

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION**

<b>In re:</b>	)	
	)	<b>Chapter 7</b>
<b>WILLIAM KENDALL THOMAS,</b>	)	
	)	<b>Case No. 5-00-0131-RWK</b>
<b>Debtor.</b>	)	

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<b>CYNTHIA RICE NATHAN,</b>	)	
	)	<b>Civil Action No. 5:01CV00107</b>
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>WILLIAM KENDALL THOMAS,</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>Appellee.</b>	)	<b>Chief United States District Judge</b>

This case comes to the court on appeal from an order of the Bankruptcy Court partially discharging the debts of Appellee William Kendall Thomas owed to Appellant Cynthia Rice Nathan. On September 20, 2002, the court dismissed Nathan's appeal. Nathan, proceeding pro se, has now filed a motion 1) to alter or amend the judgment of the court under Fed. R. Civ. P. 59(e), and 2) to substitute a party for Thomas, now deceased. For the reasons stated below, the court denies the motion.

**I.**

On October 17, 2001, following a trial, the Bankruptcy Court discharged three loans that Thomas owed Nathan, but denied the discharge of a fourth \$30,000 loan. Nathan then filed a notice of appeal on November 5, 2001.

On April 11, 2002, this court advised Nathan that counsel for the appellee had filed a suggestion of death on March 4, 2002 and that Nathan would be required to file a motion for

substitution of a party within ninety days of that date in accordance with Fed. R. Civ. P. 25(a)(1). The ninety-day time period subsequently expired, and Nathan failed to substitute a party or to provide any evidence to rebut the suggestion of death. Thus, on September 20, 2002, the court dismissed her appeal. Nathan timely filed this motion to alter or amend the judgment on September 26, 2002 on the grounds that she never received a copy of the April 11th order. She contends that she first received notice that she was required to file a motion to substitute a party when counsel for the appellee filed a motion to dismiss on September 17, 2002.

## II.

### A.

The court reviews its final judgment order pursuant to Rule 59(e). The court should grant relief under Rule 59(e) in three circumstances: “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Pacific Ins. Co. v. American Nat’l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Nathan bases her motion on the third circumstance.

The court remains convinced that it correctly dismissed Nathan’s appeal. From the beginning, Nathan has not complied with any of the rules of Bankruptcy Procedure nor orders of this court or the Bankruptcy Court directing her on how to proceed with her appeal. On November 5, 2001, Nathan filed a notice of appeal. On November 6, 2001, one day later, the Bankruptcy Court notified Nathan that pursuant to Bankruptcy Rule 8006 and Local Rules 8006-1 and 8007-1, she would be required to file with the clerk and serve on the appellee a designation of the record and a statement of the issues within ten days after the filing of the notice of appeal.

Nathan never complied with this notice nor made any effort to explain her neglect. On

December 27, 2001, the clerk of the Bankruptcy Court notified Nathan that the record did not comply with the requirements above. Again, Nathan failed to respond or comply and to this day has never complied.

Furthermore, pursuant to Rule 8009, Nathan had fifteen days from the docketing of this appeal in which to serve and file a brief. Again, Nathan failed to comply within the prescribed time period. On January 22, 2002, more than two months late, Nathan filed, not a brief, but rather a request for an extension of time. On April 11, 2002, this court granted Nathan's request on the grounds that her health had deteriorated. Nathan was given sixty days from the date of the entry of that order in which to file a brief. This gave her a total of almost seven months to file a brief that she was required to file in fifteen days. Nathan finally filed a brief on September 5, 2002, almost ten months after she filed her notice of appeal and almost three months after expiration of the extended deadline set.

In addition, counsel for the appellee filed a suggestion of death on March 4, 2002. In accordance with Fed. R. Civ. P. 25(a), Nathan had ninety days to file a motion for substitution. Within the order on April 11, 2002, supra, the court advised her to file a motion to substitute a party for the deceased. The ninety days passed, and Nathan failed to take any action.

Rule 8001(a) provides that failure to comply with a rule of appellate procedure constitutes grounds upon which the district court may dismiss an appeal. Rule 8001(a). Dismissal is appropriate in this case. The court has given Nathan multiple time extensions over the past twelve months. Now, Nathan claims that she did not receive the April 11th order of this court advising her to file a motion for substitution. The court presumes that, once mailed, the April 11th order was received. The fact that each and every order, notice and submission by the

opposing party was sent to 1371 John Marshall Highway, Front Royal, VA 22630 and Nathan received all of them, supports the conclusion that she received the April 11th order. Furthermore, Nathan mailed all of her motions and correspondence with the court and with the appellee from the same address. Thus, taken together with the fact that the court's order was the second notification sent to Nathan regarding the appellee's death (the first being the suggestion of death itself), the court finds that Nathan has presented no credible reason why the court should excuse her failure to substitute a party.

**B.**

Even if Nathan had substituted the proper party, she failed to heed the rules and orders governing this case, and there is no record on appeal to assist the court in reviewing the Bankruptcy Court's decision. Factual determinations of the Bankruptcy Court may be disregarded only if proven to be clearly erroneous. Fed. R. Bankr. P. 8013; In re Montgomery, 518 F.2d 1174 (4th Cir. 1997).<sup>1</sup> It is well settled that the actions of a court of law, absent evidence to the contrary, are presumed to have been conducted properly. Voorhees v. Jackson, 35 U.S. 449, 472 (1836). Furthermore, in addition to the lack of a statement of the issues and a designation of the record, the few items actually included in the file contain no suggestion of any error committed by the Bankruptcy Court. The order, dated October 17, 2001, granting judgment to Nathan states simply that having heard the evidence, observed the trial and reviewed the submissions of the parties, the Bankruptcy Court "made findings of fact and conclusions of law on the record from the bench . . . [and] concludes that Nathan did not sustain her burden of

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<sup>1</sup>Legal conclusions are reviewed de novo, Tudor Associates, Inc. II, 20 F.3d 115, 119 (4th Cir. 1994), but we have none at issue here.

proof to deny discharge [of three of the four loans] under 11 U.S.C. § 523(a)(2).” It states further that “Nathan did, however, sustain her burden of proof that the \$30,000 note should not be discharged under § 523(a)(2).” The order does not purport to contain the Bankruptcy Court’s findings, findings that are indispensable to Nathan’s appeal. In fact, the order clearly states that the judge made his findings “from the bench,” and thus a transcript is indispensable to appellate review. However, Nathan neither ordered a transcript of the testimony or of the court’s findings, nor submitted copies of the complaint, the answer, or any exhibit admitted during the trial. Simply put, there is nothing to review.

### **III.**

Accordingly, this court finds that Nathan had adequate notice of her responsibilities in pursuing this appeal. Her failure to comply with any rule of procedure, despite being directed to do so several times, properly resulted in dismissal of her case. Furthermore, nothing in the record discloses that the judgment of the Bankruptcy Court was in error. Accordingly, it would be futile for this court to grant Nathan’s motion, and consequently, her motion is denied.

**ENTER** this \_\_\_\_\_ day of January, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE

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<b>CYNTHIA RICE NATHAN,</b>	)	
	)	<b>Civil Action No. 5:01CV00107</b>
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<b>v.</b>	)	<b><u>ORDER</u></b>
	)	
<b>WILLIAM KENDALL THOMAS,</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>Appellee.</b>	)	<b>Chief United States District Judge</b>

In accordance with the court's memorandum opinion entered this day, it is **ORDERED** and **ADJUDGED** that appellant's motion is **DENIED**.

**ENTER** this \_\_\_\_\_ day of January, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE