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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**DORA TAPIA,**

**DEBTOR.**

**CASE NO. 99-42142-13  
CHAPTER 13**

**ORDER GRANTING STAY RELIEF TO ROSIE L. SCHMITT**

This matter is before the Court on a motion for stay relief filed by creditor Rosie L. Schmitt.

Ms. Schmitt appears by counsel Anne L. Baker and Dale L. Somers. The debtor appears by counsel William E. Metcalf. The Court has reviewed the relevant pleadings and is now ready to rule.

**FACTS**

In 1994, debtor Dora Tapia and a friend named Gabriel Sauz signed a contract for deed to buy a restaurant from Rosie Schmitt. For some reason, although the buyers were going to pay for the restaurant over time, a deed apparently transferring it from Ms. Schmitt to the debtor and Mr. Sauz was filed of record almost immediately; the contract for deed was not filed. In a separate transaction, Ms. Schmitt also agreed to sell them a house, but this agreement was never reduced to writing. In 1995, the debtor and Mr. Sauz defaulted on the payments due under the contracts, and Ms. Schmitt sued in a Kansas state court, asking for forfeiture of the payments made and an order ejecting the buyers from the properties. Ms. Schmitt tried to serve Mr. Sauz in the suit—by that time he was in prison in California—but never obtained proof of service. Nevertheless, in January 1996, the state court granted default judgment against Mr. Sauz and declared any payments he made on either

property forfeited. In June 1996, the court granted judgment against the debtor, ordering her to vacate both properties and forfeiting all payments she might have made on the restaurant, but ordering Ms. Schmitt to refund payments made on the house minus a specified amount for rent for the debtor's use of the house.

Apparently Mr. Sauz then appeared in the action, and he and the debtor obtained a stay of the judgment until their motion to alter or amend could be heard. The stay required the posting of a bond, and Chris Breitenbach supplied the money for the bond. Their motion was denied, and Mr. Breitenbach supplied more money so the judgment would be stayed pending appeal. In May 1999, the Kansas Court of Appeals declared the judgment against Mr. Sauz void for lack of personal jurisdiction, but affirmed the judgment against the debtor. The court reversed the portion of the judgment that fixed the rental value of the house and remanded for a determination of the rental value by a qualified expert. Mr. Sauz and the debtor filed a petition for review but the Kansas Supreme Court denied it in July.

In August 1999, Ms. Schmitt filed a second suit against Mr. Sauz and the debtor in the same state district court, again seeking forfeiture under the contract for deed but also asserting that the debtor was "currently in possession of the real property without any right, title or interest" in it. On September 27, Ms. Schmitt filed a motion for default judgment against Mr. Sauz because he had not filed an answer.

On September 20, 1999, the debtor filed a chapter 13 bankruptcy petition. On her schedules, she indicated that she was co-owner with Mr. Sauz of the restaurant and that there might be some dispute whether the restaurant was subject to a secured claim. All her income comes from the operation of the restaurant. She listed only three debts, one secured by her vehicle and unsecured ones

owed to Ms. Schmitt and Mr. Breitenbach. On September 29, Ms. Schmitt filed a motion for stay relief, asserting that she was the owner of the restaurant by virtue of the decision in the first state court suit and that the restaurant was not property of the debtor's bankruptcy estate.

Early in October, by fax transmission, Mr. Sauz submitted several pleadings to the state court in the second suit, including a motion to answer out of time, an answer, and a motion to dismiss. At a hearing on October 8, the state court apparently denied Mr. Sauz's motions and granted Ms. Schmitt's motion to default judgment. On October 20, before this ruling was reduced to writing, the debtor removed both state court suits to this Court, where they became Adversary No. 99-7108 and 99-7109. Ms. Schmitt has moved to dismiss the debtor from the second state court suit, and has moved to remand both suits back to state court. In November, Mr. Sauz deeded his interest in the restaurant to Ms. Schmitt.

The Court will address only the motion for stay relief in this order. Separate orders are being issued to resolve the motions pending in the adversary proceedings.

#### DISCUSSION AND CONCLUSIONS

Ms. Schmitt bases her motion for stay relief on the assertion that the state court's 1996 ruling that declared the debtor's rights in the restaurant forfeited prevented the debtor's bankruptcy estate from receiving any interest in the restaurant. The debtor responds that the ruling has not become final and that she may retain her interest in the restaurant by paying for it through a chapter 13 plan. The Court is convinced that Ms. Schmitt is correct.

In support of her position, the debtor relies on rules that govern the finality of a Kansas trial court's decisions for purposes of appeal. However, the question before this Court is not whether the

trial court has issued an appealable decision resolving the debtor's ownership rights in the restaurant, because such a decision has not only been issued but appealed and decided on appeal. The trial court determined that the debtor's rights in the restaurant had been forfeited, and that portion of the decision was affirmed on appeal. A federal statute, 28 U.S.C.A. §1738, requires this Court to give that decision the "same full faith and credit" that the state courts of Kansas would. The question here, then, is whether other Kansas state courts would hold that the trial court's affirmed decision on that question barred the debtor from asserting her interest in the restaurant in other litigation.

A leading treatise on federal practice and procedure declares that, even when an appeal of a ruling is pending: "The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal, apart from the virtually nonexistent situation in which the 'appeal' actually involves a full trial de novo." 18 Wright, Miller & Cooper, *Federal Prac. & Pro.: Jurisdiction and Related Matters* §4433 at 308 (1981). The Tenth Circuit has stated that Kansas follows this rule. *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997) (citing *Willard v. Ostrander*, 51 Kan. 481, 486-90 (1893); *Munn v. Gordon*, 87 Kan. 519, 521-22 (1912)). In this case, of course, the appeal is no longer pending but has been decided. The Court would certainly be surprised to learn that although Kansas courts hold that a ruling in a case is binding in a separate case while an appeal in the first is pending, they would nevertheless hold the ruling is no longer binding after it has been affirmed on appeal. In cases involving a second appeal after part of a trial court's initial judgment had been reversed, the Kansas Supreme Court has declared that rulings on issues decided in the first appeal are res judicata in the second appeal. See *Kansas Baptist Convention v. Mesa Operating Limited Partnership*, 258 Kan. 226, 241 (1995); *Coryell v. Hardy*, 146 Kan. 522, 525

(1937). Since an appellate ruling on an issue in a case is binding even in a later appeal in the same case, the appellate ruling would also be binding in a separate case where the same issue is raised. *See* 18 Wright, Miller & Cooper, *Fed. Prac. & Pro.* §4434 (calling this type of binding effect “practical finality”).

The debtor suggests the *Mesa* case is distinguishable from this one on two grounds. First, she argues no final judgment exists in the first state court case because the court of appeals vacated the judgment against Mr. Sauz and remanded the issue of the rental value of the house. However, in *Mesa*, the supreme court had similarly reversed and remanded certain matters to the trial court, but the court still said a decision on a matter resolved in the first appeal was binding when one of the parties tried to raise the matter again in the second appeal. The debtor is simply confusing “finality” for purposes of appeal with “finality” for purposes of issue or claim preclusion. The case law discussed above makes clear that these two types of finality are not governed by the same rules. Second, the debtor argues that the court of appeals had no subject matter jurisdiction to make any further findings or orders once it determined it had no personal jurisdiction of Mr. Sauz because that made the order appealed from non-final, thus eliminating appellate jurisdiction. The court of appeals clearly did not believe this was so, or it would not have considered other issues after it determined, as the first issue it discussed, the lack of personal jurisdiction of Mr. Sauz. Furthermore, like the debtor’s first argument, this one confuses appellate jurisdiction finality with issue or claim preclusion finality.

For these reasons, the Court is convinced that a Kansas state court would conclude it could not decide anew in a separate case whether the debtor’s rights in the restaurant had been forfeited. Consequently, §1738 requires the Court to accord full faith and credit to the ruling in the first state case

that the rights had been forfeited. Ms. Schmitt is therefore entitled to relief from the automatic stay so that she may proceed to enforce that ruling in state court.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of January, 2000.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE