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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CHRISTOPHER S. WALKER, also known as Chris Walker, Debtor.	BAP No. CO-08-018
CHRISTOPHER S. WALKER, Appellant, v. SIMON E. RODRIGUEZ, Trustee, Appellee.	Bankr. No. 07-17102-ABC Chapter 7 OPINION*

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

Before BOHANON, CORNISH, and RASURE, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

Appellant Christopher S. Walker ("Debtor") appeals the bankruptcy court's sustainment of the Trustee's objection to his homestead exemption claim and its denial of the same. Debtor claims the bankruptcy court erred in holding his printed name on a deed of trust was his intended signature and that the deed of trust was valid, enforceable, and avoidable by the Trustee under 11 U.S.C. § 547(b). We AFFIRM.

Standard of Review

This appeal implicates two standards. We review the bankruptcy court's

* This opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

interpretation and application of a state's homestead exemption *de novo* and the bankruptcy court's findings of fact with respect to the existence of the homestead for clear error.[1] Debtor chiefly complains that the bankruptcy court erroneously held that he intended his printed name to be his signature on a deed of trust. Intent is a question of fact, and the trial court's determination as to intent is reviewed for clear error.[2]

Factual Background

On July 2, 2007, Debtor filed for Chapter 7 bankruptcy. Debtor listed his residence on Schedule A and valued it at $270,000.[3] On Schedule D, Debtor listed three liens against his residence: the first, in favor of his first mortgage lender, Washington Mutual ("First DOT"); the second, in favor of his second mortgage lender, GMAC Mortgage ("Second DOT"); and the third, in favor of his uncle in connection with a $150,000 personal loan ("Third DOT").[4] The three liens add up to $284,724.70, the same amount listed on Debtor's Schedule A as secured claims. Debtor did not claim a homestead exemption in his initial bankruptcy filings.

On July 12, 2007, the Trustee filed an adversary proceeding against Debtor's uncle seeking to avoid the Third DOT against the residence. On July 25,

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1 *In re Robinson*, 295 B.R. 147, 149 (10th Cir. BAP 2003).

2 *See In re Kelley*, 300 B.R. 11, 16 (9th Cir. BAP 2003) (questions regarding the right of a debtor to claim exemptions are questions of law subject to de novo review, whereas the issue of a debtor's intent is a question of fact to be reviewed under the clearly erroneous standard).

3 Debtor's schedules and statement of financial affairs (SOFA) were not provided to this Court. These facts were gleaned from the transcript of the bankruptcy court's oral ruling on the Trustee's Objection to Debtor's Claim of Homestead Exemption. *See* Transcript of Oral Ruling on Trustee's Objection to Debtor's Claim of Homestead Exemption *in* Appellant's Appendix at 57-69.

4 The Third DOT is dated May 27, 2005 and was filed January 31, 2007. Unlike the First and Second DOTs, the Third DOT does not contain Debtor's cursive signature nor is it notarized. Instead, Debtor printed his name in the signature block. *See* Third Deed of Trust *in* Appellant's Appendix at 39.

2007, Debtor filed an amended Schedule C claiming a $60,000 homestead exemption pursuant to Colo. Rev. Stat. § 38-41-201. On August 14, 2007, the Trustee objected to the claimed homestead exemption on two grounds: (1) the value of the residence as of the date of the bankruptcy filing was less than the amount of the three valid liens against it, thereby leaving nothing for the homestead exemption to attach to, and (2) the amendment of Schedule C was made in bad faith as it was inconsistent with his sworn SOFA and schedules. Debtor responded that the Third DOT was not valid since he had printed his name instead of signing it, and that he was entitled to amend his schedules.

On September 4, 2007, the Trustee obtained a stipulated judgment against Debtor's uncle setting aside the Third DOT and preserving it for the bankruptcy estate. On September 27, 2007, the bankruptcy court approved the Trustee's request to borrow funds in order to redeem the residence from the second deed of trust foreclosure.[5]

On January 8, 2008, a trial was held on the Trustee's objection to the debtor's claimed homestead exemption. On January 22, 2008, the bankruptcy court sustained the Trustee's objection and denied Debtor's homestead exemption claim. The bankruptcy court ruled that:

> [The Third DOT] was in fact valid and enforceable when it was recorded by the Debtor in January of 2007. Notwithstanding that it was unacknowledged and that the Debtor executed it with a printed signature rather than signing it in cursive as he did on the first and second deeds of trust that encumbered the residence.
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> Debtor intended his printed signature to be valid and effective [on the Third DOT], otherwise he would have accomplished nothing by recording this deed of trust, nor would he have included it in his carefully prepared sworn statement of financial affairs and schedules.

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[5] On April 18, 2007, prepetition, GMAC commenced a non-judicial foreclosure action on Debtor's residence. Debtor filed his bankruptcy case the day before the redemption period expired.

The bankruptcy court further held that Debtor was estopped from claiming the exemption due to his inconsistent positions. This appeal follows.

Discussion

A. The record on appeal is insufficient for proper appellate review.

As a threshold matter, this Court addresses the adequacy of the record on appeal. Under 10th Cir. BAP L.R. 8009-1(b)(5), an appellant must file an appendix containing "all transcripts, or portions of transcripts, necessary for the court's review." The burden of providing an appellate court with an adequate record for review is on the appellant.[6] Debtor, however, did not provide this Court with his schedules, SOFA, or the trial transcript of the hearing on the Trustee's objection to his homestead exemption claim. Without these items, this Court cannot fully and adequately review the bankruptcy court's factual findings.

Debtor requests this Court revisit the evidence, compare the three deeds of trust, and reverse the bankruptcy court's finding regarding intent. Debtor argues the First and Second DOTs show his pattern of executing deeds of trust by indorsing his cursive signature before a notary public, which proves he never intended his printed name on the Third DOT to be his signature. Debtor essentially asks us to consider the three deeds of trust in a vacuum. This we will not do.

As a general rule, the Tenth Circuit has held that the failure to provide a trial transcript on appeal warrants affirming the trial court when the issue on appeal requires the appellate court to review the record in the trial court.[7] It is

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[6] *See In re Rambo*, 209 B.R. 527, 530 (10th Cir.BAP), *aff'd without opinion*, 132 F.3d 43 (10th Cir.1997); *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992). *See also* 10th Cir. BAP L.R. 8009-1(b)(5).

[7] *McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir.1992) (affirming the district court upon a determination that the appellant's failure to include a transcript of the district court's oral ruling "raises an effective barrier to informed, substantive appellate review").

appellant's responsibility to ensure that a relevant transcript is provided, and this Court is under no obligation to remedy any failure of appellant to provide a sufficient record.[8] The failure to provide this Court with the trial transcript is grounds for summary affirmance.[9] Nonetheless, we will briefly discuss each of Debtor's arguments.

B. The bankruptcy court correctly determined that Colorado's credit agreement statute of frauds, Colo. Rev. Stat. 38-10-124, was inapplicable.

Debtor claims Colo. Rev. Stat. 38-10-124(2) rendered the Third DOT invalid, thus the bankruptcy court erred in concluding otherwise.[10] Colo. Rev. Stat. 38-10-124(2) states:

> Notwithstanding any statutory or case law to the contrary, including but not limited to section 38-10-112, no debtor or creditor may file or maintain an action or a claim relating to a credit agreement involving a principal amount in excess of twenty-five thousand dollars unless the credit agreement is in writing and is signed by the party against whom enforcement is sought.

The bankruptcy court implicitly rejected this argument by not addressing it. We reject it as well. This statute was enacted to discourage suits against lenders based on oral representations made by members of the credit industry and to promote certainty in credit agreements.[11] Colo. Rev. Stat. 38-10-124(2) simply does not apply in this case.

C. Debtor's reliance upon Colo. Rev. Stat. 13-25-104 is misplaced.

Debtor claims the bankruptcy court erred in not properly applying court

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[8] *See Deines*, 969 F.2d at 979.

[9] *See Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756, 761 (10th Cir. BAP 2006) (without a transcript and exhibits from the trial, this court cannot review the bankruptcy court's factual findings and will summarily affirm this decision of the bankruptcy court); *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000) (without a transcript, we have an inadequate record, giving us grounds to summarily affirm the bankruptcy court).

[10] *See* Appellant's Brief at 4.

[11] *Univex Int'l v. Orix Credit Alliance*, 914 P.2d 1355, 1358 (Colo. 1996).

procedures under Colo. Rev. Stat. § 13-25-104 with respect to the evidence presented by Debtor in comparing the disputed signature with his genuine signature.[12] Colo. Rev. Stat. § 13-25-104 provides:

> Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Debtor's reliance upon Colo. Rev. Stat. § 13-25-104 is misplaced. First, it is undisputed that Debtor printed his name on the Third DOT. Thus, no comparison of signatures was required. Second, this statute governs the admissibility of evidence regarding the genuineness of a disputed writing. All three deeds of trust were admitted into evidence. Debtor's real argument goes to the weight of the evidence and not its admissibility. Debtor contends the bankruptcy court did not accord the proper weight to the First and Second DOTs. Debtor urges us to reverse based on his interpretation of the evidence. That we cannot do. Weighing the evidence at the appellate stage is improper. We must accept the bankruptcy court's determination unless "'that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'"[13]

The bankruptcy court found Debtor intended his printed signature to be valid and effective on the Third DOT because (1) he recorded the Third DOT himself, (2) he included it in his SOFA and schedules, which he prepared under oath, and (3) he initially did not make a claim for a homestead exemption which was "not surprising" given that the value of the residence ($270,000) was less than the combined values of the three liens stated in his initial schedules.

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[12] Appellant's Brief at 5.

[13] *Gillman v. Scientific Res. Prods. Inc. (In re Mama D'Angelo, Inc.)*, 55 F.3d 552, 555 (10th Cir. 1995) (quoting *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972)).

Moreover, even though Debtor amended his Schedule C to claim a homestead exemption, he never amended his Schedule D to remove the Third DOT in his uncle's favor and never listed his uncle as an unsecured creditor on Schedule F. The bankruptcy court's finding regarding intent appears amply supported and will not be disturbed.

D. The bankruptcy court's application of the doctrine of judicial estoppel was proper.

Debtor argues that under Federal Rule of Bankruptcy Procedure 1009 he is entitled to amend his schedules "as a matter of course at any time before [his bankruptcy] case is closed," thus the bankruptcy court erred in applying the doctrine of judicial estoppel.[14] Debtor's reliance upon Rule 1009 is overly broad. The right of a debtor to amend his petitions, list and schedules under Rule 1009(a) is not without limitation.[15] "An amendment may be denied . . . if there is bad faith by the debtor or prejudice to the creditor[s]."[16] By invoking judicial estoppel against Debtor, the bankruptcy court found bad faith and prejudice to Debtor's creditors.

Judicial estoppel is an equitable doctrine designed to protect the integrity of the court system. The Tenth Circuit defines judicial estoppel as follows:

[W]here a party assumes a certain position in a legal proceeding, and

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[14] Debtor cites to *In re Sutton*, 365 B.R. 900 (8th Cir. BAP 2007), for the proposition that he is entitled to amend his schedules to remove a previously reported lienholder without being considered as having misled the court. Debtor's reliance on *Sutton* is misplaced. In *Sutton*, the lien was determined post-petition to be invalid, so amending the schedules to remove the lienholder would be consistent with the bankruptcy court's ruling. Here, the bankruptcy court determined that the Third DOT was valid, so amending the schedules to remove the lienholder would be inconsistent with the bankruptcy court's ruling. Moreover, nowhere in *Sutton* does the court discuss Rule 1009, nor was it mentioned that Debtor amended his schedule.

[15] *In re Osborn*, 24 F.3d 1199, 1206 (10th Cir. 1994) (there are exceptions to the right to amend under Rule 1009).

[16] *Gillman v. Ford (In re Ford)*, 492 F.3d 1148, 1155 (10th Cir. 2007) (citing *In re Calder*, 973 F.2d 862, 867-68 (10th Cir. 1992)).

> succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.[17]

The Tenth Circuit approved the following three factors as useful tools to analyze when the doctrine should be applied: (1) the party's later position is clearly inconsistent with his earlier position; (2) the party has succeeded in persuading a court to accept the earlier position, so as to create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if he were not estopped.

The bankruptcy court found all three elements present. Debtor took an inconsistent position by first positing that the Third DOT was valid and then invalid. Second, the bankruptcy court accepted the first position in entering judgment for the Trustee in the § 547(b) preference adversary proceeding. Third, Debtor would derive a $60,000 benefit from changing positions while his creditors' dividend would be reduced to little or nothing. Despite Debtor's assertions to the contrary, the bankruptcy court apparently felt Debtor was trying to mislead it, stating: "[a]llowance of this Debtor's inconsistent positions on this record would create the perception that this Debtor has successfully manipulated or gained [sic] this bankruptcy process; whether or not that was in fact his actual intent."[18] As the bankruptcy court pointed out, Debtor amended his Schedule C to add a homestead claim only after the Trustee sued to avoid the Third DOT. It is apparent that the bankruptcy court did not believe Debtor when he asserted he had simply forgotten that the Third DOT was unsigned, especially since he recorded

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[17] *Johnson v. Lindon City Corp*, 405 F.3d 1065, 1069 (10th Cir. 2005) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)) (alteration in original).

[18] Transcript of Oral Ruling on Trustee's Objection to Debtor's Claim of Homestead Exemption *in* Appellant's Appendix at 68.

it, and then suddenly remembered this fact when it was convenient for him to do so.

Debtor argues that applying judicial estoppel here would send out the wrong message: whatever a debtor includes in his initial bankruptcy petition, whether accurate or not, will dictate the outcome of the case and the debtor no longer has the right to amend as he learns new facts. This statement is simply untrue. Judicial estoppel does not altogether preclude debtors from amending their schedules. Debtors may amend so long as the amendment does not unduly prejudice parties who relied upon the sworn representation contained in the original schedules.

Conclusion

For all of the above reasons, we AFFIRM the bankruptcy court's sustainment of the Trustee's objection to Debtor's claim of homestead exemption and its denial of Debtor's homestead exemption claim.