

AUG 10 2007

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-06-1428-DMcMo
DUC DOAN,	)	Bk. No.	LA 03-31102-TD
	)	Adv. No.	LA 04-02040-TD
Debtor.	)		
_____	)		
DUC DOAN,	)		
	)		
Appellant,	)		
v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
TU MY TONG,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on July 26, 2007  
at Pasadena, California

Filed - August 10, 2007

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: Dunn, McManus<sup>2</sup> and Montali, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 **I. INTRODUCTION**

2 Chapter 13 debtor Duc Doan ("Doan") appeals the bankruptcy  
3 court's judgment in favor of the appellee, Tu My Tong ("Tong"),  
4 dismissing Doan's claims against Tong in an adversary proceeding.  
5 We AFFIRM.

6  
7 **II. FACTUAL BACKGROUND<sup>3</sup>**

8 At one time, Doan owned certain real property (the  
9 "Property") in Los Angeles, California, where he lived. Doan and  
10 Tong met, dated and apparently reached an agreement to live  
11 together as husband and wife, but to remain unmarried. Later on,  
12 Tong expressed "concern that she would not get anything from the  
13 relationship since they were not going to get married."  
14 Memorandum Decision at 3.

15 Doan alleged that "in reliance on [Tong's] promise of a  
16 relationship together [Doan in February 2003] signed a quitclaim  
17 deed to . . . Tong of a 1/3 interest in the Property" and loaned  
18 Tong money, but no money was paid by Tong to Doan for the  
19 Property interest. Memorandum Decision at 3. In March 2003,  
20 Doan "transferred another 1/3 interest [in the Property] to Tong.  
21 Again, no money changed hands and the [deed] reflects a transfer  
22 tax of zero, consistent . . . with no money paid." Memorandum  
23 Decision at 3.

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24  
25 <sup>3</sup> Because Doan has filed very limited excerpts from the  
26 record before the bankruptcy court, much of the summary of facts  
27 herein reflects the factual background recounted in the  
28 bankruptcy court's memorandum decision, setting forth its  
findings of fact and conclusions of law, entered in conjunction  
with its Judgment in Tong's favor. See Memorandum of Decision  
Regarding Tong Motion for Judgment ("Memorandum Decision") at 1-  
11.

1 On or about May 1, 2003, Tong ostensibly "arranged for a  
2 loan of \$6,000 . . . supposedly for repairs to the [Property].  
3 [Doan] signed a paper for that, but never saw the money. At that  
4 time [Tong] represented to [Doan] that she had good credit and  
5 they could get the [Property] refinanced through her credit. To  
6 that end [Doan] signed a quitclaim for [his remaining interest in  
7 the Property to Tong], and . . . the document reflects a transfer  
8 tax of zero, consistent . . . with no money paid." Memorandum  
9 Decision at 3.

10 Instead of refinancing the Property, Tong acted thereafter  
11 as if she owned the Property and apparently made a deal to sell  
12 the Property to an unrelated third party. Doan alleged that he  
13 never was paid anything for the Property and ultimately was  
14 evicted from it. Doan further alleged that "the promised  
15 relationship [between Doan and Tong] never . . . happened . . .  
16 [Tong] never lived with [Doan], never provided any sort of  
17 refinance assistance, and never made mortgage payments on the  
18 Property, nor advanced any money for repairs. . . ." Memorandum  
19 Decision at 4. Doan claimed that "Tong took possession of the  
20 [Property] and rented out units . . . and has never accounted [to  
21 Doan] for the rents received." Memorandum Decision at 4.

22 Deeds transferring interests in the Property from Doan to  
23 Tong were recorded. A proof of claim filed by U.S. Credit  
24 Bancorp, Inc. [a party to the adversary proceeding between Doan  
25 and Tong] indicated that no mortgage payments were made with  
26 respect to the Property during the period from August 2003  
27 through April 2006.

1 Faced with foreclosure of the Property, Doan filed for  
2 bankruptcy protection, initially under chapter 11. Doan's  
3 bankruptcy case later was converted to chapter 13. Doan's  
4 chapter 13 plan, confirmed by the bankruptcy court, provided that  
5 he would file an adversary proceeding against Tong and other  
6 parties to recover the Property. Doan and the chapter 13 trustee  
7 agreed to a stipulated order, entered by the bankruptcy court,  
8 including the following provisions:

9 The debtor [Doan] shall pursue a Bankruptcy Adversary  
10 against [Tong], Michael Rone and U.S. Credit Bancorp  
11 and other necessary parties for the recovery of [the  
12 Property] not presently in the debtor's name. . . . The  
13 debtor shall have in addition to his own rights of  
14 recovery, all rights that could be asserted by the  
15 Chapter 13 Trustee, and may act in place and instead of  
16 the Trustee. The debtor will be solely responsible for  
17 fees and costs of suit. This asset secured by U.S.  
18 Credit Bancorp is not currently an asset of the  
19 debtor's Chapter 13 case.

20 Stipulation and Order Amending Order Confirming Plan Nunc Pro  
21 Tunc ("Stipulated Order"), entered May 4, 2006, at 1-2.

22 Doan subsequently filed an adversary proceeding (the  
23 "Adversary Proceeding") against Tong and various other parties.  
24 Following a status conference in the Adversary Proceeding on  
25 May 24, 2006, the bankruptcy court entered an order ("Status  
26 Conference Order"), separating out issues for trial, with the  
27 issues between Doan and Tong only to be tried during the week of  
28 October 23, 2006. The Status Conference Order further provided  
that "[b]oth sides will present direct evidence by written  
declarations." Status Conference Order, entered June 23, 2006,  
at 2. The bankruptcy court also entered a more detailed Trial  
Setting Order (the "Trial Setting Order"), describing procedures  
to be followed for the presentation of evidence to be offered at

1 trial. Trial Setting Order at 1-4.

2 Later, at Doan's request, the bankruptcy court entered an  
3 Amended Trial Setting Order "to allow Doan one extra day, as he  
4 requested, to file his declarations and other papers in support  
5 of his case in chief." Memorandum Decision at 1. Other than  
6 changing the deadlines for the parties' submissions, the Amended  
7 Trial Setting Order did not alter the procedures for presenting  
8 evidence to be offered at trial.

9 There is no evidence in the record that Doan ever objected  
10 to the procedures for presenting direct evidence at trial in the  
11 Status Conference Order, the Trial Setting Order or the Amended  
12 Trial Setting Order.

13 On October 16, 2006, Tong filed a Motion for Judgment on  
14 Partial Findings (the "Motion") and supporting memorandum, based  
15 on Doan's alleged failure to meet his burden of proof to prevail  
16 on any of the causes of action he asserted against Tong in the  
17 Adversary Proceeding. Doan filed a memorandum opposing the  
18 Motion.

19 After taking the matter under submission, the bankruptcy  
20 court granted the Motion and entered a Judgment in favor of Tong,  
21 dismissing all of Doan's claims against Tong alleged in the  
22 Adversary Proceeding. The bankruptcy court supported the  
23 Judgment with findings of fact and conclusions of law, as stated  
24 in the Memorandum Decision. This timely appeal followed.

### 25 26 **III. JURISDICTION**

27 The bankruptcy court had jurisdiction with respect to the  
28 Adversary Proceeding pursuant to 28 U.S.C. §§ 1334 and

1 157(b) (2) (E), (F) and (H).<sup>4</sup> We have jurisdiction pursuant to 28  
2 U.S.C. § 158.

3  
4 **IV. ISSUES**

5 Whether the bankruptcy court abused its discretion in  
6 requiring that direct testimony in the parties' Adversary  
7 Proceeding be submitted by declaration, where the bankruptcy  
8 court's trial setting orders allowed the parties to submit a  
9 summary of the direct testimony of an adverse witness through  
10 their counsel's declaration, incorporating a detailed summary of  
11 such witness' expected testimony.

12 Whether the bankruptcy court abused its discretion in  
13 declining to consider the transcript of the deposition of Tong  
14 that had been lodged by Doan, but had not been marked or offered  
15 in evidence consistent with the requirements of the bankruptcy  
16 court's trial setting orders.

17 Whether the bankruptcy court erred in concluding that Doan  
18 did not have standing to seek relief based on his own fraudulent  
19 conduct, despite the terms of the Stipulated Order that allowed  
20 Doan to assert all rights of the chapter 13 trustee.

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<sup>4</sup> "Core" jurisdiction pursuant to 28 U.S.C. § 157(b) (2) (F)  
24 relates to "proceedings to determine, avoid, or recover  
25 preferences." The bankruptcy court noted: "While the Doan  
26 complaint cites § 547 [the preference section], no cause of  
27 action, trial evidence, or opposition argument by Doan to Tong's  
28 [Motion] appears to be addressed to that Bankruptcy Code section.  
I will treat the issue as one that may have been pleaded  
summarily by Doan in his complaint but thereafter abandoned."  
Memorandum Decision at 5.

1 **V. STANDARDS OF REVIEW**

2 A trial court's evidentiary rulings are reviewed for abuse  
3 of discretion. City of Long Beach v. Standard Oil Co., 46 F.3d  
4 929, 936 (9th Cir. 1995). A bankruptcy court necessarily abuses  
5 its discretion if it bases its decision on an erroneous view of  
6 the law or clearly erroneous factual findings. Cooter & Gell v.  
7 Hartmarx Corp., 496 U.S. 384, 405 (1990). We may reverse for  
8 abuse of discretion only when we have a definite and firm  
9 conviction that the bankruptcy court committed a clear error of  
10 judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258  
11 F.3d 939, 941 (9th Cir. 2001); and AT&T Universal Card Servs. v.  
12 Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP 1998). To  
13 reverse an evidentiary ruling, we must conclude both that there  
14 was an abuse of discretion and that the error was prejudicial.  
15 Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004). Due  
16 process issues are reviewed de novo. Molski v. Gleich, 318 F.3d  
17 937, 951 (9th Cir. 2003).

18 We review the bankruptcy court's findings of fact for clear  
19 error and its conclusions of law de novo. Hughes v. Lawson (In  
20 re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997). Findings of  
21 fact shall not be set aside unless clearly erroneous. Fed. R.  
22 Bankr. P. 8013. "A finding is 'clearly erroneous' when, although  
23 there is evidence to support it, the reviewing court on the  
24 entire evidence is left with the definite and firm conviction  
25 that a mistake has been committed." United States v. U.S. Gypsum  
26 Co., 333 U.S. 364, 395 (1948).

27 On appeal, we may affirm a summary adjudication on any  
28 ground supported by the record. Newton v. Diamond, 388 F.3d

1 1189, 1192 (9th Cir. 2004).

2  
3 **VI. DISCUSSION**

4 I. The bankruptcy court did not abuse its discretion by  
5 allowing parties to submit a summary of the direct testimony  
of adverse witnesses by summary declaration.

6 Doan argues that the bankruptcy court violated his due  
7 process rights in not providing a trial procedure allowing him to  
8 call Tong as an adverse witness in his case in chief.<sup>5</sup>  
9 He asserts that if only he had been allowed to examine Tong  
10 orally as part of his case in chief, he would have been able to  
11 present a "further body of evidence [that] would then have  
12 supported his case and permitted a far better defense to the  
13 [M]otion." Appellant's Opening Brief at 9.

14 The bankruptcy court's trial procedures were set forth  
15 initially in the Trial Setting Order, which was served both on  
16 Doan and his counsel. The Amended Trial Setting Order was  
17 entered by the bankruptcy court at the request of Doan and  
18 likewise was served both on Doan and his counsel. Both the Trial  
19 Setting Order and the Amended Trial Setting Order provided that,

20 1. DECLARATIONS

21 (a) Except as herein provided, each party shall  
22 present the testimony of all witnesses through  
23 declarations of said witnesses, under penalty of  
24 perjury.

25 (b) The only oral testimony that may be offered  
26 at trial by a party through its witnesses will be  
27 rebuttal testimony.

28 ...

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26 <sup>5</sup> Nothing in the record before us indicates that Doan  
27 raised any due process issues before the bankruptcy court.  
28 However, we discuss the due process argument raised by Doan in  
order to set forth as complete an analysis of the issues  
presented by this appeal as possible.



1 (d) If a party is unable to obtain a declaration  
2 of a witness, counsel for that party shall file a  
3 declaration stating the name of the witness, a detailed  
4 summary of the expected testimony and why counsel was  
5 unable to obtain the witness' declaration. Unless  
6 otherwise permitted by the Federal Rules of Evidence, a  
7 witness may be examined at trial only as to those  
8 matters set forth in the detailed summary.

9 (e) If a party intends to present a witness'  
10 testimony by a transcript of a deposition of the  
11 witness, only those portions of the transcript intended  
12 to be offered should be attached to a declaration of  
13 counsel, and the testimony of the witness to be offered  
14 shall be clearly marked. . . .

15 Doan never raised any objection before the bankruptcy court  
16 regarding the procedures for the presentation of direct evidence  
17 by declaration in the Trial Setting Order or the Amended Trial  
18 Setting Order. Doan apparently did not submit a declaration of  
19 Tong, and he did not avail himself of the procedure set forth in  
20 section 1(d) of the Amended Trial Setting Order, allowing him to  
21 submit a detailed summary of what he expected Tong's testimony to  
22 be through a declaration of his counsel. Doan is not in a strong  
23 position to argue that the bankruptcy court abused its discretion  
24 in denying him an opportunity to call Tong as a witness, when he  
25 could have presented what he expected (and/or hoped) would be  
26 Tong's testimony through a declaration of his counsel and failed  
27 to do so.

28 Doan did lodge a transcript of Tong's deposition with the  
bankruptcy court, but he did not mark and offer in evidence  
relevant excerpts from Tong's deposition through a declaration of  
his counsel, as required in section 1(e) of the Amended Trial  
Setting Order. Tong timely objected to consideration of the  
transcript of Tong's deposition as part of Doan's case in chief,  
based on Doan's failure to comply with the requirements of the

1 bankruptcy court's trial setting orders and Local Bankruptcy Rule  
2 7027-1(a) (2) with respect to the introduction of deposition  
3 testimony.<sup>6</sup> The bankruptcy court sustained Tong's objections and  
4 struck all references to the transcript of Tong's deposition in  
5 considering the Motion. Appt's ER at 67, Memorandum Decision at  
6 2. The bankruptcy court did not abuse its discretion in  
7 enforcing the requirements of its own Amended Trial Setting  
8 Order. See Lee-Benner v. Gergely (In re Gergely), 110 F.3d 1448,  
9 1452 (9th Cir. 1997).

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11 <sup>6</sup> Local Bankruptcy Rule 7027-1(a) (2) provides:  
12 "Use of Deposition Evidence in Contested Hearing or  
13 Trial. Each party intending to offer any evidence by  
14 way of deposition testimony pursuant to F.R. Civ. P.  
15 Rule 32 and F.R. Evid. Rules 803 and 804 shall: (A)  
16 Lodge the original deposition transcript and a copy  
17 pursuant to this Rule with the Clerk at least 10 days  
18 before the hearing or trial at which it is to be  
19 offered. (B) Identify on the copy of the transcript  
20 the testimony the party intends to offer by bracketing  
21 in the margins the questions and answers that the party  
22 intends to offer at trial. The opposing party shall  
23 likewise countermark any testimony that it plans to  
24 offer. The parties shall agree between themselves on a  
25 separate color to be used by each party which shall be  
26 consistently used by that party for all depositions  
27 marked in the case. (C) Mark objections to the  
28 proffered evidence by the other party in the margins of  
the deposition by briefly stating the ground for the  
objection. (D) Serve and file notice of the portions  
of the deposition marked or countermarked by stating  
the pages and lines so marked, objections made and the  
grounds indicated therefor. Such notice shall be  
provided within five days after the party has marked  
and countermarked or objects to the deposition  
evidence. In appropriate cases and when ordered by the  
Court, the parties shall jointly prepare a deposition  
summary to be used in lieu of question and answer  
reading of a deposition at trial."

1 Doan's argument perhaps might present a more difficult issue  
2 if we were writing on a clean slate. In fact, the Panel in  
3 Danning v. Burg (In re Burg), 103 B.R. 222 (9th Cir. BAP 1989),  
4 considered whether the bankruptcy court's "trial by affidavit"  
5 procedure violated due process and held that it did.

6 [B]asic notions of procedural due process compel this  
7 Panel to conclude that essential rights of the parties  
8 may be jeopardized by a procedure where oral  
9 presentation of evidence is not allowed, where the  
10 bankruptcy court's ability to gage the credibility of a  
11 witness or evidence is questionable and where rulings  
12 on objections to the admissibility of all direct  
13 evidence, may be unclear.

14 Id. at 225.

15 Doan's problem is that the Ninth Circuit expressly rejected  
16 the Burg due process conclusion in Adair v. Sunwest Bank (In re  
17 Adair), 965 F.2d 777, 780 (9th Cir. 1992) ("We disagree with the  
18 Burg panel that the bankruptcy court's procedure raises  
19 significant due process concerns."), a holding that subsequently  
20 has neither been reversed nor distinguished.

21 Rule 43(a) of the Federal Rules of Civil Procedure,  
22 applicable in bankruptcy cases pursuant to Fed. R. Bankr. P.  
23 9017, provides that,

24 In every trial, the testimony of witnesses shall be  
25 taken in open court, unless a federal law, these rules,  
26 the Federal Rules of Evidence, or other rules adopted  
27 by the Supreme Court provide otherwise. . . . (emphasis  
28 added).

29 Rule 611(a) of the Federal Rules of Evidence provides that,  
30 Control by court.--The court shall exercise reasonable  
31 control over the mode and order of interrogating  
32 witnesses and presenting evidence so as to (1) make the  
33 interrogation and presentation effective for the  
34 ascertainment of the truth, (2) avoid needless  
35 consumption of time, and (3) protect witnesses from  
36 harassment or undue embarrassment.

1 Local Rule 43-1 of the United States District Court for the  
2 Central District of California, provides:

3 L.R. 43-1 Non-Jury Trial--Narrative Statements. In any  
4 matter tried to the Court, the judge may order that the  
5 direct testimony of a witness be presented by written  
6 narrative statement subject to the witness' cross-  
7 examination at the trial.<sup>7</sup>

8 In Adair, the Ninth Circuit held that the Central District  
9 procedure for requiring the presentation of direct evidence by  
10 declaration for bench trials was consistent with the requirements  
11 of Fed. R. Evid. 611(a) and was a "permissible 'mode' of  
12 presenting direct testimony under Rule 611(a)." Adair, 965 F.2d  
13 at 779. The Ninth Circuit further determined that,

14 The bankruptcy court's procedure permits oral cross-  
15 examination in open court and thereby preserves an  
16 opportunity for the judge to evaluate the declarant's  
17 demeanor and credibility. The procedure is essential  
18 to the efficient functioning of the crowded bankruptcy  
19 courts. See In re Heckenkamp, 110 B.R. 1, 4 (Bankr.  
20 C.D. Cal. 1989).

21 Id. See Gergely, 110 F.3d at 1452:

22 The pretrial order required written declarations in  
23 lieu of direct oral evidence. It was a valid order.  
24 In re Adair, 965 F.2d 777, 779 (9th Cir. 1992). Lee-  
25 Benner did not follow that procedure. The bankruptcy  
26 court did not abuse its discretion in adhering to the  
27 requirements of its pretrial order.

28 See also Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 69 (9th  
Cir. BAP 1995) ("Declaration evidence may be used in lieu of  
direct testimony.").

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<sup>7</sup> There is no analogous rule in the Local Bankruptcy Rules  
for the United States Bankruptcy Court for the Central District  
of California, but Local Bankruptcy Rule 1002-3(a) provides that  
matters not specifically covered by the Local Bankruptcy Rules  
may be determined, by "parallel or analogy to the F.R. Civ. P.,  
the F.R.B.P., or the District Court Rules."

1 In light of the foregoing review of relevant provisions of  
2 the Federal Rules of Civil Procedure and the Federal Rules of  
3 Evidence, and case law authority in the Ninth Circuit, and  
4 considering the factual record before us in this appeal, we  
5 conclude that the bankruptcy court did not violate Doan's due  
6 process rights and did not abuse its discretion in requiring the  
7 submission of the parties' direct witness testimony by  
8 declaration, with the exception that, in the event a party was  
9 unable to obtain the declaration of an adverse or uncooperative  
10 witness, such party could submit a detailed summary of the  
11 expected testimony of such witness attached to the declaration of  
12 counsel. No abuse of discretion can be imputed to the bankruptcy  
13 court where Doan did not avail himself of the opportunity to  
14 present such a summary of Tong's expected testimony through  
15 counsel's declaration. Finally, the bankruptcy court did not  
16 abuse its discretion in declining to consider the deposition  
17 transcript of Tong where Doan did not offer the transcript as  
18 evidence or mark it, as required by the terms of the Amended  
19 Trial Setting Order.

20 II. There is no basis in the record to determine whether the  
21 bankruptcy court committed a material error in concluding  
22 that Doan had no standing to seek relief based on his own  
fraudulent conduct in spite of the Stipulated Order.

23 Doan asserts that the bankruptcy court erred in concluding  
24 that he had no standing to assert claims, arguably arising from  
25 his own fraudulent conduct, in the place and stead of the chapter  
26 13 trustee in light of the terms of the Stipulated Order.

27 In the Memorandum Decision, the bankruptcy court stated,  
28 It is ironic that Doan's claims in several respects  
seek relief based on statutory law that requires a  
plaintiff to prove that a bankruptcy debtor such as

1 Doan acted fraudulently toward his or her creditors. I  
2 conclude that Doan, who appears here as a chapter 13  
3 bankruptcy debtor, does not have standing to seek  
4 relief based on what the statutes refer to as Doan's  
5 own fraudulent conduct even though Doan's chapter 13  
6 trustee has stipulated that Doan "shall have in  
7 addition to his own rights of recovery, all rights that  
8 could be asserted by the Chapter 13 Trustee, and may  
9 act in place and instead of the Trustee." . . . No one  
10 should be allowed to seek relief against another based  
11 on his own allegedly fraudulent conduct.

12 Memorandum Decision at 7. Doan's standing is not mentioned  
13 further in the bankruptcy court's Memorandum Decision.

14 However, the statements regarding Doan's standing came after  
15 the bankruptcy court already had found that Doan had not  
16 submitted adequate direct evidence to support a prima facie case  
17 as to any of the causes of action he had asserted against Tong in  
18 the Adversary Proceeding.

19 My decision to grant Tong's Motion for Judgment is  
20 based on my conclusion that Doan's proffered,  
21 admissible evidence, together with Doan's bankruptcy  
22 schedules, amended schedules, and statement of  
23 financial affairs, of which I take judicial notice, are  
24 insufficient to establish a prima facie basis to  
25 support any of the foregoing theories of liability  
26 asserted by Doan or which might be asserted by Doan  
27 based on his admissible evidence offered for trial.

28 Memorandum Decision at 6. In other words, when Doan submitted  
his declarations for his case in chief for the trial, the  
admissible evidence contained therein did not make a prima facie  
case as to any of his claims against Tong, and the bankruptcy  
court stated that it was granting the Motion on that basis. In  
fact, the Memorandum Decision concludes with the following  
statements: "Tong's Motion for Judgment is granted. Doan's  
admissible evidence fails to establish any viable basis for  
relief against Tong."

1 As noted above, in an appeal from a summary adjudication, we  
2 may affirm on any ground supported by the record. Newton v.  
3 Diamond, 388 F.3d at 1192. The bankruptcy court found that  
4 Doan's evidence did not make a case against Tong on any of his  
5 claims. It is Doan's burden as appellant to demonstrate the  
6 existence of error in the bankruptcy court's rulings that would  
7 justify a reversal. See, e.g., Kyle v. Dye (In re Kyle), 317  
8 B.R. 390, 393 (9th Cir. BAP 2004):

9 The settled rule on appellate records in general is  
10 that failure to provide a sufficient record to support  
11 informed review of trial-court determinations may, but  
12 need not, lead either to dismissal of the appeal or to  
affirmance for inability to demonstrate error.  
(citations omitted);

13 Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81 (9th Cir.  
14 BAP 1994).

15 In his Excerpt of Record, Doan has not provided us with his  
16 schedules, his amended schedules, his statement of financial  
17 affairs, the complaint or amended complaint filed in the  
18 Adversary Proceeding, or perhaps most critical, any of the  
19 declarations or other submissions of direct evidence that Doan  
20 filed pursuant to the Amended Trial Setting Order. He has not  
21 submitted a copy of the transcript of Tong's deposition. He  
22 further has not included any transcripts from any of the hearings  
23 relating to pretrial proceedings culminating in the Memorandum  
24 Decision and judgment in favor of Tong. We are entitled to  
25 presume from Doan's decision not to include any of these  
26 documents in his Excerpts of Record that he does not believe that  
27 they would be helpful to his efforts to demonstrate error. Id.  
28 at 681.

1 In any event, the record before us is inadequate to  
2 demonstrate that the bankruptcy court erred as a matter of law in  
3 finding that Doan's direct evidence did not establish a prima  
4 facie case as to any of his causes of action against Tong. The  
5 limited record further does not suffice to give us the "definite  
6 and firm conviction" that the bankruptcy court erred in its fact  
7 findings supporting its decision to grant the Motion. In these  
8 circumstances, if the bankruptcy court's "conclusion" that Doan  
9 had no standing to pursue claims based on his own fraudulent  
10 conduct, even armed with the powers of the chapter 13 trustee, is  
11 anything more than dictum, we conclude that error, if any  
12 resulting therefrom, is harmless in light of the bankruptcy  
13 court's overriding determination that Doan did not present  
14 direct evidence sufficient to make his case.<sup>8</sup>

## 15 **VII. CONCLUSION**

16 We conclude that the bankruptcy court did not abuse its  
17 discretion either (1) in requiring the parties to submit their  
18 direct evidence in the Adversary Proceeding, including summaries  
19 of the expected testimony of adverse witnesses, by declaration or  
20 of the expected testimony of adverse witnesses, by declaration or  
21 (2) in declining to consider the transcript of Tong's deposition  
22 in deciding the Motion, where Doan did not comply with the  
23 Amended Trial Setting Order in lodging the deposition transcript.  
24 We further conclude that the bankruptcy court did not err in  
25 granting the Motion and entering the Judgment in favor of Tong in  
26 the Adversary Proceeding. We AFFIRM.

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27 <sup>8</sup> Doan was entitled to rely on the terms of the Stipulated  
28 Order to exercise the powers of the chapter 13 trustee through  
the Adversary Proceeding so long as the Stipulated Order was not  
vacated or superseded by a later order of the bankruptcy court.