FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 13, 2002
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CRESTVIEW FUNERAL HOME, INC., doing business as Crestview Florist, Debtor.	BAP No. NM-02-046
JOHN LESTER SALAZAR, Plaintiff – Appellant, v. PHYLLIS FERGUSON BEKAERT, Defendant – Appellee. JAMES A. MCCORMICK; ARTHUR PEPIN; LINDA S. BLOOM; TIM RIVERA; STEPHEN D. TURPEN; RON KOCH; TOM UDALL; JULIE ALTWISE; REBECCA E. WARDLAW; Honorable RICHARD J. KNOWLES; Honorable DIANE DAL SANTO; PHYLLIS FERGUSON BEKAERT; JEROME DUKE BEKAERT; ELIZABETH VINCILL; DIANE WEBB; CHERYL A. RYERSON; ROSE ROYBAL; DAN WASKO; NEWWEST PROPERTY MANAGEMENT; FOX EXECUTIVE OFFICES; CHESTER FRENCH STEWART; WRIGHT MAINS KOWSTER, INC., AGENCY; AAAA AUCTIONS; CRESTVIEW FUNERAL HOME, INC.; LARRY BARKER; PAUL LOGAN; ALICE NYSTAL; KAREN A. INGLIS, ASA; JACK YARMOLA; ROXANNE BACA; DAVID GILPEN; BARBARA C.	Bankr. No. 7-95-11923 MA Adv. No. 00-1091 M Chapter 7 ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

EVERAGE; JEROME MARSHAK; DON D. BECKER; and JEROME J. BEKAERT, JR.,

Defendants.

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before PUSATERI, CORNISH, and NUGENT, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

John Lester Salazar ("Salazar") appeals the bankruptcy court's order granting Phyllis Ferguson Bekaert's motion for directed verdict or in the alternative, to dismiss. For the reasons that follow, we affirm.

Background

This appeal and a related one, BAP No. NM-02-044, arise from an adversary proceeding that Salazar filed in connection with the bankruptcy case of Crestview Funeral Home, Inc. ("Crestview"). He is representing himself in both appeals, and has not provided us with a complete record for either one. By reviewing both appeals, though, we have been able to piece together the facts involved.

Salazar was an officer and shareholder of Crestview, a company operating in the funeral business in New Mexico. Phyllis Ferguson Bekaert ("Bekaert") was his wife and, at least at one time, also a shareholder of Crestview. In the course of its business, Crestview accepted money from customers to pay for their funerals before they died ("preneed money"); such payments were supposed to be held in one or more trust accounts. At some point, it was discovered that Crestview did not have all the preneed money it had received. Ultimately, Salazar pleaded guilty to state criminal charges of fraud, embezzlement, and forgery in connection with the disappearance of several thousand dollars of the preneed

money. He is serving his sentence in a New Mexico state prison.

In 1993, Bekaert left Salazar and moved out of state. In subsequent divorce proceedings, through her attorney, she offered to settle a property division dispute by accepting $50,000 from Salazar. Salazar characterizes this offer as attempted extortion.

Crestview filed a voluntary Chapter 11 bankruptcy case in 1995. Salazar complains that Bekaert's opposition prevented Crestview from confirming a reorganization plan that would have compensated the victims of the preneed money shortfall. The bankruptcy court appointed a Chapter 11 trustee for Crestview in August 1997. The trustee closed the business the following January, and the case was converted to Chapter 7 that April. It appears that the person serving as the Chapter 11 trustee was then appointed as the Chapter 7 trustee ("the Trustee") for Crestview's bankruptcy estate. Salazar complains that the Trustee has somehow acted improperly, although it is impossible to discern exactly how. In July 1998, Crestview's business property was sold at auction.

Sometime during 2000, Salazar commenced an adversary proceeding against a variety of people, including Bekaert and the Trustee. Salazar claimed that Bekaert (1) took money from a Crestview account and used it for personal expenses when she left her marriage and her job with Crestview; (2) over a period of time before 1993, embezzled about $180,000 of Crestview's preneed money; (3) in 1997, improperly demanded money from him to settle their divorce property division, and because he could not pay, then improperly opposed and defeated Crestview's reorganization efforts, causing the bankruptcy estate to incur unreasonably large attorney fees along the way; and (4) tried to extort $50,000 from the bankruptcy estate by threatening to derail any Chapter 11 plan. These claims were tried to the bankruptcy court in March 2002.

On the first day of the trial, Salazar discussed with the court some problems

he was having getting two witnesses to appear at the trial. The following exchange took place:

> The Court: Certainly if the witnesses are too ill to appear, but are physically able to do a deposition, wherever they are, we will talk about that when the time comes.
>
> Salazar: Will there be a possibility of a continuance at this time?
>
> The Court: No, I think everybody is here, we are ready to go. I will certainly consider not ruling on the trial until we deal with these other two witnesses.[1]

Nothing in the record on appeal indicates that Salazar mentioned any desire to obtain the testimony of these two witnesses at any time after this exchange.

After Salazar presented his evidence against Bekaert, she moved for a directed verdict in her favor or, alternatively, to dismiss the case against her for Salazar's failure to present sufficient proof of any of the allegations he had made. The bankruptcy court treated the motion as one for judgment on partial findings under Federal Rule of Civil Procedure 52(c), made applicable by Federal Rule of Bankruptcy Procedure 7052.[2] The court found that all Salazar's claims against Bekaert failed, some because he had produced no evidence to support them, some because the court did not believe the evidence he had produced, and some because the court believed evidence that contradicted the evidence he had produced. Salazar filed a timely notice of appeal of the bankruptcy court's order.

A few days later, Salazar filed a motion to reconsider. He has not included a copy of this motion in his appendix, so we cannot see for ourselves what it said. He has, however, included a copy of the bankruptcy court's order denying the motion. The order indicates that the motion sought reconsideration on the basis

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[1] Appellant's Appendix at 32.

[2] The court stated that it was treating the motion as one for involuntary dismissal under Fed. R. Civ. P. 41(b), made applicable by Fed. R. Bankr. P. 7041, but the procedure the court applied has been renamed and moved from Rule 41(b) to Rule 52(c). *See* 1991 Advisory Committee Notes to Rules 41 and 52.

of evidence that was allegedly new. The court denied the motion because Salazar's appeal had deprived the court of jurisdiction to rule on it. The court went on, though, to indicate that it would deny the motion if it had jurisdiction to do so because Salazar had not shown that his proffered evidence was new. The court stated that the evidence consisted of four exhibits attached to the motion. According to the court, three of the exhibits had been offered at trial, and Salazar made no showing that the fourth was not available to him before the trial.

Discussion

While Salazar's *pro se* brief is rather difficult to follow, we understand him to be making two major attacks on the bankruptcy court's ruling in Bekaert's favor: (1) the court erred in denying his request for a continuance based on the unavailability of the two witnesses; and (2) the court erred in finding his evidence to be insufficient or unworthy of belief. We will address his complaints in this order.

Trial courts have broad discretion to deal with requests for continuance, and the denial of a continuance is an abuse of discretion only if it was arbitrary or unreasonable and materially damaged the moving party's ability to prove his or her case.[3] Here, on the first day of what became at least a five-day trial, the bankruptcy court denied Salazar's request for a continuance because two witnesses apparently could not appear at that time. The court indicated that it would instead consider other ways to obtain the witnesses' testimony at a later time, but before it ruled on Salazar's claims. Salazar has not included anything in the record to show that he ever mentioned the witnesses again or made any other effort to present their testimony, nor has he informed us what he expected their testimony to be. Consequently, he has failed to convince us that the bankruptcy court's handling of his continuance request was arbitrary or unreasonable or

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[3] *Phillips v. Ferguson*, 182 F.3d 769, 775 (10th Cir. 1999).

materially harmed his ability to establish his claims.

In deciding Salazar's claims against Bekaert, the bankruptcy court exercised its authority under Federal Rule of Civil Procedure 52(c), made applicable here by Bankruptcy Rule 7052. Rule 52(c) provides:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter a judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.[4]

This rule authorizes the trial judge, when also acting as the trier of fact, to resolve a factual issue against a party who has presented all his or her evidence on that issue without waiting to hear the opposing party's evidence.

The bankruptcy court found that Salazar had failed to prove that Bekaert took any money from Crestview or that she acted improperly in offering to settle the property division portion of their divorce case or in opposing Crestview's attempts to reorganize. The court specifically rejected certain testimony that Salazar had offered because the court believed it was not credible. On appeal, we may reverse the court's factual findings only if they are "clearly erroneous."[5]

> A finding is clearly erroneous only if it is without factual support in the record, or if, in light of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985). Under this standard, we uphold "any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).[6]

As this statement of the clearly erroneous standard makes clear, we must have a

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[4] Fed. R. Civ. P. 52(c).

[5] *Roth v. American Hospital Supply Corp.*, 965 F.2d 862, 865 (10th Cir. 1992); *see also* Advisory Committee Note to 1991 Amendment to Fed. R. Civ. P. 52.

[6] *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1526 (10th Cir. 1997).

full transcript of the trial before the bankruptcy court, showing all the evidence that was presented, to be able to apply the standard. Because he is the appealing party, Salazar was obliged to present an appellate record sufficient for a meaningful review of the issues he wished to raise.[7] Like many appellants before him, Salazar has made the mistake of providing us only with evidence favorable to him, and leaving out opposing evidence that the bankruptcy court accepted as true. He asks us simply to recognize the truth of his evidence. This is not the function of an appellate court. When an appellant fails to provide a transcript of all the evidence presented, we cannot review the bankruptcy court's findings of fact but must accept them all as true.[8] Thus, Salazar has failed to demonstrate that any of the bankruptcy court's findings were clearly erroneous.

Salazar may be asserting other arguments in his brief that we have not yet addressed. For example, he complains that the Trustee was somehow allied with Bekaert and improperly helped her avoid being punished for her alleged wrongdoing. We are satisfied that none of these arguments demonstrate that the bankruptcy court committed any error, much less any reversible error.

Conclusion

The bankruptcy court did not abuse its discretion in ruling on Salazar's request for a continuance. None of the bankruptcy court's findings have been shown to be clearly erroneous. Consequently, the bankruptcy court's judgment in Bekaert's favor is affirmed.

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[7] Fed. R. Bankr. P. 8009(b)(9); 10th Cir. BAP L.R. 8009-1(b)(5).

[8] *Rubner & Kutner, P.C., v. United States Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321, 1323 (10th Cir. 1993).