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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Richard J. Armenta,

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No. 08-1966-PHX-JAT

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Appellee,

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ORDER

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vs.

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Priscilla Penera,

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Appellant.

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Pending before the Court is Appellee Richard J. Armenta’s (“Appellee”) Motion (Doc. #11) for an order awarding him just damages and double costs against Appellant Priscilla Penera (“Appellant”) as a sanction for a frivolous Bankruptcy appeal. For the reasons discussed below, the Motion is denied.

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I. BACKGROUND

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On April 17, 2008, Appellee filed a motion to reopen a 2005 bankruptcy case in order to determine the dischargeability of a debt that was the subject of a judgment obtained by Appellant in the Maricopa County Superior Court for a breach of contract action. (Doc. #6 at 1.) On April 24, 2008, the Bankruptcy Court ordered that the case be reopened. (*Id.* at 3.) On August 20, 2008, Appellee filed a Motion for Summary Judgment alleging that the debt at issue was discharged. (*Id.* at 38.) On August 28, 2008, Appellant filed a cross-motion for summary judgment. (*Id.* at 60.) On October 14, 2008, the Bankruptcy Court granted Appellee’s motion for summary judgment. (*Id.* at 122.)

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1 On November 18, 2008, Appellant appealed the Bankruptcy Court's decision. (Doc.
2 #10 at 2). On June 30, 2009, the District Court affirmed the Bankruptcy Court's decision. (*Id.*
3 at 9.) On July 10, 2009, Appellee filed a Motion for an Award of Attorney Fees and Costs
4 as a Sanction Against a Frivolous Appeal. (Doc. #11.) On July 20, 2009, Appellant filed a
5 response. (Doc. #12.)

6 **II. LEGAL STANDARDS**

7 Appellate courts have discretion to award damages, attorney's fees, and single or
8 double costs as a sanction for bringing a frivolous appeal. Fed. R. App. P. 38;¹ 28 U.S.C. §
9 1912; *see also McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981). Appellee moves
10 for sanctions under Federal Rule of Bankruptcy Procedure 8020. Rule 8020 allows district
11 courts to impose sanctions for a frivolous appeal of a Bankruptcy Court order. Fed. R. Bankr.
12 P. 8020 ("If a district court or bankruptcy appellate panel determines that an appeal from an
13 order . . . of a bankruptcy judge is frivolous, it may, after a separately filed motion . . . and
14 reasonable opportunity to respond, award just damages and single or double costs to the
15 appellee."). An appeal is frivolous if the result is obvious, or the arguments of error are wholly
16 without merit. *McConnell*, 661 F.2d at 118.

17 **III. ANALYSIS**

18 *Ms. Penera's Arguments of Error Were not Wholly Without Merit and the Result of*
19 *the Appeal was not Obvious.*

20 Appellee argues that the claims in Ms. Penera's appeal were unsupported and
21 groundless. (Doc. #11 at 3.) In the appeal, Ms. Penera argued that the Bankruptcy Court erred
22 in (1) reopening Appellee's case to add a creditor; (2) refusing to consider the fraudulent
23 issues presented relating to Appellee's bankruptcies; and (3) granting Appellee's Motion for
24 Summary Judgment rather than determining the debt at issue to be an exception to

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26 ¹ *See* Fed. R. Bankr. P. 8020 advisory committee's notes (Rule 8020 was amended
27 in 1997 so that it conformed to the language of Fed. R. App. P. 38, thereby recognizing "that
28 the authority to award damages and costs in connection with frivolous appeals is the same
for district courts sitting as appellate courts.")

1 dischargeability. (Doc. #2 at 2.) Logically, because a motion for sanctions looks at whether
2 the appeal as a whole has an obvious result or wholly lacks merit, it is sufficient if at least one
3 argument asserted by Ms. Penera has merit. Therefore, the Court declines to analyze Ms.
4 Penera's first two arguments.

5 Ms. Penera's third claim was that the Bankruptcy Court erred in finding that none of
6 the debt owed to her qualified as an exception to discharge. To analyze this claim, the Court
7 looked at multiple statutory provisions, including 11 USC § 523(a)(3)(B). The relevant part
8 of the statute states:

9 A discharge under section 727 . . . of this title does not discharge
10 an individual debtor from any debt— . . . (3) neither listed nor
11 scheduled . . . with the name . . . of the creditor to whom such
12 debt is owed, in time to permit— . . . (B) if such debt is of a kind
13 specified in paragraph (2) . . . of this subsection, timely filing of
14 a proof of claim and timely request for a determination of
15 dischargeability of such debt . . . unless such creditor had notice
16 or actual knowledge of the case in time for such timely filing and
17 request.

18 11 U.S.C. § 523(a)(3)(B). To succeed on a motion for sanctions for bringing a frivolous
19 appeal, the result must be obvious or the argument pertaining to § 523 must be wholly without
20 merit. To meet the requirements for an exception to discharge under § 523, the plaintiff must
21 show that (1) the debt was for money obtained by false representation or fraud under § 523
22 (a)(2)(A) and (2) plaintiff did not obtain actual knowledge of the bankruptcy proceeding.

23 Even though the Court deferred to the Bankruptcy Court's judgment on the § 523
24 issues, Appellant made valid points regarding fraud. The cases cited by Appellee do not
25 support a claim of frivolity in relation to § 523. In *McConnell*, the appeal did not contain any
26 argument explaining why reversal was appropriate. 661 F.2d at 118. The court held the appeal
27 was frivolous and reasoned that the absence of an argument was proof that the Appellee knew
28 the appeal was frivolous. *Id.* As stated previously by this Court, however, this appeal

1 contained an argument explaining why reversal was appropriate, and the Court pointed out
2 that the argument “appeared meritorious.” (Doc. #10 at 8.) Therefore, the Court declines to
3 find Appellant’s argument frivolous or unmeritorious.

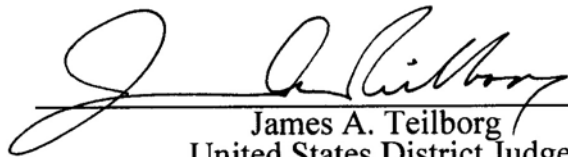
4 Although ultimately the Court did not agree with her, Ms. Pendera made meritorious and
5 plausible arguments regarding the non-dischargeability of her debt. The Court does not find
6 that the outcome of the appeal was obvious or that Ms. Pendera’s arguments were wholly
7 without merit. Based on the applicable standards, the Court will not impose sanctions for good
8 faith, albeit unsuccessful, bankruptcy appeals.

9 **IV. CONCLUSION**

10 Accordingly,

11 **It is ordered** that Appellee’s Motion for an Award of Attorney Fees and Costs as a
12 Sanction Against a Frivolous Appeal (Doc. #11) is **DENIED**.

13 DATED this 23rd day of September, 2009.

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18 James A. Teilborg
19 United States District Judge
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