

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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7	In Re:)
8	RICHARD J. SHIELDS,) No. 2:09-cv-02910-GEB
9	Debtor.) Bankruptcy Court Case No. 06-
10	_____) 22377-C-7
11	THE BANKRUPTCY ESTATE OF RICHARD) Adv. Proc. No. 08-02352
12	J. SHIELDS, by and through) <u>ORDER DENYING NEIL MCCLEAN'S</u>
13	MICHAEL F. BURKART, Chapter 7) <u>MOTION TO SUPPLEMENT THE</u>
14	Trustee,) <u>RECORD ON APPEAL</u> *
15	Plaintiff,)
16	v.)
17	NEIL MCLEAN (aka NEAL MCLEAN))
18	and RUSSELL LONGAWAY,)
19	Defendants.)
20	_____)

On August 2, 2010, Cross-Appellant Neil McLean filed a motion to "supplement and correct an omission from the record on appeal pursuant to Federal Rule[] of Bankruptcy Procedure 8006" (Docket No. 29, Mot. to Suppl. 1:20-23.) Specifically, McLean seeks an order which would include his evidentiary objections to the admission at trial of Kenneth Herold's deposition testimony in the record on appeal. Cross-Appellee Michael Burkart, the chapter 7 trustee of the bankruptcy estate of debtor Richard Shields, opposes

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 McLean's motion, arguing the record may not be supplemented since the
2 bankruptcy court did not consider McLean's evidentiary objections.

3 Although McLean seeks to supplement the appellate record
4 under Federal Rule of Bankruptcy Procedure 8006, "courts generally
5 apply Rule 10(e) of the Federal Rules of Appellate Procedure" when
6 deciding such motions. In re Flamingo 55, Inc., BK-S-03-19478 BAM,
7 2006 WL 2432764, at *4 (D. Nev. Aug. 21, 2006) (also stating that
8 "Rule 8006 does not . . . provide a method to correct or modify the
9 record on appeal"); see also In re Khoe, 255 B.R. 581, 585 (E.D. Cal.
10 2000) (stating that "[s]upplementation of a record on appeal is
11 governed by [Federal Rule of Appellate Procedure] 10(e)(2)"). Federal
12 Rule of Appellate Procedure 10(e)(2) provides:

13 If anything material to either party is omitted
14 from or misstated in the record by error or
15 accident, the omission or misstatement may be
 corrected and a supplemental record may be
 certified and forwarded:

- 16 (A) on stipulation of the parties;
17 (B) by the district court before or after the
18 record has been forwarded; or
19 (C) by the court of appeals.

20 Fed. R. App. P. 10(e)(2). This rule is construed "narrowly" and
21 "normally the reviewing court will not supplement the record on appeal
22 with material not considered by the lower court." In re Khoe, 255
23 B.R. at 585 (citing Daly-Murphy v. Winston, 837 F.2d 348, 351 (9th
24 Cir. 1987)).

25 Debtor Shields filed a chapter 11 bankruptcy petition in the
26 United States Bankruptcy Court for the Eastern District of California
27 and Michael Burkart was appointed to be the chapter 11 trustee of the
28 bankruptcy estate. Shield's bankruptcy case was later converted to a

1 chapter 7 case, and Burkart was appointed to be the chapter 7 trustee.

2
3 Burkart initiated an adversary proceeding against McLean on
4 behalf of Shield's bankruptcy estate. In the adversary proceeding
5 complaint, Burkart objected to certain of McLean's claims against the
6 bankruptcy estate under 11 U.S.C. § 502(b); sought subordination of
7 certain of McLean's claims under 11 U.S.C. § 510(c)(1); alleged state
8 claims of interference with prospective economic advantage,
9 interference with contract, breach of fiduciary duty and violation of
10 California Business and Professions Code § 17200; sought declaratory
11 relief under 11 U.S.C. § 723 and California Corporations Code § 16202;
12 and sought a judgment against McLean in the deficiency amount that
13 would be necessary for the bankruptcy estate to pay all claims.

14 Prior to trial, McLean filed evidentiary objections to the
15 admissibility of Kenneth Herold's deposition testimony. (Fernandez
16 Decl. Ex. A.) McLean argued Herold's deposition was inadmissible at
17 trial because Herold lacked personal knowledge of the negotiations to
18 which he testified and his testimony constituted hearsay. (Id.)

19 A trial on Burkart's adversary proceeding claims was held on
20 September 9 and 11, 2009 before the bankruptcy court. At the
21 commencement of trial, the bankruptcy court addressed McLean's
22 evidentiary objections as follows:

23 THE COURT: Okay. Are there any preliminary matters
24 we should dispose of before we get started?

25 MR. MACDONALD [on behalf of McLean]: Well, your
26 Honor, we suggest -- we have filed pretty extensive
evidentiary objections and would ask that those be
considered before testimony begins.

27 THE COURT: Well, I would rather not go through the
28 whole gamut of objections at this point. However,
I agree with you, we should review objections

1 before actual testimony, so if you have objections
2 to the testimony of a particular witness, I will
hear them before the witness is put on.

3 MR. MACDONALD: Okay.

4 THE COURT: But I don't want to hear everything up
5 front now.

6 MR. MACDONALD: All right.

7 (Adversary Proceeding Docket No. 155 Trial Tr. 6:22-7:12.)

8 During the trial, when Burkart moved to admit Herold's
9 deposition, the bankruptcy court inquired as to whether there were
10 "[a]ny objections to the [admission] of Mr. Herold's [deposition]."

11 (Fernandez Decl. Ex. B 48:8-9.) The following discussion then
12 transpired:

13 MR. MACDONALD: We found [sic] extensive objections.

14 THE COURT: All right. I suppose we should have --
15 we will have to redo them, won't we?

16 MR. MACDONALD: I was thinking. We made a lot of
17 hearsay objections. I think Your Honor has given
18 us a pretty good sense of how the court feels about
19 those objections.

20 THE COURT: Well, hey, if you think there is a valid
21 hearsay objection, I certainly don't intend in any
22 way to disabuse you of that position. But I think
23 you do have a sense of what I may rule in respect
24 to certain types of hearsay objections.

25 MR. MACDONALD: I was just going to -- I think in
26 the interest of time, if we could just admit the
depo and reserve the objection, unless it becomes
relevant later.

27 THE COURT: Good idea. I approve that approach if
28 it's okay with Mr. Sullivan.

MR. SULLIVAN [on behalf of Burkart]: You know, I
hate to do that, Your Honor, but I'm not exactly
sure what that means. What does he mean by reserve
objections in case they come up later?

THE COURT: Maybe there is another way we can do it.
That is -- well, you are admitting the whole
deposition, aren't you?

1 MR. SULLIVAN: I am, Your Honor

2 MR. MACDONALD: What I was going to say is the
3 deposition had a lot of exhibits to it, and I would
4 say, let's just put in the whole deposition, but
5 let's have the exhibits, too, so we know what he's
6 talking about if it becomes relevant

7 MR. MACDONALD: You know what I would like to
8 suggest, Your Honor, since we have the depo, let's
9 just admit the whole thing. I don't -- I'm very
10 uncomfortable with having a summary which quotes
11 selected parts because it argues and puts a spin on
12 it, and the deposition is there. The testimony is
13 there. Why don't we just put that in with the
14 exhibits, the whole thing?

15 MR. SULLIVAN: I have no objection to that, of
16 course, Your Honor.

17 THE COURT: Okay. We'll do that

18 MR. SULLIVAN: So my understanding of what just
19 transpired is the entire deposition and the
20 exhibits were all admitted into evidence.

21 THE COURT: Is that what you wanted to do?

22 MR. MACDONALD: Yes.

23 THE COURT: All right

24 THE COURT: All right. The whole deposition with
25 exhibits will be admitted into evidence.

26 (Id. 48:10-53:6.)

27 The bankruptcy court entered judgment in favor of Burkart on
28 October 2, 2009, finding Burkart was entitled to recover \$300,000 from
McLean on his interference with prospective economic advantage claim,
and subordinated certain of McLean's claims under 11 U.S.C. §
510(c)(1). Burkart then filed a notice of appeal and McLean filed a
cross-appeal. McLean asserts that one of the issues on appeal is
whether "the Bankruptcy Court err[ed] in admitting into evidence the
deposition transcript of Kenneth J. Herold"

1 Burkart's designation of items for the record on appeal did
2 not include McLean's evidentiary objections. McClean designated
3 additional items to be included in the record, but he also failed to
4 include his written evidentiary objections. McLean argues this
5 "omission" was "a mistake." (Mot. to Supplement Record 2:15-17.)
6 Burkart counters "[b]ecause the written objections were not considered
7 [by the bankruptcy court], they should not be part of the record on
8 appeal." (Opp'n 5:8-9.) Burkart further contends that McLean waived
9 any evidentiary objection to the admission of Herold's deposition by
10 consenting to its admission during trial.

11 The appellate record should not be supplemented if McLean
12 did not preserve his evidentiary objections for appellate review. As
13 prescribed in the pertinent part of Federal Rule of Evidence 103:

14 (a) Effect of Erroneous Ruling.--Error may not be
15 predicated upon a ruling which admits or excludes
16 evidence unless a substantial right of the party is
17 affected, and

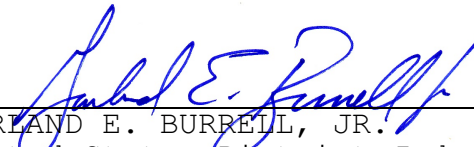
18 (1) Objection. --In case the ruling is one
19 admitting evidence, a timely objection or
20 motion to strike appears on record, stating
21 the specific ground of objection, if the
22 specific ground was not apparent from the
23 context

24 Fed. R. Evid. 103(a)(1). "By failing to object to evidence at trial
25 and request a ruling on such an objection, a party waives the right to
26 raise admissibility issues on appeal." Marbled Murrelet v. Babitt, 83
27 F.3d 1060, 1066 (9th Cir. 1996) (citations omitted). "The failure of
28 a litigant to request a ruling [on an evidentiary objection
constitutes] a waiver of the right to raise any issue [on appeal]
. . . concerning admissibility." Fenton v. Freedman, 748 F.2d 1358,
1360 (9th Cir. 1984); see also Nat'l Union Fire Ins. Co. v. Seagate
Technology, Inc., No. C 04-01593 JW, 2007 WL 2345023, at *1 (N.D. Cal.

1 Aug. 16, 2007) (stating that "Ninth Circuit law requires [appellant]
2 to seek a ruling on its [evidentiary] objection in order to preserve
3 it for appeal").

4 The record does not show that the bankruptcy court
5 considered McLean's evidentiary objections to Herold's deposition
6 testimony. Although McLean argues in his reply brief that "the trial
7 court made it clear that it was going to overrule [his] . . .
8 evidentiary objections," McLean did not specifically raise his
9 objections, and there was no ruling on the objections. (Reply 3:1-2.)
10 By failing to "request a ruling" on his objections, McLean "waive[d]
11 [his] . . . right to raise any issue [on appeal] . . . concerning
12 [the] admissibility" of Herold's deposition testimony. Fenton, 748
13 F.2d at 1360. Since McLean's evidentiary objections were not
14 "considered" and decided by the bankruptcy court, McLean failed to
15 preserve his evidentiary objections for appeal and the record need not
16 be supplemented. Kehoe, 255 B.R. at 585 (stating that "the reviewing
17 court will not supplement the record on appeal with material not
18 considered by the lower court"). Therefore, McLean's motion to
19 supplement the record is DENIED.

20 Dated: August 27, 2010

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GARLAND E. BURRELL, JR.
United States District Judge