11 U.S.C. § 362
Fed. R. Bank. P. 8009(b)

In re Christos Mandalides, Case No. 08-32091-tmb13
Appellate No. OR-08-1189-MoJuMk

3/2/09 TMB unpub

P09-4

Following the debtor's bankruptcy filing, West Coast Bank (the "Bank") sought relief from stay to foreclose on its collateral consisting of real property located in Rainier, Oregon. Debtor responded to the Bank's motion for relief and objected to its proof of claim on the grounds that the debt was unsecured and that the underlying contract was invalid. The court combined those matters for hearing. At the close of the hearing the court overruled the debtor's objection to the proof of claim and granted the Bank relief from stay. The court specifically found that the debtor had executed the note and deed of trust at issue, that the debtor was in default on this obligations under the note and that there was no unencumbered equity in the property. The debtor appealed that ruling, but did not provide the BAP with a transcript of the hearing or the evidence and exhibits introduced at that hearing.

On appeal the BAP noted that under Fed. R. Bank. P. 8009(b), the debtor had the burden of proving that the court's "precise and detailed findings regarding the promissory note, his obligations to the Bank, and other facts were clearly erroneous" and that to do so he had to "show how the findings were not supported by the record." The BAP held that, in the absence of any record showing that the bankruptcy court had abused its discretion in granting the motion for relief, it was required to affirm that ruling. It found that affirmance was "particularly justified" where, as here, the bankruptcy court "made specific and detailed findings of fact tailored to debtor's contentions" that the debt allegedly secured by the deed of trust was not valid.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-08-1189-MoJuMk
CHRISTOS MANDALIDES,	Bk. No. 08-32091
Debtor.	
CHRISTOS MANDALIDES,	
Appellant,	
v.	**M E M O R A N D U M**[1]
WEST COAST BANK; BRIAN D. LYNCH, Chapter 13 Trustee; UNITED STATES TRUSTEE,	
Appellees.	

Argued and Submitted on February 19, 2009
at Pasadena, California

Filed - March 2, 2009

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

Honorable Trish M. Brown, Bankruptcy Judge, Presiding

Before: MONTALI, JURY, and MARKELL, Bankruptcy Judges.

[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

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After conducting a full evidentiary hearing, the bankruptcy court entered an order granting a creditor relief from the automatic stay of 11 U.S.C. § 362.[2] Debtor appealed and we AFFIRM.

I. FACTS

On May 5, 2008, appellant Christos Mandalides ("Debtor") filed a petition for relief under chapter 13. On May 27, 2008, appellee West Coast Bank (the "Bank") filed a proof of claim alleging that as of the petition date, Debtor owed $191,784.03 on a promissory note executed to the order of the Bank. The Bank further alleged that a deed of trust on certain real property located on Fern Hill Road in Rainier, Oregon (the "Property") secured repayment of the promissory note.

On May 28, 2008, the Bank filed a motion for relief from stay in order to pursue its foreclosure remedies against the Property. The Bank asserted the value of the Property to be $205,500.00, its claim to be $191,784.03, and unpaid taxes on the Property to be $2,751.88 (for total encumbrances of $194,535.91). The Bank estimated the cost of liquidating the Property to be $10,964.09.

Debtor objected to the proof of claim because the Bank had not attached the original promissory note. Debtor also filed a

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[2]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as revised by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

response to the motion for relief from stay, repeatedly asserting that "this is not a secured debt." On July 22, 2008, the bankruptcy court held an evidentiary hearing on both the motion for relief from stay and Debtor's objection to the Bank's proof of claim. Debtor did not order a copy of the transcript of this hearing.

On July 25, 2008, the bankruptcy court entered its findings and facts and conclusions of law based on the evidence presented at the hearing. The court specifically found that (1) Debtor had executed a promissory note in favor of the Bank in the amount of $172,700.00; (2) Debtor had executed a deed of trust pledging title to the Property as security for repayment of the Note; (3) the deed of trust was recorded in the official county records on May 30, 2006; (4) Debtor had defaulted on his obligations under the note; (5) total encumbrances against the Property as of the petition date totaled $186,296.78; (6) the value of the Property was $205,500.00; (7) given the estimated costs of sale, no unencumbered equity existed in the Property; and (8) Debtor provided no evidence that the Property was necessary for an effective reorganization.

Based on the foregoing findings of fact, the bankruptcy court granted relief from the automatic stay under section 362(d)(1) for cause, as Debtor was not providing adequate protection to the Bank. The court also concluded that relief was appropriate under section 362(d)(2) because the Debtor did not have equity in the Property and the Property was not necessary for an effective reorganization.

On July 29, 2008, the bankruptcy court entered an order granting the Bank relief from the automatic stay. On August 1, 2008, Debtor filed an "Objection and Appeal of Court's Approval of [Bank's] Motion for Relief from Automatic Stay and Petition to Strike [Bank's] Motion for Relief from Stay" ("the Motion for Reconsideration").[3] On September 17, 2008, this panel entered an order treating the Motion for Reconsideration as a notice of appeal from a final order not requiring leave to appeal. The panel declined to proceed on the merits of the appeal, however, as the balance of the Motion for Reconsideration constituted a timely motion for relief from judgment to be decided by the bankruptcy court.

The Motion for Reconsideration alleged, inter alia, that the proof of claim was not signed under penalty of perjury by someone with personal knowledge of the claim, that no lawful document supported the claim, and that the Bank was not a holder in due course of a bona fide negotiable instrument. On September 23, 2008, the bankruptcy court entered an order denying the Motion for Reconsideration. The court reviewed its records and files and made the following additional findings:

> 1. Bank's proof of claim was filed by an authorized agent in accordance with Fed. R. Bankr. P. 3001(b) on an official bankruptcy form that sets forth the penalty for filing a fraudulent claim. Further, the court held an evidentiary hearing on the Debtor's objection to Bank's proof of claim in conjunction with the hearing on the Bank's motion for relief from stay and the Debtor failed to raise any objections to the form of Bank's proof of claim at that hearing.

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[3]Debtor appealed only the order granting relief from stay and not the separate order denying Debtor's objection to Bank's claim.

2. Debtor presented no evidence that he was fraudulently induced to enter into the Note or the Deed of Trust with the Bank.

3. Debtor admitted that the Bank is in possession of the original Note and that he had been allowed to view the original Note.

4. The Bank is the holder of the Note and is entitled to enforce both the Note and the Deed of Trust.

5. The other issues raised in the Debtor's petition to strike [Motion for Reconsideration] were heard and determined by the court at the hearing on the Bank's motion for relief from stay.

II. ISSUE

Did the bankruptcy court err in granting relief from the automatic stay to the Bank?

III. STANDARD OF REVIEW

We review a bankruptcy court's order granting relief from the stay for abuse of discretion. Arneson v. Farmers Ins. Exchange (In re Arneson), 282 B.R. 883, 887 (9th Cir. BAP 2002); Duvar Apt., Inc. v. Fed. Dep. Ins. Corp. (In re Duvar Apt., Inc.), 205 B.R. 196, 199 (9th Cir. BAP 1996). To reverse for abuse of discretion we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001).

The bankruptcy court's findings of fact are reviewed for clear error, and conclusions of law are reviewed de novo. Padilla v. U.S. Trustee (In re Padilla), 214 B.R. 496, 498 (9th Cir. BAP 1997), aff'd, 222 F.3d 1184 (9th Cir. 2000).

IV. JURISDICTION

Our order dated September 17, 2008, stated that the order granting relief from the stay was final and appealable. See also

Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1054 (9th Cir. 1997) ("Orders granting or denying relief from the automatic stay are deemed to be final orders."). We therefore have jurisdiction under 28 U.S.C. § 158(b) to review the bankruptcy court's order.

V. DISCUSSION

As we held in Burkhart v. Fed. Dep. Ins. Corp. (In re Burkhart), 84 B.R. 658, 660 (9th Cir. BAP 1988), an appellant has the burden of showing a trial court's findings of fact are clearly erroneous. "The responsibility to file an adequate record also rests with the [appellant]." Id.; see also Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). "'Appellants should know that an attempt to reverse the trial court's findings of fact will require the entire record relied upon by the trial court be supplied for review.'" Kritt, 190 B.R. at 387, quoting Burkhart, 84 B.R. at 661.

Here, Debtor has the burden of demonstrating that the bankruptcy court's precise and detailed findings regarding the promissory note, his obligations to the Bank, and other facts were clearly erroneous. To do so, he has to show how the findings were not supported by the record (i.e., the testimony and evidence upon which the court relied in issuing its ruling). Id.

Debtor's opening appellate brief duplicates the grounds of error set forth in his Motion for Reconsideration, adding one argument: "The contracts attached to Proof of Claim lack 2 essential components of any valid contract, namely: a) exchange

of consideration and b) full disclosure."[4] The bankruptcy court, relying on its initial and supplemental findings of fact, rejected each of the arguments asserted by Debtor in his Motion for Reconsideration. These findings of facts are based on testimony and evidence presented at the evidentiary hearing, but Debtor did not obtain a transcript of this hearing and has not provided the evidence and exhibits introduced at the hearing.[5]

Rule 8009(b) requires an appellant to provide the "transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel." The rules of this panel mandate the inclusion of transcripts "necessary for adequate review":

> The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. The Panel is required to consider only those portions of the transcript included in the excerpts of the record.

9th Cir. BAP R. 8006-1.[6] In order for us to determine that the

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[4]We will not consider Debtor's extra argument regarding lack of consideration and full disclosure, as it was raised for the first time on appeal. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989) (appellate court will not consider argument raised for the first time on appeal); Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996).

[5]Although we have the option of reviewing the bankruptcy court's electronic docket if the parties' excerpts do not include relevant documents (see E.R. Fegert, 887 F.2d at 957-58; Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003)), we cannot do so here because the bankruptcy court's electronic docket does not contain the transcript of the hearing or any of the evidence introduced at the hearing.

[6]Our rule is consistent with Federal Rule of Appellate Procedure 10(b)(2), which states that if "the appellant intends

(continued...)

bankruptcy court's findings were clearly erroneous, we must have access to the evidence and testimony relevant to those findings. Debtor, however, has not provided us with "the transcripts necessary for adequate review" of the bankruptcy court's findings and order. Absent a record demonstrating that the bankruptcy court abused its discretion in granting relief from the stay, we must affirm. Kritt, 190 B.R. at 387 (where appellant did not provide full transcript, it was "impossible" to review for clear error; panel therefore affirmed because debtor failed to show findings were clearly erroneous); Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th Cir. 1991) (where appellant failed to provide a trial transcript, his contentions were "unreviewable" and "justifie[d] summary affirmance.")[7]

Such affirmance is particularly justified here, because the bankruptcy court made specific and detailed findings of fact tailored to Debtor's contentions in his Motion for Reconsideration and in his opening brief. Without viewing the promissory note, deed of trust, and testimony, we cannot see how any of the bankruptcy court's findings were clearly erroneous.

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[6](...continued)
to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion."

[7]See also Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 789-90 (9th Cir. 1989) (court declined to review alleged error in contempt hearing where appellants did not provide a transcript of that hearing); Thomas v. Computax Corp., 631 F.2d 139, 143 (9th Cir. 1980) (dismissing appellant's pro se appeal when she failed to include in the record a transcript to support her claim that the trial court's findings and judgment was unsupported by the evidence).

As we do not have a definite and firm conviction that the bankruptcy court erred in its findings and conclusions, we hold that it did not abuse its discretion in granting relief from the automatic stay.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.