

DEC 16 2011

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-11-1323-KiDJu
)	
DEAD OAK ESTATES, INC.,)	Bk. No. 08-28230-MM
)	
Debtor.)	Adv. No. 09-02730
_____)	
)	
MICHAEL F. BURKART, Chapter 7)	
Trustee; SUSAN VINEYARD,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M ¹
)	
ROBERT KUPKA; CYNTHIA KUPKA,)	
)	
Appellees.)	
_____)	

Argued and Submitted on November 16, 2011
at Sacramento, California

Filed - December 16, 2011

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

Appearances: _____
 Kristen Ditlevsen, Esq. argued for appellants,
 Michael F. Burkart and Susan Vineyard;
 George C. Hollister, Esq. of the Hollister Law
 Corporation argued for appellees, Robert Kupka and
 Cynthia Kupka.

Before: KIRSCHER, DUNN, 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 Appellants, chapter 7² trustee Michael F. Burkart
2 ("Trustee") and Susan Vineyard ("Vineyard")(collectively
3 "Trustee"), appeal a bankruptcy court judgment in favor of
4 defendants, appellees Robert Kupka ("Robert") and Cynthia Kupka
5 ("Cynthia")(collectively "Defendants"), on Trustee's action for
6 declaratory relief regarding debtor's rights under an option to
7 purchase real property owned by Defendants. We AFFIRM.

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 A. Prepetition Facts.

10 Debtor, Dead Oak Estates, Inc. ("Dead Oak"), is a Delaware
11 corporation originally incorporated on June 7, 1982. Dead Oak's
12 name was changed to Hangtown Leasing Company by amendment filed
13 on July 11, 1986 ("Hangtown"). Dead Oak's name was changed back
14 to Dead Oak Estates, Inc. by amendment filed on April 4, 2002.

15 Phil Sheridan ("Sheridan") owned and operated a small
16 charter airline, Galaxy Airlines ("Galaxy"), located in Fort
17 Lauderdale, Florida. In January 1985, a Galaxy flight crashed in
18 Reno, Nevada, killing 70 of the 71 persons on board. Shortly
19 after the crash, the U.S. Department of Transportation ("DOT")
20 suspended Galaxy's operational certificate. Sheridan's efforts
21 to reinstate the operational certificate were unsuccessful, and
22 he decided to sell Galaxy.

23 In 1987, Sheridan entered into a Stock Purchase Agreement
24

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure will be referred to as
"FRCP." The Federal Rules of Evidence will be referred to as
"FRE."

1 ("Agreement") transferring his 100% interest in Galaxy to John
2 Kupka ("John") and John's assigns, in exchange for: a promissory
3 note to Sheridan in the amount of \$400,000, an agreement to pay
4 Sheridan's debt to Cardinal Corporation in the amount of
5 \$900,000, and payment of Galaxy's 941 tax obligation to the IRS.
6 John's "assigns" were Hangtown n/k/a Dead Oak, one of several
7 corporations controlled by John through the Kupka Family Trust,
8 and William and Tammy Tsui (collectively "buyers"). In October
9 1987, the buyers attempted to rescind the Agreement for, inter
10 alia, Sheridan's failure to disclose the correct amount of the
11 IRS's tax lien, and the buyer's inability to reinstate the
12 operational certificate with the DOT.³ Sheridan rejected the
13 rescission notice.

14 In 1988, Sheridan sued the buyers in a Florida federal court
15 for specific performance of the Agreement. While the suit was
16 pending, Sheridan filed for chapter 7 bankruptcy. In August
17 1993, the Florida court entered a default judgment in favor of
18 Donna Bumgardner, Sheridan's chapter 7 trustee, and Cardinal
19

20 ³ In January 1988, the DOT issued an Order to Show Cause
21 ("OSC") tentatively revoking Galaxy's operational certificate for
22 failing to comply with the continuing aviation fitness
23 requirements. Prior to the OSC, John had submitted documentation
24 to the DOT in an effort to get Galaxy's operational certificate
25 reinstated, including an Option to Purchase Real Estate, dated
26 November 10, 1986 (the "Option"). Also in the DOT's file
submitted by John was a letter dated June 3, 1987, from John to
Richard Taylor, attorney for Galaxy on the DOT matter, in which
John stated that "the family trust has first option on the
airport property for \$1.8 [million]," and that Lodi Airport was
worth "roughly \$7.5 [million]," with total debt of "less than
\$1.2 [million]."

The DOT noted several reasons in the OSC for revoking
Galaxy's operational certificate, including its apparent poor
financial condition, John's "overstated" value of Lodi Airport,
and John's prior criminal record for false swearing under oath.

1 Corporation (the third-party beneficiary to the Agreement) and
2 against John, Hangtown, and the Tsuis (the "Sheridan Judgment").
3 In 1995, Marika Tolz succeeded Donna Bumgardner as trustee for
4 Sheridan's estate. In 1996, the bankruptcy court approved
5 trustee Tolz's employment of co-plaintiff Vineyard as collection
6 agent for the Sheridan Judgment. In 2000, Vineyard filed a
7 chapter 7 bankruptcy. John filed a chapter 7 bankruptcy in 2001.
8 In 2001, Cardinal Corporation assigned its portion of the default
9 judgment (about \$1.4 million plus interest) to the trustee of
10 Vineyard's bankruptcy estate. In 2003, the bankruptcy court
11 entered an order approving the trustee's abandonment of
12 Vineyard's estate's interest in the Sheridan Judgment back to
13 Vineyard. After years of having no success in collecting on the
14 Sheridan Judgment, in May 2005, trustee Tolz filed a notice of
15 intent to abandon Sheridan's portion of the Sheridan Judgment
16 (about \$600,000 plus interest) back to Sheridan. In July 2005,
17 Sheridan affirmed and assumed the assignment agreement between
18 trustee Tolz and Vineyard for collection of the Sheridan
19 Judgment.

20 **B. Postpetition Facts.**

21 Vineyard filed an involuntary chapter 7 petition against
22 Dead Oak on June 20, 2008. John is the principal of Dead Oak.⁴
23 Upon no objection, an order for relief was entered in August
24 2008. Two proofs of claim were filed in Dead Oak's case,
25 including a general unsecured claim by Vineyard for \$5,955,000
26

27 ⁴ John, father to Robert and Cynthia, passed away during
28 this case on October 5, 2010.

1 based in part on the Sheridan Judgment. On August 21, 2009, the
2 bankruptcy court approved a compromise authorizing the joint
3 prosecution (at Vineyard's expense) of the estate's Option to
4 purchase real property owned by Defendants in Acampo, California,
5 commonly known as Lodi Airport for \$1.8 million, and providing
6 for a division of any net recovery to Vineyard and the estate's
7 other creditors. In September 2009, pursuant to an order based
8 on Dead Oak's failure to file documents, Vineyard filed schedules
9 and a statement of financial affairs on behalf of Dead Oak. In
10 those documents, Vineyard identified the Option as property of
11 the estate.

12 On November 11, 2009, Trustee filed a declaratory relief
13 action against Defendants seeking a determination that Dead Oak's
14 Option was valid. Attached to the complaint was a copy of the
15 Option, dated November 10, 1986, which stated:

16 The following is an option, with first right of refusal,
17 given to Hangtown Leasing Company, a Delaware Corporation
18 to purchase all that real property described in exhibit
19 "A" attached, commonly known as Lodi Airport situated in
Acampo, California. Option price is One million, eight
hundred thousand dollars. (\$1,800,000.00).

20 The Option reflected the signatures of Robert and Cynthia in
21 their individual capacities as co-owners of Lodi Airport.
22 Trustee alleged that Defendants never revoked the Option, and it
23 did not limit Dead Oak's right to exercise it to any specific
24 time period or describe a particular manner in which it must be
25 exercised. Defendants disputed the validity of the Option, thus
26 explaining Trustee's need for declaratory relief.

27 Defendants moved to dismiss Trustee's complaint on
28 December 15, 2009. In their motion, Defendants denied knowing

1 about the unrecorded Option until Vineyard's counsel brought it
2 to their attention in February 2008. Defendants denied ever
3 agreeing to the Option and asserted that they had never received
4 any payment with respect to or on account of it. The motion also
5 referred to a letter sent by Defendants's counsel to Trustee on
6 May 11, 2009. In the letter, attached to Robert's Declaration in
7 support of the motion, counsel asserted that Robert's and
8 Cynthia's signatures on the Option had been forged, and that the
9 Option was never signed by either of them. Defendants's motion
10 was denied on January 20, 2010. They filed an answer on
11 February 2, 2010. Defendants subsequently filed two motions for
12 summary judgment, both of which were denied.

13 Two days before trial, Trustee filed his trial brief and a
14 motion in limine to exclude certain evidence of Defendants. In
15 his brief, Trustee conceded that he was not convinced Cynthia
16 personally signed the Option based on the opinions of the
17 handwriting experts employed by both parties. However, contended
18 Trustee, their expert's analysis of Cynthia's questioned
19 signature was limited due to Defendants's unwillingness to
20 produce known signature exemplars for her for the period from
21 1985 to 1990.⁵ As for Robert's questioned signature, Trustee's
22 expert concluded that it was probably genuine. Based on the
23 expert's findings, Trustee contended that it was more probable
24 than not that Robert signed both his own signature and Cynthia's

26
27 ⁵ The bankruptcy court subsequently found that Cynthia's
28 questioned signature on the Option was not genuine. Appellants
do not appeal that finding. We discuss Cynthia's testimony as it
relates to the conduct of John and Robert.

1 signature, either mechanically or at her direction, or in his
2 capacity as her authorized agent. Cynthia had admitted at
3 deposition that Robert handled the day-to-day operations of Lodi
4 Airport, that she had little involvement with it, and that she
5 deferred to Robert's judgment on documents to be executed on
6 their behalf.

7 In his motion in limine, Trustee disputed the admission of a
8 statement by Robert in his Alternate Direct Testimony ("ADT").
9 In the ADT, Robert asserted that upon showing John a copy of the
10 Option in February 2008, John told Robert that he recognized the
11 document and stated that he had forged the signatures so the
12 Option would appear to be an asset for purposes of his
13 application to acquire Galaxy and DOT approval. Trustee
14 contended Robert's statement was inadmissible hearsay being
15 offered for the first time on the eve of trial to exculpate
16 Defendants. Moreover, John had since passed away so Trustee was
17 unable to question him about it. Alternatively, Trustee
18 contended that John's "forgery" statement to Robert should be
19 excluded under FRCP 37 for failing to disclose it in
20 interrogatories.

21 **C. The Trial.**

22 The two-day trial commenced on May 11, 2011. As a
23 preliminary matter, the parties agreed to address the basis of
24 Trustee's motion in limine when Robert testified.

25 Cynthia testified that she had never authorized John to sign
26 any documents on her behalf, but that John had done so without
27 her authorization in the past. Specifically, when she was away
28 at college, John had signed three credit card applications in

1 Cynthia's name without her knowledge. John subsequently failed
2 to pay the credit card debts and served time in jail as a result.
3 Cynthia also testified that she had never authorized Robert to
4 sign any document on her behalf, nor did she know of any
5 circumstance in which he had signed something on her behalf
6 without her knowledge.

7 Robert testified that even though he knew John had purchased
8 Galaxy in 1987, which in Robert's opinion was a "crazy" idea,
9 Robert had no involvement with John's efforts to reinstate
10 Galaxy's operational certificate with the DOT. As for the
11 Option, Robert testified that although the questioned signature
12 looked like his, he did not sign it. Robert again confirmed that
13 once he showed the Option to John in 2008, John admitted faking
14 the document and forging the signatures as a means to acquire
15 Galaxy. Robert testified that he had never seen the Option
16 before February 2008. Robert admitted that he did not disclose
17 John's "forgery" story in the interrogatories because he did not
18 remember it at the time, and he assumed his denial of signing it
19 was sufficient.

20 On cross-examination, Robert testified that he would never
21 have signed the Option. Robert further testified that Cynthia
22 never authorized him to sign her name on any documents, and he
23 never did so. Finally, Robert testified that John had also
24 obtained credit cards in Robert's name without his knowledge.

25 Both expert witnesses testified on day two of the trial.
26 Trustee's expert, David Moore ("Moore"), testified that even
27 though the Option was a copy, he found nothing in either
28 signature to suggest they were not naturally written. In other

1 words, the signatures were not traced. Moore further testified
2 that he had a sufficient amount of known signature exemplars from
3 Robert and concluded that Robert's questioned signature was
4 "probably" genuine. Moore explained that on the scale used by
5 forensic document examiners, with the finding of "did sign it" at
6 the far right end and the finding of "did not sign it" at the far
7 left end, a conclusion of "probably" was just below the finding
8 of "very probably," which was just below "did sign it." Moore
9 further explained that in the middle of the scale is the finding
10 of "no conclusion," which means the evidence is evenly split or
11 insufficient information exists to lean one way or the other. In
12 this case, explained Moore, his finding of "probably" with
13 respect to Robert's signature meant the evidence was strong but
14 some limiting factors existed - i.e., the absence of an original.
15 Because the Option was only a copy, Moore could not exclude the
16 possibility that Robert's signature was a "cut-and-paste." Moore
17 could also not recall an instance where a document contained both
18 a forged signature and a cut-and-paste signature of another.

19 On cross-examination, Moore testified that he was not asked
20 to determine whether Cynthia's questioned signature was written
21 by Robert. He did opine, however, that since their signatures
22 were so sufficiently dissimilar it would be like comparing apples
23 and oranges, and he would be unable to determine whether or not
24 Robert wrote Cynthia's signature.

25 Defendants's expert, James Blanco ("Blanco"), testified
26 next. When asked whether it was "probable" that Robert, assuming
27 his signature on the Option was genuine, wrote the questioned
28 "Cynthia Kupka" signature, Blanco replied: "I would say it would

1 not be probable." Trial Tr. (May 12, 2011) 77:6. On cross-
2 examination, Blanco testified that he saw no evidence of cut-and-
3 paste, but admitted that he was retained only to opine on
4 Cynthia's signature, not Robert's, because Robert had admitted
5 that the questioned signature looked like his. Blanco further
6 testified that he saw no traces of Robert's signature
7 characteristics in Cynthia's signature that indicated Robert
8 signed for her.

9 After Blanco's testimony, Trustee's counsel asserted that
10 any pending evidentiary objections, particularly all hearsay
11 objections with respect to submitted documents, needed to be
12 resolved before he could present closing argument. The
13 bankruptcy court responded that all exhibits had been admitted as
14 far as it was concerned. During further colloquy on this issue,
15 the court stated that any documents containing hearsay statements
16 of John would be disregarded, to which Trustee's counsel
17 responded:

18 Well, your Honor, before you come to that conclusion,
19 there may be some things in there you may regard. You
20 may accept them. You're perfectly capable of weighing
the evidence.

21 Trial Tr. (May 12, 2011) 100:5-8. The court then noted that the
22 primary issue in the case was whether Robert forged Cynthia's
23 signature on the Option. However, it believed Blanco had ruled
24 out that possibility. Furthermore, Robert had testified he had
25 never signed Cynthia's name, and Cynthia had testified she never
26 authorized anyone to sign her name on any document.

27 Trustee's counsel then stated he had one more witness to
28 call before closing his case in chief. The court asked counsel

1 for an offer of proof regarding this witness "because at this
2 stage in the game, [Trustee] d[id]n't have a case." Id. at
3 104:1-2. Counsel offered that this witness would impeach
4 Robert's testimony, to which the court responded: "You have an
5 unfortunate problem there because I happen to believe that
6 [Robert] was a very reliable witness." Id. at 104:13-15. The
7 court then asked counsel whether the witness would impeach
8 Robert's testimony about not signing the Option. Counsel
9 responded that the witness would impeach Robert's testimony about
10 having no involvement in the DOT proceedings. In response, the
11 court stated:

12 I don't care about that. I really don't care about that.
13 That's got nothing to do with this case as I see it. And
14 I believe Mr. Kupka's testimony.

14

15 . . . [A]nd I also believe [Robert's] testimony that all
16 of this has to do with John . . . trying to get some
17 evidence in, trying to get something together to show
18 that he had assets.

18

19 So how does that ever get you to the point where this
20 option, 30-year-old option, whatever it is, that is not
21 signed by either Mr. Kupka or his sister, how can that
22 possibly result in something that you can enforce?

21 Id. at 105::21-23; 106:6-15. In the court's opinion, even if
22 Trustee's witness testified that Robert was involved with the DOT
23 proceedings, it would not rehabilitate the Option, which was a
24 "complete nothing." Id. at 108:21. Even if Robert was not
25 telling the truth, opined the court, the outcome remained
26 unchanged because both signatures had to be genuine for a valid
27 Option, and the evidence showed that Cynthia never signed it and
28 never authorized Robert to sign it (or anything else) on her

1 behalf.

2 Despite the court's position, Trustee's counsel stated that
3 he still wanted to put on his last witness the following day, to
4 which the court responded: "You may do so." Id. at 110:17.
5 Counsel explained that the witness was the county planner from
6 1987 who spoke with Robert about moving Galaxy from Florida to
7 Lodi Airport. The court responded that regardless of what the
8 planner had to say, it would not render the Option valid.
9 Furthermore, the evidence showed that John had previously forged
10 Cynthia's name on various documents, and even if Robert had at
11 one time expressed to the county planner an interest in moving
12 Galaxy to Lodi Airport, Robert had testified that he determined
13 the prospect was useless considering Galaxy's debt load.
14 Finally, the court noted that even Trustee's expert could not
15 rule out the possibility that Robert's signature on the Option
16 was a cut-and-paste job.

17 Upon counsel's further offer of proof about the planner's
18 testimony, the court stated:

19 Don't buy it. I have no reason to. As I said, I think
20 Robert Kupka is a reliable witness. I heard him testify.
21 I have no reason to doubt his testimony. I believe him.
22 I believe his sister. And they're both saying, "Hey, we
23 didn't have anything to do with this stupid document."
24 There you are.

25 Id. at 118:8-14. The court reiterated that Trustee's counsel
26 could call the planner to testify, but that it would not be
27 persuaded:

28 You've made your offer of proof, which I think is
adequate, I mean, sufficient to at least bring to the
attention of any appellate court as to what kind of
evidence you were going to bring on, namely, that there
was a conversation between [Robert] and the planner that

1 was in charge, I guess, of Lodi Airport improvements --
2 that they were talking about bringing [Galaxy] to the
3 Lodi Airport. But, as I said before . . . it doesn't do
anything for this bogus document. That document, that
option agreement is bogus.

4 Id. at 121:17-122:3. Counsel then explained that the planner's
5 testimony was not based just on his memory of conversations with
6 Robert, but it was also based on a report that is part of the
7 public record. The court paused momentarily, but ultimately
8 determined the planner's testimony was not going to change the
9 court's mind. As a result, it dismissed Trustee's complaint with
10 prejudice.⁶ The court further denied Trustee's motion in limine
11 to exclude John's "forgery" hearsay statement to Robert.

12 An order denying Trustee's motion in limine was entered on
13 May 17, 2011. A judgment in favor of Defendants was entered on
14 June 8, 2011. This timely appeal followed.

15 II. JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C.
17 §§ 157(b)(2)(A) and 1334. The order denying Trustee's motion in
18 limine was an interlocutory order that merged into the final
19 judgment. United States v. Real Prop. Located at 475 Martin
20 Lane, Beverly Hills, Cal., 545 F.3d 1134, 1141 (9th Cir. 2008)
21 (under the merger rule interlocutory orders entered prior to the
22 judgment merge into the judgment and may be challenged on
23 appeal). Therefore, we have jurisdiction over both the order
24 denying the motion in limine and the judgment under 28 U.S.C.

25
26
27 ⁶ Since the dismissal occurred at the close of the evidence
28 presented on Trustee's case in chief, including his offer of
proof, it appears to have been a Judgment on Partial Findings as
allowed by FRCP 52(c), as incorporated by Rule 7052.

1 § 158.

2 **III. ISSUES**

3 1. Did the bankruptcy court clearly err in finding that the
4 Option was invalid?

5 2. Did the bankruptcy court abuse its discretion by not having
6 the county planner testify and by admitting the hearsay
7 testimony?

8 3. Did the bankruptcy court apply the proper burden of proof?

9 **IV. STANDARDS OF REVIEW**

10 We review the bankruptcy court's findings with respect to
11 the validity of the Option for clear error. A finding is clearly
12 erroneous when it is illogical, implausible or "without support
13 in inferences that may be drawn from the facts in the record."
14 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
15 (en banc). If the trial court's account of the evidence is
16 plausible in light of the record viewed in its entirety, the
17 court of appeals may not reverse it even though convinced that
18 had it been sitting as the trier of fact, it would have weighed
19 the evidence differently. S.E.C. v. Rubera, 350 F.3d 1084, 1094
20 (9th Cir. 2003)(citing Anderson v. City of Bessemer City, N.C.,
21 470 U.S. 564, 573-74 (1985)). Great deference is to be given to
22 the bankruptcy court's determinations on witness credibility due
23 to its opportunity to observe the witness. Retz v. Samson
24 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)(citing
25 Anderson, 470 U.S. at 575 (1985)).

26 To reverse an evidentiary ruling, we must conclude that the
27 bankruptcy court both abused its discretion and that the error
28 was prejudicial. Latman v. Burdette, 366 F.3d 774, 786 (9th Cir.

1 2004). We review the bankruptcy court's ruling on a motion in
2 limine for an abuse of discretion. United States v. Rude,
3 88 F.3d 1538, 1549 (9th Cir. 1996). To determine whether the
4 bankruptcy court abused its discretion, we conduct a two-step
5 inquiry: (1) we review de novo whether the bankruptcy court
6 "identified the correct legal rule to apply to the relief
7 requested" and (2) if it did, whether the bankruptcy court's
8 application of the legal standard was illogical, implausible or
9 "without support in inferences that may be drawn from the facts
10 in the record." Hinkson, 585 F.3d at 1261-62.

11 Whether the bankruptcy court properly applied the correct
12 burden of proof is a question of law reviewed de novo. United
13 States v. Banuelos, 322 F.3d 700, 704 (9th Cir. 2003).

14 **V. DISCUSSION**

15 We begin by noting that our review of this appeal is
16 hindered due to Trustee's failure to include in his excerpts of
17 record: the complaint, answer, all pretrial motions including the
18 subject motion in limine and related order, the pretrial order,
19 any pretrial statements, Trustee's trial brief, the Alternate
20 Direct Testimony of Robert and Blanco, Blanco's report, the
21 notice of appeal, and the judgment. This is a severe violation
22 of Rule 8009(b) subjecting Trustee's appeal to dismissal. Kyle
23 v. Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004).
24 Nonetheless, we exercised our discretion to retrieve many of
25 these items from the bankruptcy court's electronic docket, of
26 which we take judicial notice. See Atwood v. Chase Manhattan
27 Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
28 2003)(we are free to take judicial notice of relevant documents

1 on the bankruptcy court's docket). However, the Alternate Direct
2 Testimony of Robert and expert witness Blanco, as well as
3 Blanco's report, were not available.

4 **A. The bankruptcy court did not clearly err in finding that the**
5 **Option was invalid.⁷**

6 Trustee disputes the bankruptcy court's finding that the
7 Option was not valid based on what he believes was compelling
8 evidence to the contrary. In order to reverse the bankruptcy
9 court on this basis, we must conclude that its findings of fact
10 are illogical, implausible, or not supported by the record.

11 Hinkson, 585 F.3d at 1261-62.

12 Trustee contends he established the Option's validity by the
13 following. The copy of the Option and John's 1987 letter
14 referencing the Option demonstrated its existence. Robert and
15 Cynthia's names appear on the Option, signed by someone. Both
16 experts opined that Robert's signature was probably written by
17 him, and Robert admitted that it looked like his signature.
18 Cynthia admitted that she was unfamiliar with the business
19 dealings of Lodi Airport, and that she would sign documents when
20 Robert advised her to do so. Cynthia also admitted she had
21 little memory of the time period when the Option was executed,

22 ⁷ Trustee contends the bankruptcy court did not appear to be
23 fully familiar with the written materials submitted by the
24 parties prior to trial and did not have a complete grasp on
25 Trustee's arguments. Trustee further contends the court let
26 Defendants's counsel argue extensively in his opening statement,
27 which likely influenced the court's evaluation of the evidence
28 presented.

26 First, we see no objections by Trustee's counsel to any of
27 Defendants's opening statement in the transcript. Further, the
28 transcript reflects that the bankruptcy court was familiar with
Trustee's legal arguments, but it chose to reject them based on
the evidence.

1 and that she could not remember signing several airport-related
2 documents at the time she signed them. Trustee asserts that even
3 if Cynthia did not sign the Option, the evidence suggests she may
4 have authorized Robert to sign it on her behalf. Thus, contends
5 Trustee, even assuming Cynthia's signature is not genuine,
6 Robert's signing of both their signatures is sufficient to
7 establish their intent to be bound by the Option's terms. In
8 short, Trustee asserts that based on the evidence one of the
9 following must have occurred: either John forged the Option, or
10 Robert signed it and forged Cynthia's signature, either with her
11 authorization or without it.

12 Although Trustee's scenario of Robert forging Cynthia's
13 signature on the Option is plausible, we also have to consider
14 all of the evidence and testimony offered in this case. In
15 addition to Cynthia's testimony that she would sign documents
16 when Robert advised her to do so, and that she could not remember
17 signing various airport-related documents at the time she signed
18 them, Cynthia also testified that she did not sign the Option.
19 Both experts agreed that Cynthia's signature on the Option was
20 not genuine. Cynthia also testified that she never authorized
21 Robert to sign any document on her behalf, including the Option.
22 As for whether Robert forged Cynthia's signature on the Option,
23 Blanco determined that Robert probably did not, and Moore could
24 not determine that Robert did. Robert testified that he did not
25 forge Cynthia's signature. Robert testified that he did not sign
26 the Option, and both experts could not conclusively rule out the
27 possibility that his signature was a cut-and-paste job. Cynthia
28 and Robert also testified as to John's history of forging his

1 children's signatures on documents. Furthermore, according to
2 the DOT's OSC, one of the reasons it refused to reinstate
3 Galaxy's operational certificate was John's prior criminal record
4 of lying under oath. The bankruptcy court made explicit findings
5 that Robert and Cynthia were credible witnesses. It also found
6 expert Blanco's testimony more persuasive than expert Moore's.

7 Even if we as the fact-finder would have weighed the
8 evidence differently, "when there are two permissible views of
9 the evidence, the trial judge's choice between them cannot be
10 clearly erroneous." Village Nurseries v. Gould (In re Baldwin
11 Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999). We cannot
12 conclude on this record that the bankruptcy court clearly erred
13 in finding the Option was bogus. This finding is not illogical,
14 implausible, or without any support in the record viewed in its
15 entirety. Hinkson, 585 F.3d at 1261-62.

16 **B. The bankruptcy court did not abuse its discretion by not**
17 **having the county planner testify or by admitting the**
"forgery" hearsay testimony.

18 Trustee contends the bankruptcy court abused its discretion
19 when it "refused" to allow him the opportunity to call the county
20 planner, whose testimony would have impeached Robert's testimony
21 on the key issue of his involvement with John's efforts with the
22 DOT and to bring Galaxy to Lodi Airport. Despite Trustee's
23 failure to disclose the county planner as a witness in the
24 pretrial order, the record clearly shows that the bankruptcy
25 court did not deny Trustee the opportunity to call him. The
26 court considered Trustee's offer of proof regarding the planner's
27 testimony and ultimately concluded that regardless of what he had
28 to say about Robert's involvement with relocating Galaxy to Lodi

1 Airport, it would not rehabilitate what the court determined was
2 a bogus document. The court went further to say that even if
3 Robert was not being truthful about his involvement with the DOT
4 proceedings, the Option was still invalid because Cynthia never
5 signed it and never authorized anyone else to sign it on her
6 behalf, and to be a valid contract both signatures had to be
7 genuine. We see no abuse of discretion here.

8 Trustee also contends the bankruptcy court abused its
9 discretion by precluding the admission of relevant documentary
10 evidence demonstrating Robert's involvement in John's affairs
11 that would have discredited Robert and diminished the weight the
12 court could reasonably have placed on his testimony. Trustee
13 fails to state what "documentary evidence" the court failed to
14 admit, but we assume he is referring to the planner's report from
15 1987. As the bankruptcy court noted, even if Robert was not
16 being truthful about his involvement with relocating Galaxy to
17 Lodi Airport or the DOT proceedings, the planner's documentary
18 evidence could not render the Option valid.

19 Finally, Trustee contends that the bankruptcy court abused
20 its discretion by admitting the hearsay testimony that John told
21 Robert he forged the signatures on the Option because its
22 admission must have tainted the outcome of his case. "Hearsay"
23 is a statement, other than one made by the declarant while
24 testifying at the trial or hearing, offered in evidence to prove
25 the truth of the matter asserted. FRE 801(c). Unless falling
26 under an exception in FRE 803 and 804, hearsay statements are
27 inadmissible under FRE 802. The "forgery" hearsay testimony was
28 subject to the motion in limine, which the bankruptcy court

1 denied. A motion in limine is "any motion whether made before or
2 during trial to exclude anticipated prejudicial evidence before
3 the evidence is actually offered." Luce v. United States,
4 469 U.S. 38, 40 (1984).

5 We agree with Trustee that the bankruptcy court erred by
6 allowing in the "forgery" hearsay testimony. However, on this
7 record, such error was harmless because it was not the only
8 evidence before the court on the genuineness of the signatures.
9 Early in the litigation, counsel for Defendants informed Trustee
10 by letter that the signatures on the Option were forgeries.
11 Admittedly, Defendants did not provide the basis for their
12 position. Nonetheless, both experts concluded that Cynthia's
13 signature was not genuine. Moore could not conclusively
14 determine that Robert forged Cynthia's signature, and Blanco
15 determined that Robert had not forged it. Cynthia testified that
16 she did not sign the Option and did not authorize or tell Robert
17 to sign it on her behalf. Robert testified that he did not sign
18 Cynthia's name or his name. Finally, neither expert could rule
19 out the possibility that Robert's signature was not the product
20 of cut-and-paste. On this record, the bankruptcy court could
21 plausibly have found the Option was invalid without the hearsay
22 testimony.

23 Accordingly, we cannot conclude the court abused its
24 discretion or that Trustee was unfairly prejudiced by allowing in
25 the "forgery" hearsay testimony.

26 **C. The bankruptcy court applied the correct burden of proof.**

27 Trustee contends the bankruptcy court erred by applying a
28 clear and convincing standard of proof to his declaratory relief

1 action, rather than the required standard of preponderance of the
2 evidence. Under a preponderance of the evidence standard, the
3 trier of fact is simply required to believe that the existence of
4 a fact is more probable than its non-existence. Concrete Pipe
5 and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for
6 S. Cal., 508 U.S. 602, 622 (1993).

7 Trustee's contention is purely conjecture. He points to
8 nothing specific in the record to support his assertion that the
9 bankruptcy court applied an improper burden of proof. We note
10 that during the trial, Trustee's counsel stated that the burden
11 of proof in this case was preponderance of the evidence. The
12 bankruptcy court expressly agreed. Trial Tr. (May 12, 2011)
13 116:9-13.

14 We see nothing in the record to conclude that anything other
15 than a preponderance of the evidence standard was applied.
16 Because we conclude the bankruptcy court applied the proper
17 burden of proof, we need not address Trustee's argument about
18 what the court might have determined with respect to the Option
19 if it had applied a preponderance standard.

20 VI. CONCLUSION

21 Based on the foregoing reasons, we AFFIRM.
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