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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: JIMMIE LEROY CHATTERLEY, Debtor.	BAP No. CC-04-1507-KMaT Bk. No. SV 01-11493-KL Adv. No. 01-01301
JIMMIE LEROY CHATTERLEY, Appellant, v. GINA BONGIOVANNI; BRAD D. KRASSNOFF, Chapter 7 Trustee; UNITED STATES TRUSTEE, Appellees.	**MEMORANDUM**[*]

Argued and Submitted on May 12, 2005
at Pasadena, California

Filed - May 23, 2005

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

Honorable Kathleen T. Lax, Bankruptcy Judge, Presiding

Before: KLEIN, MARLAR, and TCHAIKOVSKY,[**] Bankruptcy Judges.

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[*]This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[**]Hon. Leslie J. Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

In this appeal from a judgment excepting a debt from discharge under 11 U.S.C. §§ 523(a)(2) & (a)(6), the debtor challenges the court's award of damages in favor of appellee. The debtor further challenges the court's refusal to continue the case and reopen the trial record to compel a witness's testimony. We hold that the court's award of damages was correct and that the refusal to reopen the evidentiary phase of the trial was not an abuse of discretion. AFFIRMED.

FACTS

In mid-1998, the debtor, Jimmie Chatterley, sold a 5.2 acre parcel of property located in Newhall, California, to appellee, Gina Bongiovanni. The property was improved by a large main house, a guest house over the garage, and a shop/barn structure located a distance away from the main house and garage.

The debtor had owned the property for several years, but had not lived on it for at least four years prior to the sale to Bongiovanni.

During the four years before the sale, the main house was rented out to Tim Rafalovich, the debtor's real estate broker in the sale to Bongiovanni. The guest quarters were rented to a different family and the barn/shop was occupied by a Mr. Sykes.

During the time the debtor owned the property, he attempted to obtain legal approval of a subdivision of the property into three lots, but was unsuccessful.[1]

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[1]The primary impediment to the lot split was the City's requirement that an all-weather bridge be built over a nearby creek, which the debtor did not undertake to build.

In 1997, the debtor and Rafalovich worked on a plan to sell the property to a buyer who would take the main residence and agree to sell the remaining portions of the property after a lot split was effective. Rafalovich was to be a purchaser of one of those split lots.

In May 1997, the debtor listed the property for sale.

In late April 1998, Bongiovanni drove by the property and stopped after witnessing a "for sale" sign. She was given a 20-30 minute tour of the main house by Rafalovich, who resided in the main house. Bongiovanni visited the property a few more times, toured the guest unit over the garage, and spoke with the guest unit's tenant who told her the amount paid for rent each month. Bongiovanni tried to view the shop/barn during her visits, but because it was always locked and Sykes was not present, she was unable to view that part of the property.

Bongiovanni was represented by her own real estate agent, Maggie Ardeshiri.

After an offer and counter-offer process, Bongiovanni and the debtor agreed on a purchase price of $530,000 for the entire property. No mention was made to Bongiovanni about selling back two portions of the property.

Bongiovanni, the debtor, Ardeshiri, and Rafalovich all signed off on a real estate transfer disclosure statement ("TDS"), and escrow closed on July 28, 1998. The TDS did not disclose that the lot split had been attempted, nor did it disclose that the guest house and shop/barn were unable to be used as rental property, even though the debtor knew that it was a violation of the city codes to have tenants.

Within a month of closing, Bongiovanni discovered that the debtor had attempted to split the property into three lots and had been unsuccessful. She started exploring the possibility of pursuing the split herself. In the meantime, Bongiovanni renovated the guest house and shop/barn in anticipation of renting them out.

After Bongiovanni had renovated and rented out the guest house and shop/barn, Bongiovanni received notification from the City of Santa Clarita that the conversion of the guest house and shop/barn into living quarters was not permitted and was in violation of city codes.

The debtor filed his chapter 7 case in 2001. Bongiovanni filed an adversary complaint seeking nondischargeability of her claims against the debtor under §§ 523(a)(2) and (a)(6).

Trial was held over a period of five days. The evidentiary record closed on August 27, 2004, with closing arguments scheduled for September 17, 2004. At the time set for closing arguments, the debtor attempted to delay closing arguments, reopen the evidentiary record, and compel the appearance and testimony of a witness upon whom he had served a subpoena on September 16, 2004. The court did not permit the evidentiary phase of the trial to be reopened and made findings determining that the debtor misrepresented to Bongiovanni that the guest house and the shop/barn could be rented out to paying tenants.

The court awarded damages to Bongiovanni pursuant to California Civil Code § 3343(a). The court specifically awarded $15,742.19 for repair and remodel costs of the guest house and shop/barn in preparation for rental; $800 in moving expenses

Bongiovanni paid for the tenants to vacate; and $43,110 in total lost rent from the guest house ($25,110) and shop/barn ($18,000).

The court concluded that Bongiovanni was entitled to a judgment against the debtor for $59,652, which debt was declared nondischargeable pursuant to §§ 523(a)(2)(A) and (a)(6).

This appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

1. Whether the bankruptcy court erred when it awarded consequential damages for lost rents under California Civil Code § 3343(a) following a finding of fraud and misrepresentation under § 523(a)(2) & (a)(6).
2. Whether the bankruptcy court abused its discretion when it refused to continue the trial and to reopen the record to compel a witness to appear and testify.

STANDARD OF REVIEW

The bankruptcy court's legal conclusion as to whether damages are available is reviewed de novo. United States v. 22 Santa Barbara Drive, 264 F.3d 860, 868 (9th Cir. 2001). The court's computation of damages is reviewed for clear error. Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004). The court's denial of a continuance is reviewed for an abuse of discretion. Orr v. Bank of Am., NT & SA, 285

F.3d 764, 783 (9th Cir. 2002). The court's decision on a motion to reopen or supplement the trial record is also reviewed for an abuse of discretion. Weiner v. Perry, Settles & Lawson (In re Weiner), 161 F.3d 1216, 1217 (9th Cir. 1998).

DISCUSSION

I

The debtor is not challenging the court's finding of fraud; rather he is challenging the court's award of consequential damages. The debtor argues that California law only allows for the recovery of "out-of-pocket" losses in a fraudulent property sale and that anticipated lost rents are not recoverable.

A

A brief history of California Civil Code § 3343 is warranted. In 1935, the California legislature enacted Civil Code § 3343, which governs the measure of damages for fraud in real property transactions. The 1935 statute, as originally enacted, provided, in part:

> One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

Stout v. Turney, 22 Cal. 3d 718, 725 n.9 (1978).

The statute officially adopted the "out-of-pocket" rule as the standard for assessing damages for fraud in property transactions. Id. at 725. Prior to the enactment, the measure

of damages for fraud in real property transactions was based on the "benefit of the bargain" principle, which "awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive." Id. The benefit of the bargain principle essentially satisfies the expectancy interest of the defrauded party.

The out-of-pocket rule, on the other hand, "awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received." Id. The out-of-pocket rule seeks to compensate the defrauded party for its actual losses sustained. Id.

After the statute's enactment, courts, in the interest of avoiding injustice, fashioned relief appropriate to the circumstances to limit the strict application of the out-of-pocket rule. Id. For example, courts began giving a liberal construction to the "additional damage" language of the 1935 statute, which was held to encompass actual expenditures of time and money in reliance on the misrepresentation. Id. at 726.

In 1971, the California legislature amended Civil Code § 3343 in response to the growing list of judicially created exceptions to and expansions of the out-of-pocket rule so as to permit consequential damages in certain circumstances. Id. The 1971 statute, which remains in force, provides:

> (a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud

(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud

(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it

(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

(b) Nothing in this section shall do either of the following:

(1) Permit the defrauded person to recover any amount measured by the difference between the value of the property as represented and the actual value thereof.

(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

CAL. CIV. CODE § 3343 (emphasis supplied).

Subdivisions (a)(1) and (a)(2), which permitted "additional" or "consequential" damages, codified existing case law relating to damages arising from lost time and money expended in reliance on the fraud. Stout, 22 Cal. 3d at 727. Subdivisions (a)(3) and (a)(4) similarly permitted the recovery of lost profits. Id.; Kenly v. Ukegawa, 16 Cal. App. 4th 49, 55 (1993); Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 247 (1977).

In addition to codifying existing law, the 1971 amendments authorized lost profits as an element of damages. Previously, defrauded parties were unable to receive anticipated profits in an action for damages. Croeni v. Goldstein, 21 Cal. App. 4th 754, 759 (1994). The 1971 amendments, however, statutorily reversed earlier decisions denying the buyer lost income when the seller misrepresented the property's income producing qualities. 12 MILLER & STARR CALIFORNIA REAL ESTATE § 3490 (3d ed. 2001). Those earlier decisions included Oliver v. Benton, 92 Cal. App. 2d 853 (1949), and Eatwell v. Beck, 41 Cal. 2d 128 (1953), both of which the debtor now relies upon in his brief for his argument that lost rents are not recoverable as "additional" damages. He does not explain how those decisions could retain vitality after the 1971 amendments.

Nor does the debtor mention the California Supreme Court decision in Stout v. Turney in his brief. Stout is the 1978 decision that explains the 1971 amendments and illustrates the post-1971 approach taken by the courts in determining the measure of damages under § 3343. Stout, 22 Cal. 3d at 725-27. We think that Stout is controlling on this question of California law.

The issue in Stout was whether the trial court erred when it instructed the jury only on the portion of § 3343 that dealt with "additional" or "consequential" damages and not the portion dealing with "out-of-pocket" or compensatory damages. Id at 723. The court held that such instruction was not erroneous. Id. at 730.

The issue of lost profits in Stout related to a buyer's purchase of a mobile home park with representations by the seller that its sewer disposal system was capable of accommodating eight additional mobile home spaces. Id. at 722. The buyer discovered subsequent to the purchase that such representations about the sewer disposal system were false and as a result the buyer lost profits because it was precluded from having tenants occupy those eight promised additional spaces. Id. at 722-23. A jury awarded the buyer lost profits for the eight unuseable spaces. Id. at 721. The California Supreme Court upheld the damage award.

Thus, lost profits in the form of lost rent are allowed under the statute and the court did not err in so holding.[2]

B

For the first time at oral argument, the debtor raised a new theory as to why he believes the court erred when it awarded damages to Bongiovanni. At oral argument, the debtor argued that § 3343(a)(4)(i) mandates that the purchased property be used

[2]Bongiovanni did not request compensatory damages. The recovery of consequential damages is independent of and cumulative to the recovery of compensatory damages. Stout, 22 Cal. 3d at 729-30.

solely for income-producing purposes. In other words, the buyer of the property must intend to only use it for profit.

Because Bongiovanni's intent was to use part of the property for profit as a rental and use another part of the property as her personal residence, the debtor maintains that she does not satisfy the mandate of the statute and is thus not entitled to § 3343 damages.

This question of statutory intent was not raised to the bankruptcy court, nor was it argued in the debtor's briefing on appeal. We could find no pertinent case law under § 3343 with a similar fact pattern whereby the purchased property had a dual purpose - i.e., both non-income producing and income producing residential property.

Although the statutory interpretation question may be interesting, the debtor did not give the bankruptcy court an opportunity to address it, nor did he give Bongiovanni an opportunity to respond to it. We therefore decline to address this new argument and hold that this argument has been waived.[3] Arai v. Am. Bryce Ranches, Inc., 316 F.3d 1066, 1069 n.2 (9th Cir. 2003); Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc., 306 F.3d 806, 820 n.8 (9th Cir. 2002).

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[3]At oral argument, the panel asked the debtor's counsel why this new argument was not waived. Counsel responded that the debtor had been acting pro se up until a few weeks prior to oral argument. Counsel conceded, however, that he had participated in preparing the "pro se" debtor's brief, even though he had not yet entered an appearance on behalf of the debtor in this appeal. Hence, the debtor's previous pro se status does not suffice to overcome waiver.

C

The debtor also argues that, even if such lost rent is recoverable, there was no evidence to support the lost rent awarded for the shop/barn.[4]

Bongiovanni sought to recover lost rent of $1000 per month for the shop/barn. The court elected to assess the damages for an eighteen-month period concluding that Bongiovanni was entitled to $18,000.

The debtor argues that Bongiovanni presented no testimony or evidence to support the $1000 per month valuation. The debtor contends that the only time Bongiovanni quantified her claim for damages relating to the shop/barn was during closing argument and such representation is not evidence.

Bongiovanni sought damages for the shop/barn of $21,000, which represented $1000 a month for twenty-one months. The court examined rental contracts offered into evidence by Bongiovanni to establish a monthly rental value. It too decided that $1000 a month was reasonable. As for the length of time to award damages in the form of lost rent, the court reasoned:

> [W]hat period of time will constitute fair compensation without becoming a windfall for the Plaintiff and unfair to the Defendant? For example, it hardly seems reasonable that one should calculate such damages in perpetuity or even for Bongiovanni's expected ownership. Nor has Bongiovanni asked for such a remedy. However, the problem with awarding damages to the date of trial, as Bongiovanni seeks, is that a trial date has little or nothing to do with accrual of damages and can be manipulated. Furthermore, it leaves the Defendant with no means to mitigate damages other

[4]The debtor does not challenge the court's award of $15,742.19 for repair/remodel costs, $800 in moving expenses, or the $25,110 in lost rent from the guest house.

> than by settlement offers which the Plaintiff may refuse.
>
> For the forgoing reasons, this court elects to assess damages for an 18 month period only, bringing the award for lost rent in this case to $25,110 for the guest house and $18,000 for the shop/barn.

We cannot say that the court's computation of damages was clearly erroneous.

II

The debtor's final argument alleges that the court abused its discretion when it refused to grant a continuance and reopen the trial record to compel attendance of Ardeshiri, Bongiovanni's real estate agent, as a witness.

The debtor contends that Ardeshiri was properly subpoenaed by the debtor, yet she did not appear at the trial. The debtor claims he requested the court to compel Ardeshiri's testimony and continue the trial to force her appearance, but the court refused. The debtor argues that it is probable that Ardeshiri's testimony would have caused a more favorable result for him.

The record shows that the debtor executed a subpoena for Ardeshiri on September 1, 2004, and it was personally served on Ardeshiri on September 16, 2004.

The trial was held over a period of five days - July 21-23, August 27, and September 17. On August 27, the court closed the record and set closing arguments for September 17. The debtor waited until the evidentiary record was closed to subpoena Ardeshiri.

On September 17, when the debtor attempted to introduce statements that Ardeshiri made during a deposition, the following

colloquy took place:

> THE COURT: I mean, the problem that I have with this is we're at closing argument, and all of this should have been done during the course of the initial case and, of course, the trial portion of the case.
>
> [THE DEBTOR]: I respect that. On the other hand, for now 10 weeks I've had three different people try to serve Ms. Ardeshiri. I spoke with her three times. She hung up on me saying 'Look, I've settled out. Don't bother me. You're pestering me. I'll' - you know, and she was very irritated. . . .
>
> THE COURT: What I'm going to make a decision on is what's in the record up to today, including what Mr. Rafalovich had to say. He said he talked to her. And I'm going to go back and see once again what he has to say in terms of specifics on that.
>
> [THE DEBTOR]: Well, I thank you for - I guess I'm saying that in the sequence of what's occurred, in my defense, it's almost as if it's a trial by ambush in the fact that Ardeshiri is a key party to this communication mishap, if you will, and, in fact, I'm not able to use her as a witness or to clarify the very questions you were asking [Bongiovanni's attorney].
>
> THE COURT: You have always had the opportunity to use her as a witness. But you know, I can't be your lawyer, and I have to impose some sort of order on these proceedings, and the order on these proceedings has been imposed and known to all parties for a long time. We've had so many days of trial, we've had an extra day of trial in order to allow Mr. Rafalovich to testify.
>
> [BONGIOVANNI'S ATTORNEY]: I'll also mention, your Honor, that [the debtor] has asked for things to be set out so he could take depositions and conduct discovery. So anywhere for the last year and half now, he could have served a subpoena upon her, enforced it to bring her in. And if he thought she really had some helpful testimony -
>
> THE COURT: I don't think there's any question she would have testimony that would be enlightening, either because of what she would say, would admit or wouldn't say or wouldn't admit. The fact is, she wasn't here in any timely fashion, and that record is closed now.
>
> If it turns out I'm wrong on having closed the record, there will - that's what appellate courts are for. But it seems to be that I have been given lots of opportunities to get this case fully before me, and now

> we're at closing argument. So I'm going to concentrate on what the record shows me and what the law tells me about what I should do with the evidence.

The record does not show that the debtor made any formal motion for or request that the court continue the hearing or reopen the record to compel Ardeshiri to appear and testify.

In any event, a court's decision on a motion for continuance and a motion to reopen the record is reviewed for an abuse of discretion. Orr, 285 F.3d at 783; Weiner, 161 F.3d at 1217.

On August 27, the court closed the record and set September 17 as the date for closing arguments. The debtor did not seek to subpoena Ardeshiri until September 1 - five days after the evidentiary record was closed. Further, Ardeshiri was not personally served until September 16 - one day before the date set for closing arguments.

The debtor had ample time to subpoena and seek Ardeshiri's testimony during the portion of the trial in which evidence was admitted - July 21, 22, 23, and August 27.

Thus, we conclude that the court did not abuse its discretion when it refused to continue the case and reopen the record to compel Ardeshiri's testimony.

CONCLUSION

Because lost profits in the form of lost rent are recoverable under Civil Code § 3343 and because the court did not clearly err in its computation of damages, the court did not err when it awarded damages in favor of Bongiovanni. Further, because the debtor had ample time to seek Ardeshiri's testimony, the court did not abuse its discretion when it refused to

continue the case and reopen the trial record. Based on what the debtor argued to the bankruptcy court and in his briefing on appeal, we AFFIRM.