

OCT 21 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-10-1049-DNoPa
)	
SHAHRIAR DARGAHI and)	Bk. No. 03-15884-KT
NAZILA ADELI-NADJAFI,)	
)	Adv. Pro. No. 06-1228-KT
Debtors.)	
_____)	
)	
SHAHRIAR DARGAHI;)	
NAZILA ADELI-NADJAFI,)	
)	
Appellants,)	
)	
v.)	MEMORANDUM¹
)	
KEST INVESTMENT COMPANY,)	
)	
Appellee.)	
_____)	

Argued and Submitted on September 23, 2010
at Pasadena, California

Filed - October 21, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Kathleen H. Thompson, Bankruptcy Judge, Presiding

Appearances: _____
Mohammed K. Ghods for Appellants Shahriar Dargahi
and Nazila Adeli-Nadjafi
Cynthia Futter, Futter-Wells, PC for Appellee Kent
Investment Company

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 Before: DUNN, NOVACK² and PAPPAS, Bankruptcy Judges.
2

3 The debtors, Shahriar Dargahi and Nazila Adeli-Nadjafi,
4 filed a complaint to determine the amount of the secured claim of
5 Kest Investment Co. ("KIC").³ In their complaint, the debtors
6 asserted certain offsets against the claim and disputed certain
7 charges included in the claim.

8 The debtors never amended their complaint. They instead
9 raised additional issues in a second proposed pre-trial order;
10 namely, the debtors sought a determination as to the value and
11 extent of KIC's secured claim and whether KIC's claim was
12 oversecured. The bankruptcy court did not sign the second
13 proposed pre-trial order.

14 Following the trial, the bankruptcy court issued a
15 memorandum decision and entered an order adjusting the amount of
16 KIC's claim and reserving the issues of the value and extent of
17 KIC's security interest for later determination.

18 The debtors contend on appeal that the bankruptcy court
19 erred in declining to address the issues raised in the second
20 proposed pre-trial order. We conclude that the bankruptcy court
21 did not err in declining to address these issues at trial and
22 AFFIRM.

23
24 ² Hon. Charles D. Novack, Bankruptcy Judge for the Northern
District of California, sitting by designation.

25
26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
enacted and promulgated prior to October 17, 2005, the effective
date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 **FACTS**

2 This is the second appeal before this Panel to address
3 issues between these parties.⁴

4 In August 1997, KIC sold the debtors commercial real
5 property ("subject property"), which included a gas station and a
6 convenience store (collectively, "business"), located in Long
7 Beach, California. According to the sale escrow instructions,
8 the sale included the business and its furniture, fixtures,
9 equipment and liquor license, but not the inventory of goods and
10 gasoline. KIC financed the sale, taking back a \$400,000
11 promissory note secured by a first trust deed against the subject
12 property.

13 Prior to the sale, KIC had a claim application pending
14 before the California State Water Resources Control Board
15 ("Cal/EPA") for reimbursement of the costs of cleaning up
16 contamination from the gas station's leaking underground storage
17 tanks ("reimbursement claim").⁵ Under the sale escrow
18 instructions, KIC agreed to name the debtors as co-payees on the
19 reimbursement claim.⁶ KIC did not do so. Four months after the
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21 ⁴ The Panel issued its memorandum decision in the debtors'
22 previous appeal, Dargahi v. Kest Investment Co., CC-04-1261-
23 MoPMA, on February 24, 2006. KIC had filed a motion for relief
24 from stay which the bankruptcy court granted. On appeal, the
Panel reversed and remanded to the bankruptcy court.

25 ⁵ Cal/EPA provides such reimbursement through its
26 Underground Storage Tank Cleanup Fund Program ("Clean Up
Program").

27 ⁶ Paragraph 26 of the sale escrow instructions provides:
28

(continued...)

1 sale closed, Cal/EPA denied the reimbursement claim. Without
2 knowledge that the reimbursement claim had been denied, the
3 debtors replaced the gas station's underground storage tanks in
4 November 1998.

5 In October 1999, the debtors fell behind on their promissory
6 note payments to KIC. Under an amendment to the promissory note
7 ("amendment"), KIC agreed to accept interest-only payments at 12%
8 per annum until October 2001, at which time the interest rate
9 would revert to the original interest rate of 9% per annum.

10 The debtors later attempted to refinance the subject
11 property through A.S.K. Investments, Inc. ("AI"). The refinance
12 fell through when KIC failed to submit a payoff statement in
13 response to AI's request.

14 Thereafter, the debtors again fell behind on their
15 promissory note payments to KIC. When KIC commenced foreclosure
16 proceedings against the subject property, the debtors filed their
17 chapter 11 petition on July 14, 2003.

18 KIC filed a proof of claim asserting a claim secured by the
19 subject property. Exactly three years following the petition
20 date, the debtors filed an adversary complaint against KIC
21 seeking a determination of the amount of KIC's secured claim.
22 The debtors titled their complaint, "Complaint to Determine
23

24 ⁶(...continued)

25 Seller will name the buyer as co-payee regarding the
26 reimbursement fund from State Water Resources program.
27 Buyer and [seller] hereby acknowledge and agree that
28 there is no discount from the selling price because of
the existing contamination at the subject property.
The parties further agree that this is not a
contingency to this escrow.

1 Secured Status (11 U.S.C. Section 506).” The debtors contended
2 that they were entitled to certain offsets against the amount of
3 KIC’s claim and that KIC had overcharged interest and improperly
4 included certain attorney’s fees in its claim.

5 First, the debtors asserted that they had a right to a
6 \$100,000 offset based on an alleged agreement between KIC and the
7 debtors. The debtors contended they had causes of action against
8 KIC arising from its failure to inform the debtors of the denial
9 of the reimbursement claim and that to resolve those claims and
10 to receive an immediate payoff of the balance, KIC agreed to
11 reduce the balance owed under the promissory note by \$100,000.

12 Second, the debtors claimed a \$100,000 offset based on the
13 alleged damages they sustained when they were unable to complete
14 their refinance transaction as a result of KIC’s failure to
15 submit the payoff statement to AI.

16 Third, the debtors asserted an offset based on the alleged
17 damages they sustained from the denial of the reimbursement
18 claim. The debtors claimed that they had to expend \$25,000 to
19 regain admittance to Cal/EPA’s Clean Up Program.

20 The debtors also disputed the amount of KIC’s claim on two
21 additional grounds. The debtors maintained KIC overcharged
22 interest, calculating the amount of its claim at 12% interest
23 rather than at 9% interest. Under the amendment, the debtors
24 asserted, the original interest rate of 9% applied once the 12%
25 interest rate for interest-only payments expired in October 2001.

26 The debtors further contended KIC improperly included in its
27 claim certain attorney’s fees.⁷ Specifically, the debtors

28 ⁷ The debtors requested in their trial brief that the
(continued...)

1 argued, it was unreasonable for KIC to include in its claim
2 attorney's fees for the motion for relief from stay on which the
3 debtors prevailed.

4 In its scheduling order entered in the adversary proceeding,
5 the bankruptcy court required the debtors and KIC to submit a
6 joint pre-trial order by February 7, 2007. On March 26, 2007,
7 the debtors filed a status report, advising the bankruptcy court
8 that they and KIC had completed the pre-trial order, but needed
9 to finalize the exhibits for trial. The debtors attached a copy
10 of the proposed joint pre-trial order ("first pre-trial order");
11 both the debtors and KIC signed the first pre-trial order. In
12 the first pre-trial order, the debtors and KIC elaborated on the
13 issues set forth in the complaint, but did not introduce any new
14 issues. The bankruptcy court did not sign the first pre-trial
15 order.

16 The debtors never amended the complaint over the course of
17 the adversary proceeding. The bankruptcy court set the matter
18 for trial. The debtors and KIC both submitted trial briefs on
19 May 12 and May 21, 2008, respectively. In their trial brief, the
20 debtors further expanded on the issues and arguments they
21 presented in their complaint.

22 On September 5, 2008, the debtors filed a second proposed
23 pre-trial order ("second pre-trial order"). The second pre-trial
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25 ⁷(...continued)
26 bankruptcy court reduce KIC's claim for attorney's fees KIC
27 incurred in objecting to the debtors' chapter 11 disclosure
28 statement and plan. The bankruptcy court did not address this
contention in its memorandum decision. The debtors do not raise
this issue on appeal.

1 order shows electronic signatures of counsel for both the debtors
2 and KIC, but at oral argument, counsel for KIC asserted that they
3 did not sign the second pre-trial order. The debtors introduced
4 new issues for trial in the second pre-trial order. Among them,
5 the debtors sought a determination of the following: (1) the
6 value of the subject property; (2) whether KIC held a secured
7 claim; and (3) whether KIC was an oversecured creditor. The
8 bankruptcy court did not sign the second pre-trial order.

9 On the same day, KIC filed a motion in limine to exclude
10 from trial the issue of whether KIC held a secured claim and if
11 so, in what amount, contending that the debtors raised this issue
12 for the first time in the second pre-trial order. The debtors
13 opposed the motion in limine.

14 The bankruptcy court addressed KIC's motion in limine on the
15 first day of trial, noting that "we don't do trial by ambush
16 around here." Tr. Of October 15, 2008 hr'g, 12:10-11. After
17 hearing argument from counsel, the bankruptcy court concluded
18 that:

19 the amount of the debt [was] clearly at issue, because
20 there [was] a dispute about what the various terms were
21 over time, changes to those, and there's a dispute
22 about whether or not they [were] entitled to set off
23 their damages, whatever they [were] able to prove
24 against the amounts due. So we're really talking about
25 amount in this trial.

26 Tr. of October 15, 2008 hr'g, 13:25, 14:1-7.

27 The bankruptcy court conducted the trial over six days. At
28 the conclusion of the trial, the bankruptcy court permitted the
29 debtors and KIC to submit post-trial briefs and reply briefs
30 ("post-trial briefs").

31 In their post-trial briefs, the debtors argued that the

1 bankruptcy court should determine whether KIC was an oversecured
2 creditor because, unless KIC could demonstrate that its claim was
3 oversecured pursuant to § 506(b), it could not add postpetition
4 interest, attorney's fees and costs to its claim. The debtors
5 also argued that the bankruptcy court should determine the extent
6 of KIC's security interest, asserting that KIC did not have a
7 security interest in the business's personal property because a
8 UCC-1 financing statement had not been included in the sale
9 documents and had not been recorded by KIC.

10 The bankruptcy court issued its memorandum decision on
11 November 17, 2009, noting at the outset that the debtors did not
12 present any specific claims for relief in their complaint. While
13 the bankruptcy court nonetheless thoroughly addressed each of the
14 issues raised by the debtors in their complaint, it specifically
15 declined to address the issues with respect to the value and
16 extent of KIC's secured claim raised by the debtors in the second
17 pre-trial order and in their post-trial briefs. With respect to
18 the issue of whether KIC was an oversecured creditor, the
19 bankruptcy court agreed with KIC that "the value of the [subject
20 property] was not fairly raised as an issue in the litigation."
21 Memorandum Decision at 14. The bankruptcy court noted that,
22 though the debtors sought a determination under § 506 in the
23 title to their complaint, "a comparison of debt to value was
24 never brought up at trial." Id. The bankruptcy court emphasized
25 that "the amount of [KIC's] claim at issue in the trial" did not
26 involve "the value of the collateral for the claim." Id. The
27 bankruptcy court thus

28 specifically reserve[d] jurisdiction to make
determinations of value vis-a-vis the claim and whether

1 [KIC] was oversecured or undersecured in the
2 appropriate context next arising in this bankruptcy
3 case.

3 Id.

4 Similarly, the bankruptcy court declined to determine the
5 issue concerning the extent of KIC's lien with respect to the
6 business's personal property, as it "[had not been] the subject
7 of trial." Memorandum Decision at 15.

8 On January 21, 2010, the bankruptcy court entered its order
9 consistent with its memorandum decision. In its order, the
10 bankruptcy court repeated its resolution to reserve for later
11 determination the issue of whether KIC's claim was fully secured.
12 Order on Memorandum of Decision on Trial, 2:3-5.

13 The debtors timely appealed the bankruptcy court's order.⁸

14 **ISSUE**

15 Did the bankruptcy court err in declining to make
16 determinations at trial on the new issues raised by the debtors
17 in the second pre-trial order?

18 **STANDARD OF REVIEW**

19 We review the bankruptcy court's factual determinations for
20 clear error. McClure v. Thompson, 323 F.3d 1233, 1240 (9th Cir.
21 2003). See also 389 Orange Street Partners v. Arnold, 179 F.3d
22 656 (9th Cir. 1999)(determining that district court did not err
23 in not considering claims not pleaded in complaint). We must
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26 ⁸ On April 14, 2010, the Panel issued a clerk's order re:
27 finality, requesting that the debtors explain how the bankruptcy
28 court's order was final. After reviewing the debtors'
explanation, on May 26, 2010, the Panel issued an order
determining that the bankruptcy court's order was final.

1 defer to the bankruptcy court's factual determinations unless we
2 have a definite and firm conviction that a mistake has been
3 committed. McClure, 323 F.3d at 1240.

4 **DISCUSSION**

5 The debtors contend on appeal that the bankruptcy court
6 erred in declining to determine at trial the value and extent of
7 KIC's secured claim and whether KIC's claim was oversecured. The
8 debtors argue that they "expressly commenced [the adversary
9 proceeding] pursuant to § 506 to resolve all issues regarding the
10 nature and amount" of KIC's claim. Appellant's Opening Brief at
11 17. Moreover, the debtors assert, KIC had ample notice of these
12 issues, as the debtors raised them in the second pre-trial order,
13 in their opposition to the motion in limine, and in their post-
14 trial briefs.

15 Inclusion of "§ 506" in the complaint's title and stating
16 that debtors "are entitled, under 11 U.S.C. § 506 to a
17 determination of the amount due Defendants on their secured
18 claim" do not adequately apprise KIC or the bankruptcy court that
19 the debtors sought a determination as to whether KIC's claim was
20 oversecured and whether KIC's claim was secured against the
21 business's personal property. This is particularly true where
22 the debtors had characterized and treated KIC's claim as fully
23 secured in the debtors' plan and disclosure statement previously
24 considered by the bankruptcy court.⁹ Reviewing the complaint, we

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26 ⁹ Neither the debtors nor KIC included a copy of the second
27 amended disclosure statement (which the bankruptcy court
28 amended plan (confirmation of which is awaiting a further

(continued...)

1 also agree with the bankruptcy court that these issues were not
2 implicit in the complaint, as the debtors appear to contend.

3 The debtors rely on the second pre-trial order as providing
4 notice to KIC of these issues. While it is true that the debtors
5 raised these additional issues in the second pre-trial order, the
6 bankruptcy court never signed it.

7 We recognize that a pre-trial order controls the subsequent
8 course of action in litigation, Eagle v. AT&T, 769 F.2d 541, 548
9 (9th Cir. 1985), cert. denied, 475 U.S. 1084 (1986), and binds
10 the parties, Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d
11 983, 996 (9th Cir. 2009). However, for a pre-trial order to
12 become binding and effective, the bankruptcy court must adopt the
13 pre-trial order by signing it. See 389 Orange Street Partners v.
14 Arnold, 179 F.3d at 666. Although the bankruptcy court
15 apparently treated the unsigned first pre-trial order as
16 effective between the parties to frame the issues for trial, the
17 bankruptcy court declined to extend that same treatment to the
18 unsigned second pre-trial order. Thus, the issues as to whether
19 KIC was an oversecured creditor and whether it had a security
20 interest in the business's personal property were not before the
21 bankruptcy court for determination at trial. The bankruptcy
22 court did not err in declining to determine whether KIC's claim
23 was secured against the business's personal property. The

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26 ⁹(...continued)
27 hearing) ("plan") in the record before us. We obtained copies of
28 the disclosure statement and plan from the bankruptcy court's
electronic docket. See O'Rourke v. Seaboard Surety Co. (In re
E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 bankruptcy court moreover expressly reserved jurisdiction to
2 determine the issue of whether KIC's claim was oversecured.

3 **CONCLUSION**

4 The debtors argue that the bankruptcy court erred in
5 declining to address certain issues they raised in the unsigned
6 second pre-trial order but not in their complaint. Because the
7 debtors did not properly and timely raise these issues before
8 trial, we conclude that the bankruptcy court did not err in
9 refusing to address them. Accordingly, we AFFIRM.

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