NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-09-1282-MkHMo
BENZION ERREZ,	Bk. No. 09-13325-SJS
Debtor.	
BENZION ERREZ,	
Appellant,	
v.	**MEMORANDUM**[*]
NANCY L. JAMES, Chapter 7 Trustee; AUBURN ACE HOLDINGS, LLC; TRH LENDERS, LLC,	
Appellees.	

Argued And Submitted On February 19, 2010
at Seattle, Washington

Filed – March 24, 2010

Appeal From The United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Before: MARKELL, HOLLOWELL and MONTALI, 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.

INTRODUCTION

This is an appeal from an order disallowing the homestead exemption claim of debtor and appellant Benzion Errez ("Errez") in certain real property located in Okanogan County, Washington (the "Okanogan Property"). The bankruptcy court concluded that Errez had not satisfied the requirements under Washington law for a homestead exemption in the Okanogan Property. We agree and, therefore, AFFIRM the bankruptcy court's order.

FACTS

The key facts are undisputed. From 2001 to 2008, Errez lived in a house in Sammamish, Washington (a suburb of Seattle). In May, 2008, Errez lost his Sammamish home to foreclosure, and thereafter moved into an apartment in Seattle, where he continues to reside. At no point has Errez occupied the Okanogan Property as his residence.

Errez filed his chapter 7 bankruptcy petition on April 7, 2009.[1] In his bankruptcy schedules, filed shortly thereafter, Errez listed the Okanogan Property as a "cabin + 50 acres" and claimed a homestead exemption therein under Washington law. Errez's exemption claim was founded upon Washington's homestead exemption statute, RCW 6.13.070, which exempts from attachment, execution and forced sale real or personal property

[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

that qualifies as the debtor's homestead as specified in RCW 6.13.010[2] and 6.13.040.[3]

Two parties filed objections to Errez's homestead exemption claim within thirty days of the May 19, 2009, § 341(a) meeting of

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[2]RCW 6.13.010(1) provides, in relevant part:

> (1) The homestead consists of real or personal property that the owner uses as a residence. In the case of a dwelling house or mobile home, the homestead consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated and by which the same are surrounded, or improved or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. . . . Property included in the homestead must be actually intended or used as the principal home for the owner.

[3]RCW 6.13.040 provides, in relevant part:

> (1) Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner or, if the homestead is unimproved or improved land that is not yet occupied as a homestead, from and after the declaration or declarations required by the following subsections are filed for record . . . .
>
> (2) An owner who selects a homestead from unimproved or improved land that is not yet occupied as a homestead must execute a declaration of homestead and file the same for record in the office of the recording officer in the county in which the land is located . . . .
>
> (3) The declaration of homestead must contain:
>
> (a) A statement that the person making it is residing on the premises or intends to reside thereon and claims them as a homestead; . . . .

creditors in Errez's bankruptcy case: (1) the chapter 7 trustee Nancy James ("Trustee") filed an objection on June 16, 2009, and (2) Auburn Ace Holdings, LLC ("Auburn") filed a separate objection on June 18, 2009.[4] Among other things, Auburn is a judgment creditor of Errez's. In their objections, and in subsequent filings made in support of their objections, the Trustee and Auburn asserted that the Okanogan Property did not qualify as Errez's homestead, because he did not reside at the Okanogan Property, he had not filed a declaration of homestead, and he did not intend to reside at the Okanogan Property. According to the Trustee and Auburn, Errez's true intent was to sell the Okanogan Property, as suggested by listings that Errez had posted for the sale of the Okanogan Property.

In response, Errez admitted that he had posted listings for the sale of the Okanogan Property. However, Errez claimed that the sale listings were not really meant to solicit potential buyers for the Okanogan Property; rather, according to Errez, he posted the sale listings because he wanted to find a caretaker for the Okanogan Property. According to Errez, the best way he could find to look for a caretaker was to post spurious sale listings. Errez represented that he truly intended to reside at the Okanogan Property eventually, but that he currently could not do so because of a joint custody arrangement concerning his minor

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[4]In August 2009, another party by the name of Theresa Heacock belatedly joined in objecting to Errez's homestead exemption claim. Ms. Heacock's joinder and accompanying declaration added nothing material to the bankruptcy court proceedings, nor are they material to our analysis.

son that necessitated Errez living in or near Seattle, and the Okanogan Property was simply too remote (a five-hour drive) from Seattle. According to Errez, once his son reached an age where he could take care of himself, Errez intended to move his residence from Seattle to the Okanogan Property.[5]

Errez recited the following list of alleged actions as manifestations of his intent to eventually make the Okanogan Property his residence:

> a. I designed and built a house on the Property;
> b. I installed a private sewer and dug a well (420 feet deep) as its water source;
> c. I obtained a Construction Permit and Certificate of Occupancy for the Property;
> d. I installed solar panels and a wind generator as the power source for the Property;
> e. I fenced the Property;
> f. I planted a vineyard to mature and be ready for wine production as my source of income by the time I am ready to move in;
> g. I installed a significant driveway; and
> h. I am current on the payment of my taxes on the Property.

July 31, 2009, Declaration of Benzion Errez at para. 17.

Errez further argued that the objections filed were either untimely, invalid, or both. At the August 14, 2009, hearing on the objections, the bankruptcy court did not explicitly address Errez's arguments regarding the timeliness and validity of the objections, but the court must have implicitly rejected those arguments because it ultimately sustained the objections and disallowed Errez's homestead exemption claim. The court offered the following explanation for its ruling:

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[5]Errez's opening brief on appeal indicates that Errez's son currently is eleven years old.

> As I understand it, on the Washington State Homestead Exemption, there are a couple of key factors which have to be considered. First, as I understand it, the statute requires that in order to have a valid homestead in unoccupied land, not only do you have to have an intent to reside there permanently, but you have to file this homestead declaration. The homestead declaration in this case was never filed up to the time of filing.
>
> Now, beyond that, the debtor had this property for sale, which in my mind, negates any intent to live there permanently. I think this bit about having it for sale in order to get a caretaker is so ridiculous as to be unbelievable.
>
> In short, the declaration wasn't filed. The property was for sale. There's no intent to live there permanently. And the objection will be sustained.

August 14, 2009, Hearing Transcript at pp. 9-10.

On August 19, 2009, the bankruptcy court entered its order denying Errez's claimed homestead exemption, and Errez timely appealed, on Monday, August 31, 2009.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err when it disallowed Errez's homestead exemption claim?

STANDARDS OF REVIEW

The scope of a statutory exemption is a question of law subject to de novo review. Gonzalez v. Davis (In re Davis), 323 B.R. 732, 734 (9th Cir. BAP 2005); Kelley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003). The construction and application of Rule 4003(b), which governs

procedure for objecting to exemption claims, also is a question of law reviewed de novo. Spenler v. Siegel (In re Spenler), 212 B.R. 625, 628 (9th Cir. BAP 1997).

A debtor's intent to reside on property, for purposes of determining the validity of a homestead exemption claim, is a factual issue which we review under the clearly erroneous standard. In re Kelley, 300 B.R. at 16. A factual finding is clearly erroneous, when there is evidence to support it, only if we have a definite and firm conviction that a mistake has been committed. Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001)(quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)). Alternately stated, we must affirm the bankruptcy court's findings of fact unless those findings are "illogical, implausible, or without support in inferences that may be drawn from the record." U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009).

DISCUSSION

Since Errez claimed his homestead exemption under state law, state law governs the validity of his exemption claim. In re Kelley, 300 B.R. at 16; Arkison v. Gitts (In re Gitts), 116 B.R. 174, 178 (9th Cir. BAP 1990), aff'd, 927 F.2d 1109 (9th Cir. 1991). "[U]nder Washington law . . . 'a declaration of homestead is a right or privilege given a property owner by statute, so that its validity depends upon compliance with the statutory requirements and only by such compliance does the homestead come into existence.'" Wilson v. Arkison

(In re Wilson), 341 B.R. 21, 27 (9th Cir. BAP 2006) (quoting Bank of Anacortes v. Cook, 10 Wash.App. 391, 395, 517 P.2d 633, 636 (1974)). See also United States Fidelity & Guar. Co. v. Alloway, 173 Wash. 404, 406, 23 P.2d 408, 409 (1933).

In Washington, a property owner can establish a homestead exemption in his property in one of two different ways. A homestead subject to exemption is automatically created "from and after the time the property is occupied as a principal residence by the owner." In re Gitts, 116 B.R. at 178 (quoting RCW 6.13.040(1)). Alternatively, the owner may establish a homestead for exemption purposes by declaration. In re Wilson, 341 B.R. at 26. In relevant part, to declare a homestead in property he or she does not occupy as his or her residence, the owner must: (1) intend in the future to reside at the property; and (2) record a declaration of homestead. Id. (citing In re Gitts, 116 B.R. 178).

In this case, Errez admitted that the Okanogan Property was not his residence. Thus, the only potential means by which he could have established the Okanogan Property as his homestead was by declaration. However, Errez also admitted that he had not recorded a homestead declaration. This by itself is fatal to Errez's homestead exemption claim.

In his response to the exemption objections, and in his appeal briefs, Errez expressed an intention to record a homestead declaration in the future. Ordinarily, a debtor's entitlement to an exemption is determined based on facts as they existed at the

time of the bankruptcy filing, and subsequent changes to those facts typically are irrelevant for exemption determination purposes. See Hopkins v. Cerchione (In re Cerchione), 414 B.R. 540, 548 (9th Cir. BAP 2009). Errez apparently takes comfort in In re Gitts, which held that debtors who recorded their Washington homestead declarations after the date of their bankruptcy filing had a valid exemption enforceable against the bankruptcy trustee. Washington law recognizes declared homestead exemptions as effective against judgment lienholders if the declaration is recorded at any time prior to execution on the judgment lien or other forced sale. See In re Gitts, 116 B.R. at 178-80. According to In re Gitts, since bankruptcy trustees enjoy no greater rights to a debtor's property than a judgment lienholder who has not completed a sale, the bankruptcy trustee's interest in the debtor's property is subject to a declared homestead exemption under Washington law even if the homestead declaration is recorded after the bankruptcy is filed. Id.

Assuming that In re Gitts correctly applied federal law regarding when and how a debtor's state exemption rights are determined, there are two key distinctions between the facts presented in In re Gitts and the facts presented here. First, Errez's expressed intention does not change the undisputed fact that, at the time the bankruptcy court ruled upon his homestead exemption claim, Errez had not recorded a homestead declaration. By contrast, in In re Gitts, the debtors recorded the requisite homestead declarations between the date of the bankruptcy filing

and the date of the bankruptcy court's ruling on the exemptions. See Id. at 175-76. The holding in In re Gitts simply does not confer upon Errez a Washington homestead exemption by his merely expressing an intent to record a homestead declaration sometime in the future, without actually recording the declaration. To conclude otherwise would significantly alter Washington homestead exemption law, by allowing debtors in bankruptcy to establish Washington homestead exemptions by expression of an intent to record homestead declarations, rather than by actually recording the requisite declarations as prescribed in RCW 6.13.040.[6]

There is a second, independent reason why the holding in In re Gitts does not apply here. In re Gitts relies in part on the fact that the debtors therein had a right under Washington law, as of the date of the bankruptcy filing, to record a

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[6]The requirements of appellate procedure bolster our analysis. The undisputed fact that Errez had not recorded a homestead declaration by the time of the bankruptcy court's ruling controls the outcome of this appeal; we can not consider a different set of facts from those that were before the bankruptcy court. See Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001) ("[e]vidence that was not before the lower court will not generally be considered on appeal"); Kirschner v. Uniden Corp of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988) (papers not filed or admitted into evidence by trial court prior to judgment on appeal were not part of the record on appeal and thus stricken; appellate court would not consider issues which were not supported by record on appeal). As noted by the Ninth Circuit in Kirschner, "'We are here concerned only with the record before the trial judge when his decision was made.'" Kirschner, 842 F.2d at 1077 (quoting United States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979)). In short, even if Errez had recorded a homestead declaration the day after the bankruptcy court's ruling, and even if he had presented to us evidence of that recordation, we could not consider it.

homestead declaration and establish a declared homestead. That right, in turn, was based on evidence before the court that the court concluded was sufficient to establish the requisite intent of the debtors to make their declared homestead their future residence. See In re Gitts, 116 B.R. at 180 (noting that the debtors there took steps prior to their bankruptcy filing sufficient to manifest their declared intent to reside at the subject property). In this case, by contrast, the bankruptcy court found that Errez did not have the requisite intent to make the Okanogan Property his future residence. According to the bankruptcy court, Errez intended to sell the Okanogan Property, rather than reside there. In making its finding regarding intent, the bankruptcy court principally relied on the undisputed fact that Errez had listed the Okanogan Property for sale. Further, the bankruptcy court did not believe Errez's representation that he posted the sales listings merely to locate a caretaker. The bankruptcy court stated: "I think this bit about having it for sale in order to get a caretaker is so ridiculous as to be unbelievable." August 14, 2009, Hearing Transcript at p. 10.

Thus, the holding in In re Gitts can not be applied here; unlike the debtors in In re Gitts, Errez had no right as of the date of his bankruptcy filing to record a homestead declaration because he had no intent to make the Okanogan Property his residence. Under Washington law, homestead declarations must be made in good faith, which in relevant part means that the

declaration must accurately reflect the owner's true intent to reside at the subject property. See In re Wilson, 341 B.R. at 26-27 (citing Heck v. Kaiser Gypsum Co., 56 Wash.2d 212, 214, 351 P.2d 1035, 1036 (1960); Clark v. Davis, 37 Wash.2d 850, 856-57, 226 P.2d 904, 908 (1951); Cook, 10 Wash.App. at 395, 517 P.2d at 636). Here, the bankruptcy court found that Errez did not truly intend to reside in the future at the Okanogan Property. Thus, Errez could not in good faith have recorded a homestead declaration under Washington law.

On appeal, Errez has challenged the bankruptcy court's findings concerning his intent. According to Errez, the objecting parties did not successfully refute his allegations regarding intent. We disagree. It is true that the objecting parties bore the burden of proof, and the ultimate burden of persuasion, regarding the validity of Errez's exemption claim. See Rule 4003(c); In re Cerchione, 414 B.R. at 548; In re Kelley, 300 B.R. at 16-17. The objecting parties needed to come forward with evidence sufficient "to rebut the presumptively valid exemption." In re Kelley, 300 B.R. at 16 (citing Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 (9th Cir. 1999)). The objecting parties did come forward with evidence regarding Errez's intent, in the form of the sales listings, which Errez ultimately acknowledged. Having produced this and other evidence, the bankruptcy court found that the objecting parties had met their initial burden of production. At that point, as stated in In re Kelley, the burden of production then shifted to

Errez "to come forward with unequivocal evidence to demonstrate that the exemption [was] proper." Id. (emphasis added, again citing Carter).

The bankruptcy court determined that Errez did not come forward with unequivocal evidence demonstrating his intent to reside at the Okanogan Property. We agree. Errez's list of actions that he allegedly took to maintain and/or to improve the Okanogan Property are equally consistent with either an intent to sell or an intent to reside. His alleged actions do little or nothing to counter the impression regarding his intent that arises from his posting of the sales listings.

In sum, we perceive no reversible error in the bankruptcy court's findings regarding Errez's intent. The bankruptcty court's findings were not clearly erroneous. Based on the record on appeal, we can not say that we have been left with a definite and firm conviction that a mistake has been committed. See In re Banks, 263 F.3d at 869. Nor can we say that the bankruptcy court's findings were "illogical, implausible, or without support in inferences that may be drawn from the record." Hinkson, 585 F.3d at 1263.

Errez also argues that the objections filed were either untimely, invalid, or both. According to Errez, the Trustee's objection was untimely. Errez contends that an exemption objection must be filed within sixty days of the bankruptcy filing. This simply is incorrect. In order to be considered timely and valid, objections generally must be filed within

thirty days of the conclusion of the § 341(a) meeting of creditors. Rule 4003(b); In re Spenler, 212 B.R. at 629 (citing Taylor v. Freeland & Kronz, 503 U.S. 638, 643 (1992)). Absent a timely, valid objection, a debtor's exemption claims ordinarily are deemed allowed. Id. The record here establishes that the § 341(a) meeting of creditors in Errez's bankruptcy case was concluded on May 19, 2009, and that the Trustee filed her initial objection to Errez's homestead exemption claim on June 16, 2009, within the thirty-day limitation period set forth in Rule 4003(b).

Nor is there any doubt regarding the sufficiency of the Trustee's initial objection. The initial objection specified in relevant part:

> 1. The Debtor has claimed a homestead exemption in real property and a cabin held for vacation property in Eastern Washington. It is unclear whether or not this property qualifies as homestead property and therefore, the Trustee objects to the same.
>
> * * *
>
> The Trustee is objecting, in part, to preserve her rights to object pending receipt of more information about the Debtors' [sic] assets. She is also objecting in part to preserve any equity the estate may have in property that is subject to the Debtors' [sic] exemption. The Trustee reserves the right to assert any other basis for her objection or otherwise amend this objection as she may determine to be appropriate at a later date.

June 16, 2009, Trustee's Objection To Claimed Exemptions at pp. 1-2.

We are convinced that the trustee's initial objection was timely and sufficient under Rule 4003(b). As noted in

In re Spenler, unlike many other types of filings governed by the Federal Rules of Bankruptcy Procedure, Rule 4003(b) sets out no specific requirements as to the form of exemption objections. Id. at 630. Further, the principal purpose of the exemption objection is to put the debtor on notice that his or her exemption claim has drawn an objection. Id. It is beyond cavil that the Trustee's initial objection, here, was sufficient to put Errez on notice that his homestead exemption claim was the subject of an objection.[7]

Errez asserts that Auburn's exemption objection was invalid because the attorneys who filed the objection on Auburn's behalf were, according to him, not properly retained by Auburn in compliance with Auburn's operating agreement. Errez claims that

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[7]The Trustee's initial objection apparently did not comply with Western District of Washington Local Bankruptcy Rule 9013-1 ("Local Rule 9013-1"), which on its face seems to cover exemption objections. See Local Rule 9013-1(a) ("As used herein, the term "motion" includes any motion, application, objection, or other request for an order or determination of the court . . . ."). Pursuant to Local Rule 9013-1(d), all motions are supposed to be accompanied by a memorandum of points and authorities and all of the evidence to be offered to support the motion. The Trustee's initial objection was not accompanied by these items; rather, the evidence and legal argument were submitted later. (In large part, the Trustee relied upon and adopted the evidence offered and legal arguments made by Auburn.) However, Errez never raised the issue of the Trustee's non-compliance with Local Rule 9013-1, and the bankruptcy court did not raise it sua sponte. We will not address this issue because it was not raised during the bankruptcy court proceedings. See Moldo v. Matsco, Inc. (In re Cybernetic Services, Inc.), 252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (declining to consider ramifications of new argument, and deeming argument waived, when argument was raised for the first time on appeal).

the appointment of one of Auburn's attorneys (Dean Von Kallenbach) required the approval of a majority of Auburn's members pursuant to section 7.1 of Auburn's operating agreement because his fees likely have exceeded $100,000. As for Auburn's other attorney (Christine Tobin), Errez contends that her appointment was invalid because Auburn's board of directors attempted to appoint her at an improperly-held board meeting on April 21, 2008.[8] We note that the bankruptcy court, and the district court on appeal, rejected similar arguments that Errez made in support of his motion to dismiss Auburn's April 2008 bankruptcy filing, and in support of his appeal of the order denying that motion. See In re Auburn Ace Holdings, LLC, Case No. C08-1242RAJ (W.D. Wash. September 23, 2009).

In any event, we need not determine the validity of Auburn's exemption objection. The bankruptcy court did not address this

[8]Errez's arguments challenging Auburn's objection arise from the ownership structure and governance of Auburn. As reflected in the record, Plan B Development, LLC ("Plan B") held 50% of Auburn's membership interests and Third Century, LLC ("Third Century") held the other 50%. In turn, Plan B was owned and controlled by Errez, and Third Century was owned and controlled by Pat and Jan Cavanaugh. Initially, both Plan B and Third Century designated two directors each to Auburn's board of directors. Third Century's two designated directors were the Cavanaugh's, and Plan B's were Errez and a man by the name of Martin Loesch. Apparently, Mr. Loesch resigned from Auburn's board of directors, thereby leaving Auburn with only three directors. Because the Cavanaugh's, by themselves, constituted a majority of Auburn's board, Errez's arguments regarding the retention of Dean Von Kallenbach and the convening of the April 21, 2008 board meeting hinge on Errez's claim that these two actions required the affirmative vote of a majority of Auburn's members rather than a majority of Auburn's directors.

issue, and the bankruptcy court did not commit reversible error by not doing so. The validity of Auburn's objection is irrelevant because the Trustee timely filed an objection, as set forth above. That the Trustee also later joined in Auburn's objection does not alter the controlling fact that the Trustee timely filed her own objection in compliance with Rule 4003(b).[9]

CONCLUSION

For all of the reasons set forth above, the bankruptcy court's order disallowing Errez's homestead exemption claim is AFFIRMED.

[9]On March 2, 2010, Errez filed a motion asking us to rule, separate from our decision in this appeal, whether the meeting of Auburn's board held on April 21, 2008, was valid. For the reasons stated immediately above, it is not necessary for us to reach that issue. Accordingly, Errez's motion for a separate ruling is hereby ORDERED DENIED.