NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-07-1465-KJuKu
CARSTEN VON BORSTEL,	Bk. No. 01-42235
Debtor.	Adv. No. 03-03523
JAMES J. O'HAGAN,	
Appellant,	
v.	**MEMORANDUM**[*]
THEODORE VON BORSTEL,	
Appellee.	

Argued and Submitted on June 18, 2008
at Seattle, Washington

Filed – July 11, 2008

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

Honorable Elizabeth L. Perris, Chief Bankruptcy Judge, Presiding

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Before: KLEIN, JURY and KURTZ,[**] Bankruptcy Judges.

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[*]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.

[**]Hon. Frank Kurtz, Chief Judge for the U.S. Bankruptcy Court for the Eastern District of Washington, sitting by designation.

This is an appeal from a judgment entered by the bankruptcy court after a three-phase trial in which the bankruptcy court rendered an accounting and dissolution of a partnership comprising of the debtor and the appellee. The appellant is the successor in interest to the chapter 7 trustee as a result of acquiring the estate's interest in the adversary proceeding. After conclusion of all three phases of trial, the bankruptcy court determined that the appellant was entitled to $29,920, as its share of the partnership, plus $156,750, which was one-half of the net equity in certain real property owned by the partnership, in addition to 9 percent prejudgment interest as compensation for the delay in the winding up of the partnership.

Although the appellant was represented by counsel during all phases of trial in which he received his share of the value of the partnership and partnership assets, the now-pro se appellant disputes specific findings of the court, accuses the court of preferential treatment and bias, requests sanctions against his former attorney for alleged negligence in conducting discovery, and contends that he is entitled to a jury trial.

We AFFIRM.

FACTS

DVB & Sons ("DVB"), a business partnership was formed in the mid-1970s when Donald von Borstel and one of his sons, debtor Carsten von Borstel, began jointly farming together. In 1979, appellee Theodore von Borstel and another von Borstel brother,

became partners with their father and the debtor.[1]

The debtor filed a chapter 7 petition on December 10, 2001. The case trustee, Michael A. Grassmeuck, Inc., filed an adversary proceeding on December 5, 2003 against the appellee seeking an accounting of the debtor's interest in and dissolution of the DVB partnership.

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[1]The following background facts are taken from the bankruptcy court's Ruling on Phase I of Trial, filed November 28, 2006.

After the appellee joined the partnership, DVB purchased 5,000 acres, commonly referred to as the Bakeoven property. DVB filed chapter 11 bankruptcy in the mid-1980s. In 1986, at the end of the chapter 11 bankruptcy, the debtor stopped actively farming, but continued as a partner.

In 1989, DVB filed chapter 12 bankruptcy and confirmed a plan in 1991 pursuant to which DVB sold all of its real and personal property, consisting of the Bakeoven property, a Sherman County property, and machinery, to Don Phillips on an installment contract. The plan was premised on the installment contract, pursuant to which Phillips was to pay DVB the amounts due to creditors under the plan and DVB was to use the Phillips payments to pay the creditors.

As part of the Phillips transaction, but not disclosed or discussed in the chapter 12 plan, Donald von Borstel deeded two parcels of property he owned individually to Phillips, property known as the Home Place and the Pausch Place. In 1997, Phillips deeded the Home Place and the Pausch Place to the appellee.

Although the appellant initially claimed that the conveyance of the Home Place and the Pausch Place to the appellee was a fraudulent conveyance, the appellant later stated in closing argument of Phase I of trial and as part of the revised pretrial order that the appellee owned the Home Place and the Pausch Place for the partnership, which was the true owner.

DVB continued to operate after confirmation of the chapter 12 plan through the lease back of property from Phillips, leasing of other property, and custom farming. Donald von Borstel retired from active farming in the mid-1990s, and the appellee remained the only active farmer in the DVB partnership.

According to DVB's tax returns, DVB continued some operations after the debtor filed bankruptcy and after the debtor's bankruptcy trustee filed the original complaint in this action.

The debtor's bankruptcy filing triggered dissolution of the partnership. However, rather than winding up the partnership, as required by state law, the appellee continued to operate DVB after the date that the debtor filed bankruptcy without regard to the dissolution.

Appellant James J. O'Hagan is the successor in interest to the trustee, having acquired the estate's interest in this litigation in exchange for $10,000 plus 15% of any net recovery.[2] The appellant hired Joseph A. Field as legal counsel. Although Field represented the appellant during all phases of trial on the adversary proceeding, the appellant brings this appeal pro se.

The appellant's complaint, as amended by the pretrial order lodged on November 16, 2006, sought an accounting and dissolution of DVB and avoidance of the alleged fraudulent conveyance of the personal property of DVB to the appellee.

Discovery proved complex and the bankruptcy court bifurcated the trial into a real property trial (Phase I) and a personal property trial (Phase II). A Phase III of trial occurred to value DVB's net equity in real property known as the Home Place. At the three trials, the bankruptcy court considered all of the submissions of the parties, the evidence received, and argument presented. Upon careful consideration, the bankruptcy court issued detailed written opinions containing findings on each of

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[2]Believing that he could recover additional DVB assets, the appellant objected to a settlement that the trustee had negotiated with the appellee and he subsequently purchased the trustee's interest in the case and certain other assets in February 2005. The appellant thereupon substituted in for the trustee in this adversary proceeding.

the three phases of the trial as follows: Phase I, November 28, 2006; Phase II, March 29, 2007; and Phase III, October 24, 2007.

After concluding during Phase I of the trial in November 2006 that the debtor had a 50 percent capital interest in DVB at the time he filed bankruptcy, the bankruptcy court found that DVB had no interest in real property, including no interest in the Home Place, the Pausch Place, the Bakeoven property, and the John Larsall property.

On December 14, 2006, the appellant filed a motion to reconsider the Phase I trial ruling that DVB did not own the Home Place, a 640-acre farm located in Sherman County, Oregon.

During Phase II of the trial in December 2006, after accounting for the assets of DVB, the court determined the amount to which the appellant, as successor in interest to the debtor's bankruptcy estate, was entitled upon dissolution of the partnership.

From evidence presented in Phase II, the court granted the appellant's motion to reconsider and found that DVB owned the Home Place. The court noted that a further evidentiary hearing (Phase III) would be set to determine the net equity of the Home Place as of December 10, 2001.

In addition to granting one-half of the net equity in the Home Place on December 10, 2001 to the appellant, the court determined that the appellant's share of the partnership was $29,920 plus 9 percent prejudgment interest as compensation for the delay in the winding up of the partnership.

After Phase III of trial in June 2007, the bankruptcy court concluded that the value of the Home Place, as of December 10,

2001, was $313,500, and that the appellant was entitled to one-half of that value ($156,750) plus 9 percent prejudgment interest.

Upon completion of all three phases of trial, the now-pro se appellant filed a motion to amend findings on Phase I, II, and III on November 23, 2007. Specifically, the appellant requested that the court reconsider its finding that DVB did not have an interest in the Bakeoven property, reconsider evidence of an allegedly fraudulent transfer of the Robert Larsall property (which he contends the court confused with an entirely different property known as the John Larsall property), and allow amendment of his complaint after another discovery period.

After reviewing the motion and its accompanying attachments, the court concluded that there was no cause to amend the findings and denied the appellant's motion.

Judgment encompassing all three phases of trial was entered on December 5, 2007.

The appellant timely appealed. The appellee did not file a brief and consequently waived his right to file a brief and to appear at oral argument, according to the conditional order of waiver entered by the BAP clerk on March 19, 2008.

Thus, we have only the pro se appellant's brief, which is difficult to follow. As listed in subsection I, entitled "Assignment of Error," it appears the appellant contends that the bankruptcy court erred in the following:

> 1) The Trial Court erred in engaging in an impartial [sic] trial that sacrificed justice for the protection of public officials and liabilities.
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> 2) The Trial Court erred in disallowing Plaintiff's

> Motion to Amend The [sic] Plaintiff's Complaint to include other parties and actions.
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> 3) The Trial court [sic] erred in it's [sic] finding that the Pauch [sic] Place was not an asset of DvB & Sons.
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> 4) The Trial Court erred in ordering the defendant Theodore von Borstel to produce the lease agreements but then failing to obtain the lease purchase option agreements on the Bake Oven [sic] Properties and the Robert Larcell Properties [sic]
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> 5) The Trial Court erred in it's [sic] finding to the argument that DvB & Sons had an interest in the Bake Oven [sic] property with Don Phillips was frivolous at best.
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> 6) The trial court erred in the amount of crop subsidy payments it found were an asset of DvB & Sons.
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> 7) The Trial Court erred in not sanctioning the Appellant's attorney Joe Field for failing to conduct a reasonable discovery related to the defendant real properties, engaging in obstructing justice and delays.
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> 8) The Trial Court erred in not requiring that an independent jury decide the factual issues related to DvB & Sons alleged ownership in the 17,000 acres of real property.

Appellant's Br. at 4.

Moreover, in subsection VI of the appellant's brief, entitled "Request for Relief," not only does the appellant request that the Panel overrule the bankruptcy court's decision to disallow the appellant's amended complaint and its finding on the Bakeoven property, the appellant also requests that the Panel find that "all of the properties of DvB's were involved in frauds associated with their 1990' [sic] bankruptcy" and requests that the Panel address the negligence allegations of his former attorney, Field. Appellant's Br. at 21. Furthermore, the appellant states he plans to subpoena certain witnesses to testify at the hearing.

JURISDICTION

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

ISSUES

The list of assigned errors advanced by the pro se appellant may be distilled to the following:

(1) Whether the bankruptcy court erred in its findings of fact and conclusions of law rendered after the three-phase trial.

(2) Whether the bankruptcy court erred in denying the appellant's motion to amend the findings after conclusion of the three-phase trial.

(3) Whether the appellant can properly raise allegations against and request sanctions against his former attorney, Joseph Field, for the first time before the Panel.

(4) Whether the appellant has a right to a jury trial on the factual issue regarding ownership interests of DVB & Sons.

STANDARD OF REVIEW

We review findings of fact for clear error. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007). A factual determination is clearly erroneous if the appellate court, after reviewing the record, has a definite and firm conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

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DISCUSSION

Over the course of six months, the bankruptcy court held three phases of trial, ultimately calculating the amounts to which the appellant was entitled upon dissolution of the DVB partnership. The court determined that the appellant was entitled to $29,920, as its share of the partnership, plus $156,750, which was one-half of the net equity in the Home Place, in addition to 9 percent prejudgment interest as compensation for the delay in the winding up of the partnership. Upon careful consideration of all submissions of the parties, evidence received, and argument presented at trial, the court issued detailed written opinions encompassing its findings of fact and conclusions of law on each of the three phases of trial.

Although the appellant received his share of the value of the partnership and partnership assets after a trial on the merits conducted in bankruptcy court, the appellant uses his brief not only to dispute the specific findings of the bankruptcy court (with additional evidence and request to call forth witnesses as if the appellate court would be conducting another trial), but he also uses his brief to accuse the bankruptcy court of preferential treatment and bias. In addition, the appellant requests that the Panel sanction his former attorney for alleged misconduct in conducting discovery and he contends that he is entitled to a jury trial.

While we note at the outset that the Panel is an appellate court empowered only with jurisdiction to review the decision of the trial court and not conduct a trial anew, we nevertheless address each grievance in turn.

I

Contending that the trial court was biased, the appellant disputes the court's findings. Specifically, the appellant contends that the court erred in its finding that the Pausch Place and the Bakeoven property were not assets of the DVB partnership, that it erred in the evidence it ordered produced regarding the Bakeoven property and the Robert Larsall property, and that it erred in the amount of crop subsidy payments it concluded were an asset of the DVB partnership.

Generally speaking, we construe a pro se appellate brief liberally even when it is difficult to ascertain the appellant's contentions. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). Thus, we assess the arguments as sympathetically as possible.

Nevertheless, the standard of review applied to findings of fact made by the trial court is clear error.

Federal Rule of Civil Procedure 52(a) specifies that findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a), incorporated by Fed. R. Bankr. P. 7052.

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

This standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have decided the case differently. The reviewing court oversteps the

bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. Anderson, 470 U.S. at 573.

During Phase I of the trial, the court examined the evidence provided by both of the parties regarding the disputed assets of DVB and it considered the argument and testimony presented at trial in reaching its conclusion that the Pausch Place and the Bakeoven property were not assets of DVB. Furthermore, during Phase II of trial, the court again reviewed the evidence submitted and the arguments presented in determining the amount of crop subsidy payments that were an asset of DVB.

The appellant is essentially requesting that we decide the factual issues de novo. That we cannot do.

Review of factual findings under the clearly erroneous standard with deference to the trier of fact is the rule, not the exception. Anderson, 470 U.S. at 575.

Regardless of whether we would have weighed the evidence differently, if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it. Anderson, 470 U.S. at 573-74. If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Anderson, 470 U.S. at 573-75; Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007).

We are not a factfinding court. The trial court, as the trier of fact, is best equipped to make factual determinations, to which we are obliged to defer.

The court entered thorough findings of fact and conclusions of law after every phase of trial. The appellant has not

provided trial transcripts that would enable precise review of all testimony nor did he submit as part of the record on appeal the exhibits admitted at trial. An appellant has the burden of providing an adequate record. See Drysdale v. Educ. Credit Mgmt. Corp. (In re Drysdale), 248 B.R. 386, 388 (9th Cir. BAP 2000). This requirement is mandatory and failure to comply may result in dismissal or in the appellate panel simply looking "for any plausible basis upon which the bankruptcy court might have exercised its discretion to do what it did." McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999).

Here, we have conscientiously reviewed the record that has been provided and cannot say that the trial court's careful and detailed findings of fact were clearly erroneous. We do not have a definite and firm conviction that a mistake has been committed. Hence, we perceive no clear error.

Accordingly, we do not disturb the judgment based on clearly erroneous factual findings determined after each phase of trial.

II

The appellant further contends that the court erred in denying his motion to amend the detailed written findings that were made after each of the three phases of trial.

Thus, for the reasons previously stated, we do not perceive clear error in the factual determinations. We are not definitely and firmly convinced that a mistake has been committed. It follows that the bankruptcy court did not err in denying the appellant's motion to amend the findings.

III

The appellant next contends that his former attorney Fields, who represented the appellant during all three phases of trial before the court, was negligent in his conduct of discovery and thereby requests that he be sanctioned.

Fields represented the appellant before the bankruptcy court after gathering the evidence necessary for the accounting action. As a result of the three-part trial, he ultimately secured the appellant's share of the value of the DVB partnership and partnership assets.

The appellant argues in his brief that not only did Fields improperly conduct the discovery related to the various real property holdings, but also that the court, the trustees in this case and a closely related case, and Fields have a suspiciously close relationship.

Generally, we do not consider an issue raised for the first time on appeal. Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994). The appellant's argument was never presented to the bankruptcy court.

As an appellate court, we review orders or judgments rendered by the bankruptcy court presented to us on appeal. The appellant's allegation of misconduct against his former attorney does not result from an order or judgment on this issue from the bankruptcy court.

The findings of fact indicate that Fields represented the appellant in securing his share of the partnership and partnership assets after a full trial on the merits. The bankruptcy court entered a judgment regarding the accounting

action, by which the appellant is to receive the amount to which he is entitled. We cannot say that the bankruptcy court was clearly erroneous in its judgment.

As to the assertions regarding misconduct, nothing in the record suggests that there was misconduct. Moreover, an appeal is not the correct forum for raising grievances. To the extent that appellant thinks that there has been inappropriate conduct by members of the Oregon State Bar in the manner in which they prepared and conducted the trial, he is entitled to raise those matters with the state bar.

IV

The appellant finally contends that the court erred by not requiring that an independent jury decide the factual issues related to the ownership interests of DVB. The appellant provides no reasoning in support of this argument other than stating this as an issue under the subsection "Assignment of Error" in his opening brief.

We do not agree that there was a jury trial right in this case. The act of the debtor filing the chapter 7 case invokes the equitable jurisdiction of the bankruptcy court, in which the Seventh Amendment right to jury trial generally does not apply. See Hickman v. Hana, 384 B.R. 832, 839 (9th Cir. BAP 2008)(act of filing chapter 7 case invokes bankruptcy court's equitable jurisdiction, in which the debtor has no right to trial by jury on such matters integral to restructuring debtor-creditor relations); see also Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (creditors who filed claims against debtor's bankruptcy estate

invoked the bankruptcy court's equitable jurisdiction and thereby, had no right to jury trial). Furthermore, all property of the debtor and property of the estate passes into the exclusive jurisdiction of the court. 28 U.S.C. § 1334(e).

In this case, the appellant is the successor in interest to the chapter 7 trustee, who held the estate's interest in the litigation resulting from the dissolution of the partnership. As such, the division of assets of the partnership is within the jurisdiction of the bankruptcy court to determine, with no right to a jury trial.

Thus, the appellant has subjected himself to the bankruptcy court's equitable jurisdiction and has no right to a jury trial regarding the ownership interests of the partnership.

Finally, even assuming there may have been a right to trial by jury, it does not appear that a jury trial was timely demanded.

CONCLUSION

We hold that the bankruptcy court did not err in the findings of fact and conclusions of law rendered after the three-phase trial, based upon the evidence provided by both parties and upon argument and testimony presented at trial.

We further hold that the bankruptcy court did not err in denying the appellant's motion to amend the findings.

Also, we conclude that the appellant does not have a right to a jury trial on the factual issues regarding ownership interests in the DVB partnership.

Finally, we do not rule on whether the appellant's former attorney, Fields, was negligent in conducting discovery.

We AFFIRM.