

DEC 15 2015

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. EC-15-1000-FDJu  
 )  
 RHONDA STIJAKOVICH-SANTILLI, ) Bk. No. 13-33804  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 DOUGLAS M. WHATLEY, )  
 Chapter 7 Trustee; )  
 )  
 Appellant, )  
 )  
 v. ) **OPINION**  
 )  
 RHONDA STIJAKOVICH-SANTILLI, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on November 19, 2015  
at Sacramento, California

Filed - December 15, 2015

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Barry H. Spitzer of the Law Office of Barry H.  
 Spitzer argued for appellant Douglas M. Whatley,  
 Chapter 7 Trustee; Appellee Rhonda Stijakovich-  
 Santilli argued pro se.  
 \_\_\_\_\_

Before: FARIS, DUNN, and JURY, Bankruptcy Judges.

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1 FARIS, Bankruptcy Judge:  
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3 **INTRODUCTION**

4 Appellant Douglas M. Whatley, Chapter 7 Trustee, appeals  
5 from the bankruptcy court's order overruling his objection to  
6 Appellee Rhonda Stijakovich-Santilli's claim of a homestead  
7 exemption. The bankruptcy court held that the Trustee's  
8 objection was untimely. The Trustee argues that the Debtor  
9 fraudulently asserted the claim of exemption, so the deadline for  
10 his objection was extended under Rule 4003(b)(2) of the Federal  
11 Rules of Bankruptcy Procedure.<sup>1</sup> We hold that the bankruptcy  
12 court erred as a matter of law by ruling that (1) the Trustee was  
13 not entitled to the extended objection period because he could  
14 have discovered the Debtor's misstatements earlier; and  
15 (2) evidence of the Debtor's subsequent false statements about  
16 her exemption claim could not support a finding that she  
17 fraudulently claimed the exemption in the first place.  
18 Accordingly, we VACATE the bankruptcy court's order and REMAND  
19 this case to the bankruptcy court for further proceedings.

20 **FACTS**

21 The Debtor filed her chapter 7 petition on October 25, 2013.  
22 She listed three single family homes in her Schedule A, including  
23 real property located on Beckenham Drive in Granite Bay,  
24 California ("Subject Property"). Her Schedule I listed "Other  
25

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26 <sup>1</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037, and all "Civil Rule" references are  
to the Federal Rules of Civil Procedure, Rules 1-86.

1 monthly income" as \$3,400 from a "Room Mate." Initially, the  
2 Debtor claimed a \$75,000 homestead exemption<sup>2</sup> on the Subject

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6 <sup>2</sup> Under California law, a "homestead" is defined as  
7 the principal dwelling (1) in which the judgment  
8 debtor or the judgment debtor's spouse resided on the  
9 date the judgment creditor's lien attached to the  
10 dwelling, and (2) in which the judgment debtor or the  
11 judgment debtor's spouse resided continuously  
thereafter until the date of the court determination  
that the dwelling is a homestead.

12 Cal. Civ. Proc. Code § 704.710(c). The amount of exemption is  
13 codified in section 704.730(a) of the California Code of Civil  
14 Procedure, which states, in relevant part:

15 The amount of the homestead exemption is one of the  
16 following:

17 (1) Seventy-five thousand dollars (\$75,000) unless  
18 the judgment debtor or spouse of the judgment  
debtor who resides in the homestead is a person  
described in paragraph (2) or (3).

19 . . . .

20 (3) One hundred seventy-five thousand dollars  
21 (\$175,000) if the judgment debtor or spouse of the  
22 judgment debtor who resides in the homestead is at  
the time of the attempted sale of the homestead  
any one of the following:

23 . . . .

24 (B) A person physically or mentally disabled  
25 who as a result of that disability is unable  
26 to engage in substantial gainful  
employment. . . .

27  
28 Cal. Civ. Proc. Code § 704.730.

1 Property, pursuant to section 704.950<sup>3</sup> of the California Code of  
2 Civil Procedure.<sup>4</sup> The Debtor submitted her electronically signed  
3 Declaration Concerning Debtor's Schedules with her petition, in  
4 which she attested that the schedules "are true and correct to  
5 the best of [her] knowledge, information, and belief." She later  
6 amended her exemption to \$175,000 and again declared that the  
7 information in the amendments is "true and correct to the best of  
8 [her] information and belief."

9 The meeting of creditors concluded on January 21, 2014.  
10 There is no transcript of the meeting, but the Trustee

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12 <sup>3</sup> Section 704.950 of the California Code of Civil Procedure  
13 states, in relevant part:

14 (c) A judgment lien attaches to a declared homestead in  
15 the amount of any surplus over the total of the  
16 following:

17 (1) All liens and encumbrances on the declared  
18 homestead at the time the abstract of judgment or  
19 certified copy of the judgment is recorded to  
20 create the judgment lien.

21 (2) The homestead exemption set forth in Section  
22 704.730.

23 Cal. Civ. Proc. Code § 704.950.

24 <sup>4</sup> The Debtor claimed the homestead exemption in her  
25 Schedule C under section 704.950 of the California Code of Civil  
26 Procedure. However, this section does not create a homestead  
27 exemption; rather, it concerns the interplay of the homestead  
28 exemption with judgment liens. The proper basis for the Debtor's  
claim of a homestead exemption would have been section 704.720,  
which provides that "[a] homestead is exempt from sale under this  
division to the extent provided in Section 704.800." Cal. Civ.  
Proc. Code § 704.720. However, neither party discussed the  
import of the Debtor's choice of and reliance on section 704.950,  
and we do not address this issue further.

1 represented that the Debtor "confirmed her only income is the  
2 social security and from a contribution from a roommate."

3 The Debtor received a discharge on February 5, 2014. The  
4 case remained open while the Trustee administered non-exempt  
5 assets. On or around April 2, 2014, the bankruptcy court granted  
6 the Debtor's motion to discharge her attorney, D. Randall  
7 Ensminger, and proceed in propria persona.

8 The Debtor filed a motion to compel abandonment of three  
9 single family residences, including the Subject Property ("Motion  
10 to Compel Abandonment"). Essentially, the Debtor claimed that,  
11 considering the liens on the properties and her exemption, there  
12 was no equity in the three properties for the estate. Regarding  
13 the Subject Property, the Debtor stated that she claimed a  
14 \$175,000 homestead exemption due to a disability.

15 The Trustee did not oppose the Motion to Compel Abandonment  
16 as it related to the Subject Property and a second property, but  
17 opposed the motion as to a third property. The court granted the  
18 Motion to Compel Abandonment of the two properties, including the  
19 Subject Property.

20 On August 18, 2014, the Trustee filed his Objection by  
21 Chapter 7 Trustee to Debtor's Claim of Exemption in Real Property  
22 and Request for Relief from a Final Order on Abandonment of the  
23 Real Property ("Objection"), arguing that the Debtor fraudulently  
24 asserted the claim of exemption in the Subject Property. He  
25 contended that the Debtor did not reside at the Subject Property  
26 on the date she filed her chapter 7 petition and did not reside  
27 there at any time in 2013. The Trustee relied on the fact that,  
28 on her tax returns, the Debtor declared the Subject Property a

1 rental property for 365 days of the year, without any personal  
2 days. The Trustee further sought relief from the abandonment of  
3 the Subject Property, because, if the homestead exemption were  
4 inapplicable, then the Subject Property would have substantial  
5 equity and could add value to the estate.

6 In response, the Debtor argued that, although she received  
7 rental income from the Subject Property, she resided at the  
8 Subject Property during all of 2013: "Even though debtor has been  
9 receiving rental income with respect [to the Subject Property]  
10 during 2013, debtor had resided at [the Subject Property] during  
11 all of 2013." She represented that she "has been residing at  
12 [the Subject Property], as her principle [sic] dwelling,  
13 throughout 2012, 2013, and into 2014. The Debtor has also been  
14 renting to roommates at [the Subject Property] during 2012, 2013,  
15 and into 2014, in order for debtor to meet her income needs."  
16 She argued that renting the Subject Property to "roommates" does  
17 not prevent her "from claiming [the Subject Property] as her  
18 principle [sic] dwelling. Further, since debtor is renting to  
19 roommates in [the Subject Property], even though she is also  
20 residing at [the Subject Property], then debtor is correctly and  
21 accurately declaring [the Subject Property] as rental property on  
22 her Federal income tax returns . . . ."

23 In support of her position, the Debtor attached (1) a letter  
24 from her CPA, who confirmed that he advised her that the Subject  
25 Property "qualif[ies] as your primary residence partially based  
26 on your declaration that you have occupied it as your primary  
27 residence"; (2) a copy of a letter from the United States Social  
28 Security Administration sent to the Subject Property's address;

1 (3) a copy of her driver's license information request reflecting  
2 the Subject Property's address; and (4) copies of water bills for  
3 the Subject Property that are in the Debtor's name.

4 On September 24, 2014, the bankruptcy court heard arguments  
5 on the Trustee's Objection. The Debtor argued, "I just want to  
6 state that I do live at the house . . . ."

7 The court ultimately overruled the Objection. The court  
8 noted in its final ruling that, in the absence of fraud, the  
9 Trustee had until February 20, 2014 to object to the Debtor's  
10 claim of exemption. However, if the Debtor had fraudulently  
11 asserted the claim of homestead exemption, the Trustee's  
12 objection on August 18, 2014 would be timely under Rule  
13 4003(b)(2).

14 The court stated that the problem with the Trustee's theory  
15 is that the question on this objection to exemption is  
16 not whether the debtor prepared her tax returns in  
17 accordance with applicable tax law and rules. It is  
18 whether the debtor resided in the Property on the date  
19 her petition was filed, October 25, 2013. . . .  
[P]resumably, she was living in one of the three  
20 properties she owns; the trustee has given the court no  
21 reason to believe it was not the one in which she has  
22 claimed the homestead exemption.

23 In other words, the bankruptcy court believed that the  
24 Debtor resided on the Subject Property, but misreported its  
25 status on her tax returns. The court continued:

26 Here, the trustee's evidence goes only to the  
27 question of whether the debtor properly prepared her  
28 tax returns; the court finds that evidence to be  
insufficient to rebut the presumption that the debtor  
resided in the Property on the petition date. However,  
even if the trustee's evidence may be said to have  
overcome that presumption, the debtor has met her  
burden to produce evidence that she was living in the  
Property that day: she has testified unequivocally to  
that effect, thereby shifting the burden of proof back  
to the trustee, who, as the objecting party, always has

1 the burden of persuasion.

2 Thereafter, the Trustee conducted further investigation and  
3 gathered evidence that the Subject Property was not the Debtor's  
4 primary residence at the time she claimed the homestead  
5 exemption. The Trustee filed another objection on November 14,  
6 2014 ("Renewed Objection") and presented further evidence,  
7 including: (1) gas utility records reflecting bills directed to  
8 Joseph A. Mendoza, Jr. and Joanna R. Mendoza; (2) Ms. Mendoza's  
9 declaration that she was a tenant at the Subject Property with  
10 her husband and two children from June 16, 2012 through June 29,  
11 2014, and that, during that time, the Debtor did not reside at  
12 the Subject Property; and (3) county records showing that the  
13 Debtor did not file her homeowner's tax exemption for the Subject  
14 Property until March 3, 2014.

15 In response, the Debtor abandoned her argument that she was  
16 living on the Subject Property with "roommates" and admitted that  
17 she was living elsewhere. Instead, she argued that she had kept  
18 some of her personal belongings at the Subject Property. She  
19 claimed that her former attorney, Mr. Ensminger, had advised her  
20 that

21 as long as she kept most of her personal belongings at  
22 [the Subject Property], and did not reside primarily at  
23 any other home, then the court would consider [the  
24 Subject Property] as her primary residence. Debtor  
25 based her decisions on her attorney's advice that  
26 renting [the Subject Property] to roommates/tenants and  
27 staying at various friends' homes and traveling did not  
preclude [the Subject Property] from being her primary  
residence. Accordingly, even though debtor had rented  
out [the Subject Property] to roommates/tenants, it was  
the only home that reasonably could be considered to be  
her primary residence.

28 In his reply, the Trustee attached another declaration by

1 Ms. Mendoza, who testified that the only personal property that  
2 the Debtor had left at the Subject Property was a spa, outdoor  
3 furniture, garden hoses, a ladder, an ironing board, wine racks,  
4 outdoor brass deer, remote controls, and some maintenance items,  
5 such as paint and light bulbs. The Trustee also pointed out that  
6 the Debtor mischaracterized the Mendozas as "roommates/tenants,"  
7 despite the fact that they were clearly tenants who had entered  
8 into formal leases.

9 The bankruptcy court held a hearing on the Renewed Objection  
10 on December 17, 2014. The court focused on whether a false  
11 statement made well **after** the claim of exemption meets the  
12 requirements of Rule 4003(b)(2). At the outset, the Trustee  
13 agreed with the court that Rule 4003(b)(2) is to be read as  
14 requiring the Trustee to show that the Debtor fraudulently  
15 "asserted the exemption at the time the exemption was claimed."  
16 However, the Trustee argued that the Debtor, "from the very first  
17 filing, set to out deceive the court, the trustee and her  
18 creditors by stating she lived at" the Subject Property.

19 In its final ruling, the court again overruled the  
20 objection, holding that the Debtor did not "fraudulently  
21 assert[ ] the claim of exemption." The court stated:

22 Based on the declaration of Joanna Mendoza  
23 submitted by the trustee, it appears to be an accurate  
24 statement that the debtor did not actually reside in  
25 the Property on October 25, 2013. However, that fact  
26 alone - which is virtually the only fact the trustee  
27 relies on - is not sufficient to establish that the  
28 debtor "fraudulently asserted the claim of exemption,"  
as required for a finding that the trustee's objection  
is timely under Rule 4003(b)(2).

27 The court said that the Trustee should have "taken more  
28 concrete steps to determine whether the debtor was actually

1 living on the Property [after the meeting of creditors]." The  
2 court found that "the debtor's use of a post office box address  
3 . . . might reasonably have been expected to put the trustee on  
4 notice he should investigate the question of her actual residence  
5 further." The court said that

6 the trustee was on notice from the debtor's schedules  
7 that she was receiving \$3,400 per month in rent from  
8 the Property, almost the amount of the rents on the  
9 other two properties combined. A quick Zillow search  
10 would have revealed that the Property is a four  
11 bedroom, three bath house. The amount of the rent  
12 alone might reasonably have been expected to trigger  
13 further inquiry into whether the debtor was residing at  
14 the Property along with her tenants.

11 The court did not believe the Trustee's assertion that he only  
12 realized that the Debtor did not reside at the Subject Property  
13 when he received her 2013 tax returns. Rather, the Trustee had  
14 the Debtor's 2012 tax returns, which similarly claimed the  
15 Subject Property as a rental property for the entire year. It  
16 stated that the Debtor's 2012 tax returns, "on which the debtor  
17 claimed all three of her properties, including the Property, as  
18 rental properties for the entire year, might reasonably have been  
19 expected to trigger further inquiry into her actual residence."

20 The court further determined that the Debtor's reasons for  
21 claiming a homestead exemption in the Subject Property "also  
22 weigh against a finding of fraud. She states her attorney told  
23 her that 'as long as [she] kept most of [her] personal belongings  
24 at [the Property], and did not reside primarily at any other  
25 home, then the court would consider [the Property] as [her]  
26 primary residence.'" The court said that, "[i]n fact, given the  
27 debtor's two-year lease of the property to others, reserving no  
28 right of occupancy for herself, the validity of her claim to a

1 homestead exemption seems tenuous." However, the court stated  
2 that "it does not matter whether the debtor had a valid or even a  
3 colorable claim to the exemption. It matters only whether she  
4 fraudulently asserted the exemption, such that the late objection  
5 should be allowed under Rule 4003(b)(2)."

6 In sum, the court concluded that

7 the debtor's testimony in response to the trustee's  
8 earlier objection to exemption that she "[has] been  
9 residing at [the Subject Property] . . . continuously  
10 for all of 2012, 2013 and all of 2014 through the date  
11 of this declaration" is quite troubling to this court.  
12 However, this testimony was given not at the time the  
13 debtor asserted the claim of exemption, but almost 11  
14 months later, when she was defending against the  
15 trustee's objection, and long after the trustee's time  
16 to object, in the absence of fraud, had run. Thus,  
17 although this testimony appears to have been  
18 inaccurate, and possibly deliberately so, it does not  
19 support a conclusion that the debtor fraudulently  
20 asserted the exemption at the time it was claimed.

21 The court issued its order overruling the Renewed Objection  
22 on December 18, 2014. The Trustee timely filed his notice of  
23 appeal on December 30, 2014.

24 On March 18, 2015, the Trustee obtained a declaration from  
25 Mr. Ensminger wherein he refuted certain of the Debtor's  
26 statements regarding his representation of the Debtor. Mr.  
27 Ensminger attested that the Debtor had not informed him that she  
28 rented the Subject Property exclusively to others, but he recalls  
that she had told him that she resided at the Subject Property  
with roommates. He stated that he would not have advised her  
that the court would consider the Subject Property as her primary  
residence if she left personal belongings at the Subject  
Property. Finally, he said that he had been in the hospital and  
unable to respond to work-related e-mails until recently. It is

1 undisputed that the bankruptcy court did not have the benefit of  
2 Mr. Ensminger's declaration when it ruled on the Objection and  
3 Renewed Objection.

#### 4 JURISDICTION

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.  
7 § 158.

#### 8 ISSUE

9 Whether the bankruptcy court erred in overruling the  
10 Trustee's objection to the Debtor's claim of a homestead  
11 exemption in the Subject Property.

#### 12 STANDARD OF REVIEW

13 The bankruptcy court's conclusions of law are reviewed de  
14 novo. Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109  
15 (9th Cir. 2010). We review exemption determinations de novo.  
16 Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 389 (9th  
17 Cir. BAP 2003); Kelley v. Locke (In re Kelley), 300 B.R. 11, 16  
18 (9th Cir. BAP 2003). De novo review requires that we consider a  
19 matter anew, as if it had not been heard before, and as if no  
20 decision had been rendered below. Dawson v. Marshall, 561 F.3d  
21 930, 933 (9th Cir. 2009).

22 The bankruptcy court's factual findings, for purposes of  
23 determining the validity of a homestead exemption claim, are  
24 reviewed under the clearly erroneous standard. In re Kelley, 300  
25 B.R. at 16 (citation omitted). A factual finding is clearly  
26 erroneous only if we have a definite and firm conviction that a  
27 mistake has been committed. Banks v. Gill Distrib. Ctrs., Inc.  
28 (In re Banks), 263 F.3d 862, 869 (9th Cir. 2001) (quoting

1 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573  
2 (1985)).

3 **DISCUSSION**

4 **A. Rule 4003(b)(2) extends the time for a trustee to object to**  
5 **a claim for exemption if a debtor fraudulently asserts the**  
6 **claim of exemption.**

7 A creditor or trustee must ordinarily "file an objection to  
8 the list of property claimed as exempt within 30 days after the  
9 meeting of creditors held under § 341(a) is concluded or within  
10 30 days after any amendment to the list or supplemental schedules  
11 is filed, whichever is later." Rule 4003(b)(1). Rule 4003(b)(2)  
12 creates a limited exception to this rule. It provides that  
13 "[t]he trustee may file an objection to a claim of exemption at  
14 any time prior to one year after the closing of the case if the  
15 debtor fraudulently asserted the claim of exemption." Rule  
16 4003(b)(2).<sup>5</sup>

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17 <sup>5</sup> Rule 4003(b)(2) was enacted in 2008. The advisory  
18 committee notes to the 2008 amendments state:

19 Subdivision (b)(2) is added to the rule to permit the  
20 trustee to object to an exemption at any time up to one  
21 year after the closing of the case if the debtor  
22 fraudulently claimed the exemption. Extending the  
23 deadline for trustees to object to an exemption when  
24 the exemption claim has been fraudulently made will  
25 permit the court to review and, in proper  
26 circumstances, deny improperly claimed exemptions,  
27 thereby protecting the legitimate interests of  
28 creditors and the bankruptcy estate. However, similar  
to the deadline set in § 727(e) of the Code for  
revoking a discharge which was fraudulently obtained,  
an objection to an exemption that was fraudulently  
claimed must be filed within one year after the closing  
of the case. Subdivision (b)(2) extends the objection  
deadline only for trustees.

Rule 4003(b) advisory committee's notes to 2008 amendment.

1 In this case, the meeting of creditors concluded on January  
2 21, 2014. Thus, in the absence of fraud, the Trustee had until  
3 February 20, 2014 to object to the Debtor's claims of exemptions.  
4 The Trustee filed his Objection on August 18, 2014, nearly six  
5 months past the general deadline. Therefore, the Trustee's  
6 Objection is barred under Rule 4003(b)(1), unless the Debtor  
7 "fraudulently asserted a claim of exemption" under Rule  
8 4003(b)(2).

9 As a general rule, a party who objects to a debtor's claim  
10 of exemption has the burden of proving that the exemption is not  
11 properly claimed, according to Rule 4003(c). If the objector can  
12 produce evidence to rebut the presumption of validity, then the  
13 burden of production shifts to the debtor to come forward with  
14 unequivocal evidence to demonstrate that the exemption is  
15 properly claimed. In re Kelley, 300 B.R. at 16-17; Carter v.  
16 Anderson (In re Carter), 182 F.3d 1027, 1029 (9th Cir. 1999).  
17 The burden of persuasion remains, however, with the objecting  
18 party. The quantum of proof is a preponderance of the evidence.  
19 In re Kelley, 300 B.R. at 17.<sup>6</sup>

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22  
23 <sup>6</sup> In the present case, the bankruptcy court applied the  
24 burden-shifting rule in Rule 4003(c). At least one California  
25 bankruptcy court has held that, if the debtor chooses a state law  
26 exemption, then state law allocates the burden of proof  
27 notwithstanding Rule 4003(c). See In re Tallerico, 532 B.R. 774,  
28 780, 787-89 (Bankr. E.D. Cal. 2015). The parties have not  
briefed this issue, so we express no opinion and leave this issue  
to the bankruptcy court on remand.

1 **B. "Fraudulently asserted" under Rule 4003(b)(2) should be**  
2 **construed with regard to the common law definition of fraud**  
3 **and § 523(a)(2).**

4 The bankruptcy court did not offer a definition of the  
5 phrase "fraudulently asserted." Rule 4003(b)(2) does not define  
6 the term, and the case law is scant. We begin with the standard  
7 rules of statutory interpretation, which apply equally to  
8 interpretation of the Rules. See generally Rhodes v. Litig. Tr.  
9 of the Rhodes Cos., LLC (In re Rhodes Cos., LLC), 475 B.R. 733,  
10 738 (D. Nev. 2012) ("To determine the meaning of a Federal Rule  
11 of Civil Procedure, courts apply rules of statutory  
12 interpretation."). "[W]hen the statute's language is plain, the  
13 sole function of the courts – at least where the disposition  
14 required by the text is not absurd – is to enforce it according  
15 to its terms." In re Trejos, 352 B.R. 249, 255 (Bankr. D. Nev.  
16 2006), aff'd, 374 B.R. 210 (9th Cir. BAP 2007) (quoting Lamie v.  
17 U.S. Tr., 540 U.S. 526, 534 (2004)). Words and phrases used in  
18 statutes and rules should ordinarily be given their common  
19 meaning. See Williams v. Taylor, 529 U.S. 420, 431 (2000) (The  
20 words of a statute are given their "ordinary, contemporary,  
21 common meaning," unless Congress intended to give them other  
22 meaning.). Words that have special legal definitions should  
23 usually be given their common legal meaning. See Henry v. United  
24 States, 251 U.S. 393, 395 (1920) ("The law uses familiar legal  
25 expressions in their familiar legal sense[.]"); In re LTV Steel  
26 Co., Inc., 264 B.R. 455, 473 (Bankr. N.D. Ohio 2001) ("When  
27 Congress uses a familiar legal expression and does not provide a  
28 definition, that connotes Congress' intent that the words be  
given their usual legal meaning." (citation omitted)).

1 At common law, the word "fraud" and its derivatives refer to  
2 (1) a representation (2) that the speaker knew was false when the  
3 speaker made the representation, (3) that the speaker made with  
4 the intent to deceive another, (4) on which the hearer  
5 justifiably relied, and (5) which caused damage to the hearer.  
6 See Rasidescu v. Midland Credit Mgmt., Inc., 435 F. Supp. 2d  
7 1090, 1099 (S.D. Cal. 2006) ("In California, the elements of  
8 common law fraud are: 1) misrepresentation of a material fact; 2)  
9 knowledge of falsity by defendant of the material fact; 3) intent  
10 of defendant to defraud plaintiff; 4) justifiable reliance of  
11 plaintiff on the material fact; and 5) damages." (citing City of  
12 Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68  
13 Cal. App. 4th 445, 481 (1998))). We have applied this common law  
14 definition to the phrase "actual fraud" in § 523(a)(2).<sup>7</sup> See  
15 Britton v. Price (In re Britton), 950 F.2d 602, 604 (9th Cir.  
16 1991) (employing the same five-part test); Tallant v. Kaufman (In  
17 re Tallant), 218 B.R. 58, 64 (9th Cir. BAP 1998) (same); see also  
18 In re Trejos, 352 B.R. at 255 ("In determining the appropriate

19 \_\_\_\_\_  
20 <sup>7</sup> Section 523(a)(2) provides, in relevant part:

21 (a) A discharge under section 727, 1141, 1228(a),  
22 1228(b), or 1328(b) of this title does not discharge an  
individual debtor from any debt -

23 (2) for money, property, services, or an  
24 extension, renewal, or refinancing of credit, to  
the extent obtained by -

25 (A) false pretenses, a false representation,  
26 or actual fraud, other than a statement  
27 respecting the debtor's or an insider's  
financial condition[.]

28 § 523(a)(2)(A).

1 sense, investigation into ways in which the Bankruptcy Code uses  
2 the same or similar words is appropriate, especially when that  
3 usage comports with common usage." (citing Rousey v. Jacoway, 544  
4 U.S. 320, 326-27 (2005)).

5 Thus, we hold that, to determine whether a debtor  
6 "fraudulently asserted" an exemption claim within the meaning of  
7 Rule 4003(b)(2), the bankruptcy court should apply the usual  
8 definition of fraud, except the damages requirement, which has no  
9 bearing on the question of exemptions.

10 The court must first identify the relevant "representation."  
11 Whenever a debtor asserts a claim of exemption, the debtor  
12 implicitly represents that the facts support that claim. When a  
13 debtor completes her schedules, she signs a declaration attesting  
14 to the accuracy of the information and expressly certifies under  
15 the penalty of perjury that all statements contained therein are  
16 true. See Suter v. Goedert, 396 B.R. 535, 541 (D. Nev. 2008)  
17 ("Statements made in bankruptcy schedules are executed under  
18 penalty of perjury and, when offered against the debtor, 'are  
19 eligible for treatment as [evidentiary] admissions.'" (quoting In  
20 re Bohrer, 266 B.R. 200, 201 (Bankr. C.D. Cal. 2001))). By  
21 extension, the debtor is also certifying that the factual  
22 predicates to each statement are true. For example, when a  
23 California debtor claims a homestead exemption, she implicitly  
24 attests that the property for which she is claiming an exemption  
25 is "the principal dwelling (1) in which the judgment debtor or  
26 the judgment debtor's spouse resided on the date the judgment  
27 creditor's lien attached to the dwelling, and (2) in which the  
28 judgment debtor or the judgment debtor's spouse resided

1 continuously thereafter until the date of the court determination  
2 that the dwelling is a homestead[.]” See Cal. Civ. Proc. Code  
3 § 704.710(c). In other words, a debtor making that claim  
4 represents that the underlying facts support the claim of  
5 exemption, including the facts that the alleged homestead was her  
6 “principal dwelling” and that she resided there at the relevant  
7 times.

8 In order to establish that the debtor fraudulently asserted  
9 the exemption, the objector must do more than show that the facts  
10 do not support the claim of exemption. The objector must also  
11 show that the debtor knew, at the time she claimed the exemption,  
12 that the facts did not support that claim, and that she intended  
13 to deceive the trustee and creditors who read the schedules.

14 **C. The bankruptcy court erred as a matter of law in construing**  
15 **Rule 4003(b)(2).**

16 The bankruptcy court overruled the Trustee’s objections to  
17 the Debtor’s homestead exemption on the basis that (1) the  
18 Trustee had been put on notice of possible fraud and failed to  
19 investigate in a timely manner; and (2) the Debtor’s later false  
20 statements and changing story regarding her place of residence  
21 did not prove that she fraudulently asserted the exemption **at the**  
22 **time she claimed it.** We conclude that the bankruptcy court  
23 misinterpreted Rule 4003(b)(2).

24 **1. The bankruptcy court erred by imposing a duty to**  
25 **investigate upon the Trustee.**

26 First, the bankruptcy court faulted the Trustee for not  
27 taking steps earlier to inquire into the Debtor’s situation and  
28 object within the thirty-day time period. We hold that the  
bankruptcy court erred in imposing a duty to investigate on the

1 Trustee. The question under Rule 4003(b)(2) is whether the  
2 debtor "fraudulently asserted" the exemption. As we explain  
3 above, the word "fraudulently" should be given its common law  
4 meaning. At common law (and under § 523(a)(2)(A), which  
5 incorporates the common law standard), the perpetrator of an  
6 alleged fraud cannot avoid liability by showing that the victim  
7 could have uncovered the fraud had the victim investigated more  
8 carefully. See Merchants Bank of Cal. v. Oh (In re Oh), 278 B.R.  
9 844, 855 (Bankr. C.D. Cal. 2002) ("A person is justified in  
10 relying upon a misrepresentation even if he might have  
11 ascertained the falsity of the information through investigation.  
12 Although one cannot close his eyes and rely blindly, mere  
13 negligence in failing to discover an intentional  
14 misrepresentation is no defense to fraud." (citing Citibank  
15 (South Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082,  
16 1090-91 (9th Cir. 1996)); see also La Trattoria, Inc. v. Lansford  
17 (In re Lansford), 822 F.2d 902, 904 (9th Cir. 1987) ("Having  
18 intentionally misled the sellers in an area he knew was important  
19 to them, it is unseemly for Lansford now to argue that he should  
20 be excused from section 523 because the sellers believed him.");  
21 Salehsari v. Aalam (In re Aalam), 538 B.R. 812, 822 (Bankr. C.D.  
22 Cal. 2015) ("a plaintiff does not have a duty to investigate").

23 For purposes of fraud, the victim's behavior is only  
24 relevant to the issue of the victim's reliance. The victim need  
25 not show that he could not have discovered the fraud; rather, he  
26 must only show that he justifiably relied on the perpetrator's  
27 false representations.

28 Nothing in Rule 4003(b)(2) suggests that the drafters

1 intended to impose a duty on objectors to investigate promptly.  
2 If anything, the language of the rule points in the opposite  
3 direction: if the debtor fraudulently claimed an exemption, the  
4 trustee may object "at any time" up to the cutoff date.

5 In this case, the Debtor asserted a claim of exemption based  
6 on false predicates and later continued to mislead the Trustee  
7 and the court with further false statements. It would be  
8 inappropriate for the Debtor to benefit from the fact that the  
9 Trustee believed her false statements. Therefore, we hold that  
10 the bankruptcy court erred when it ruled that the Trustee failed  
11 to timely investigate the Debtor's claim of exemption.

12 The bankruptcy court relied heavily on In re James, 498 B.R.  
13 813 (Bankr. E.D. Tenn. 2013), but we hold that James is  
14 distinguishable. In James, the court found, as a matter of fact,  
15 that "no actual fraud was committed by" the debtor. In re James,  
16 498 B.R. at 816. The court expressed concern about the debtor's  
17 apparent overstatement of the amount he was entitled to exempt,  
18 but found that "the single overstatement of the value of the  
19 claimed exemption [does not rise] to the level of a fraudulent  
20 assertion of an exemption." Id. at 823. In this case, there is  
21 evidence which could support a finding of fraudulent assertion by  
22 the Debtor.

23 Taylor v. Freeland & Kronz, 503 U.S. 638, 643-44 (1992), is  
24 also inapposite. That decision stands for the proposition that,  
25 if a party in interest does not object to an exemption within the  
26 thirty-day time period in Rule 4003(b)(1), it cannot contest the  
27 exemption, regardless as to whether the debtor had a colorable  
28 statutory basis for claiming the exemption. Taylor provides no

1 guidance because it construed Rule 4003(b)(1), not Rule  
2 4003(b)(2). Indeed, the Supreme Court rendered its decision in  
3 1992, long before Rule 4003(b)(2) was promulgated.

4 Further, the Taylor rule is not as absolute as some might  
5 suggest. In this circuit, if the debtor makes a vague assertion  
6 of an exemption, the bankruptcy court can determine the extent to  
7 which the exemption claim is valid, even after the thirty-day  
8 deadline has run.

9 In Hyman v. Plotkin (In re Hyman), 967 F.2d 1316 (9th Cir.  
10 1992), the debtors claimed a homestead exemption, but contended  
11 that their description of the exemption as merely "homestead,"  
12 rather than "homestead exemption," indicated that they were  
13 claiming as exempt the entire homestead, rather than the limited  
14 dollar amount allowed by California law. The debtors argued that  
15 the trustee's failure to object timely to the claim of exemption  
16 rendered the real property fully exempt. The Ninth Circuit  
17 disagreed, stating that, because the debtors' schedules were  
18 vague and did not inform the trustee that the debtors were  
19 claiming an exemption on the full value of the property, "the  
20 trustee had no basis for objecting, and could well have suffered  
21 the bankruptcy judge's ire had he objected to the \$45,000  
22 exemption to which the Hymans were clearly entitled." In re  
23 Hyman, 967 F.2d at 1319.

24 We followed Hyman in Slates v. Reger (In re Slates), BAP No.  
25 EC-12-1168-KiDJu, 2012 WL 5359489 (9th Cir. BAP Oct. 31, 2012)  
26 (unpublished disposition). In Slates, the debtor claimed as  
27 exempt "possible disability benefits." The debtor did not  
28 disclose a pending administrative proceeding and a later lawsuit

1 concerning those benefits. The trustee found out about the  
2 action when the former employer contacted the trustee to attempt  
3 a settlement. The trustee moved for approval of the settlement  
4 of the bankruptcy estate's claims against the employer and for  
5 the sale of the estate's interest in the lawsuit. The trustee  
6 argued that, because the lawsuit had not been scheduled or  
7 exempted, or described in any way to give the trustee notice of  
8 the claims, it was property of the estate. The bankruptcy court  
9 agreed and (1) held that the lawsuit was properly a part of the  
10 estate and not exempt; and (2) approved the settlement and sale  
11 of the estate's interest. On appeal, the debtor argued that the  
12 lawsuit was exempt because (1) he had listed it in good faith on  
13 his Amended Schedule C; (2) he had described it sufficiently to  
14 put the trustee on notice; (3) the trustee had a duty to  
15 investigate the matter and failed to do so; and (4) the trustee  
16 had failed to object to the exemption. Id. at \*6. The Panel  
17 noted the strict standard set forth in Taylor. Id. at \*7.  
18 However, it stated "that neither this Panel nor the Ninth Circuit  
19 has interpreted Taylor as holding that failure by the trustee to  
20 object to a claim of exemption will always result in the debtor  
21 being entitled to a full exemption in the subject property. For  
22 example, the property may not be exempt if the debtor's schedules  
23 are ambiguous." Id. at \*8 (citing In re Hyman, 967 F.2d 1316).

24 The Panel held that any ambiguity in the schedules should be  
25 construed against the debtor and that the debtor's schedules were  
26 not sufficient to put the trustee on notice of the lawsuit. It  
27 noted that the trustee "could have been more diligent in his  
28 investigation of this case," but disagreed that the trustee

1 should be equitably estopped from claiming ownership of the  
2 lawsuit. Id. at \*10. It concluded that, because the trustee was  
3 not able to determine from reading the schedules that the debtor  
4 was claiming the lawsuit as exempt, the debtor failed to assert a  
5 valid exemption, and the trustee was not required to object to it  
6 under Rule 4003(b). Id. at \*11.

7 Slates and Hyman are not controlling, because they dealt  
8 with exemption claims that were merely vague, as opposed to  
9 fraudulent. But both cases are instructive in two respects.  
10 First, they rejected the notion that, under Taylor, "failure by  
11 the trustee to object to a claim of exemption will always result  
12 in the debtor being entitled to a full exemption in the subject  
13 property." Id. at \*8. Rather, the Ninth Circuit in Hyman held  
14 that any ambiguity in a debtor's schedules must be construed  
15 against her and may be the basis for an objection outside of the  
16 thirty-day period. Second, they also held that a trustee is  
17 entitled to rely on, and need not investigate, the information  
18 the debtor chooses to include in the schedules.

19 In this case, by claiming a homestead exemption in the  
20 Subject Property and attesting to the accuracy of the information  
21 contained in the schedules, the Debtor implicitly represented  
22 that she resided at the Subject Property and that it was her  
23 principal dwelling. Nothing in the schedules suggested  
24 otherwise. In addition, the Debtor unequivocally stated at the  
25 meeting of creditors that she resided on the Subject Property.  
26 Given this evidence, "the trustee had no basis for objecting, and  
27 could well have suffered the bankruptcy judge's ire had he  
28 objected" to the claim of exemption. See In re Hyman, 967 F.2d

1 at 1319. The Trustee took the Debtor at her word and justifiably  
2 relied on the schedules and her declaration as to their accuracy.

3 Thus, the bankruptcy court erred when it held that the  
4 Trustee was not entitled to the extended objection period because  
5 he failed to investigate earlier.

6 **2. The bankruptcy court erred by discounting the Debtor's**  
7 **subsequent actions and statements as evidence of a**  
8 **fraudulent assertion of a claim of exemption.**

9 The bankruptcy court determined that, while the Debtor's  
10 statements regarding her residence may have been "inaccurate, and  
11 possibly deliberately so," it could not conclude that the Debtor  
12 fraudulently asserted the claim of exemption. It stated that the  
13 Debtor's prior false testimony that she resided at the Subject  
14 Property was "quite troubling to this court[,]" but "does not  
15 support a conclusion that the debtor fraudulently asserted the  
16 exemption at the time it was claimed."

17 We agree with the bankruptcy court that, to determine  
18 whether the debtor fraudulently asserted an exemption, one must  
19 look to the circumstances existing at the time of the assertion.  
20 We do not agree, however, with the court's decision that a  
21 debtor's later statements cannot help to establish that the  
22 debtor fraudulently asserted the claim of exemption in her  
23 initial filings.

24 It is hard to imagine a case in which the debtor's  
25 schedules, standing alone, prove that the debtor fraudulently  
26 asserted an exemption. To prove (for example) the debtor's  
27 knowledge of the schedules' falsity and intent to deceive, the  
28 objector will almost certainly have to offer extrinsic evidence.  
In an appropriate case, this extrinsic evidence may include the

1 debtor's subsequent statements and conduct.

2       The bankruptcy court's decision implies that a debtor's  
3 false testimony after the debtor files the schedules cannot  
4 establish that the debtor's exemption claims were fraudulent when  
5 made. But this cannot be correct. To choose the most extreme  
6 example, suppose that the debtor claimed an exemption, and later  
7 admitted her fraudulent knowledge and intent. Such a statement  
8 would undoubtedly be admissible to prove that the exemption claim  
9 was fraudulently asserted, even though the admission came after  
10 the initial assertion.

11       Therefore, we hold that the bankruptcy court applied an  
12 incorrect legal standard when it ruled that subsequent statements  
13 were not evidence of a fraudulent assertion of an exemption  
14 claim. Therefore, we remand this case to permit the bankruptcy  
15 court to apply the correct legal definition of the phrase  
16 "fraudulently asserted" and to consider whether the evidence  
17 shows that the Debtor fraudulently asserted the claim of  
18 exemption.

19 **D. The Panel will not consider new evidence not in the record**  
20 **before the bankruptcy court.**

21       Finally, the Trustee requests that the Panel consider Mr.  
22 Ensminger's declaration or remand this case to the bankruptcy  
23 court for consideration of the new evidence that he claims "was  
24 not available due to the medical issues of Mr. Ensminger at the  
25 time the Debtor first brought up the argument of following [the]  
26 advice of Mr. Ensminger in regard to the homestead  
27 exemption . . . ." The Debtor argues that the Trustee should  
28 have brought a Civil Rule 60(b) request before the bankruptcy

1 court and that he has waived his right to seek admission of the  
2 declaration on appeal.

3 Except in rare cases where “the interests of justice demand  
4 it,’ an appellate court will not consider evidence not presented  
5 to the trial court[.]” Graves v. Myrvang (In re Myrvang), 232  
6 F.3d 1116, 1119 n.1 (9th Cir. 2000) (quoting Dakota Indus., Inc.  
7 v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993);  
8 citing Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th  
9 Cir. 1988)); see 16A Charles Alan Wright & Arthur R. Miller, Fed.  
10 Prac. & Proc. § 3956.1 (4th ed.) (“[A]s a general matter, the  
11 court of appeals will not consider [a] matter that is not part of  
12 the record on appeal. A litigant who wishes that newly  
13 discovered evidence had been considered by the district court  
14 should investigate the possibility of seeking relief from the  
15 judgment in the district court.”).

16 In the present case, it is undisputed that the Trustee did  
17 not present Mr. Ensminger’s declaration to the bankruptcy court,  
18 as he obtained the declaration over two months after he filed his  
19 notice of appeal. We do not think that this case presents such  
20 exceptional circumstances as to warrant the Panel’s consideration  
21 of this new evidence in “the interests of justice.” The Trustee  
22 could have sought a continuance of the hearing on the Renewed  
23 Objection while he attempted to obtain Mr. Ensminger’s  
24 declaration; he could also have moved under Civil Rule 60(b)(2)  
25 or (3) to have the bankruptcy court consider the new evidence.  
26 In any event, the Panel declines to consider Mr. Ensminger’s  
27 declaration in the first instance on appeal. The bankruptcy  
28 court is in the best position to consider all of the evidence and

1 make appropriate factual findings. We thus leave it to the  
2 Trustee to present the declaration or testimony of Mr. Ensminger  
3 to the bankruptcy court in the appropriate manner on remand.

4 **CONCLUSION**

5 For the reasons set forth above, we VACATE the bankruptcy  
6 court's orders overruling the Trustee's objections to the  
7 Debtor's homestead exemption and REMAND this case to the  
8 bankruptcy court for further proceedings consistent with our  
9 ruling.

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