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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NOT FOR PUBLICATION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

In re:) BAP No. AZ-05-1215-SCMo
SERGIO RENTERIA and SANDRA)
RENTERIA,) Bk. No. 02-01943
))
Debtors.)
_____))
SERGIO RENTERIA and SANDRA)
RENTERIA,)
Appellants,)
v.) **MEMORANDUM¹**
))
UNITED STATES DEPARTMENT OF)
AGRICULTURE, FARM SERVICE)
AGENCY,)
Appellee.)
_____)

Argued and Submitted on
January 20, 2006 at Phoenix, Arizona

Filed - February 9, 2006

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

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Before: SMITH, CARROLL,² and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Peter H. Carroll, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The United States Department of Agriculture, Farm Service
2 Agency ("FSA") filed a motion for turnover of proceeds from the
3 sale of estate property (the "turnover motion"), presumably
4 pursuant to 11 U.S.C. § 542³. Though this type of motion may
5 only be brought by a trustee, the parties treated the matter as a
6 declaratory relief request for a determination that certain
7 property sold in 2004 during the pendency of the bankruptcy case
8 constituted property of the estate.⁴ Following an evidentiary
9 hearing on the matter, the bankruptcy court concluded that the
10 property and the sale proceeds therefrom were indeed property of
11 the estate. The debtors filed a timely Notice of Appeal on May
12 12, 2005. We AFFIRM.

13 I. FACTS

14 Debtors Sergio Renteria ("Renteria") and Sandra Renteria
15 (collectively, "Debtors") filed a chapter 12 petition on April
16 26, 2002, which was subsequently converted to a chapter 7 on June
17 18, 2004. Their schedules and statement of affairs indicated
18 their ownership of thirteen head of cattle.

19 Prior to the bankruptcy filing, in February 2001, Debtors

20 ³ Unless otherwise indicated, all chapter, section, and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

23 ⁴ The bankruptcy court noted that such a proceeding should
24 arguably be brought as an adversary proceeding under Fed. R.
25 Bankr. P. 7004(2) and (9), but as the debtors did not object to
26 the form of the proceeding, and because the record and result
27 would not be substantially different, the motion could be
28 determined on its merits. We agree. See, In re Munoz, 287 B.R.
546, 551 (9th Cir. BAP 2002) (the use of the "contested matter"
procedure where an adversary proceeding is required is harmless
error if "neither the factual record nor the quality of the
presentation of the arguments would have been materially
different had there been an adversary proceeding").

1 purchased eleven head of cattle with money lent by FSA.
2 According to Renteria, upon learning that FSA regulations
3 prohibited them from using the loan proceeds to feed the cattle,
4 he and his wife traded eight of the thirteen head of cattle to
5 their then 16-year old daughter, Amber Renteria ("Amber") for 700
6 bales of hay in July 2001. According to Renteria and Amber,
7 Amber used her savings to purchase the hay. In December 2002,
8 Amber and Debtors opened a joint savings account at Cochise
9 Credit Union ("Cochise Account").

10 Between July 2001 and November 2004, the eight head of
11 cattle traded to Amber increased to twenty-six. During this same
12 period, according to Renteria, all of their remaining cattle were
13 lost to illness or accidents. Also during this period, Amber
14 moved away to college and left her parents powers of attorney to
15 deal with the care of her cattle and other farming activities.

16 On November 30, 2004 (post-petition), the twenty-six head of
17 cattle were sold to Daniel Skinner ("Skinner") for \$19,950 in a
18 sale negotiated by Renteria on Amber's behalf. The check for the
19 purchase was made payable to Amber, endorsed by her, and
20 deposited into the Cochise Account.

21 On December 22, 2004, FSA filed the turnover motion,
22 alleging that Debtors had sold assets of the estate in blatant
23 disregard of a court order.⁵ In particular, FSA asserted that

24
25 ⁵ On June 22, 2004, the chapter 7 trustee filed an emergency
26 motion for order directing Debtors to vacate real property. See
27 Bankruptcy Court Docket, Entry 262. The trustee was concerned
28 about the dissipation of assets due to Debtors' behavior during
the chapter 12 proceeding. The court denied the trustee's
request, but entered an order prohibiting Debtors from disposing
of any property.

1 the twenty-six head of cattle sold to Skinner (the "November 2004
2 sale") belonged to the bankruptcy estate and not to Amber.
3 According to FSA, the pre-petition trade to Amber was for less
4 than fair consideration. Debtors did not file a response to the
5 turnover motion.

6 On March 2, 2005, an evidentiary hearing was held on the
7 turnover motion. Witnesses included Debtors' neighbor, Larry
8 Hubbard ("Hubbard"), Amber, and Renteria.

9 In her testimony regarding the 2001 cattle trade, Amber
10 could not recall how much she paid for the hay, but estimated the
11 cost of planting the alfalfa to be approximately \$1,000. Her
12 testimony regarding the source of funds used for the planting was
13 equivocal. As to the November 2004 sale, Amber could not recall
14 if she cashed or deposited the money. She also did not remember
15 that she had a joint bank account with Debtors at the Cochise
16 Credit Union until it was brought to her attention that the sale
17 proceeds were deposited there. Though she testified that she was
18 using the proceeds to cover living expenses, she did not know how
19 much she had spent or how much remained of the proceeds.
20 Significantly, she also testified that she had never written any
21 checks against the account and could not recall how she had
22 accessed the funds to pay for the expenses about which she had
23 previously testified.

24 Renteria testified that he had purchased eleven head of
25 cattle in February 2001 and later traded eight of them to Amber
26 in order to purchase feed for his other animals. At all times,
27 the cattle, including offspring, were kept on the farm. All of
28 the remaining cattle owned by Debtors either died of natural

1 causes or were euthanized. According to Renteria, none of the
2 cattle sold to Skinner belonged to him or his wife.

3 Following the hearing, Debtors were permitted to supplement
4 the record with documents intended to demonstrate Amber's ability
5 to finance her farming activities in the summer of 2001.

6 On May 3, 2005, the bankruptcy court ruled as follows:

7 Considering the evidence as a whole, I find
8 that there was insufficient credible evidence
9 offered by the Debtors to establish that Amber
10 paid consideration for the cattle. Indeed, the
11 evidence indicates that after the date of the
12 alleged transfer, the Renterias and Amber
13 continued to treat the cattle as the Renterias
14 property as demonstrated by Mr. Renteria's
15 negotiation of the sale of the cattle to a
16 third party and the deposit of the \$19,950
17 check into an account which the Debtors control.
18 I find, therefore, that the 26 cattle were
19 property of the bankruptcy estate on the
20 November 30 sale date and the proceeds from
21 that sale are also estate property subject to
22 any valid lien of [sic] the FSA may establish
23 in those proceeds.

24 Debtors appeal.

25 **II. JURISDICTION**

26 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
27 and §§ 157(b) (1) and (b) (2) (E). We have jurisdiction under 28
28 U.S.C. §§ 158(b) and (c).

29 **III. ISSUE**

30 Whether the bankruptcy court erred when it determined that
31 the cattle sold in November 2004 were property of the estate.

32 **IV. STANDARD OF REVIEW**

33 We review the bankruptcy court's legal conclusions de novo,
34 findings of fact for clear error, and mixed questions of law and
35 fact de novo. In re Roberts, 331 B.R. 876, 880 (9th Cir. BAP
36 2005). We also "give due regard to the opportunity of the

1 bankruptcy court to judge the credibility of witnesses." In re
2 Carolan, 204 B.R. 980, 984 (9th Cir. BAP 1996). "If two views of
3 the evidence are possible, the bankruptcy court's choice between
4 them cannot be clearly erroneous." Anderson v. Bessemer City,
5 470 U.S. 564, 573 (1985).

6 V. DISCUSSION

7 Debtors contend that the bankruptcy court erred in finding
8 that the November 2004 sale of the cattle was a sale of property
9 of the estate because: 1) it did not give appropriate weight to
10 Amber's testimony; 2) the determination that Amber did not own
11 the cattle because she failed to pay fair consideration ignored
12 other possibilities of obtaining ownership of the property; 3) no
13 evidence was offered to refute the circumstances of either the
14 pre-petition exchange of the eight cows to Amber or the November
15 2004 sale; and 4) the court improperly expanded FSA's narrow
16 request for a determination that the cattle sold to Skinner were
17 property of the estate by delving into whether the pre-petition
18 transfer between Debtors and Amber was a bona fide sale.

19 The bankruptcy court did not err in finding that Amber's
20 testimony lacked credibility.

21 Debtors believe that the court erred when it failed to give
22 sufficient weight to Amber's testimony, particularly as: 1) she
23 had no prior experience testifying in court, and 2) no evidence
24 was offered by FSA to refute her testimony.

25 "Findings of fact, whether based on oral or documentary
26 evidence, shall not be set aside unless clearly erroneous, and
27 due regard shall be given to the bankruptcy court to judge the
28 credibility of the witness." Rule 8013. "The burden is on the

1 appellant to demonstrate that the bankruptcy court's findings are
2 clearly erroneous." In re Drehsen, 190 B.R. 441, 442 (Bankr.
3 M.D. Fla. 1995). "A finding is clearly erroneous when, although
4 there is evidence to support it, the reviewing court, on the
5 entire record, is left with the definite and firm conviction that
6 a mistake has been made." United States v. Gypsum Co., 333 U.S.
7 364, 395 (1948).

8 Debtors' arguments fail to demonstrate clear error on the
9 part of the bankruptcy court. The record sufficiently supports
10 the weight given Amber's testimony by the court in that: 1) there
11 appears to have been scant documentary evidence supporting
12 Amber's representation that she actually had the funds in 2001 to
13 purchase the hay; 2) Amber could not remember the amount of her
14 cash savings in 2001; 3) there was no documentary evidence or
15 third party testimony demonstrating any sale of hay to Amber in
16 2001; 4) the submitted documents with regard to the transfer of
17 the cattle to Amber were all created by Debtors and there was no
18 corroborating, independent evidence to substantiate the existence
19 and terms of the trade; 5) she could not remember in what account
20 the check (received from the sale of cattle) was deposited; 6)
21 Amber initially denied having an interest in the account in which
22 the check was deposited and did not know the balance of that
23 account; and 7) her testimony that she used a portion of the sale
24 to pay her expenses was inconsistent with later testimony that
25 she had not used the account (where the proceeds were deposited)
26 in years. Therefore, we conclude that the bankruptcy court did
27 not err in finding that Amber's testimony lacked credibility.

28

1 The burden was on Debtors to establish that the cattle were
2 validly transferred to Amber.

3 Debtors complain that the bankruptcy court's determination
4 that Amber did not own the cattle because she failed to pay fair
5 consideration ignores other possibilities of obtaining ownership
6 of the property, e.g., that the cattle could have been gifted to
7 her.

8 The bankruptcy court correctly determined that FSA bore the
9 initial burden of proving that the twenty-six head of cattle
10 constituted property of Debtors. See In re Wolff, 22 B.R. 510,
11 512 (9th Cir. BAP 1982). In this regard, the court also
12 correctly concluded that FSA met its burden when Renteria
13 testified that he and his wife acquired the cattle with FSA funds
14 in February of 2001. At that point, the burden shifted to
15 Debtors to establish that the cattle were transferred to Amber
16 for fair consideration. See Gorenz v. Illinois Dept. of Agric.,
17 653 F.2d 1179, 1184 (7th Cir. 1981).

18 Debtors' argument that the court failed to take into
19 consideration other possibilities to justify the transfer to
20 Amber (i.e., that the cattle was gifted to her) is not persuasive
21 and is inconsistent with Debtors' primary position that the cows
22 were fairly traded for hay. After reviewing all the evidence,
23 the court was ultimately unpersuaded by Debtors' evidence. We
24 find nothing in the record indicating clear error in the court's
25 assessment of the evidence.

26 The November 2004 sale had no direct impact on the immediate
27 issue of whether the transfer of cattle to Amber was valid.

28 Debtors argue that FSA failed to provide any evidence to

1 refute the circumstances of the November 2004 sale, e.g., that
2 the check was made payable to Amber. Debtors argue further that
3 FSA failed to present any testimony from the buyer refuting the
4 representations and testimony of Renteria and Amber regarding the
5 sale.

6 The issue before the bankruptcy court was whether the
7 property sold on November 30, 2004 belonged to the bankruptcy
8 estate or to Amber. In order to make such a determination, the
9 court necessarily had to examine the underlying pre-petition
10 conduct of Debtors and Amber. The record sufficiently supports
11 the court's conclusion that the purported transfer to Amber was
12 not effective and, therefore, the property sold to Skinner was
13 property of the estate.

14 The bankruptcy court's finding that Debtors did not receive
15 fair consideration for the transfer of the cattle to their
16 daughter was not clearly erroneous.

17 Debtors assert that, by examining the earlier pre-petition
18 transfer of cattle from Debtors to Amber, the bankruptcy court
19 improperly expanded FSA's request for a determination that the
20 cattle sold to Skinner was property of the estate. Further,
21 Debtors urge that "[b]ecause the decision is strictly based on
22 the conclusion that no consideration existed, the order must be
23 reversed as it does not address other possibilities for a
24 legitimate transfer, i.e., such as sale, gift, or otherwise."

25 As we have already found that it was Debtors' burden to
26 prove that the cattle was validly transferred to Amber, and that
27 all possibilities, including gifting, are inconsistent with the
28 record, we find Debtors' argument on this point unpersuasive.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the bankruptcy court.

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