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NOT FOR PUBLICATION

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. MT-12-1364-JuTaPa
)	
JOHN TRAVIS ALDRICH and)	Bk. No. 11-60839-RBK
ALDORA JUNE ALDRICH,)	
)	Adv. No. 11-00054-RBK
Debtors.)	
)	
<hr/>)	
JOHN TRAVIS ALDRICH;)	
ALDORA JUNE ALDRICH,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M *
)	
ALBERT STEVEN JUNKERT,)	
)	
Appellee.)	
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Argued and Submitted on July 25, 2013
at Butte, Montana

Filed - September 5, 2013

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Appearances: Craig D. Martinson, Esq., of Patten, Peterman,
Bekkedahl & Green, PLLC argued for appellants
Aldora and John Aldrich; Jack E. Sands, Esq., of
Sands Law Office, argued for appellee Albert
Steven Junkert.

Before: JURY, TAYLOR, and PAPPAS, Bankruptcy Judges.

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

1 Appellee, Albert Steven Junkert (Steve), filed an adversary
2 proceeding against chapter 7¹ debtors, Aldora and John Aldrich,
3 seeking to quiet title to real property, referred to as Tract 2,
4 that was listed in debtors' Schedule A. After a trial, the
5 bankruptcy court entered judgment in favor of Steve, finding an
6 enforceable oral contract between the parties for the transfer
7 of Tract 2 and ordering debtors to quitclaim the property to
8 Steve upon payment of \$27,956.25. This appeal followed. We
9 AFFIRM.

10 I. FACTS²

11 This is a dispute among family members. Aldora Aldrich is
12 Steve's sister. Tract 2, consisting of 62 acres, was part of
13 320 acres located in Huntley, Montana, that were owned by Steve
14 and Aldora's father and mother, Albert and Julia Junkert.
15 Albert and Julia had five children: Steve, Aldora, Krista
16 Junkert, Adella Hammerstrom and Allena Junkert.

17 In 1985, Albert and Julia deeded 20 acres from their
18 320-acre parcel to debtors.³ Debtors currently reside on the
19 20-acre parcel. For the past forty to forty-five years, Steve
20 lived on a 19.809-acre parcel of Albert and Julia's property
21 (Tract 1). For thirty-five or so years, Steve operated a gravel
22

23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
25 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

26 ² Many of the facts are taken from the bankruptcy court's
27 Memorandum of Decision and Order entered June 22, 2012.

28 ³ It is unclear from the record how the 20 acres was deeded
to debtors when the 320 acres was not yet subdivided.

1 and dump truck business on Tract 2. Tracts 1 and 2 comprise the
2 northern portion of the 320-acre parcel and debtors' 20-acre
3 parcel lies just to the south of Tract 2.

4 Steve, who is developmentally disabled, graduated from high
5 school receiving a special education certificate. Julia, while
6 alive, kept the books for Steve's business and before 2003,
7 Steve did not have a checking account in his name. Prior to her
8 death, Julia would invoice Steve's customers, deposit the income
9 from Steve's business into her personal checking account and pay
10 all Steve's bills. Steve never had a loan in his own name and
11 when he needed a loan for his business, the loan was obtained in
12 Julia's name. Julia also oversaw the preparation and filing of
13 Steve's income tax returns. After Julia passed away in 2000,
14 Allena Junkert and Aldora took over Steve's books. They would
15 deposit Steve's business income into their personal checking
16 accounts and would pay Steve's bills from their personal
17 accounts.

18 Pursuant to a Last Will and Testament dated June 6, 2002,
19 Albert provided for the division of his personal assets and his
20 300 remaining acres. Under the Last Will and Testament, debtors
21 were not left any property, other than the 20 acres they
22 received in 1985. Debtors' three children (Travis, Alicia and
23 Andrea) were willed a combined sum of 42 acres. Steve was
24 awarded 62 acres per Albert's Last Will and Testament; Allena
25 Junkert was awarded 62 acres, which included Albert's residence;
26 Krista Junkert was awarded 62 acres; and Adella Hammerstrom and
27 her children were awarded a total of 62 acres.

28 At the time of his death, Albert's 300 remaining acres were

1 not subdivided, the acreage was encumbered by a mortgage⁴ and
2 Albert had other miscellaneous debts. In an effort to satisfy
3 the mortgage and debts, Albert's Estate sold approximately 65
4 acres to Gabel Construction, receiving net proceeds of
5 \$58,887.00. The two representatives of Albert's Estate were
6 also contemplating selling additional acreage to Gabel
7 Construction to fully satisfy the mortgage and debts and to pay
8 for the expenses associated with dividing the 300 acres. Had
9 the Estate followed through with its plan, debtors' 20 acres
10 would be surrounded on three sides by property owned by Gabel
11 Construction. Aldora opposed the second sale to Gabel
12 Construction and instead wanted to keep the property together,
13 with her children receiving the property surrounding debtors' 20
14 acres.

15 A dispute arose between Steve and Albert's Estate over some
16 personal assets, a claim Steve was asserting against the Estate,
17 and a claim the Estate was asserting against Steve for gravel
18 extracted by Steve from the property. Steve hired an attorney
19 to help him with the dispute. At some point, Aldora joined
20 Steve in the action against Albert's Estate, although she did
21 not have a dispute under Albert's Will. According to Aldora,
22 she wanted to help Steve with his claims and the paperwork.

23 Steve, Aldora and Albert's Estate eventually reached a
24 resolution, which was reflected in a Stipulation dated July 20,
25 2004. Per the Stipulation, Steve's claim against the Estate was

26
27 ⁴ The mortgage payments between January 16, 2003, and
28 May 2, 2005, and the final payoff made by the Estate totaled
approximately \$63,214.00.

1 disallowed in full, the Estate's claim against Steve was
2 disallowed in full, and personal property was divided.

3 As for the real property, the parties agreed that Aldora and
4 Steve could purchase property that would have been sold to Gabel
5 Construction.

6 On March 31, 2005, debtors and Albert's Estate entered into
7 a Contract for the Sale and Purchase of Real Estate, whereby
8 debtors agreed to purchase 129.3 acres which was identified as
9 Tracts 1 through 5: Tract 1 (Steve's residence), Tract 2
10 (Steve's gravel pit), Tract 3 consisting of 17.306 acres, Tract
11 4 consisting of 17.306 acres and Tract 5 consisting of 12.853
12 acres. Albert's Estate and debtors agreed on a purchase price
13 of \$119,040.00 for the entire 129.3 acres and from the purchase
14 price, debtors were given a credit for the inheritance Steve,
15 Travis, Alicia and Andrea would have otherwise been entitled to
16 and for funds debtors had already advanced to the Estate.
17 However, debtors would still need approximately \$41,404 to close
18 the sale. Someone would need to obtain a loan for this amount.
19 In addition, Steve, Travis, Alicia and Andrea would have to
20 waive their respective inheritances of \$36,863, \$8,324, \$8,324,
21 and \$8,324 (the values attributed to the parcels willed to them
22 by Albert).

23 Although Steve had never had a loan in his own name, he
24 explored financing for Tract 2 from friends and acquaintances
25 (Kathleen Barnes and Vick Reichenbach). However, he did not
26 follow through with his efforts, instead agreeing to waive his
27 inheritance so debtors could procure financing to close the
28 sale. Steve and debtors orally agreed that if Steve waived his

1 inheritance, debtors would purchase Tracts 1 through 5 and as
2 soon as Steve repaid what he owed, Tracts 1 and 2 would be
3 transferred to Steve. Consistent with their oral agreement,
4 Steve waived his inheritance and debtors obtained a loan from
5 Yellowstone Bank to complete the purchase of Tracts 1 through 5.

6 The sale closed on or about May 2, 2005. The settlement
7 statement reflected a total purchase price of \$119,040. In
8 addition to the purchase price, debtors paid settlement charges
9 of \$687.00, property taxes of \$3,609.74, and county taxes from
10 May 2, 2005, to January 1, 2006, of \$646.62. From the gross
11 amount due of \$123,983.36, debtors were given a \$61,835.00
12 credit for the inheritances waived by Steve, Travis, Alicia and
13 Andrea. Debtors were also given a credit of \$15,801,
14 representing funds previously advanced by debtors to keep
15 Albert's Estate liquid during the probate period. The balance
16 owed of \$46,347.36 was paid with proceeds from a Yellowstone
17 Bank loan.⁵ The sum of the earnest money and the loan is
18 \$62,148.36, but of the foregoing amount, \$3,609.74 was for
19 property taxes owed on debtors' property. After subtracting the
20 inheritance waivers and the property taxes, \$58,538.62 of the
21 total funds advanced were paid to purchase Tracts 1 through 5.
22 Of the foregoing amount, \$1,333.62 was attributable to
23 settlement charges and county taxes, leaving funds due to the
24 Estate of \$57,205.00.

25
26 ⁵ The loan bore interest at 7.5% and called for 35 monthly
27 payments of \$429.75 with a balloon of \$41,141.32 on May 1, 2008.
28 Debtors gave Yellowstone Bank Tracts 1, 2, 3, 4 and 5 and their
separate 20 acres as collateral for the \$46,347.36 loan.

1 In 2007, debtors refinanced the Yellowstone Bank
2 obligation, releasing all the real property collateral except
3 their own 20 acres. Debtors then transferred Tracts 3, 4 and 5
4 to Alicia, Travis and Andrea. Debtors also formed TAA, LLC in
5 February 2009. The Articles of Organization show Kevin and
6 Alicia Remington as the members of TAA, LLC. Debtors
7 transferred four of their acres, and Tracts 1 and 2 to TAA, LLC
8 on or about February 24, 2010.

9 In February of 2011, TAA, LLC transferred Tract 1 to
10 Steve.⁶ At this same time, TAA, LLC transferred debtors'
11 original 20 acres and Tract 2 back to debtors.

12 As previously noted, Steve's home is located on Tract 1.
13 Steve temporarily left his property from August 2, 2010, to
14 February 1, 2011, to attend an alcohol treatment program. Steve
15 allowed a friend, Kenny, to stay at his home while Steve was
16 away for treatment. Steve anticipated that Kenny would operate
17 the gravel pit during Steve's absence. Debtors, however, would
18 not allow Kenny access to Tract 2 and when Steve returned from
19 treatment in February 2011, he discovered debtors had posted no
20 trespassing signs and had installed chains across the gates on
21 Tract 2. Steve contacted the sheriff, but was advised that he
22 would have to consult with a civil attorney because title to
23 Tract 2 was in debtors' name. Debtors have not allowed Steve to
24 operate his gravel business since his return from alcohol
25 treatment.

26 _____
27 ⁶ Steve was entitled to Tract 1 free and clear as part of
28 his inheritance. Aldora failed to explain why Tract 1 was not
transferred to Steve any sooner.

1 Steve has a screener plant and other personal property
2 located on Tract 2. Steve was advised by debtors' attorney in
3 January 2012 that he could remove his personal property from
4 Tract 2. However, given the time of the year, it was impossible
5 for Steve to remove his personal property, including the
6 screener plant, from Tract 2.

7 While Steve was away for alcohol treatment, debtors
8 attempted to operate Steve's gravel business by holding
9 themselves out as the new owners of Steve's business and
10 identifying their daughter, Andrea Aldrich, as business manager.
11 Debtors' efforts failed.

12 **The Bankruptcy Proceedings**

13 On April 29, 2011, debtors filed their chapter 7 petition.
14 Debtors listed Tract 2 in Schedule A. Debtors filed a homestead
15 declaration for their entire 20 acres plus Tract 2.

16 **The Adversary Proceeding**

17 On August 25, 2011, Steve commenced an adversary proceeding
18 against debtors seeking to quiet title to Tract 2 and gain
19 immediate possession of Tract 2. Steve also sought damages for
20 conversion, fraud, breach of fiduciary duty and breach of
21 contract. Steve alleged that he had a contract with debtors and
22 that upon payment of a purchase price, they were to convey
23 Tract 2 to him. On December 12, 2011, debtors answered the
24 complaint and asserted affirmative defenses, including the
25 statute of frauds. Pursuant to stipulation and an order,
26 debtors filed an amended answer on February 6, 2012, asserting a
27 statute of limitations defense to Steve's claims for fraud,
28 breach of fiduciary duty, conversion and breach of oral

1 contract. That defense was based in part on a claim for adverse
2 possession under 70-19-401, MCA.⁷

3 On April 26, 2012, the bankruptcy court conducted a trial.
4 The court took the matter under advisement and on June 22, 2012,
5 entered a Memorandum of Decision and Order finding in favor of
6 Steve. The court found that there was an enforceable oral
7 contract between the parties and that the balance owing on the
8 contract was \$27,956.25. The court entered judgment on the same
9 day. Debtors appealed.

10 On October 29, 2012, the clerk's office issued an order
11 regarding the Panel's jurisdiction over the claims for breach of
12 fiduciary duty, fraud and punitive damages which were not ruled
13 upon. On November 30, 2012, the bankruptcy court entered an
14 amended judgment which dismissed those claims. Accordingly, the
15 Panel issued an order finding that the finality problem had been
16 cured.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction over this proceeding
19 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (O). We have
20 jurisdiction under 28 U.S.C. § 158.

21 **III. ISSUES**

22 A. Whether the bankruptcy court erred in finding an
23

24 ⁷ This statute states:

25 An action for the recovery of real property or for the
26 possession of real property may not be maintained
27 unless it appears that the plaintiff or the plaintiff's
28 ancestor, predecessor, or grantor was seized or
possessed of the property in question within 5 years
before the commencement of the action.

1 enforceable oral contract between Steve and debtors for the sale
2 of Tract 2;

3 B. Whether the bankruptcy court erred in calculating the
4 balance due from Steve to debtors for the purchase of Tract 2;
5 and

6 C. Whether the bankruptcy court erred in not awarding
7 debtors ten percent interest on the balance due from Steve.

8 IV. STANDARDS OF REVIEW

9 We review the bankruptcy court's findings of fact for clear
10 error and its conclusions of law de novo. Korneff v. Downey
11 Reg'l Med. Ctr.-Hosp., Inc. (In re Downey Reg'l Med. Ctr.-Hosp.,
12 Inc.), 441 B.R. 120, 127-28 (9th Cir. BAP 2010).

13 A factual determination is clearly erroneous if the
14 appellate court, after reviewing the record, has a definite and
15 firm conviction that a mistake has been committed. Anderson v.
16 City of Bessemer City, N.C., 470 U.S. 564, 573 (1985). Where
17 there are two plausible views of the evidence, "the factfinder's
18 choice between them cannot be clearly erroneous." Id. at 574.
19 "A court's factual determination is clearly erroneous if it is
20 illogical, implausible, or without support in the record." Retz
21 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)
22 (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21
23 (9th Cir. 2009) (en banc)).

24 V. DISCUSSION

25 Montana law determines the parties' ownership interest in
26 Tract 2. Butner v. United States, 440 U.S. 48, 55 (1979).
27 Debtors admit that there was an oral contract which required
28 Steve to pay them for Tract 2. Therefore, our discussion

1 focuses on the enforceability of the contract.

2 **A. The Statute of Frauds**

3 Debtors first contend that the oral contract is
4 unenforceable due to the statute of frauds. The statute of
5 frauds is codified in 28-2-903 and 70-20-101, MCA. Pursuant to
6 28-2-903(1)(d), MCA, "an agreement for the leasing for a longer
7 period than 1 year or for the sale of real property . . . is
8 invalid unless the authority of the agent is in writing and
9 subscribed by the party sought to be charged." Additionally,
10 70-20-101, MCA, provides that an interest in real property may
11 not be transferred unless there is an instrument in writing,
12 subscribed by the party transferring it or by the party's lawful
13 agent authorized by writing. Hayes v. Hartelius, 697 P.2d 1349,
14 1353 (Mont. 1985).

15 Here, there is no dispute that the agreement between the
16 parties was not in writing and therefore it could not be
17 enforced under 28-2-903(d), MCA, and the bankruptcy court so
18 found. Debtors argue that "for this reason alone" there is no
19 contract that Steve has a right to enforce. We are not
20 persuaded.

21 The Montana Supreme Court has held that the statute of
22 frauds is inapplicable when the parties have admitted the
23 existence of a contract. Hayes, 697 P.2d at 1353. The court
24 reasoned that "it would be a fraud on the defendant to allow
25 plaintiffs to admit to the contract, and then allow them to
26 avoid its obligations by asserting the statute of frauds." Id.;
27 see also Hillstrom v. Gosnay, 614 P.2d 466, 470 (Mont. 1980)
28 (stating that "in cases involving admitted contracts, we have

1 construed the statute of frauds less technically, refusing to
2 allow the statute to be used so as to defeat its purpose to
3 prevent the commission of a fraud."). Because Aldora testified
4 that an oral agreement existed between the parties, debtors
5 cannot now attempt to invoke the statute of frauds to deny the
6 existence of such an agreement. Hayes, 697 P.2d at 1353.

7 Additional factors also defeat debtors' statute of frauds
8 defense. Debtors acknowledge that partial performance may take
9 an oral contract outside the statute of frauds. The statute of
10 frauds does not abridge the power of any court to compel the
11 specific performance of an agreement, in case of partial
12 performance of the agreement. 70-20-102(3), MCA; Hayes,
13 697 P.2d 1349 (Mont. 1985). The sufficiency of acts to
14 constitute part performance can be decided as a matter of law.
15 Quirin v. Weinberg, 830 P.2d 537, 541 (Mont. 1992) (citing
16 Schwedes v. Romain, 587 P.2d 388, 391 (1978)). For an act to be
17 sufficient to constitute part performance, it "must be
18 unequivocally referable to the contract." Quirin, 830 P.2d at
19 541 (quoting Schwedes, 587 P.2d at 391). In addition, "a court
20 has the power to compel the specific performance of one party to
21 an oral contract for the sale of real property in the case of
22 part-performance by the other party." Luloff v. Blackburn,
23 906 P.2d 189, 191 (Mont. 1995).

24 Debtors ignore this settled case law and fail to specify on
25 appeal why they think that the bankruptcy court erred in finding
26 that Steve's payments to debtors of over \$12,000 constituted
27 partial performance of the oral contract. Issues not
28 specifically raised and argued in a party's opening brief are

1 waived. Martinez-Serrano v. INS, 94 F.3d 1256, 1259-60 (9th
2 Cir. 1996). Because the record supports the bankruptcy court's
3 finding that Steve partially performed the oral contract, we
4 conclude the court properly found that the contract was outside
5 the statute of frauds.⁸ As a result, debtors' assignment of
6 error on the statute of frauds ground fails.

7 **B. Termination of the Contract for Nonpayment**

8 Debtors next contend that they terminated the contract
9 because Steve stopped making payments to them in August 2008
10 despite their repeated demands. Debtors argue that because
11 Steve had a duty to make regular monthly payments on this
12 obligation and did not make any for over four years, by law this
13 contract should have been deemed to have terminated.

14 To support their argument, debtors cite Montana case law
15 that sets forth two rules. "When the purchase price of property
16 under a contract for deed is paid in installments, 'default in
17 the payment of any installment is a distinct breach and gives
18 the vendor the right to declare a forfeiture.'" Liddle v.
19 Petty, 816 P.2d 1066, 1069-70 (Mont. 1991). Debtors also argue
20 that "[i]f a contracting party materially breaches the contract,
21 the injured party is entitled to suspend his performance, and
22 the determination of whether a material breach exists is a
23 question of fact." Sjoberg v. Kravki, 759 P.2d 966, 969 (Mont.
24 1988). Debtors contend that the facts showed that Steve failed
25 to make the payments he was required to make and, therefore,
26

27 ⁸ The record shows that Aldora gave Steve credit for some of
28 the payments he made to debtors towards the purchase.

1 there was a material breach of the oral contract. Accordingly,
2 debtors maintain they have no further obligation to convey title
3 to Tract 2 to Steve.

4 The rules in Liddel and Sjoberg have no application under
5 the facts developed at trial. Steve's testimony shows that he
6 was willing to tender performance, but debtors never told him
7 how much he owed. They then refused his payments and declared
8 Tract 2 as part of their homestead so it would be protected when
9 they filed bankruptcy.

10 The bankruptcy court found that debtors never told Steve he
11 was in default under the oral agreement. Yet, debtors contend
12 on appeal that they took "appropriate action" to terminate the
13 contract when Steve failed to make the payments. Without
14 citation to the record, they argue that they made a demand on
15 Steve to cure his arrearage and that he was given sufficient
16 notice to do so.

17 We have combed the record, but find no evidence to support
18 debtors' contentions. When asked whether she ever told Steve
19 that he was in default, Aldora testified "I don't recall at this
20 moment whether I specifically said 'you are in default.'" She
21 further testified that she never sent Steve a default notice.
22 Aldora later stated that although Tract 1 and 2 were transferred
23 to TAA, LLC in 2010, if Steve "would have made up the payments
24 and caught them up and paid off the original Yellowstone Bank
25 loan" he could have gotten the property back. When asked
26 whether she told Steve how much he owed at that point, she said:
27 "I did not know how much he owed because he was already in
28 arrears with everything."

1 Moreover, the record shows that Steve attempted to tender
2 payment, which debtors refused. Steve testified that he offered
3 debtors a complete payoff for the property and they wouldn't
4 take it. Steve also stated that debtors would not take any
5 further payments from him because they were going to file
6 bankruptcy. At one point, Aldora testified that she asked Steve
7 to make additional payments "many times" in 2007 and 2008.
8 However, Aldora later admitted that she did tell Steve she could
9 not take any more money from him because debtors were filing
10 bankruptcy. Steve's friend, Rick Althoff, testified that
11 sometime after Steve returned from the alcohol treatment center,
12 Rick spoke to John about working something out for a payoff.
13 Rick said that John responded "no." This testimony was
14 uncontroverted.

15 Given this testimony, the bankruptcy court reasonably could
16 have concluded that the oral contract was not terminated or
17 forfeited due to debtors' failure to give Steve notice of the
18 alleged default coupled with Steve's good faith attempt to
19 tender payment, which debtors refused. Further, by imposing a
20 constructive trust over the property, the bankruptcy court
21 implicitly found that a forfeiture would result in unjust
22 enrichment to debtors due to Steve's partial performance.
23 Debtors have not pointed to, nor have we found, any facts in the
24 record at variance with the bankruptcy court's findings. Given
25 the absence of such evidence, the bankruptcy court's
26 interpretation of the facts was not implausible on its face.
27 For these reasons, debtors' termination of contract argument
28 fails.

1 **C. Adverse Possession Claim**

2 Debtors next contend that they obtained title to Tract 2 by
3 adverse possession. Because they paid all the real estate taxes
4 since 2005, debtors argue that Steve has no right to a claim or
5 interest in the property as a matter of law.

6 The bankruptcy court did not rule on debtors' adverse
7 possession claim⁹ and nowhere in the trial was the issue of
8 adverse possession raised. We need not consider arguments
9 raised for the first time on appeal. See Brown v. Gen. Tel. Co.
10 of Cal., 108 F.3d 208, 210 n.1 (9th Cir. 1997) (per curiam).

11 However, if we address this argument, it fails. The record
12 does not support a claim for adverse possession. Under Montana
13 law, the party asserting a claim for adverse possession must
14 prove each element by clear and convincing evidence. Wareing v.
15 Schreckendgust, 930 P.2d 37, 43 (Mont. 1996). In addition to
16 paying the taxes, the claimant must show use that is open,
17 notorious, exclusive, adverse, continuous, and uninterrupted for
18 the statutory five-year period. Burlingame v. Marjerrison,
19 665 P.2d 1136, 1139 (Mont. 1983). Here, the testimony of the
20 parties shows that Steve had use and possession of Tract 2 until
21 debtors locked him out in the summer of 2010 when he left the
22 property for alcohol treatment. Steve commenced the adversary
23 proceeding against debtors to quiet title to Tract 2 on
24 August 25, 2011. On these facts, debtors have not shown their
25 open, notorious, exclusive, adverse, continuous, and
26

27
28 ⁹ Debtors did raise adverse possession in connection with
their statute of limitation defense in their amended answer.

1 uninterrupted use for the statutory five-year period by clear
2 and convincing evidence. Debtors' adverse possession claim thus
3 fails as a matter of law.

4 **D. Amount Owed by Steve**

5 Debtors contend that the bankruptcy court abused its
6 discretion when it determined the amount Steve needed to pay to
7 debtors before transferring Tract 2 to Steve. Debtors maintain
8 that the court erred in determining the amount of principal owed
9 and the amount of credit given for payments made by Steve.

10 The bankruptcy court's Memorandum of Decision includes
11 extensive factual findings supporting its calculation of the
12 amount owed: (1) the parties had a contract, but they never
13 discussed the exact amount Steve would need to pay in order to
14 secure title to the property nor did they discuss a repayment
15 plan; (2) Steve testified that he understood he could make
16 payments to Aldora as he had funds available; (3) Steve did not
17 keep accounting records and Aldora was, to some extent, in
18 charge of Steve's records; (4) Aldora did not have a complete
19 accounting of the bills she allegedly paid on Steve's behalf;
20 (5) Steve testified that he thought he owed \$35,000 to debtors;
21 and (6) Aldora testified that the sole purpose of the
22 Yellowstone Bank loan was to allow Steve to purchase Tracts 1
23 and 2.

24 On this last point, the bankruptcy court found that the
25 evidence did not necessarily support Aldora's testimony. The
26 court determined that debtors' primary motive when they entered
27 into the Contract for the Sale and Purchase of Real Estate with
28 Albert's Estate was to secure title to Tracts 3 and 4 and

1 preclude Gabel Construction from purchasing this land. The
2 bankruptcy court supported its finding by reference to the
3 Contract for the Sale and Purchase of Real Estate, which
4 specifically referred to Tracts 1 through 5, and the settlement
5 statement. The court concluded that although debtors had
6 advanced \$15,801 to the Estate, they could not have secured
7 Tracts 3 and 4 without obtaining the loan from Yellowstone Bank
8 because their deal with the Estate was an all or nothing deal
9 that tied Tracts 3 and 4 to the purchase of Tracts 1 and 2.

10 Based on this evidence, the bankruptcy court concluded that
11 Steve was originally obligated to pay debtors \$39,293.42 plus
12 property taxes of \$1307.82 for a total of \$40,601.25.¹⁰ The
13 court further found that Steve was entitled to a credit of
14 \$12,645 based on payments made as shown in Exhibit S.
15 Accordingly, the court concluded that the total owed by Steve to
16 debtors for the purchase of Tract 2 was \$27,956.25.

17 The bankruptcy court thoroughly considered the relevant
18 evidence and issued detailed findings of fact based on this
19 evidence. On appeal, rather than show how the evidence fails to
20 support the bankruptcy court's factual findings, debtors simply
21 reargue the facts of the case to convince us they should have
22 prevailed. This is not an appellate function. It is debtors'
23 burden to point out where the findings are clearly erroneous.

24
25 ¹⁰ The court calculated the \$39,293.42 amount by taking
26 43.009 acres x \$913.61 per acre. The 43.009 number represents
27 the acreage over and above which Steve would have received free
28 and clear under Albert's Will. The court arrived at the \$913.61
per acre by dividing \$58,538.62 (the amount debtors' paid the
Estate at closing) by Steve's excess acreage (43.009) and
debtors' children's excess acreage (21.065).

1 An appellant's mere challenge of a finding does not
2 cast the onus of justifying it on this court. The
3 party seeking to overthrow findings has the burden of
4 pointing out specifically wherein the findings are
5 clearly erroneous. Appellant has not carried the
6 burden as to any particular challenged finding
7 sufficiently to require or justify a detailed analysis
8 of the evidence. . . .

9 Glen Falls Indem. Co. v. United States, 229 F.2d 370, 373 (9th
10 Cir. 1955).

11 Debtors have not carried their burden to show specifically
12 where the bankruptcy court clearly erred. Nothing more is
13 required of us than to compare the bankruptcy court's findings
14 to the record to see if they are clearly erroneous. See id. We
15 conclude they are not. Where there are two plausible views of
16 the evidence, "the factfinder's choice between them cannot be
17 clearly erroneous." Anderson, 470 U.S. at 574.

18 **E. Interest on the Amount Owed**

19 Last, debtors contend that the bankruptcy court erred by
20 not awarding them interest on the amount owed by Steve. We
21 review de novo whether an award of interest is authorized under
22 state law. See Oak Harbor Freight Lines, Inc. v. Sears Roebuck
23 & Co., 513 F.3d 949, 954 (9th Cir. 2008).

24 Debtors argue that they are entitled to ten percent
25 interest based on 31-1-106, MCA, which provides the legal
26 interest rate for breach of contract:

27 (1) Except as otherwise provided by the Uniform
28 Commercial Code, 31-1-111 and 31-1-112, or 31-1-817,
unless there is an express contract in writing fixing
a different rate or a law or ordinance or resolution
of a public body fixing a different rate on its
obligations, interest is payable on all money at the
rate of 10% a year after it becomes due on:

. . .

1 (b) an account stated;

2 (c) money lent or due on any settlement of accounts
3 from the date on which the balance is ascertained

3

4 Debtors fail to show they qualify for interest under this
5 statute. First, subsection (b) is inapplicable. An "account
6 stated" is a final adjustment of demands and amounts due.

7 Holmes v. Potts, 319 P.2d 232, 238 (Mont. 1957).

8 'An account stated presupposes an absolute
9 acknowledgment or admission of a certain sum due, or
10 an adjustment of accounts between the parties, the
11 striking of a balance, and an assent, express or
12 implied, to the correctness of the balance. If the
13 acknowledgment or admission is qualified, and not
14 absolute there is no account stated.' Id.

12 See also Nelson v. Mont. Iron Mining Co., 371 P.2d 874, 876

13 (Mont. 1962). There was no account stated in this case.

14 Second, subsection (c) does not apply under these facts.
15 Black's Dictionary defines a "loan" as "1. An act of lending; a
16 grant of something for temporary use - Turner gave the laptop as
17 a loan, not a gift. 2. A thing lent for the borrower's
18 temporary use; esp., a sum of money lent at interest - Hull
19 applied for a car loan." The record does not show that debtors
20 made a loan to Steve. Further, there was no money due on any
21 "settlement of accounts from the date on which the balance is
22 ascertained." Debtors never made a demand on Steve, never gave
23 him notice of default, and never did the parties agree on the
24 amount Steve was to pay. Ultimately, it was up to the
25 bankruptcy court to decide that there was an oral contract,
26 liquidate the claim and enter judgment. We conclude that
27 debtors were not entitled to interest under 31-1-106, MCA.

28 We also examined 27-1-211, MCA, entitled "Right to

1 interest," which states:

2 Each person who is entitled to recover damages certain
3 or capable of being made certain by calculation and
4 the right to recover that is vested in the person upon
5 a particular day is entitled also to recover interest
6 on the damages from that day except during the time
7 that the debtor is prevented by law or by the act of
8 the creditor from paying the debt. (Emphasis added.)

9 By its terms, this statute applies to any conduct by the
10 creditor that prevents the debtor from complying with his or her
11 obligation to pay.

12 The case of Kosena v. Eck, 635 P.2d 1287 (Mont. 1981)
13 illustrates the point. There, the landlords refused to accept
14 the tenant's monthly rent payment. Because of their refusal,
15 the tenant had no choice but to file a lawsuit and tender the
16 monthly rent payment into court. The trial court awarded the
17 landlords interest on rental payments due from the tenant at the
18 rate of six percent per annum from the due date of each payment
19 as rent on the premises. The Montana Supreme Court reversed,
20 finding that 27-1-211, MCA, clearly released the tenant from any
21 obligation to pay interest:

22 Because the landlords were entitled to no more than
23 \$650 per month, it was their own refusal to accept the
24 tendered payment, which resulted in the tenant filing
25 a lawsuit and prevented them from receiving each
26 payment as it became due. By any standards, the
27 conduct of the landlords prevented the tenant from
28 making the required payments. The tenant should not
be penalized for attempting to comply with the terms
of the lease agreement, nor should the landlords be
rewarded for unjustifiably refusing to accept the
payments. The order allowing interest is reversed.

29 For the same reasons, debtors' argument for an award of
30 interest at the contract rate of ten percent from 2005 is
31 flawed. The record shows they contributed to Steve's delay in
32 the payment of the funds. After Steve partially performed,

1 debtors refused to tell him how much he owed. They also told
2 him not to pay since they were filing bankruptcy and, when Steve
3 attempted a complete payoff for the property, they wouldn't take
4 it. Therefore, Steve's tender was excused and the payment of
5 interest, if any, was suspended. See Sunray DX Oil Co. v. Great
6 Lakes Carbon Corp., 476 P.2d 329, 344 (Okla. 1970) (a party
7 cannot act in a manner which will tend to cause the other party
8 to default under a contract and benefit therefrom).

9 Finally, interest as an element of damages is not allowable
10 until the exact amount due is ascertained or is ascertainable.
11 In re Marriage of Gerhart, 800 P.2d 698, 701 (Mont. 1990).
12 "Liquidated claims" include indebtedness which is capable of
13 ascertainment by reference to agreement or simple mathematical
14 computation. Kelleher Law Office v. State Compensation Ins.
15 Fund, 691 P.2d 823, 826 (Mont. 1984). Here, there is no
16 agreement to refer to. Further, Aldora admitted that she did
17 not know how much Steve owed and there was a dispute between the
18 parties as to the exact amount. Therefore, the bankruptcy court
19 had to liquidate the claim and enter judgment. Under these
20 circumstances, at best, debtors would be entitled to interest at
21 the ten percent rate only from the date of the judgment until
22 Steve paid over the funds. See Callihan v. Burlington N. Inc.,
23 654 P.2d 972, 977 (Mont. 1982) (statute governing right to
24 interest allows interest only from date of judgment, as that is
25 date damages are capable of being made certain).

26 In sum, we conclude that the relevant Montana statutory and
27 case law does not support an award of interest when debtors
28 refused to take Steve's payments and on a contract that debtors

1 claimed did not exist. Accordingly, we find no error with the
2 bankruptcy court's decision not to award interest on the amount
3 owed by Steve to debtors.

4 **VI. CONCLUSION**

5 For the reasons stated, we AFFIRM.

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