FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 6, 2006
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD ALVIN CARLSON, also known as DC Production Services, Energy Field Technologies, Debtor.	BAP No. WY-06-070
H & E EQUIPMENT, Defendant – Appellant, v. R. MICHELE RUSSELL, Trustee, Plaintiff – Appellee.	Bankr. No. 04-22255 Adv. No. 05-02058 Chapter 7 ORDER AND JUDGMENT*

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

Before BOHANON, MICHAEL, and THURMAN, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

This appeal concerns an action brought by the Trustee-Appellee to recover an alleged $15,000 preferential transfer made by the Debtor to the Creditor-

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Appellant within 90 days of the petition date. Because we conclude that there is not a sufficient record upon which to make a meaningful review, we hereby AFFIRM the bankruptcy court's decision to grant summary judgment for the Appellee.

Background

The key facts are not in dispute. The Debtor leased certain roadside lighting equipment from the Appellant. The Appellant subsequently lost track of the equipment and contends that it had been searching for its equipment when the Debtor contacted it to inquire about purchasing the equipment. On August 24, 2004, the Debtor paid the Appellant $15,000 for the equipment. The $15,000 apparently approximated the amount that would have been paid for lease of the equipment under the parties' previous lease agreement.

The Debtor filed his Chapter 7 petition on November 18, 2004. The Appellee was appointed the Chapter 7 Trustee in the Debtor's case. The Appellee brought a complaint seeking to avoid an alleged preferential transfer to the Appellant and to recover $15,000 from the Appellant. The Appellee moved for summary judgment in her favor, and the Appellant responded in opposition and with a cross-motion for summary judgment. Following a hearing, the bankruptcy court granted the Appellee's motion for summary judgment and denied the Appellant's cross-motion. This appeal followed.

Standard of Review

For purposes of standard of review, decisions by judges are traditionally divided into three categories denominated as questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion"). Pierce v. Underwood, 487 U.S. 552, 558 (1988). Here, the applicable standard is de novo since this appeal hinges on whether the bankruptcy court correctly applied the substantive law. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996) (holding that de novo was the

appropriate standard of review on an appeal of a motion for summary judgment and that appellate court was to apply the same legal standard used by the bankruptcy court).

Discussion

The Bankruptcy Code provides that:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made –
>
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The burden is on the trustee, here the Appellee, to prove all these elements by a preponderance of the evidence; however, where the transfer at issue was made within 90 days of the petition date, then the Debtor is presumed to be insolvent. See 11 U.S.C. § 547 (f) & (g). Even where all the elements of § 547(b) are established, the party against whom recovery or avoidance is sought may prevail if it can establish one of the enumerated defenses in § 547(c). That party also has the burden of proving the § 547(c) defenses. See § 547(g).

Here, we interpret the Appellant's first argument to be that the Appellee failed to show that allowing the debtor to retain the equipment was not a transfer

of an interest in property of the debtor. It also asserts that it should prevail on its affirmative defenses under § 547(c)(1) known commonly as the "contemporaneous exchange for new value"defense and § 547(c)(2) known commonly as the "ordinary course of business" defense.

We do not reach the core of the Appellant's arguments because we conclude that it has not provided a sufficient record upon which to base a meaningful review. It is the Appellant's responsibility to provide the Court with a record sufficient to decide the issues on appeal. See In re Armstrong, 294 B.R. 344, 361 (10th Cir. BAP 2003); Fed. R. App. P. 10(b)(2); 10th Cir. BAP L.R. 8009-1(b)(5). This includes supplying those parts of the record that disclose the lower court's reasoning. See Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1015 (10th Cir. BAP 1998).

What the record does disclose is that a hearing was held on May 18, 2006, on the cross-motions for summary judgment and that the bankruptcy court entered an order granting the Appellee's motion for summary judgment. That order includes a handwritten interlineation stating that the relief requested was granted "[f]or the reasons stated on the record at the hearing[.]" (Order Granting Plaintiff Summary Judgment, in Appendix to Appellant's Brief ("App.") at 67.) The minutes of the adversary proceedings show handwritten notes that the bankruptcy court's ruling was that the "lease had expired" and that "Trustee's motion will be granted based on only evidence before the court." (Minutes of Adversary Proceedings, in App. at 65.) However, the Appellant did not include a transcript of the hearing that would permit us to know the bankruptcy court's reasoning that was made on the record. See e.g., Sunset Sales, 220 B.R. at 1015 (noting that appellant did not include key transcript from pretrial conference and "[a]ccordingly, we do not know the reasons why the bankruptcy court overruled" the objection so "[t]his alone compels this Court to affirm the bankruptcy court as the Appellants have not complied with their obligation to provide this Court with

an adequate record for review."); In re Armstrong, 294 B.R. at 362 (stating that, "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."); In re Rambo, 209 B.R. 527, 530 (10th Cir. BAP), aff'd, 132 F.3d 43 (1997) (same). Without the transcript of the summary judgment hearing, we can only speculate as to the bankruptcy court's legal reasoning.

Following the guidance of the Court of Appeals for the Tenth Circuit that failure to include a key transcript "raises an effective barrier to informed, substantive appellate review" that leaves "no alternative but to affirm the affected ruling," we hereby AFFIRM the bankruptcy court's decision. McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992).