Federal Rules of Evidence

Mahler v. Mahler — BAP #OR-98-1830-RyKMe
Adv. Proc. # 97-6193-fra
In re Nancy Mahler — Case #697-61863-fra7

11/3/99 BAP aff'g Alley Unpublished

After Nancy and Robert Mahler divorced, Debtor filed a Chapter 7 bankruptcy petition. Plaintiff, Robert Mahler, filed a complaint against Debtor, her father, and her second husband alleging that the Defendants had converted various items of property belonging to the Plaintiff and seeking a money judgment. The complaint alleged that the Debtor's portion of the debt was nondischargeable. After trial, the court ruled in favor of the Defendants and the Plaintiff appealed.

The Plaintiff listed as error the court's admitting evidence during trial concerning the disposition of marital property other than the property mentioned in the complaint, evidence concerning passport fraud committed by Plaintiff, and evidence of Plaintiff's criminal conviction. The BAP held that the court did not commit error in admitting the complained of evidence. Evidence concerning disposition of marital property was relevant regarding the existence of an agreement regarding division of marital property. Evidence of passport fraud and of the criminal conviction was relevant with regard to Plaintiff's truthfulness and his propensity to testify truthfully. Because this was a bench trial, there was little chance that the trier of fact was prejudiced by introduction of that evidence.

E99-27(14)
(No underlying Bankruptcy Court opinion)

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re NANCY A. MAHLER, Debtor. ROBERT E. MAHLER, Appellant, v. NANCY A. MAHLER aka NANCY ANN REAMER aka NANCY ANN HARVEY, JOHN HOWARD REAMER, and MICHAEL WADE HARVEY, Appellees.	BAP No. OR-98-1830-RyKMe Bk. No. 697-61836-fra7 Adv. No. 97-6193-fra **MEMORANDUM**[1]

FILED
NOV 03 1999
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on October 21, 1999
Portland, Oregon

Filed - November 3, 1999

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

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding.

Before: RYAN, KLEIN, and MEYERS, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel. See Ninth Circuit BAP Rule 13 & Ninth Circuit Rule 36-3.

(26)

After Nancy ("Debtor") and Robert Mahler ("Plaintiff") divorced, Debtor filed a chapter 7[2] bankruptcy petition. Plaintiff filed a complaint (the "Complaint") against Debtor, her father, and her second husband alleging that the defendants had converted various items of property that belonged to Plaintiff and seeking a money judgment. The Complaint alleged that Debtor's portion of the debt was nondischargeable under § 523(a)(6).

After a trial, the bankruptcy court ruled in favor of the defendants, and Plaintiff timely appealed.

We AFFIRM.

I. FACTS

In July 1995, the Mahlers filed a pro se petition for divorce. The petition for dissolution of marriage provided that Debtor assumed liability for all debts and obligations incurred during the marriage. On August 14, 1995, the state court entered the Stipulated Judgment of Dissolution of Marriage, and the Mahlers were divorced effective September 8, 1995.[3] The dissolution decree did not address division of the marital property.

On April 2, 1997, Debtor filed her chapter 7 petition. Plaintiff timely filed the Complaint, naming as defendants Debtor,

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[2]Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. All rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[3]Based on the testimony at trial, the bankruptcy court found that contrary to the representations made to the state court regarding irreconcilable differences, the Mahlers divorced in order to enable Debtor to adopt a child. Apparently, they believed that if they remained married, they would be unable to adopt a child because Plaintiff had a criminal conviction.

her father, John Reamer, and her second husband, Michael Harvey. The Complaint alleged that Debtor "fraudulently, unlawfully, and with intent to deprive him of his ownership interest therein, transferred Plaintiff's undivided interest" in the following property (the "Property"): (1) a 1982 Mercedes Benz; (2) a 1.5 carat diamond ring; (3) a set of 1 carat diamond earrings; (4) the value of 35 firearms; and (5) a Macintosh computer. It also alleged that Debtor retained a 50% interest in a parcel of real property that she had not disclosed on her schedules. The Complaint sought a determination that Debtor owed Plaintiff $28,250 and that this debt was nondischargeable under § 523(a)(6). The Complaint also alleged that Reamer and Harvey had fraudulently and unlawfully transferred the Property and sought a determination that they owed Plaintiff $17,250. The Complaint requested that any judgment be entered jointly and severally and that Debtor's portion be nondischargeable.

After a trial on the merits, the bankruptcy court entered judgment against Plaintiff.[4] Plaintiff timely appealed the Judgment.

II. ISSUES

A. Whether the bankruptcy court abused its discretion in admitting evidence of the disposition of marital property other than the Property.

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[4]Apparently, Plaintiff also alleged that the debt owed by Debtor was nondischargeable under §§ 523(a)(2)(A) and (a)(15). However, at trial, the court granted motions to dismiss these claims. Plaintiff does not appeal that ruling.

B. Whether the bankruptcy court plainly erred in admitting evidence of Plaintiff's passport fraud.

C. Whether the bankruptcy court plainly erred in admitting evidence of Plaintiff's criminal conviction.

III. STANDARD OF REVIEW

A bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent a showing of prejudice. See Lake v. Capps (In re Lake), 202 B.R. 751, 756 (9th Cir. BAP 1996).

We review the admission of evidence without objection for plain error. See United States v. Gomez-Norena, 908 F.2d 497, 500-01 (9th Cir. 1990). "'A plain error is a highly prejudicial error affecting substantive rights.'" Id. (quoting United States v. Yarbrough, 852 F.2d 1522, 1537 (9th Cir. 1986)).

IV. DISCUSSION

A. The Bankruptcy Court Did Not Abuse Its Discretion in Admitting Evidence of the Disposition of Property Other Than the Property.

In Oregon, conversion is defined as an "'intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" Morrow v. First Interstate Bank of Oregon, 847 P.2d 411, 415 (Or. 1993)(quoting Mustola v. Toddy, 253 Or. 658, 663, 456 P.2d 1004, 1007 (1969)). A debt for conversion may be excepted from discharge pursuant to § 523(a)(6) if it is proven to be a debt "for willful and malicious injury by the debtor to another entity or to the

property of another entity." 11 U.S.C. § 523(a)(6). The Supreme Court recently held that "the word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, __, 118 S.Ct. 974, 977, 140 L.Ed. 2d 90, __ (1998). The Court noted that this was consistent with a prior holding that "not every tort judgment for conversion is exempt from discharge. Negligent or reckless acts . . . do not suffice to establish that a resulting injury is 'wilful and malicious.'" Id. at __, 118 S.Ct. at 978, 140 L.Ed. 2d at __ (quoting Davis v. Aetna Acceptance Co., 293 U.S. 328, 332 (1934)). Thus, Plaintiff had to establish that Debtor, Reamer, and Harvey converted the Property with the intent to injure Plaintiff.

During Plaintiff's cross-examination, Debtor's attorney asked Plaintiff whether the Property included all of the marital property. Plaintiff responded that there was other marital property, and Debtor's attorney stated that he wanted to discuss Plaintiff's recollection of the properties' disposition. Plaintiff's attorney objected to this line of questioning as being irrelevant because

> [t]his is not a divorce court; it's not allowed to disburse the assets of a dissolution proceeding. The law in Oregon is that each item of property becomes held by tenancy in common between the parties, and it's not up to this Court as a bankruptcy court to act or attempt to adjust the equities between parties as though it were a dissolution court. . . . If you allow them to go off in this direction, I suppose that they will try to bring in what they think might be related to the properties, but if the property is only owned one-half by each party, that's true for today and it's true

> after today no matter what the Court does, and it's irrelevant for them to attempt to adjust the values on other unrelated properties that aren't an issue in this case.

Tr. of Proceedings (July 22, 1998) at 31-32.

The bankruptcy court overruled the objection, finding that the evidence was relevant to whether Plaintiff and Debtor had reached an agreement as to the disposition of their marital property and because the disposition of property other than the Property might "shed some light on the boundaries of that agreement." Id. at 34.

By overruling Plaintiff's objection, the bankruptcy court admitted the following evidence:

(1) Debtor and Plaintiff sold a parcel of land in Falls City (the "Falls City Property") and initially received monthly checks on the contract. After receiving monthly checks for one year, Plaintiff assigned his interest in this property to a third party.

(2) Debtor received $9,000 from the sale of the property on which the Mahler's firearms store was located (the "Portland Road Property").

(3) The Mahlers had owned a condominium in South Africa that was transferred back to the seller in lieu of foreclosure.

(4) Debtor and Plaintiff owned a parcel of property worth $23,000 on East North Main adjacent to another parcel that they sold.

(5) The Mahlers had owned a parcel of property in Brummeria, South Africa and some timeshares in South Africa that had been forfeited.

(6) Debtor and Plaintiff had owned gold coins that Plaintiff believed remained in Debtor's possession.

(7) During the marriage, Plaintiff purchased a .85 carat diamond ring for Debtor that he believed she still had.

(8) Plaintiff had possession of a watch worth $3500.

(9) Plaintiff received the proceeds of a $7500 legal malpractice settlement that belonged to him and Debtor by opening a bank account in their names after the divorce without Debtor's knowledge and depositing the settlement check into that account.

On appeal, Plaintiff argues that by overruling the objection to this evidence, the court's attention was diverted from Plaintiff's case. Specifically, he contends that by admitting evidence of the Portland Road Property and the Falls City Property, the bankruptcy court was misled into believing that Plaintiff had received a benefit from their sale and that this evidence was irrelevant and served to prejudice the court against him. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Relevant evidence is admissible. See FED. R. EVID. 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

Debtor's evidence of the existence and disposition of marital property other than the Property was relevant because it tended to make it more likely that the Mahlers had an agreement regarding

division of marital property and distribution of proceeds. Evidence of such an agreement would tend to show that Debtor did not interfere with any interest of Plaintiff in the Property and therefore was not liable for conversion. In addition, the existence of an agreement, either implicit or explicit, regarding disposition of marital property would make it less likely that Debtor had the requisite intent to injure Plaintiff. Because this evidence had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," this evidence was relevant. FED. R. EVID. 401. Because it was relevant, the evidence was admissible. See FED. R. EVID. 402.

Although admissible, relevant evidence may still be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403. "[P]rejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror. These dangers appear likely to arise only in jury trials and therefore rarely in bankruptcy proceedings." HON. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 403.1, at 439 (1999 ed.). Indeed, the Ninth Circuit has noted that "in a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial." EEOC v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994).

There is no basis for finding that the bankruptcy court was unfairly prejudiced by introduction of evidence regarding the

Portland Road Property or the Falls City Property. The bankruptcy court determined that the debt was dischargeable after determining that

> [t]he divorce proceeding was part of a larger agreement whereby they would terminate their relationship on paper, but not otherwise. In effect, they hid their relationship from parties or any agencies that had a right to know about it. But they would sort of stay together and afterwards they would either get back together as one exhibit suggests; or, as another one suggests, at least marshall and use their property together for the purpose of paying joint debts.
>
> . . . .
>
> Now, subsequent to that, Mrs. Mahler and perhaps Mr. Mahler had a change of heart with respect to their relationship and made the decision to go their separate ways. The evidence suggests to me that there was . . . at least an implicit agreement between them that they would each take what they had and go his or her separate ways. Mrs. Mahler's actions and testimony are consistent with that finding because she testified that what she took and sold she used to support herself, to pay legal fees, and thought that it was only fair in light of the fact that if she proceeded Mr. Mahler retained about two-thirds of the total value of their property held in common.
>
> I believe that Mr. Mahler's actions after the fact and testimony are also consistent with such an approach because he did not feel that he was legally obligated to make any accounting to the trustee in this bankruptcy for the value of the property that he held, which under the theory the Court's encouraged to adopt would have been subject to Mrs. Mahler's interest and therefore the interest of the bankruptcy trustee.

Tr. of Proceedings (July 22, 1998) at 167-68.

The transcript reveals that the bankruptcy court carefully weighed the evidence and came to its decision after evaluation of both Debtor's and Plaintiff's testimony and actions with respect to the disposition of marital property. Based on this evidence, it concluded that there was at least an implicit agreement with

respect to this property as established by the conduct of both parties. Plaintiff does not challenge this finding on appeal. There is no indication that the bankruptcy court decision was improperly based and that Plaintiff was unfairly prejudiced. Therefore, the evidence was admissible and the bankruptcy court did not abuse its discretion in overruling Plaintiff's objection.[5]

B. The Bankruptcy Court Did Not Plainly Err in Admitting Evidence of Plaintiff's Passport Fraud.

During Plaintiff's cross-examination, the following testimony was admitted without objection:

> Q (By Mr. Gunn) Mr. Mahler, in looking at what's been marked for identification as Exhibit 126, could you describe what that is.
> A That is a South African passport.
> Q Now, you've indicated the name on that passport is not in fact your own but that of a friend, is that correct?
> A Yes.
> Q And did you merely take his passport and remove the photograph, or how did you falsify this passport?
> A He went down with me and helped me fill out some forms to the U.S. passport -- not the U.S. passport, the South African passport and walked me through the procedure to get a passport, and we used his I.D. to get a passport for me.
> Q Do you remember if those forms required you to state under oath that they were true and correct?
> A Oh, I imagine they did.
> Q And you simply disregarded that and signed it anyway, stating that your name was Mr. Van Der Merwe, if that's how you pronounce it, and as the passport has indicated you were born in South Africa and so forth?
> A I signed the papers, yes.

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[5]We note that even if the court had abused its discretion in admitting evidence of the disposition of the Portland Road Property and Falls City Property, any error was harmless because there was ample evidence to support the court's conclusion that Debtor did not intend to injure Plaintiff.

Tr. of Proceedings (July 22, 1998) at 30-31. Debtor's attorney then requested that the passport be admitted into evidence. The court asked Plaintiff's attorney whether he had any objection to its admission, and Plaintiff's attorney stated that he did not.

On appeal, Plaintiff argues that this testimony "diverted the court's attention from material facts presented by Plaintiff" and "[i]nflame[d] and prejudice[d] the court against Plaintiff." Appellant's Opening Br. at 5-7. We disagree.

Plaintiff's failure to timely and properly object to the introduction of this evidence at trial bars Plaintiff from raising this issue on appeal unless plain error exists. See United States v. Turman, 122 F.3d 1167, 1169 (9th Cir. 1997). Reversal under this standard requires (1) an error, (2) that was plain, and (3) that affected substantial rights. Id. at 1170 (citing United States v. Olano, 507 U.S. 725, 730-32 (1993)). Plain error "is error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." Id. Plain error is absent here.

Federal Rule of Evidence 608 provides that

> [s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.

FED. R. EVID. 608(b). Here, on cross-examination, Debtor's attorney inquired into Plaintiff's falsification of a passport. This conduct was probative of Plaintiff's truthfulness because in fraudulently obtaining a passport, Plaintiff lied under oath.

Evidence relating to a witness's participation in a fraudulent transaction is probative of truthfulness. See United States v. Jackson, 882 F.2d 1444, 1446 (9th Cir. 1989)(and cases cited therein). Even if there had been error, there is no evidence to establish that this testimony deprived Plaintiff of a substantial right, particularly since this was a bench trial. See EEOC, 31 F.3d at 898. Thus, the bankruptcy court did not commit plain error in permitting cross-examination regarding Plaintiff's passport fraud.

C. The Bankruptcy Court Did Not Plainly Err in Permitting Cross-Examination Related to Plaintiff's Criminal Conviction.

During Plaintiff's cross-examination, the following exchange occurred:

> Q You indicated that there were two charges, one had to do with a shipment of guns to South Africa?
> A Yes.
> Q Were those automatic weapons?
> A No.
> Q And you indicated there was another charge; that wasn't quite explored in its entirety. What was the previous charge on that one?
> A That was for the inaccuracies in the paperwork at the gun store.
> Q And were those automatic weapons?
> A Yeah. They were sold to a police agency.

Tr. of Proceedings (July 22, 1998) at 41. Plaintiff's attorney did not object to this line of questioning.

On appeal, Plaintiff contends that this questioning was irrelevant to Debtor's bankruptcy case and was introduced solely to inflame and prejudice the bankruptcy court. We disagree.

Federal Rule of Evidence 609(a)(2) provides that "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the

punishment." FED. R. EVID. 609(a)(2). On direct examination, Plaintiff testified that he and Debtor had

> a discrepancy in some paperwork involving transfer of some firearms to a law enforcement agency. At the time I was a reserve deputy for them, and there was something not recorded in an acquisition and disposition book, and being one of the owners of the store we were responsible for that paperwork not being recorded properly.

Tr. of Proceedings (July 22, 1998) at 15. Plaintiff testified that he had been convicted for this crime.

In interpreting Federal Rule of Evidence 609(a)(2), the Ninth Circuit has held that "'dishonesty and false statement'" refers to "'crimes such as perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, truthfulness, or falsification bearing on the accused's propensity to testify untruthfully.'" United States v. Brackeen, 969 F.2d 827, 830 (9th Cir. 1992)(quoting FED. R. EVID. 609 advisory committee's note).

Based on the evidence before us, Plaintiff's conviction for keeping inaccurate records of transactions related to automatic weapons appears to involve a false statement that bears on his tendency to truthfully testify, and Plaintiff does not argue otherwise. Evidence of a conviction involving "dishonesty or false statement" is admissible without being subject to a balancing test. FED. R. EVID. 609(a)(stating that such evidence "shall be admitted")(emphasis added). Because this evidence was admissible under Federal Rule of Evidence 609(a), the bankruptcy court did not plainly err in allowing this testimony.

V. CONCLUSION

In sum, the bankruptcy court did not abuse its discretion in admitting evidence of the disposition of marital property other than the Property because it was relevant and not unfairly prejudicial.

Additionally, the bankruptcy court did not plainly err in permitting cross-examination of Plaintiff regarding a fraudulent passport because this conduct was probative of Plaintiff's truthfulness.

Last, the bankruptcy court did not plainly err in permitting testimony on cross-examination of Plaintiff's conviction for keeping inaccurate paperwork on transactions involving automatic weapons because this crime involved a false statement that bears on Plaintiff's propensity to testify truthfully.

AFFIRMED.

U.S Bankruptcy Appellate Panel
of the Ninth Circuit Court of Appeals
125 South Grand Avenue
Pasadena, California 91105
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NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-98-1830-RyKMe

RE: NANCY A. MAHLER

A separate Judgment was entered in this case on November 3, 1999.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rule of Appellate Procedure 39.

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Angie Croswhite

Deputy Clerk: November 3, 1999