

MAY 23 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	CC-04-1507-KMaT
)		
7	JIMMIE LEROY CHATTERLEY,)	Bk. No.	SV 01-11493-KL
)		
8	Debtor.)	Adv. No.	01-01301
)		
9	_____)		
	JIMMIE LEROY CHATTERLEY,)		
10)		
	Appellant,)		
11)		
	v.)	MEMORANDUM*	
12)		
	GINA BONGIOVANNI; BRAD D.)		
13	KRASSNOFF, Chapter 7)		
	Trustee; UNITED STATES)		
14	TRUSTEE,)		
)		
15	Appellees.)		
)		
16	_____)		

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.

*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.

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

9
10 FACTS

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

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

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

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

26
27 ¹The primary impediment to the lot split was the City's
28 requirement that an all-weather bridge be built over a nearby
creek, which the debtor did not undertake to build.

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

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

7 In late April 1998, Bongiovanni drove by the property and
8 stopped after witnessing a "for sale" sign. She was given a 20-
9 30 minute tour of the main house by Rafalovich, who resided in
10 the main house. Bongiovanni visited the property a few more
11 times, toured the guest unit over the garage, and spoke with the
12 guest unit's tenant who told her the amount paid for rent each
13 month. Bongiovanni tried to view the shop/barn during her
14 visits, but because it was always locked and Sykes was not
15 present, she was unable to view that part of the property.

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

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

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

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

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

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

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

25 The court awarded damages to Bongiovanni pursuant to
26 California Civil Code § 3343(a). The court specifically awarded
27 \$15,742.19 for repair and remodel costs of the guest house and
28 shop/barn in preparation for rental; \$800 in moving expenses

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

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

6 This appeal ensued.

7 8 JURISDICTION

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

11 12 ISSUES

13 1. Whether the bankruptcy court erred when it awarded
14 consequential damages for lost rents under California Civil Code
15 § 3343(a) following a finding of fraud and misrepresentation
16 under § 523(a)(2) & (a)(6).

17 2. Whether the bankruptcy court abused its discretion when it
18 refused to continue the trial and to reopen the record to compel
19 a witness to appear and testify.

20 21 STANDARD OF REVIEW

22 The bankruptcy court's legal conclusion as to whether
23 damages are available is reviewed de novo. United States v. 22
24 Santa Barbara Drive, 264 F.3d 860, 868 (9th Cir. 2001). The
25 court's computation of damages is reviewed for clear error.
26 Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 843
27 (9th Cir. 2004). The court's denial of a continuance is reviewed
28 for an abuse of discretion. Orr v. Bank of Am., NT & SA, 285

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

5
6 DISCUSSION

7
8 I

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

14
15 A

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

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

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

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

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

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

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

19 In 1971, the California legislature amended Civil Code
20 § 3343 in response to the growing list of judicially created
21 exceptions to and expansions of the out-of-pocket rule so as to
22 permit consequential damages in certain circumstances. Id. The
23 1971 statute, which remains in force, provides:

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

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

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

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

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

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

28 (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).

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

8 In addition to codifying existing law, the 1971 amendments
9 authorized lost profits as an element of damages. Previously,
10 defrauded parties were unable to receive anticipated profits in
11 an action for damages. Croeni v. Goldstein, 21 Cal. App. 4th
12 754, 759 (1994). The 1971 amendments, however, statutorily
13 reversed earlier decisions denying the buyer lost income when the
14 seller misrepresented the property's income producing qualities.
15 12 MILLER & STARR CALIFORNIA REAL ESTATE § 3490 (3d ed. 2001). Those
16 earlier decisions included Oliver v. Benton, 92 Cal. App. 2d 853
17 (1949), and Eatwell v. Beck, 41 Cal. 2d 128 (1953), both of which
18 the debtor now relies upon in his brief for his argument that
19 lost rents are not recoverable as "additional" damages. He does
20 not explain how those decisions could retain vitality after the
21 1971 amendments.

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

1 The issue in Stout was whether the trial court erred when it
2 instructed the jury only on the portion of § 3343 that dealt with
3 “additional” or “consequential” damages and not the portion
4 dealing with “out-of-pocket” or compensatory damages. Id. at 723.
5 The court held that such instruction was not erroneous. Id. at
6 730.

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

17 Thus, lost profits in the form of lost rent are allowed
18 under the statute and the court did not err in so holding.²
19

20 B

21 For the first time at oral argument, the debtor raised a new
22 theory as to why he believes the court erred when it awarded
23 damages to Bongiovanni. At oral argument, the debtor argued that
24 § 3343(a)(4)(i) mandates that the purchased property be used
25

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

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

3 Because Bongiovanni's intent was to use part of the property
4 for profit as a rental and use another part of the property as
5 her personal residence, the debtor maintains that she does not
6 satisfy the mandate of the statute and is thus not entitled to
7 § 3343 damages.

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

14 Although the statutory interpretation question may be
15 interesting, the debtor did not give the bankruptcy court an
16 opportunity to address it, nor did he give Bongiovanni an
17 opportunity to respond to it. We therefore decline to address
18 this new argument and hold that this argument has been waived.³
19 Arai v. Am. Bryce Ranches, Inc., 316 F.3d 1066, 1069 n.2 (9th
20 Cir. 2003); Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.,
21 306 F.3d 806, 820 n.8 (9th Cir. 2002).

24 ³At oral argument, the panel asked the debtor's counsel why
25 this new argument was not waived. Counsel responded that the
26 debtor had been acting pro se up until a few weeks prior to oral
27 argument. Counsel conceded, however, that he had participated in
28 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.

1
2 The debtor also argues that, even if such lost rent is
3 recoverable, there was no evidence to support the lost rent
4 awarded for the shop/barn.⁴

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

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

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

20 [W]hat period of time will constitute fair compensation
21 without becoming a windfall for the Plaintiff and
22 unfair to the Defendant? For example, it hardly seems
23 reasonable that one should calculate such damages in
24 perpetuity or even for Bongiovanni's expected
25 ownership. Nor has Bongiovanni asked for such a
26 remedy. However, the problem with awarding damages to
27 the date of trial, as Bongiovanni seeks, is that a
28 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

⁴The 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.

1 than by settlement offers which the Plaintiff may
2 refuse.

3 For the forgoing reasons, this court elects to
4 assess damages for an 18 month period only, bringing
5 the award for lost rent in this case to \$25,110 for the
6 guest house and \$18,000 for the shop/barn.

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

9 II

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

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

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

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

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

1 colloquy took place:

2 THE COURT: I mean, the problem that I have with this is
3 we're at closing argument, and all of this should have
4 been done during the course of the initial case and, of
5 course, the trial portion of the case.

6 [THE DEBTOR]: I respect that. On the other hand, for
7 now 10 weeks I've had three different people try to
8 serve Ms. Ardeshiri. I spoke with her three times.
9 She hung up on me saying 'Look, I've settled out.
10 Don't bother me. You're pestering me. I'll' - you
11 know, and she was very irritated. . . .

12 THE COURT: What I'm going to make a decision on is
13 what's in the record up to today, including what Mr.
14 Rafalovich had to say. He said he talked to her. And
15 I'm going to go back and see once again what he has to
16 say in terms of specifics on that.

17 [THE DEBTOR]: Well, I thank you for - I guess I'm
18 saying that in the sequence of what's occurred, in my
19 defense, it's almost as if it's a trial by ambush in
20 the fact that Ardeshiri is a key party to this
21 communication mishap, if you will, and, in fact, I'm
22 not able to use her as a witness or to clarify the very
23 questions you were asking [Bongiovanni's attorney].

24 THE COURT: You have always had the opportunity to use
25 her as a witness. But you know, I can't be your
26 lawyer, and I have to impose some sort of order on
27 these proceedings, and the order on these proceedings
28 has been imposed and known to all parties for a long
29 time. We've had so many days of trial, we've had an
30 extra day of trial in order to allow Mr. Rafalovich to
31 testify.

32 [BONGIOVANNI'S ATTORNEY]: I'll also mention, your
33 Honor, that [the debtor] has asked for things to be set
34 out so he could take depositions and conduct discovery.
35 So anywhere for the last year and half now, he could
36 have served a subpoena upon her, enforced it to bring
37 her in. And if he thought she really had some helpful
38 testimony -

39 THE COURT: I don't think there's any question she would
40 have testimony that would be enlightening, either
41 because of what she would say, would admit or wouldn't
42 say or wouldn't admit. The fact is, she wasn't here in
43 any timely fashion, and that record is closed now.

44 If it turns out I'm wrong on having closed the
45 record, there will - that's what appellate courts are
46 for. But it seems to be that I have been given lots of
47 opportunities to get this case fully before me, and now
48

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

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

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

9 On August 27, the court closed the record and set September
10 17 as the date for closing arguments. The debtor did not seek to
11 subpoena Ardeshiri until September 1 - five days after the
12 evidentiary record was closed. Further, Ardeshiri was not
13 personally served until September 16 - one day before the date
14 set for closing arguments.

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

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

21 22 CONCLUSION

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

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

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