

March 30, 2010

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CHEYENA HOUSTON
KLEINHANS, also known as Cheyena
Houston,

Debtor.

BAP No. CO-09-029

DANIEL A. HEPNER,

Plaintiff – Counter-
Defendant – Appellee,

v.

ROBERT LAWRENCE PERRY,

Defendant – Counter-
Claimant – Appellant.

Bankr. No. 07-19376-SBB
Adv. No. 08-01067-SBB
Chapter 7

OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before CORNISH, Chief Judge, KARLIN, and BOULDEN¹, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

Appellant Robert Lawrence Perry (Perry) appeals a bankruptcy court judgment avoiding the postpetition transfer to him of the Chapter 7 estate's

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

property and granting a money judgment against him for conversion damages and sanctions. We affirm.²

I. BACKGROUND

The dispute involves a 1968 mobile home that debtor Cheyena Kleinhans (the “Debtor”) acquired on August 7, 2007 from Perry in payment of a debt Perry³ owed to her. At the time of the initial transfer and throughout these proceedings, the mobile home was located in a mobile home park (the “Lot”) that was owned by Alasco Investments, Ltd. (Alasco). Neither the Debtor nor Perry was ever approved to lease a space for the mobile home on the Lot, and Alasco initiated a state court eviction action against the Debtor and Perry seeking removal of the mobile home from the Lot.

About two weeks after the Debtor acquired title to the mobile home from Perry, she filed a voluntary Chapter 7 petition. The filing of Debtor’s bankruptcy petition automatically stayed Alasco’s eviction action as to her, but the lawsuit continued on against Perry, including the issue of whether Perry had standing to continue to prosecute various counterclaims he asserted against Alasco when he was no longer an owner of the mobile home. After the Section 341 meeting, and one day prior to a hearing in the eviction action to resolve Alasco’s request to dismiss Perry’s counterclaims, the Debtor transferred the title to the mobile home back to Perry for no consideration and without leave of court. Both the Debtor and Perry contend that this transfer was based on their understanding that the Chapter 7 trustee, Daniel Hepner (Trustee), wanted Perry to have the title and that

² This Court heard oral argument in this case in Denver, Colorado on January 26, 2010. Accordingly, the Appellee Daniel A. Hepner’s Motion for Oral Argument, filed October 15, 2009, is GRANTED *nunc pro tunc* as of that date.

³ Perry now refers to himself as the Debtor’s “ex-husband” but claims that he and the Debtor were “common-law married” when the petition was filed, were “joined in matrimony on September 22, 2007,” and are now “legally separated, due to the stress of the controversy over the mobile home.” Regardless of their legal relationship, Perry did not himself file for bankruptcy protection.

he intended to abandon the estate's interest in the mobile home. But the transfer also was an attempt by Perry and the Debtor to provide a basis for Perry's standing to pursue counterclaims against Alasco in the eviction action.

At the time of the Chapter 7 filing, the mobile home apparently had no functioning bathroom, significant water damage to its floor and walls, and a roof leak that had caused mold contamination. In her bankruptcy schedules, the Debtor listed the mobile home as exempt property with a stated value of \$4,000. There were no properly perfected liens against the mobile home.

The Trustee filed two adversary proceedings related to the mobile home. The first was a proceeding seeking to deny the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(B) because of her postpetition transfer of the mobile home to Perry. The second was a proceeding against Perry seeking 1) a declaration that the mobile home was estate property unencumbered by any lien asserted by Perry; 2) to avoid Debtor's postpetition transfer of the mobile home to Perry; 3) disallowance of Perry's claim against the estate until his turnover of the mobile home; and 4) a judgment for his attorney's fees and treble damages pursuant to Colorado's conversion statute.⁴ The denial of discharge proceeding against the Debtor was tried on one day, and the proceeding against Perry to avoid the mobile home transfer and any alleged lien, from which this appeal arises, the next day.

Many of the issues tried required the bankruptcy court to assess the credibility of the various witnesses and to pick through the allegations and accusations made by the Debtor and Perry. They alleged that the Trustee essentially told them to deal with the mobile home then turned on them when they

⁴ Perry asserted a number of counterclaims, all of which consisted of misconduct allegations against the Trustee. The Bankruptcy Court dismissed the counterclaims on the grounds that Perry was without standing to assert them and had failed to adequately state a claim. Perry's appeal of the dismissal of his counterclaims was dismissed as interlocutory, *Hepner v. Perry (In re Kleinhans)*, BAP Appeal No. CO-08-056, 2009 WL 1426780 (10th Cir. BAP May 22, 2009), and Perry did not appeal the order of dismissal in the present appeal.

tried to do so. They further contend that the Trustee threatened them and has in virtually every way failed to carry out his duties for the benefit of the estate. Notwithstanding Debtor's assignment of a \$4,000 value to the mobile home in her sworn schedules, both the Debtor and Perry testified that the mobile home was worthless when the petition was filed and assert that the Trustee not only should have abandoned the mobile home but that any expenses incurred by Trustee in connection with recovery of the mobile home were the result of his own inappropriate conduct.

While acknowledging that the mobile home's title was transferred postpetition, both also admit that they did so for the purpose of overcoming Alasco's motion to dismiss Perry's counterclaims in the state court action on the ground that Perry no longer had an ownership interest in the mobile home and therefore lacked standing. The parties further disputed the Debtor and Perry's familiarity with bankruptcy practice and the automatic stay, and whether statements made by the Trustee or the conduct of the state court (or both) were to blame for their alleged misunderstanding that there was an exception to the stay as to the mobile home.

The Trustee attempted to prove that the Debtor and Perry have simply used the bankruptcy filing and title transfers to manipulate an advantage to themselves over both him and their creditors. The Trustee testified that the Debtor and Perry were always aware that the estate asserted an interest in the mobile home. He also testified that he had negotiated a sale of the mobile home for \$3,500 to Alasco but that the transaction could not be consummated because of the Debtor's postpetition transfer of title to Perry. The Trustee presented evidence that Perry's actions had caused actual damages to the estate of \$3,500. He further plead and testified that the estate had incurred at least \$27,000 in attorney's fees and costs litigating the avoidance of the lien claim and avoidance of the transfer of the mobile home and its recovery. The attorney's fees the estate had incurred

included defending counterclaims and a prior appeal to the bankruptcy appellate panel. Perry cross-examined the Trustee on various issues including the estate's attorney's fees claimed as damages, but the evidence was consistent that the fees testified to by the Trustee had actually been incurred by the estate.

This brief description of the issues that arose between the estate, Perry, and Kleinhans understates the number of pleadings filed and peripheral issues. The docket in this adversary proceeding alone reflects over 100 docket entries from complaint to this appeal. The denial of discharge proceeding and the main case are equally voluminous with a similar number of docket entries in each matter.

In a rather strongly worded memorandum opinion and order, the Bankruptcy Court determined that the Debtor and Perry employed "extraordinary machinations and deliberate, persistent, defiance of the Trustee, and applicable law" such that "it has become a legal and financial nightmare for the estate."⁵ Judgment was entered granting the relief sought in the Trustee's complaint in its entirety. The Bankruptcy Court avoided the postpetition transfer of the mobile home, denied Perry's claim against the estate, avoided Perry's alleged lien on the mobile home, found that Perry had engaged in conversion under Colorado law, and found Perry in contempt. The Trustee was awarded damages in the amount of \$10,500 (\$3,500 multiplied by three). The Bankruptcy Court also awarded attorney's fees and costs to the estate in the amount of \$27,000 both under Colorado Revised Statute § 18-4-405 and under 11 U.S.C. § 105(a) as a sanction for Perry's abusive litigation practices and violation of the Bankruptcy Code. Perry timely filed his notice of appeal on June 8, 2009.⁶

⁵ *Memorandum Opinion and Order*, dated May 28, 2009 ("*Order*") at 1, in Appellant's Appendix ("App.") Vol. 5 at 313.

⁶ Also on June 8, 2009, Perry filed a motion to amend the Bankruptcy Court's judgment. That motion was denied by the Bankruptcy Court on June 26, 2009, and Perry asserts error in the denial of that motion in this appeal. However, (continued...)

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.⁷ Because the notice of appeal was timely filed within ten days of a final order, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

III. ISSUES AND STANDARD OF REVIEW

Perry listed 25 issues in his opening brief, which the Trustee then condensed down to six. Principally, Perry asserts that several of the Bankruptcy Court's factual findings are erroneous.⁸ This Court reviews factual findings under the clearly erroneous standard, and a factual finding is "clearly erroneous" when "it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made."⁹ In addition, Perry contends that the Bankruptcy Court erroneously determined and awarded damages and attorney's fees, erroneously precluded his presentation of evidence at trial, and was influenced

⁶ (...continued)

his notice of appeal preceded the order denying that motion and, as he neither amended his previous notice to include that order nor filed a new notice of appeal within ten days of it, the propriety of the Bankruptcy Court's denial of the motion is not properly before this Court. Fed. R. Bankr. P. 8002(b).

⁷ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

⁸ Perry specifically challenges the Bankruptcy Court's findings that: 1) he intended to deprive the estate of the mobile home; 2) he was not a credible witness, and his conduct was in bad faith; 3) he had enough knowledge of the bankruptcy system to understand that the automatic stay precluded postpetition transfers of the mobile home; and 4) based on a settlement negotiation between Trustee and Alasco, the mobile home (listed by Debtor at a value of \$4,000) could have benefitted the estate in the amount of \$3,500.

⁹ *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. U.S.*, 826 F.2d 949, 953 (10th Cir. 1987)).

by personal bias against him. We review the imposition of sanctions under the abuse of discretion standard.¹⁰ Likewise, a bankruptcy court's procedural and evidentiary rulings, and its denial of a motion to recuse, are all reviewed for abuse of discretion.¹¹ Under that standard, a bankruptcy court's decision will be affirmed "unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."¹²

IV. DISCUSSION

The Federal Rules of Bankruptcy Procedure specify the required form for all appellate briefs filed with this Court. Among other requirements, the Rules dictate that an appellant's brief contain:

(D) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and the disposition in the court below. *There shall follow a statement of the facts* relevant to the issues presented for review, *with appropriate references to the record.*

(E) An argument. The argument may be preceded by a summary. *The argument shall contain* the contentions of the appellant with respect to the issues presented, and the reasons therefor, *with citations to the authorities, statutes and parts of the record relied on.*¹³

¹⁰ *Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1084-85 (10th Cir. 2009).

¹¹ *See, e.g., Reed v. Bennett*, 312 F.3d 1190, 1193 n.1 (10th Cir. 2002) (order denying motion to continue trial is reviewed for abuse of discretion); *In re Durability, Inc.*, 212 F.3d 551, 555 (10th Cir. 2000), *rev'd on other grounds*, 166 F. App'x 321 (10th Cir. 2006) (bankruptcy court's evidentiary rulings reviewed for abuse of discretion); *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500-01 (10th Cir. 1994) (denial of motion to recuse reviewed for abuse of discretion).

¹² *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

¹³ Fed. R. Bankr. P. 8010(a)(1)(D) and (E) (emphasis added).

Perry's briefs are woefully inadequate with respect to these requirements.¹⁴ For example, of the 38 fact statements in Perry's opening brief, only fifteen reference the trial transcript¹⁵ (whereas twelve reference Perry's own affidavit, submitted post-trial);¹⁶ eight reference various state court orders;¹⁷ and at least five reference documents that are irrelevant and/or not admitted at trial, or unsigned, unsworn submissions by Perry himself.¹⁸ Significantly, most of the cited portions of the trial transcript are completely unresponsive to the fact statements made in Perry's brief, while others only support the statements partially. Virtually all of Perry's fact statements consist of unsupported "characterizations" of the record.

It has long been held in this Circuit that inadequately briefed appellate arguments are waived.¹⁹ Perry's brief is simply insufficient to meet his burden

¹⁴ The Trustee suggests that Perry's failure to include the transcript of the trial in the denial of discharge proceeding should be fatal to his appeal because "[t]he Bankruptcy Court adopted all of its relevant findings of fact and conclusions of law entered in connection with the Discharge Adversary [Debtor's trial] in the Avoidance Adversary [Perry's trial]." Appellee's Response Brief at 11-12. Indeed, the Court did do so on page 9 of its findings and conclusions in Perry's trial (*Order* at 9, *in App. Vol. 5* at 321), but it also rendered separate findings in Perry's case. Perry was not a party to the Debtor's denial of discharge trial and was in fact excluded from much of it because he was a witness. Thus, at his trial, in response to the Court's admonition to "try and be streamlined, not be duplicative," Perry stated that he would "try to limit [his] testimony," but that he was not privy to a lot of what may have been said at the previous trial. *Dec. 30, 2008, Trial Transcript* at 5, ll. 15, 22-25, & 1-4, *in App. Vol. 7* at 654-55. Under these circumstances, we do not view the transcript of the denial of discharge proceeding to be relevant to our consideration of Perry's appeal.

¹⁵ Opening Brief, Statement of Facts at 15-18, ¶¶ 3-6, 12, 14-16, 20, 21, 23, 25, and 31.

¹⁶ *Id.* at 15, 17-18, ¶¶ 2, 7, 8, 22, 26, 32-38.

¹⁷ *Id.* at 15-16, 17, ¶¶ 9-11, 13, 17-19, 24.

¹⁸ *Id.* at 15, 17-18, ¶¶ 1, 27-30.

¹⁹ See *FDIC v. Schuchmann*, 235 F.3d 1217, 1230 n.11 (10th Cir. 2000) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995)) ("[j]udges are not like pigs, hunting for truffles buried in briefs," and therefore an
(continued...)

to prove, on appeal, that the Bankruptcy Court’s factual findings are clearly erroneous. In any event, having reviewed the entire appellate record, this Court cannot reach such a conclusion on its own.

The “argument” section of Perry’s brief is almost entirely a restatement of his facts. “It is axiomatic that simply saying that something is so, even repeatedly, does not make it so.”²⁰ Nonetheless, this is precisely Perry’s method — repeatedly stating his version of the facts (whether or not relevant) in the hope that some combination of them will achieve his desired result. We reject this methodology, particularly where the brief also fails to establish that any of the Bankruptcy Court’s underlying findings are clearly erroneous.

One of Perry’s issues deserves additional discussion. He contends that the Bankruptcy Court improperly awarded attorney’s fees without following the requirements of 11 U.S.C. §§ 326-330, citing various cases dealing with the criteria to determine the amount of reasonable compensation to be awarded from the estate to estate professionals. Sections 326-330 are irrelevant to our determination of this issue since those provisions govern awards of compensation that are made from the estate. The attorney’s fees at issue were awarded against Perry, a non-debtor, as a sanction for violation of the Colorado statute and for his litigation conduct, and thus will not be paid out of Debtor’s estate. Therefore, we reject Perry’s assertion of error for failure to comply with §§ 326, 327, 328, 329, or 330.

Perry also argues that an award of attorney’s fees under either Colorado law or § 105 cannot be made, as a matter of law, without documented evidence

¹⁹ (...continued)
appeals court should “decline to speculate as to the possible legal basis” for a claim of error). *See also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

²⁰ *In re Hook*, 397 B.R. 544, 2008 WL 3906794 at *4 (10th Cir. BAP 2008).

of attorney's fees. The statutory basis for an award of attorney's fees is reviewed *de novo*, but the Bankruptcy Court's determination that attorney's fees, or other sanctions, are warranted is reviewed only for abuse of discretion.²¹ The fact findings supporting a sanctions determination are reviewed under the clearly erroneous standard.²²

The Bankruptcy Court awarded damages and attorney's fees pursuant to Colorado Revised Statute § 18-4-405.²³ Perry principally challenges the award on the ground that the evidence does not support the Bankruptcy Court's finding of a violation of this provision. We have already found Perry's challenges to the sufficiency of the evidence supporting the Bankruptcy Court's conclusion that Perry intended to deprive the estate permanently of the use of the mobile home to be without merit. The Bankruptcy Court's finding regarding the \$3,500 amount of actual damage to the estate is supported by the record, and the total of \$10,500 is merely a mathematical calculation. The Colorado statute also allows for recovery of costs of the action and reasonable attorney's fees against Perry

²¹ *Daleske v. Fairfield Cmty., Inc.*, 17 F.3d 321, 323 (10th Cir. 1994).

²² *Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, 963 F.2d 1352, 1355 (10th Cir. 1992).

²³ That section provides: "All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property. *In any such action, the owner may recover two hundred dollars or three times the amount of the actual damages sustained by him, whichever is greater, and may also recover costs of the action and reasonable attorney fees*; but monetary damages and attorney fees shall not be recoverable from a good-faith purchaser or good-faith holder of the property." Colo. Rev. Stat. § 18-4-405 (emphasis added).

as damages as a consequence of Perry's actions,²⁴ and the decision whether fees are warranted is reviewed only for an abuse of discretion.²⁵

To determine if a fee request is reasonable, Colorado courts may look to, among other things, the criteria set forth in the Rules of Professional Conduct.²⁶ Those criteria may include the time and labor required, the difficulty of the questions involved and the skill required to perform the legal service, the fees customarily charged in the locality, and similar criteria. Given the Trustee's unrebutted evidence of the fees incurred by the estate, the Bankruptcy Court's awareness of the Trustee's pleadings filed not only in this proceeding but also in the main case and the denial of discharge proceeding, and that this matter is within the expertise of the Bankruptcy Court, we conclude that the award was not clear error.

The \$27,000 portion of the fee award was also based upon the Bankruptcy Court's power to sanction conduct abusive of the judicial process under 11 U.S.C. § 105. After specifically itemizing Perry's conduct in unlawfully acquiring the mobile home despite his knowledge of the estate's interest in the mobile home and rejecting Perry's excuses or justifications, the Bankruptcy Court determined that Perry's conduct constituted a deliberate attempt to circumvent the Bankruptcy Code and interfere with the bankruptcy process. Further, Perry himself acknowledged at oral argument in this appeal that he,

²⁴ *Butler v. Lembeck*, 182 P.3d 1185, 1189 (Colo. App. 2007) (attorney's fees are damages if they are sought as a legitimate consequence of the tort sued upon).

²⁵ *Daleske*, 17 F.3d at 323.

²⁶ *Rifkin v. Platt*, 824 P.2d 32, 36 (Colo. App. 1991) (court should consider relevant factors in Code of Professional Responsibility).

rather than the Debtor, made all decisions with respect to the mobile home and the bankruptcy proceedings.²⁷

We determine that the Bankruptcy Court has fully supported its decision to sanction Perry. And, as with the attorney's fee award under the Colorado statute, it appears that Perry's dispute is with lack of attorney's fee itemization rather than the actual decision to sanction. Again, Perry neither cross-examined the Trustee regarding the costs to recover the mobile home, nor offered any evidence to the effect that the fees were not actually incurred and an administrative claim against the estate. Therefore, we conclude that Perry has not met his burden to prove that the Bankruptcy Court's award of fees was either based on clearly erroneous factual findings or constituted an abuse of discretion.²⁸

V. CONCLUSION

Perry has failed to establish on appeal that the Bankruptcy Court's findings or conclusions were erroneous. We therefore affirm the judgment.

²⁷ As such, the inclusion of attorney's fees that were incurred in the same efforts, but in the adversary proceeding against Debtor, appears to be justified.

²⁸ We view Perry's claims of bias against Judge Brooks to require no analysis because they are supported only by the *non sequitur* that the judge must have been biased simply because he ruled against Perry.