

MAR 17 2010

SUSAN M SPRAY, CLERK
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NOT FOR PUBLICATION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-09-1275-DJuPa
)	
JAMES P. PULITO,)	
)	Bk. No. 05-13557-CGC
Debtor.)	
_____)	
LISA WARD,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
JAMES P. PULITO,)	
)	
Appellee.)	
_____)	

Argued and Submitted on February 17, 2010
at Tucson, Arizona

Filed - March 17, 2010

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

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Before: DUNN, PAPPAS, and JURY, Bankruptcy Judges

¹ 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 The relationship between Ms. Ward and Mr. Pulito continued
2 on and off until 1999 at which time they began to see each other
3 regularly. Ultimately, they became engaged on July 7, 2000, and
4 Mr. Pulito began residing in Ms. Ward's home. In September 2000,
5 Mr. Pulito moved out. In December 2001, Ms. Ward began a
6 relationship with someone else, which continued through late
7 July 2002.

8 2. Legal services provided to Ms. Ward

9 In 1999 Mr. Pulito began representing Ms. Ward regarding
10 post-decree support matters in the Curtis Proceedings, including
11 an action to modify Mr. Curtis' spousal support obligation to
12 Ms. Ward. Despite the breakdown in their personal relationship
13 in September 2000, Mr. Pulito continued as Ms. Ward's attorney in
14 the Curtis Proceedings, and in January 2001, Mr. Pulito
15 represented Ms. Ward in an arbitration ("Arbitration") in the
16 Curtis Proceedings. Ms. Ward was not satisfied with Mr. Pulito's
17 representation or the result of the Arbitration.

18 Ms. Ward characterized her relationship with Mr. Pulito
19 after the Arbitration as "strained." Nevertheless, Mr. Pulito
20 continued as Ms. Ward's counsel of record in post-decree matters
21 in the Curtis Proceedings until 2004. He also provided other
22 limited legal services to Ms. Ward.

23 3. The Guenther legal disputes

24 Mr. Pulito had a long-term personal relationship with
25 Christine Guenther and her brother (the "Guenthers"). Throughout
26 that relationship, Mr. Pulito performed occasional legal services
27 for the Guenthers. As relevant to the dispute in this appeal,
28 the Guenthers requested that Mr. Pulito initiate a lease

1 collection action on their behalf. Although Mr. Pulito never
2 acted on the request, he represented to the Guenthers that the
3 collection action had been commenced and gave occasional
4 "updates" about its status. Sometime in 2002, Mr. Pulito
5 confessed to the Guenthers that he had not been truthful with
6 them about the status of the collection action and that it had
7 never been filed. Almost immediately, the Guenthers filed both
8 civil litigation (based on malpractice, fraud, and breach of
9 contract) and a complaint with the Arizona State Bar against him.

10 4. The Ward-Pulito renewed relationship

11 In mid-2002, Mr. Pulito contacted Ms. Ward by e-mail to ask
12 how she was doing. In her reply, she updated Mr. Pulito on her
13 health issues and discussed the difficulty she was having in
14 getting accommodations she believed she was entitled to under the
15 Americans with Disabilities Act ("ADA") as the result of
16 increasing incapacity from a progressive form of a neuromuscular
17 atrophy. Mr. Pulito began assisting Ms. Ward in her efforts with
18 respect to her ADA claims. Ultimately, the parties renewed their
19 personal relationship: they became engaged in late August 2002,
20 and were married October 11, 2002. Ms. Ward ultimately became
21 fully disabled and stopped working in December 2003.

22 The marriage between Ms. Ward and Mr. Pulito effectively
23 ended in May 2004. On January 21, 2005, Ms. Ward and Mr. Pulito
24 executed a Consent Decree which terminated their marriage.
25 Incorporated into the Consent Decree was an agreement
26 ("Dissolution Agreement"), signed by Ms. Ward and Mr. Pulito, in
27 which they expressly retained claims against one another. The
28 claims Ms. Ward retained against Mr. Pulito through the

1 Dissolution Agreement included liability on a promissory note
2 ("Promissory Note") dated July 2, 2002, in the amount of
3 \$400,000. She also retained other claims ("Additional Retained
4 Claims") against Mr. Pulito for:

- 5 • liability under an agreement dated July 23, 2002 to
6 compensate Ms. Ward's children regarding a loss of
7 stock earnings
- 8 • liability resulting from negligence, legal malpractice
9 or breach of fiduciary duty, all in connection with
10 Mr. Pulito's "assistance" to Ms. Ward in the Curtis
11 Proceedings
- 12 • liability "resulting from the information provided in
13 the FAFSA Forms."

14 5. The bankruptcy case

15 On July 27, 2005, Mr. Pulito filed a voluntary bankruptcy
16 petition to prevent a sheriff's sale of his real property by the
17 Guenthers. On December 6, 2005, Ms. Ward filed an unsecured
18 claim in the amount of \$400,000 in the bankruptcy case, asserting
19 that the claim was based on the Promissory Note. The chapter 7
20 trustee objected to the claim. Ultimately, Mr. Pulito was
21 substituted as a party in interest and prosecuted the objection
22 in place of the trustee.

23 B. The Promissory Note

24 The parties presented very different versions of the facts
25 with respect to the Promissory Note. As stated by the bankruptcy
26 court, "It is undisputed that Ms. Ward possesses the [Promissory]
27 Note; it is signed by [Mr. Pulito]; and it is in the amount of
28 \$400,000. The parties agree on little else regarding the
[Promissory] Note." Under Advisement Decision re Lisa Ward Note
Claim ("Decision"), at 3:9-11.

1 Ms. Ward asserts that the Promissory Note was delivered in a
2 sealed envelope to her office sometime between July 1 and July 3
3 in 2002 and was brought to her attention by a co-worker. She
4 testified that, in addition to the Promissory Note, several other
5 documents were included in the envelope:

- 6 1. An "Apology" dated June 28, 2002, signed by Mr. Pulito,
7 which expresses a desire to make amends for earlier
8 actions and acknowledges that Mr. Pulito owes "for
9 [his] actions and [is] attempting to pay."
- 10 2. A map of property Mr. Pulito owned in Cave Creek,
11 property he wanted to protect from the claims brought
12 by the Guenthers.
- 13 3. A "Written Assurance" dated July 2, 2002 and signed by
14 Mr. Pulito, in which he acknowledges Ms. Ward's
15 deteriorating physical condition, offers to provide a
16 financial safety net for her family, and acknowledges
17 Ms. Ward's lack of trust of his promises based on his
18 past actions. The Written Assurance discloses the
19 Guenthers' claims against him, admits his liability on
20 those claims and expresses his concern about avoiding a
21 claim against Ms. Ward for a fraudulent transfer. He
22 explains that he considered preparing documentation to
23 detail claims Ms. Ward has against him, including a
24 lawyer's demand letter addressed to himself and an
25 acknowledgment of liability to Ms. Ward. The Written
26 Assurance states that the Promissory Note was provided
27 until a "workable game plan is in place and final
28 documentation prepared and executed."
4. An unsigned draft document, which (a) lists potential
claims against Mr. Pulito from fraud in the inducement
to breach of a promise to marry, and (b) lists damages
based on losses from monetary decisions, mental pain
and suffering, aggravation of preexisting condition,
lost social opportunity, and lost prime years. The
document states that the Cave Creek property is
Mr. Pulito's sole asset and is valued at \$700,000. The
document recognizes the Guenthers' claims as a
potential threat to Ms. Ward's retention of any money
transferred.

25 After receiving the Promissory Note and accompanying
26 documents, Ms. Ward locked them in her desk until late July 2002,
27 at which time she moved them to her bank safe deposit box. In
28 August, 2003, Ms. Ward took the Promissory Note and accompanying

1 documents from her safe deposit box and gave them to her mother
2 to store at her mother's home, where they remained until Ms. Ward
3 took them to her attorney in connection with her divorce from
4 Mr. Pulito after May 2004.

5 Ms. Ward testified that the day she received the Promissory
6 Note and accompanying documents she spoke to Mr. Pulito about
7 them by telephone for approximately 30 minutes, and that it was
8 her understanding that the documents were sent to her "because he
9 wanted to rekindle our relationship and get married." Tr. of
10 August 25, 2008 Trial, at 40:9-41:9. Approximately one week
11 later Ms. Ward asked Mr. Pulito about the deeds he had said he
12 was preparing, which she was to attach to the Promissory Note and
13 possibly "file." Whenever Ms. Ward asked Mr. Pulito about the
14 deeds, he "kept reiterating that I had the written assurance and
15 the financial assurance, and he was going to come up with a
16 better idea." Tr. of August 25, 2008 Trial, at 42:1-16.

17 Mr. Pulito did not dispute that he signed the Promissory
18 Note or that he prepared the accompanying documents. He did,
19 however, dispute that he ever gave any of the documents to
20 Ms. Ward and does not know how they came into her possession. He
21 speculated that she may have taken them from his office during
22 the time they were married.

23 Mr. Pulito testified that he prepared the documents as
24 "visual aids" for a lunch meeting he had with Ms. Ward on
25 July 2, 2002. The purpose of the meeting was to allow Mr. Pulito
26 to discuss with Ms. Ward the Guenthers' claims against him and
27 his plan to help both himself and Ms. Ward by having her assert
28 claims against him, which he would then settle. Although she

1 testified she had no recollection of this meeting, Ms. Ward
2 acknowledged on cross-examination that she told Mr. Pulito she
3 did not want anything to do with his general plan to keep his
4 assets from reaching the Guenthers by transferring them to her
5 instead.

6
7 C. The Claims Litigation and Appeal

8 Trial of the objection to Ms. Ward's claim was held
9 August 25, 2008. On March 9, 2009, the bankruptcy court entered
10 its Decision. Mr. Pulito was to submit a simple form of order
11 disallowing the proof of claim ("Order Disallowing Claim");
12 although the Order Disallowing Claim was not provided as part of
13 the record on appeal, it was entered on March 20, 2009. On
14 March 30, 2009, Ms. Ward filed a motion ("Post-Decision Motion")
15 for a new trial, for relief from the Order Disallowing Claim, and
16 to amend the proof of claim. The bankruptcy court denied the
17 Post-Decision Motion by its order entered on August 12, 2009.
18 This appeal was timely filed on August 21, 2009. The Notice of
19 Appeal asserts that the orders on appeal include both the Order
20 Disallowing Claim and the order denying the Post-Decision Motion.

21
22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C.
24 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
25 § 158.

26
27 **III. ISSUES**

28 1. Whether the bankruptcy court erred in determining that
the Promissory Note was a prenuptial agreement under Arizona law,

1 but that it did not meet the statutory requirements to be
2 enforceable as such.

3 2. Whether the bankruptcy court erred when it determined
4 that the Promissory Note was not supported by consideration.

5 3. Whether the Promissory Note was given to Lisa Ward as a
6 gift in contemplation of marriage or as an inducement to marry.

7 4. Whether the bankruptcy court abused its discretion when
8 it denied the Post-Decision Motion.

9
10 **IV. STANDARDS OF REVIEW**

11 We review a bankruptcy court's interpretation of state law
12 de novo. State Bd. of Equalization v. Leal (In re Leal),
13 366 B.R. 77, 80 (9th Cir. BAP 2007). De novo review requires
14 that we consider a matter anew, as if it had not been heard
15 before, and as if no decision had been rendered previously.
16 United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988);
17 B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229
18 (9th Cir. BAP 2008). We review findings of fact for clear error,
19 giving due regard to the opportunity of the bankruptcy court to
20 judge the credibility of the witnesses. Fed. R. Bankr. P. 8013.
21 "A factual finding is clearly erroneous if the appellate court,
22 after reviewing the record, has a firm and definite conviction
23 that a mistake has been committed." Wall St. Plaza, LLC v. JSJF
24 Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006).

25 We review a bankruptcy court's ruling on a motion to alter
26 or amend a judgment (Fed. R. Civ. P. 59(e)) or for relief from
27 judgment (Fed. R. Civ. P. 60(b)) for abuse of discretion.
28 Dixon v. Wallowa County, 336 F.3d 1013, 1022 (9th Cir. 2003).
Similarly, the decision to deny the right to amend a filed proof

1 of claim is reversible only for an abuse of discretion. Wall
2 Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. at
3 99. To determine whether the bankruptcy court abused its
4 discretion, we conduct a two-step inquiry: (1) we review de novo
5 whether the bankruptcy court "identified the correct legal rule
6 to apply to the relief requested" and (2) if it did, whether the
7 bankruptcy court's application of the legal standard was
8 illogical, implausible or "without support in inferences that may
9 be drawn from the facts in the record." United States v.
10 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009).

11 12 **V. DISCUSSION**

13 As a preliminary matter we observe that our ability to
14 address the issues raised by Ms. Ward in this appeal has been
15 hampered by the lack of an adequate record for review. Ms. Ward
16 included in her excerpts of record on appeal only four items:

- 17 1. The transcript of the August 25, 2008 trial.
- 18 2. Ms. Ward's pretrial statement for the trial.
- 19 3. The Decision.
- 20 4. Exhibit #62, which consists of the Promissory Note and
the accompanying documents.

21 Notably absent from Ms. Ward's excerpts of record are her
22 post-trial memorandum, the Order Disallowing Claim, the
23 Post-Decision Motion, the bankruptcy court's findings with
24 respect to the Post-Decision Motion, the transcript of the
25 hearing on the Post-Decision Motion, and the order denying the
Post-Decision Motion.

26 As the appellant, Ms. Ward has the burden to demonstrate in
27 what way the findings of the bankruptcy court were clearly
28 erroneous; this requires that she provide us with the bankruptcy
court's findings and the evidence upon which the findings are

1 based. Burkhart v. Fed. Dep. Ins. Corp. (In re Burkhart),
2 84 B.R. 658, 660 (9th Cir. BAP 1988). The requirement of
3 Rule 8009(b)(5) that the appellant designate a record that
4 includes the "opinion, findings of fact, or conclusions of law
5 filed or delivered orally," is mandatory; when the findings of
6 fact and conclusions of law are stated orally on the record, the
7 appellant must include a transcript in the excerpts of record.
8 See McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417
9 (9th Cir. BAP 1999). Although Ms. Ward did designate the
10 transcript of the August 12, 2009 hearing on the Post-Decision
11 Motion, it does not appear that the transcript ever was prepared,
12 and it certainly was not included in Ms. Ward's record on appeal.
13 In this case, the absence of a record which sets forth the
14 bankruptcy court's findings provides an insufficient record to
15 review and renders Ms. Ward's burden to demonstrate the
16 bankruptcy court's findings of fact were clearly erroneous
17 difficult, if not impossible, to meet. See Krittr v. Krittr
18 (In re Krittr), 190 B.R. 382, 387 (9th Cir. BAP 1995).

19 How this sparse record impacts the specific issues on appeal
20 is addressed where necessary below.

21
22 A. Determining the Validity of Ms. Ward's Claim

23 Section 502(a) provides that a "claim . . . , proof of which
24 is filed . . . , is deemed allowed, unless a party in
25 interest . . . objects." Because the trustee objected to
26 Ms. Ward's claim, § 502(b) requires that the bankruptcy court
27 determine whether the claim should be allowed, and if so, in what
28 amount. When an objection has been filed, unless a claim falls
into one of the exceptions under § 502(b), it must be allowed.

1 Heath v. Am. Express Travel Related Serv. Co. (In re Heath),
2 331 B.R. 424, 435 (9th Cir. BAP 2005).

3 Section 502(b)(1) provides:

4 Except as provided in subsections (e)(2), (f), (g), (h)
5 and (i) of this section, if [an] objection to a claim
6 is made, the court, after notice and a hearing, shall
7 determine the amount of such claim . . . as of the date
8 of the filing of the petition, and shall allow such
9 claim in such amount, except to the extent that -

(1) such claim is unenforceable against the
debtor and property of the debtor, under any
agreement or applicable law for a reason
other than because such claim is contingent
or unmatured

10 The trustee objected to Ms. Ward's proof of claim on the
11 basis that the Promissory Note was not supported by
12 consideration. Ms. Ward countered that "consideration exists
13 because the [Promissory] Note was given: 1) in lieu of a
14 prenuptial agreement; 2) as an inducement to marry; and 3) as a
15 settlement of potential legal claims against [Mr. Pulito]."
16 Decision, at 1:21-23.

17
18 B. The Bankruptcy Court Did Not Err When It Determined That the
19 Promissory Note Did Not Constitute an Enforceable Prenuptial
Agreement Under Arizona Law.

20 The bankruptcy court interpreted Ms. Ward's claim - that
21 consideration for the Promissory Note existed because Mr. Pulito
22 gave her the Promissory Note instead of a formal prenuptial
23 agreement - to be an assertion that the Promissory Note was given
24 in contemplation of marriage and would only be effective upon
25 marriage. Similarly, the bankruptcy court interpreted Ms. Ward's
26 claim that consideration for the Promissory Note existed because
27 Mr. Pulito gave her the Promissory Note as an inducement to marry
28 to be an assertion that the Promissory Note would only be
effective upon marriage. The bankruptcy court determined that

1 each of these claims fell within the statutory definition of a
2 premarital agreement under A.R.S. § 25-201(1), which states:
3 “‘Premarital agreement’ means an agreement between prospective
4 spouses that is made in contemplation of marriage and that is
5 effective on marriage.”

6 Following the presentation of evidence, the bankruptcy court
7 determined that, to the extent the Promissory Note was intended
8 as a prenuptial agreement, it did not meet the requirements under
9 Arizona law to be enforceable as a prenuptial agreement because
10 it was not signed by both parties as required by A.R.S.
11 § 25-202(A).

12 On appeal, Ms. Ward asserts that this determination of the
13 bankruptcy court was error, because “[t]he Promissory Note at
14 issue in this case is not a Pre-Nuptial Agreement.” Appellant’s
15 Opening Brief at 15:16. She states more emphatically: “Lisa Ward
16 never argued or claimed that the Promissory Note was a Pre-
17 Nuptial Agreement.” Id. at 15:16-17 (emphasis in the original).
18 However, we note that in her Pre-Trial Statement, Ms. Ward states
19 as issue number 3 presented to the court:

20 Whether there is valid consideration for the Note or
21 there is a presumption of consideration; or whether the
22 Promissory Note was in exchange or replacement for a
prenuptial agreement and an inducement for Ward to
marry Pulito? (emphasis added).

23 Further, an attachment to her proof of claim is a letter directed
24 to the attention of the Clerk of the Bankruptcy Court in which
25 she outlines the basis of her claim on the Promissory Note. In
26 that letter she states: “Mr. Pulito was suppose[d] to provide me
27 with a prenuptial agreement, but convinced me that the promissory
28 note was just as good and that a prenuptial agreement could be

1 signed at any time." In response to Mr. Pulito's
2 Interrogatory 2.(a) "Did you tender any consideration in exchange
3 for your claimed Note, dated July 2, 2002?" Ms. Ward stated,
4 among other things:

5 Mr. Pulito gave me the note to induce me to give him
6 another chance, to trust him, to consider marrying him
7 and as a fulfillment of his previous financial promises
8 to both me and my children. (emphasis added).

9 At oral argument in this appeal, Ms. Ward's counsel stated that
10 it would be a "rough call" to enforce the Promissory Note if the
11 marriage between Ms. Ward and Mr. Pulito had not taken place.

12 We are somewhat confused by Ms. Ward's assertion of error on
13 this issue, which effectively asserts that the bankruptcy court
14 erred in its determination that the Promissory Note was not an
15 enforceable prenuptial agreement, because the Promissory Note was
16 not a prenuptial agreement. It is likely that the issue Ms. Ward
17 intended to articulate is that the bankruptcy court erred because
18 it did not find that presentation of the Promissory Note in lieu
19 of a prenuptial agreement and/or as an inducement to marry
20 constituted consideration to support the Promissory Note.

21 In light of her statements, both in testimony and in the
22 letter attached to her proof of claim, to the effect that the
23 Promissory Note was in lieu of a prenuptial agreement and/or an
24 inducement to marry because she otherwise would not trust
25 Mr. Pulito with her financial future, the bankruptcy court
26 correctly determined that these claims fell within the definition
27 of A.R.S. § 25-201. Because Ms. Ward, whether she intended to or
28 not, claimed that the Promissory Note constituted a prenuptial
agreement, the proof of claim would be allowed unless it was
unenforceable as a prenuptial agreement under applicable law.

1 In this instance, the applicable law was A.R.S. § 25-202(A),
2 which provides that to be enforceable “[a] premarital agreement
3 must be in writing and signed by both parties.” It was not.

4 We find no reversible error in the bankruptcy court’s
5 consideration of an alternative theory of recovery for Ms. Ward
6 in the event she failed to establish that the Promissory Note was
7 supported by consideration, particularly where the alternative
8 theory was raised explicitly by Ms. Ward in her filings with the
9 bankruptcy court.

10
11 C. The Bankruptcy Court Did Not Err When It Determined That the
12 Promissory Note Was Not Supported By Consideration.

13 Mr. Pulito admits he prepared and signed the Promissory
14 Note. The bankruptcy court presumed delivery of the Promissory
15 Note because it was in Ms. Ward’s possession. Mr. Pulito has not
16 appealed this determination. The only issue remaining with
17 respect to the Promissory Note is whether it was supported by
18 consideration.

19 Aside from her contention that the Promissory Note was given
20 in lieu of a prenuptial agreement and/or as an inducement to
21 marry, which the bankruptcy court correctly analyzed as subject
22 to the applicable law regarding enforceability of prenuptial
23 agreements, Ms. Ward asserted that consideration to support the
24 Promissory Note was given in the form of a settlement of
25 potential legal claims against Mr. Pulito. However, the
26 bankruptcy court determined, as evidenced by the Dissolution
27 Agreement, that Ms. Ward retained her claims against Mr. Pulito
28 as of 2005. The Dissolution Agreement lists the Promissory Note
as a separate claim against Mr. Pulito, and Ms. Ward retained her

1 claim under the Promissory Note in addition to her other claims
2 for liability against Mr. Pulito, including legal malpractice in
3 connection with Mr. Pulito's "assistance" to Ms. Ward in the
4 Curtis Proceedings. The bankruptcy court correctly determined
5 that because Ms. Ward's legal claims against Mr. Pulito continued
6 in existence after the execution and delivery of the Promissory
7 Note, they were not "settled," with the result that there was no
8 consideration to support the Promissory Note.

9 On appeal, Ms. Ward asserts that the bankruptcy court erred
10 in its finding that the Promissory Note was not supported by
11 consideration. First, Ms. Ward asserts that the Promissory Note
12 states on its face that it was given "for good and valuable
13 consideration." Ms. Ward contends this is sufficient evidence of
14 consideration, citing 10 C.J.S. Bills and Notes § 15 (2009).
15 Also see A.R.S. § 44-121 ("Every contract in writing imports a
16 consideration."). See Aboud v. DeConcini, 173 Ariz. 315, 319
17 (1992) ("Except as otherwise provided by statute, promissory
18 notes are construed like other contracts."). This issue was
19 raised obliquely in argument before the bankruptcy court
20 [Decision, at 190:18-20], but not discussed by the bankruptcy
21 court in the Decision.

22 As noted in Ms. Ward's brief, 10 C.J.S. Bills and Notes § 15
23 does stand for the proposition that, "The statement 'for value
24 received' in a note is a sufficient allegation of consideration."
25 (emphasis added). However, "[t]he fact that a note recites 'for
26 value received' does not bar the introduction of parol evidence
27 to show that, in fact, no value was ever received." 11 Am. Jur.
28 2d. Bills and Notes § 518 (2009). See Yuma Nat'l Bank v. Balsz,

1 28 Ariz. 336, 398, 237 P. 198, 202 (Ariz. 1925) (“[T]he parol
2 evidence rule certainly does not exclude evidence having a
3 legitimate bearing on the question of consideration, without
4 which there is no contract to vary.”). In the circumstances of
5 this case, the bankruptcy court did not abuse its discretion
6 when, despite the recitation in the Promissory Note that it was
7 given for valuable consideration, it considered parol evidence in
8 the form of the Dissolution Agreement to refute the contention
9 that consideration was given.

10 Ms. Ward also asserts in her opening brief on appeal that
11 consideration for a note can be based upon a previous obligation,
12 which in this instance is represented by the Written Assurance.
13 The opening brief states the issue was raised in a post-trial
14 memorandum which Ms. Ward filed prior to the Decision. However,
15 because Ms. Ward did not include her post-trial memorandum in her
16 excerpts of record, and the bankruptcy court did not address it
17 in its Decision, we cannot tell from the record before us whether
18 this issue was raised before the bankruptcy court. We will not
19 consider on appeal an issue that was not raised before the
20 bankruptcy court in the first instance. See O’Rourke v. Seaboard
21 Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir.
22 1989).

23 Similarly, Ms. Ward asserts in her opening brief that she
24 raised in her post-trial memorandum the alternate theory that
25 consideration can be implied. She also raises on appeal the
26 following arguments concerning consideration: that the court
27 cannot inquire into the adequacy of consideration; that a moral
28 obligation and commitment to pay a debt constitutes sufficient

1 consideration; that a promissory note given for a pre-existing
2 indebtedness is adequate consideration for the note; and that
3 where there is a benefit to the promisor and a detriment to the
4 promisee there is adequate consideration. On the record before
5 us, none of these issues was presented to the bankruptcy court.
6 We therefore decline to consider them on appeal. As previously
7 noted, Ms. Ward asserted three theories before the bankruptcy
8 court that consideration was given to support the Promissory
9 Note. The bankruptcy correctly ruled that the theories that the
10 Promissory Note was given in lieu of a prenuptial agreement
11 and/or as an inducement to marry raise the issue of whether the
12 Promissory Note constituted an enforceable prenuptial agreement.
13 As to the third theory, i.e., that consideration was given when
14 Ms. Ward settled her legal claims against Mr. Pulito, the
15 bankruptcy court did not err when it found, based on the
16 Dissolution Agreement, that the claims had not been settled in
17 exchange for the Promissory Note. Accordingly, the bankruptcy
18 court did not err when it concluded that the Promissory Note was
19 not enforceable because it was not supported by consideration.

20
21 D. Whether the Promissory Note Should Be Considered a Gift in
22 Contemplation of Marriage or an Inducement to Marry

23 The Decision does not address whether the Promissory Note
24 constituted a gift. Unlike her other issues on appeal, Ms. Ward
25 does not assert any error on the part of the bankruptcy court in
26 not determining that the Promissory Note constituted a gift. In
27 our review of the limited record, we find no assertion before the
28 bankruptcy court that the Promissory Note was a gift rather than
either a prenuptial agreement or a Promissory Note supported by

1 consideration. Because we cannot determine that this issue was
2 first presented to the bankruptcy court, we do not reach it in
3 this appeal.

4
5 E. The Bankruptcy Court's Denial of the Motion for New Trial is
6 Not Properly Before the Panel on Appeal

7 Finally, in her opening brief, Ms. Ward states:

8 The Bankruptcy Court entered an Order denying Lisa
9 Ward's Motion for New Trial, Motion for Relief from
Judgment and Motion to Amend Proof of Claim (docket
No. 323) on August 12, 2009.

10 Lisa Ward filed a timely Notice of Appeal on August 24,
11 2009 (docket No. 324). Lisa Ward in her Appeal seeks
12 to overturn the bankruptcy Court Under Advisement
13 Decision (docket No. 311) and Order disallowing her
claim, to allow her Proof of Claim, or alternatively to
allow a New Trial and allow her to amend her Proof of
Claim for damages, including a malpractice claim.

14 Ms. Ward asks that we determine that the bankruptcy court
15 abused its discretion when it denied her Post-Decision Motion,
16 which included a motion for a new trial and a motion to amend the
17 claim to assert other claims against Mr. Pulito. The Post-
18 Decision Motion is not in the record before us; nor is a
19 transcript of the hearing on the Post-Decision Motion, or the
20 bankruptcy court's findings, or its order.

21 As we stated above, because the bankruptcy court's findings
22 of fact and conclusions of law were stated orally on the record,
23 Ms. Ward was required to include a transcript in her excerpts of
24 record. She did not. As a consequence, we have nothing to
25 review, so on this issue we must affirm.

