ANDERSON, AGOSTINO & KELLER, P.C.
131 S. Taylor Street
South Bend, IN 46601
(574) 288-1510 Tel.
(574) 288-1650 Fax
wilson@aaklaw.com

Attorney for Appellant Marcel's Tanning Salons, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Local Rules

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Indiana has jurisdiction to hear this appeal from the United States Bankruptcy Court for the Northern District of Indiana ("Bankruptcy Court") pursuant to 28 U.S.C. § 158(a)(1) in that this appeal arises out of a final order of the Bankruptcy Court.

STATEMENT OF THE ISSUE

The Bankruptcy Court abused its discretion in an adversary proceeding by granting the Debtor's motion to dismiss the creditor's counter-claim and then refusing to set aside the dismissal, where the court granted the Debtor's motion prior to the deadline to file a response established in the Bankruptcy Court's scheduling order.

STATEMENT OF THE CASE

On August 1, 2006, the Debtor filed her Voluntary Petition under Chapter 13 of the United States Bankruptcy Code. On the same date, the Bankruptcy Court established November 6, 2006, as the deadline for objecting to the dischargeability of debts. On October 19, 2006, the Debtor filed an adversary proceeding against Marcel's Tanning Salons, Inc. ("Marcel's"), a creditor of the Debtor. In the complaint, the Debtor alleged that Marcel's had violated the automatic stay in the Debtor's prior Chapter 7 bankruptcy proceeding filed in 2002.

On October 23, 2006, Marcel's filed its answer to the Debtor's complaint, along with affirmative defenses and a counter-claim against the Debtor to determine the dischargeability of the debt owed to Marcel's. The Debtor filed her answer to the counter-claim on November 1, 2006.

On November 29, 2006, the Bankruptcy Court conducted a telephonic pretrial conference, and at the conclusion entered an order directing the parties to file a stipulation of facts by December 29, 2006, and any motions for summary judgment were to be filed by January 29, 2007

and responses thereto on or before February 28, 2007. Because of the relationship between the issues asserted in the Debtor's complaint and Marcel's counter-claim, the parties and the Bankruptcy Court agreed that the Debtor's complaint should be resolved first, since its outcome might affect issues in the counter-claim.

The parties filed the stipulation of facts on December 29, 2006, and then filed an amended stipulation of facts on January 3, 2007. The parties filed their cross-motions for summary judgment on January 29, 2007 and their responses were filed on February 28, 2007. Marcel's filed a reply brief on March 7, 2007.

On September 19, 2007, the Bankruptcy Court entered a memorandum of decision granting Marcel's motion for summary judgment and denying the Debtor's motion for summary judgment on her complaint against Marcel's. Judgment was entered by the Clerk on the same date.

On November 8, 2007, the Bankruptcy Court entered an order closing the adversary proceeding, but then on December 5, 20007, entered an order re-opening the adversary proceeding *sua sponte* because Marcel's counter-claim had not been resolved. In the same order, the Bankruptcy Court set a telephonic pretrial conference for December 19, 2007, which went forward as scheduled.

On December 20, 2007, the Bankruptcy Court entered an order stating that motions for summary judgment and other dispositive motions were to be filed by February 4, 2008, with responses thereto to be filed by February 19, 2008.

On December 27, 2007, the Debtor filed a motion to dismiss the counter-claim, alleging that it should have been filed as a separate adversary proceeding. Apparently pursuant to N.D.Ind. L.B.R. 2002-2, the Debtor filed a notice of motion and opportunity to object and served it on Marcel's counsel. The notice reflected that objections to the motion to dismiss were due by January 16, 2008.

On January 29, 2008, the Bankruptcy Court granted the Debtor's motion to dismiss. On January 30, 2008, Marcel's filed a motion to vacate the order of dismissal, along with a response to the motion to dismiss and its own motion for summary judgment.

On February 4, 2008, the Debtor filed a motion to extend the deadline for the Debtor to file her motion for summary judgment, along with a response to the motion to vacate the order of dismissal. On February 5, 2008, Marcel's filed a reply in favor of its motion to vacate the order of dismissal.

On February 11, 2008, the Bankruptcy Court entered an order denying the motion to vacate the order dismissing Marcel's counter-claim, which noted that Marcel's had not filed an objection by the date set forth in the notice of motion served by the Debtor.

Marcel's filed its notice of appeal, designation of contents to be included in the record of proceedings, a certification that no transcript would be requested, and a statement of issues on appeal in a timely manner on February 15, 2008.

STATEMENT OF FACTS

From February of 1999 through May of 2000, the Debtor was employed by Marcel's. [Appendix, Page 28; Amended Stipulation, ¶ 1.] After Marcel's discovered that the Debtor apparently had been stealing money from her employer, Marcel's made a complaint to law enforcement authorities, and the Debtor was subsequently charged with theft by the State of Indiana. [App. Page 28; Amend. Stip. ¶ 2.] Bennett pleaded guilty to the theft, a Class A misdemeanor. [App. Page 28; Amend.Stip. ¶ 3.]

In April of 2002, Bennett filed a petition for relief under Chapter 7 of the United States Bankruptcy Code, which was docketed as Case No. 02-31987. [App. Page 29; Amend.Stip. ¶ 4] In her filing, Bennett did not list Marcel's as a creditor on her schedules or her matrix of creditors. [App. Page 29; Amend. Stip. ¶ 6.] Approximately two weeks later, Marcel's filed a civil suit in the St. Joseph Circuit Court against Bennett to recover the funds she had stolen from Marcel's. [App. Page 29; Amend. Stip. ¶ 8.] Bennett did not advise the St. Joseph Circuit Court of the bankruptcy filing.

[App. Page 29; Amend. Stip. ¶ 10.] On July 22, 2002, the Bankruptcy Court entered its discharge order in the Chapter 7 case. [App. Page 29; Amend. Stip. ¶ 11.]

In November of 2002, Marcel's then-attorney, Patrick J. Hinkle, deposed Bennett. During this deposition, she revealed the Chapter 7 filing, thus providing notice to Marcel's. [App. Page 29; Amend. Stip. ¶ 12.] In the fall of 2004, Marcel's new counsel filed a motion for summary judgment in the civil proceeding, and a hearing was scheduled for December 6, 2004. [App. Pages 29–30; Amend. Stip. ¶ 13.] Prior to the summary judgment hearing, Bennett's attorney, André Gammage, withdrew his appearance because Bennett had not maintained communication with him. [App. Page 30; Amend. Stip. ¶ 14.]

On December 6, 2004, the St. Joseph Circuit Court ruled on Marcel's summary judgment ruling, granting the motion as unopposed. [App. Page 30; Amend. Stip. ¶ 15.] The court entered a judgment in favor of Marcel's in excess of $200,000 (based upon treble damages pursuant to the Indiana Crime Victims Relief Act). [App. Page 30; Amend. Stip. ¶ 15.] In the spring of 2005, Marcel's obtained an order requiring Bennett to appear before the St. Joseph Circuit Court to answer regarding assets or wages that Bennett owned that might be applied toward the judgment. [App. Page 30; Amend. Stip. ¶ 16.] Bennett appeared and disclosed that she was employed by X-Ray Consultants, Inc. [App. Page 30; Amend. Stip. ¶ 16.] At this time, Marcel's was aware of the prior Chapter 7 filing, and that the Chapter 7 case had not been re-opened to add the debt to Marcel's. [App. Page 30; Amend. Stip. ¶ 17.] On May 27, 2005, Marcel's obtained a wage garnishment order against Bennett, and between that date and August 1, 2006, Marcel's received $6,673.18 in garnishments from Bennett's wages. [App. Page 30; Amend. Stip. ¶¶ 18, 19.]

On August 1, 2006, Bennett filed her Chapter 13 bankruptcy proceeding. [App. Pages 30–31; Amend. Stip. ¶ 20.] Thereafter, she filed a complaint against Marcel's, alleging that the garnishment of her wages constituted a violation of the automatic stay in the prior Chapter 7 case. [App. Page 2; Adversary Proc. Docket Entry 1; App. Pages 10–21; Complaint.] Four days later, on October 23,

2006, Marcel's filed its answer, affirmative defenses, and a counterclaim to determine the dischargeability of the debt owed by Bennett to Marcel's. [App. Page 3; Adv.Proc. Docket Entry 2; App. Pages 22–26; Answer.] On November 29, 2006, the Bankruptcy Court conducted a pretrial conference and directed the parties to file a stipulation of facts related to Bennett's claim by December 29, 2006, and motions for summary judgment on Bennett's claim by January 29, 2007. Reply briefs were due on or before February 28, 2007. [App. Page 3; Adv.Proc. Docket Entry 13; App. Page 27; Order.]

After the parties filed their stipulation of facts (subsequently amended) and their summary judgment motions, the Bankruptcy Court granted Marcel's motion for summary judgment and denied Bennett's motion. The ruling rejected Bennett's argument that the automatic stay had been violated by the filing of the civil suit, and accepted Marcel's argument that the automatic stay in that Chapter 7 case should be retroactively annulled due to Bennett's conduct. [App. 32–44; Memorandum of Decision, pp. 8, 12.]

Subsequently, on November 8, 2007, the Bankruptcy Court closed the adversary proceeding. [App. Page 6; Adv.Proc. Docket Entry of 11/08/2007], but the Bankruptcy Court re-opened the adversary proceeding on December 5, 2007 because Marcel's counter-claim had not been resolved. [App. Page 6; Adv.Proc. Docket Entry 38; Order.] In the same order, the Bankruptcy Court set a telephonic pretrial conference for December 19, 2007, which went forward as scheduled.

On December 20, 2007, the Bankruptcy Court entered an order stating that motions for summary judgment and other dispositive motions were to be filed by February 4, 2008, with responses thereto to be filed by February 19, 2008. [App. Page 6; Docket Entry 40; App. Page 46.]

On December 27, 2007, the Debtor filed a motion to dismiss the counter-claim, alleging that it should have been filed as a separate adversary proceeding. Apparently pursuant to N.D.Ind. L.B.R. 2002-2, the Debtor filed a notice of motion and opportunity to object and served it on Marcel's

counsel. The notice reflected that objections to the motion to dismiss were due by January 16, 2008. [App. Page 7; Docket Entries 42, 43; App. Pages 47–52; Motion and Notice of Motion.]

On January 29, 2008, the Bankruptcy Court granted the Debtor's motion to dismiss. [App. Page 7, Docket Entry 44; App. Page 57; Order.] On January 30, 2008, Marcel's filed a motion to vacate the order of dismissal, along with a response to the motion to dismiss and its own motion for summary judgment. [App. Page 7; Docket Entries 45, 46, 47 and 48; App. Pages 58–74.]

On February 4, 2008, the Debtor filed a motion to extend the deadline for the Debtor to file her motion for summary judgment, along with a response to the motion to vacate the order of dismissal. [App. Page 7; Docket Entries 50 and 51; App. Pages 75–78; Response.] On February 5, 2008, Marcel's filed a reply in favor of its motion to vacate the order of dismissal. [App. Page 8; Docket Entry 52.]

On February 11, 2008, the Bankruptcy Court entered an order denying the motion to vacate the order dismissing Marcel's counter-claim, noting that Marcel's had not filed an objection by the date set forth in the notice of motion served by the Debtor concerning its motion to dismiss. App. Page 8; Docket Entry 53; App. Page 79; Order.]

SUMMARY OF ARGUMENT

The Bankruptcy Court's error is bewildering. After establishing a scheduling order for the filing of dispositive motions and summary judgment motions, the Bankruptcy Court disregarded the schedule and dismissed Marcel's counter-claim before Marcel's response was due. When the error was pointed out to the Bankruptcy Court, it relied upon the wrong local rule and declined to correct the mistake. As will be shown in detail below, scheduling orders take precedence over deadlines established by local rules, and even if the Bankruptcy Court was properly relying upon local rules in reaching its decision, it applied the wrong rule. For these reasons, the Bankruptcy Court's decision must be reversed.

ARGUMENT

I. Standard of Review

This appeal seeks review of the Bankruptcy Court's denial of Marcel's motion to vacate the order dismissing its counter-claim. The motion sought relief under Fed.R.Civ.P. 60(B) (which applies to the Bankruptcy Court per Fed.R.Bk.P. 9024). On appeal this Court reviews the Bankruptcy Court's decision using an abuse of discretion standard. *Easley v. Kirmsee*, 382 F.3d 693 (7th Cir. 2004).

To find an abuse of discretion, the reviewing court must conclude that no reasonable person could agree with the lower court's ruling—that it was fundamentally wrong. *Edie F. ex rel. Casey F. v. River Falls School Dist.*, 243 F.3d 329 (7th Cir. 2001). An abuse of discretion exists only where the result is not one that could have been reached by a reasonable jurist or where the decision of the lower court strikes the reviewing court as fundamentally wrong or is clearly unreasonable, arbitrary, or fanciful. *Greviskes v. Universities Research Ass'n., Inc.,* 417 F.3d 752 (7th Cir. 2005). A court does not abuse its discretion unless one or more of the following factors is present: (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary. Actual and substantial prejudice must also be established. *Reynolds v. Jamison*, 488 F.3d 756 (7th Cir. 2007).

While considerable deference is accorded to the lower court's interpretation and application of its own rules of practice and procedure, where the reviewing court is convinced that the lower court has misconstrued its own rules, reversal can be appropriate and warranted. *See Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980).

II. The Bankruptcy Court erred in not following its scheduling order.

The Bankruptcy Court held its pretrial conference on December 19, 2007. At that time, the Bankruptcy Court developed a scheduling order with input from the parties. This order was entered on December 20, 2007. The order clearly states that the parties had until February 4, 2008, to file

dispositive motions and motions for summary judgment, and that responses to such motions were due on February 19, 2007. By not following the schedule set out in its order, the Bankruptcy Court erred.

The federal courts have overwhelmingly endorsed the use of scheduling orders and their enforcement. As the U.S. Court of Appeals for the Seventh Circuit noted, "'Courts have a legitimate interest in ensuring that parties abide by scheduling orders to ensure prompt and orderly litigation.'" *Campania Management Company v. Rooks, Pitts & Poust*, 290 F.3d 843, 851 (7th Cir. 2002), quoting *United States v. 1948 S. MLK Dr.*, 270 F.3d 1102, 1110 (7th Cir. 2001). The U.S. Court of Appeals for the Ninth Circuit has said, "The district's court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities…Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Johnson v. Mammoth Creations*, 975 F.2d 604, 610 (9th Cir. 1992).

In this case, despite the existence of a scheduling order, the Bankruptcy Court appears to have relied upon the provisions of a local rule to declare the time for responding to the Debtor's complaint to have expired. This approach—placing local or other procedural rules above a court's scheduling order—has been rejected by the courts. In the case of *In re Acceptance Insurance Companies Securities Litigation*, 352 F.Supp.2d 940 (D.Neb. 2004), a scheduling order established the deadline for the disclosure of expert reports and testimony. When these experts' testimony was offered in response to the defendant's summary judgment motion, the defendant objected on the grounds that the plaintiffs had not complied with the provisions of Fed.R.Civ.P. 26. The district court rejected this argument, holding that "The Court's Interim Progression Order supercedes the more general requirements of Rule 26." 352 F.Supp.2d at 947.

In *Doe v. State of Hawaii Dept. of Educ.*, 351 F.Supp.2d 998 (D. Hawai'i 2004), the district court entered a scheduling order establishing a deadline for the filing of dispositive motions. The

defendants filed a motion for summary judgment, and the plaintiff filed a counter-motion for summary judgment along with his response, even though the counter-motion was filed six months after the deadline for filing dispositive motions set forth in the scheduling order. The plaintiff relied on the provisions of a local rule that stated a counter-motion for summary judgment could be filed at the same time as a response to a motion for summary judgment. The district court rejected this argument, holding that the scheduling order trumps the local rule. 351 F.Supp.2d at 1007.

In *ORI, Inc. v. Lanewala*, 2000 WL 1683659 (D.Kan. 2000), the U.S. District Court in Kansas denied a motion to dismiss that was filed after the dispositive motion deadline established in the scheduling order on the grounds that it was untimely.

In *Cotter v. Prudential Financial*, 238 F.R.D. 567 (N.D.W.Va. 2006), the parties had agreed among themselves that responses to requests for admissions would be served by a certain date, which was a date prior to the deadline established by the court's scheduling order. The plaintiff served a set of request for admissions after the agreed deadline, but before the deadline set out in the scheduling order. The defendant objected to the request as being untimely, but its objections were not favored by the court: "A valid scheduling order controls the litigation until modified. Fed.R.Civ.P. 16(e). Where a scheduling order and a time frame agreed to by the parties conflict, the scheduling order controls." 238 F.R.D. at 571.

The holdings of these decisions and others are well summarized by the U.S. Court of Appeals for the First Circuit: "[W]hen a court charts a procedural route, lawyers and litigants are entitled to rely on it." *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29–30 (1st Cir. 1996).

In this case, there is no dispute that the Bankruptcy Court established definite deadlines for the filing of dispositive motions (February 4, 2008) and responses thereto (February 19, 2008).[1] Nevertheless, the Bankruptcy Court chose not to abide by the scheduling order when it dismissed

[1] It cannot be disputed that the motion to dismiss Marcel's claim to determine dischargeability was a dispositive motion.

Marcel's counter-claim on January 29, 2008. In doing so, the Bankruptcy Court made a substantial error. It dismissed Marcel's charge that the more than $70,000 stolen from Marcel's by the Debtor should not be wiped out and forgiven in the form of a bankruptcy discharge.

By granting the Debtor's motion to dismiss, and then not correcting its error, the Bankruptcy Court effectively yanked the rug from under Marcel's. The Bankruptcy Court's scheduling order provided Marcel's had until February 19, 2008, to respond to the Debtor's motion to dismiss. Marcel's was entitled to rely upon that scheduling order, *Berkovitz v. Home Box Office, Inc.*, *supra*, but the Bankruptcy Court acted inconsistent with that principle. The Bankruptcy Court's actions constitute an abuse of discretion, and must be reversed.

III. In granting the motion to dismiss, the Bankruptcy Court misapplied its local rules.

A. The Bankruptcy Court should have applied Local Rule B-7007-1.

Of the many local rules of the Bankruptcy Court, only N.D.Ind. B.L.R. B-7007-1 applied to the Debtor's motion to dismiss. This rule provides in relevant part:

> (a) Any motion filed within a contested matter or an adversary proceeding…*Unless the court orders otherwise*, the opposing party shall have thirty (30) days after service of the motion and initial brief within which to serve and file a response. (Emphasis added.)

The Debtor's motion to dismiss was filed within the adversary proceeding, and thus Local Rule B-7007-1 applied. The key provision of this rule is "Unless the court orders otherwise…" In this case, the Bankruptcy Court ordered otherwise—it ordered that responses to motions for summary judgment and other dispositive motions were to be filed by February 19, 2008. The parties and the Bankruptcy Court established a briefing schedule. Any ruling upon the Debtor's motion to dismiss prior to February 19, 2008, was premature, and therefore reversal is warranted.

Because the Bankruptcy Court did not follow the timetable set out in its own scheduling order, its denial of Marcel's motion to vacate the dismissal of the counter-claim constitutes an abuse of discretion.

B. The Bankruptcy Court mistakenly applied Local Rule 2002-1.

In granting the Debtor's motion to dismiss and then denying Marcel's motion to vacate the dismissal, the Bankruptcy Court apparently based its decision on N.D.Ind. L.B.R. B-2002-1. This rule, in summary, states that the Bankruptcy Court can grant certain motions without the need for a hearing unless a party in interest objects to the motion. The rule prescribes a procedure for handling these types of motions: upon the filing of such a motion, the moving party is required to send a notice of the motion to all parties in interest. This notice is required to include a deadline for the filing of any objection to the motion.

Rule B-2002-1 provides in relevant part:

> (a) Except as otherwise ordered, the court will consider the following matters without holding a hearing, unless a party in interest files a timely objection to the relief requested:
> (1) Motions to approve agreements relating to relief from the automatic stay; providing adequate protection; or prohibiting or conditioning the use, sale or lease of property.
> (2) Motions to approve agreements relating to the use of cash collateral.
> (3) Motions for authority to obtain credit.
> (4) In cases pending under Chapter 7, motions for relief from the automatic stay.
> (5) Motions to avoid liens on exempt property.
> (6) Motions to redeem personal property from liens.
> (7) Applications for administrative expenses, including compensation for services rendered and reimbursement of expenses.
> (8) Motions to extend the time for filing claims.
> (9) Motions to extend the exclusivity periods for filing a Chapter 11 plan.
> (10) Motions to extend the time to assume or reject executory contracts and unexpired leases.
> (11) Motions filed by a trustee or debtor-in-possession to assume or reject executory contracts and unexpired leases.
> (12) Motions to approve a modification to a confirmed Chapter 11, Chapter 12 or Chapter 13 plan.
> (13) Motions to approve a compromise or settlement.
> (14) Motions to transfer a case to another district or to another division in this district.
> (15) Motions to approve transactions outside the ordinary course of business, except motions for the sale or lease of personally identifiable information.
> (16) Motions to sell property free and clear of liens, except motions to sell or lease personally identifiable information.
> (17) Motions to abandon property of the estate.
> (18) Motions for relief from the co-debtor stay of 11 U.S.C. § 1201 or § 1301.
> (19) Motions for the substantive consolidation of cases.
> (20) Motions to compel the debtor to turnover or deliver property to a trustee.

(21) In cases under Chapter 12 and 13, motions for a discharge prior to the completion of payments under a confirmed plan (motions for hardship discharge).
(22) Motion of a party in interest to enter a final decree in a case under Chapter 11.
(23) Trustees' Applications to Employ Professionals after Notice to Creditors filed pursuant to N.D.Ind. L.B.R. B-2014-2(b).
(24) Applications to employ professionals nunc pro tunc.

(b) Except as otherwise ordered by the court:
(1) no less than fifteen (15) days notice shall be given of the opportunity to file objections to:
(A) motions to approve agreements relating to relief from the automatic stay, providing adequate protection, prohibiting or conditioning the use, sale or lease of property;
(B) motions to approve agreements relating to the use of cash collateral;
(C) motions for authority to obtain credit;
(D) motions for relief from the automatic stay in cases pending under Chapter 7; and
(E) motions relating to abandonment of property from the estate.
(2) no less than twenty (20) days notice shall be given of the opportunity to file objections to the other motions subject to this rule.[2]

The first noticeable characteristic of all of the motions described in the twenty-four different categories is that they are not of the sort filed in most adversary proceedings. Indeed, a motion to dismiss in an adversary proceeding is not even remotely referred to by any of these descriptions in Local Rule B-2002-1. While Debtor's counsel might understandably assume that this rule applied to her motion to dismiss, the provisions of the rule clearly state otherwise. The Bankruptcy Court erred in making the same assumption and not correcting its erroneous dismissal of Marcel's counter-claim.

Furthermore, the Debtor's use of this rule constitutes an effective unilateral modification of the Bankruptcy Court's scheduling order. As shown above, the courts have held that the agreement of parties concerning a deadline will not be enforced in light of a different deadline in a scheduling order. *Cotter v. Prudential Financial, supra.* If both sides to a case cannot agree to modify the deadline set out in a scheduling order, then certainly a single side cannot unilaterally change a deadline. Even

[2] The provisions of this local rule track the provisions of General Order 99-1 of the Bankruptcy Court.

so, the Bankruptcy Court's decision permitted the Debtor to do so, and to not correct its error constitutes an abuse of discretion requiring reversal.

IV. The Bankruptcy Court's error actually and substantially prejudiced Marcel's.

Marcel's brought its counter-claim in order to make certain that the Debtor cannot walk away from her debt to Marcels—one that she created through her own criminal behavior. The record shows that Marcel's actively litigated the Debtor's claim that Marcel's had violated the automatic stay in her previous Chapter 7 bankruptcy. Indeed, the Bankruptcy Court had to find that the Debtor's behavior was unfair in order to reach its decision on the Debtor's complaint—a ruling that the Debtor did not challenge on appeal. The record shows that Marcel's has taken its case seriously, even though the Debtor may be judgment-proof. By erroneously dismissing Marcel's challenge to the dischargeability of the debt in question, the Bankruptcy Court has deprived Marcel's of its right to ensure that the Debtor's attempt to walk away from her indefensible criminal acts does not succeed.

To show that Marcel's has been actually and substantially prejudiced, it is helpful to look at its counter-claim to determine dischargeability as a property right. It is well established that legal claims can be "property" for due process purposes. *Logan v. Zimmerman Bruch Co.*, 455 U.S. 422, 428–31, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Irizarry v. Board of Educ. of City of Chicago*, 251 F.3d 604, 611 (7th Cir. 2001). Marcel's does not contend in this appeal that the Bankruptcy Court's ruling constitutes a due process violation, but the analogy is useful. The fact that legal claims are often treated as property protected by the Due Process Clause reflects the value that society and the legal system places on legal claims.

By dismissing Marcel's challenge to the dischargeability of the debt owed to Marcel's, the Bankruptcy Court deprived Marcel's of a valuable property interest—a deprivation that is certainly actual and substantial. The Debtor owes Marcel's over $200,000. If the amount in question was $50, one might reasonably argue that Marcel's was not actually and substantially harmed by the

Bankruptcy Court's actions. The amount of this debt, however, in combination with the criminal conduct by the Debtor that created this debt, renders it impossible to make a good faith argument that Marcel's has not suffered actual and substantial prejudice as a result of the Bankruptcy Court's errors. Therefore, this Court must reverse the Bankruptcy Court and direct that Marcel's counter-claim be reinstated.

CONCLUSION

The Bankruptcy Court committed two errors in this case. First, it disregarded the scheduling order it entered by dismissing Marcel's counter-claim before Marcel's response was due. Second, when Marcel's pointed out the mistake, the Bankruptcy Court declined to correct it. By doing so, the Bankruptcy Court abused its discretion to the actual and substantial prejudice of Marcel's. No reviewing court could reasonably conclude that the Bankruptcy Court's actions were consistent with established case law and the Bankruptcy Court's local rules. All of the standards are met that justify reversal of the Bankruptcy Court's rulings, and for this reason Marcel's Tanning Salons, Inc. respectfully requests the Court to reverse the decision of the Bankruptcy Court, to order that the counter-claim to determine dischargeability be reinstated, and to grant all other just and appropriate relief.

Respectfully submitted,

/s/ William L. Wilson
William L. Wilson, Atty. No. 16245-71
ANDERSON, AGOSTINO & KELLER, P.C.
131 South Taylor Street
South Bend IN 46601
(574) 288-1510 Tel.
(574) 288-1650 Fax
wilson@aaklaw.com

Attorneys for Appellant

WORD COUNT CERTIFICATE

I affirm under the penalties for perjury that this brief contains fewer than 5,000 words as shown by the word count tool contained within the software application Pages, a part of the iWork suite distributed by Apple, Inc.

/s/ William L. Wilson

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief and accompanying appendix were served upon counsel for the Debtor, Debra Voltz-Miller and Joseph F. Zielinski, by way of the Court's ECF system on March 19, 2008.

/s/ William L. Wilson