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MAR 24 2010

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

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. CC-09-1242-BMoPa
)	
ERIC T.Y. HSU aka Ting Yang)	Bk. No. LA 03-26874-RN
Hsu and MAN LING CHENG aka)	
Man Ling Hsu, aka Mang Ling)	
Cheng Hsu,)	
)	
Debtors.)	
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ERIC T.Y. HSU,)	
)	
Appellant,)	M E M O R A N D U M¹
)	
v.)	
)	
BANK OF TAIWAN,)	
)	
Appellee.)	
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Submitted Without Oral Argument on March 19, 2010

Filed - March 24, 2010

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

Honorable Richard M. Neiter, Bankruptcy Judge, Presiding

Before: BRANDT², MONTALI, and PAPPAS, 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.

² Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

1 After an evidentiary hearing the bankruptcy court overruled
2 debtor's objection to the claim of Bank of Taiwan ("Bank"), finding that
3 the evidence did not support his contention that the debt in question had
4 been released in a settlement between debtor's father's company and the
5 Bank.

6 We AFFIRM.

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I. FACTS

9 In November of 2002, the Bank's Los Angeles branch ("Bank Los
10 Angeles") made two loans to Cal-Rainbow Products, Inc., of Pomona,
11 California, one for \$299,499.60 and another for \$150,000. Debtor Eric
12 Hsu (aka Ting Yang Hsu) was the president of Cal-Rainbow and personally
13 guaranteed both loans. The loans were also guaranteed by Chin-Mu Metal
14 Manufacturing Co., Ltd., located in Taiwan, whose principal is debtor's
15 father, Chin Mu Hsu. Chin-Mu Metal's guarantee took the form of two
16 checks, one for NT\$11,500,000 (equivalent to \$299,499.60) and another for
17 NT\$5,775,000³ (equivalent to \$150,000).

18 At the time, Chin-Mu Metal also owed the Bank on loans of
19 approximately NT\$45,000,000 from the Bank's Southgate branch, located in
20 Taipei, Taiwan ("Bank Southgate"). Debtor and his father had guaranteed
21 those loans.

22 Cal-Rainbow subsequently defaulted on its loans and filed a
23 chapter 7 bankruptcy petition in April of 2003. As Cal-Rainbow had no
24 assets, Bank Los Angeles was left to look to the guarantors for
25 satisfaction of the debt. In June of 2003, debtor and his wife filed the

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27 ³ "NT\$" is the symbol for Taiwan dollars, the currency of
Taiwan.

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1 instant chapter 7 case. Bank Los Angeles filed a general unsecured claim
2 for \$443,499.60 on 30 January 2004.

3 Approximately one month earlier, on 21 December 2003, Chin Mu Metal
4 sought a settlement with Bank Southgate by way of a "Petition," the
5 subject line of which was "Chin Mu Metal Manufacturing Co., Ltd's
6 proposal for the repayment of debts to the Bank of Taiwan Southgate
7 Branch." Exhibit M to Findings of Fact and Conclusions of Law
8 (henceforth "Findings").⁴ The petition requested that Chin Mu Metal be
9 allowed to pay less than the full balance owed due to recent financial
10 difficulties, and based on the parties' longstanding relationship.
11 Apparently referring to the checks provided as a guaranty for the Cal-
12 Rainbow loan, Chin Mu Hsu stated in the petition:

13 As of the entrustment of foreign branch to claim for
14 compensation of the auxiliary pledge, the said auxiliary
15 pledge should have been returned to me a long time ago. It is
16 an invalidated note. I am not responsible for paying off the
17 note. . . .

18 Bank Southgate responded with its Internal Memo dated 12 March 2004,
19 which was originally written in Chinese. The Chinese version and two
20 different English translations were offered at the evidentiary hearing
21 (The translations are attached to the court's Findings as Exhibits D and
22 N). The first English translation provides in relevant part:

23 2. Said case will be handled as follows: After Chin Mu Metal
24 Manufacturing Co., Ltd. makes the payment of NT\$33,000,000
25 (which shall be used to pay off the debts owed to Southgate
26 Branch), the Bank will waive this company's other debts at the
27 Bank (including the debt owed to Southgate Branch and the
28 promissory note debts owed to Los Angeles Branch), cancel the
liens on the properties listed on Exhibits 1 & 2 and the

26 ⁴ The exhibits to the court's findings and conclusions are
27 designated as they were when they were submitted as exhibits by the
28 Bank. They do not follow an alphabetical sequence. The first exhibit
is "M" followed by Exhibit D, Exhibit N, Exhibit 2, and Exhibit O.

1 provisional seizure of the properties listed on Exhibit 3 & 4,
2 and also return the two promissory notes payable to the Los
3 Angeles Branch as an auxiliary pledge.

4 4. Los Angeles Branch shall continue its efforts to recover
5 its credit's [sic] rights on the loan to the borrower and the
6 guarantor.

7 Exhibit D to Findings. (emphasis added).

8 The second translation is essentially identical to the first, except
9 that both instances of "promissory note(s)" in paragraph 2 are translated
10 as "auxiliary pledge(s)." Exhibit N to Findings.

11 Thereafter, the Bank issued a letter dated 19 March 2004, which
12 became the settlement agreement between the parties ("Settlement
13 Proposal"). Again, two different translations were offered at the
14 evidentiary hearing, one by debtor and the other by the Bank. Both
15 translations incorporated the Internal Memo of 12 March 2004, and
16 differed in translating the Chinese characters which sound like "ben
17 piao" (sometimes written as one word: "benpiao"). The debtor's version
18 renders those characters as "promissory notes," while the Bank's does as
19 "auxiliary pledges."

20 The translation in Exhibit 2 is:

21 2. We agree to process this request as follows: you make a
22 full payment NT\$33,000,000, we will revoke the balance of your
23 debts in our Southgate Branch and the debts of promissory
24 notes in our Los Angeles Branch, and erase the mortgages set
25 on the real properties listed in Attachments 1 and 2, revoke
26 the implementation of provisional seizure of real properties
27 listed in Attachments 3 and 4, and return to you the two
28 promissory notes submitted to our Los Angeles Branch as
auxiliary pledges.

Exhibit 2 to Findings. (emphasis added). The translation in Exhibit O
is:

2. We agree to process this request as follows: you will make
a one-time payment of NT\$33,000,000, and we will revoke the
balance of your debts in our Southgate Branch and the

1 auxiliary pledges in our Los Angeles Branch, and erase the
2 mortgages set on the real properties listed in Attachments 1
3 and 2, revoke the implementation of provisional seizure of
4 real properties listed in Attachments 3 and 4, and return to
5 you the two auxiliary pledges submitted to our Los Angeles
6 Branch as auxiliary pledges.

7 Exhibit O to Findings. (emphasis added).

8 It is not clear from the record whether the parties executed any
9 settlement documents. The court's Findings indicate that the parties
10 verbally accepted the Settlement Proposal and performed their obligations
11 under it. The full settlement amount of NT\$33,000,000 was paid off in
12 March 2007.

13 Thereafter the Bank returned Chin Mu Metal's two checks which had
14 been pledged to guarantee Cal-Rainbow's debt. The checks were sent to
15 debtor with a letter from Bank Southgate dated 18 April 2007. Exhibit 11
16 to debtor's Objection to Claim of Bank of Taiwan. That letter provided,
17 in relevant part:

18 2. With regard to your application to pay off your debts with
19 NT\$33,000,000, we got approval from our head office and
20 consented to process it in our letter number Southgate
21 Business Tzu 0930013361 dated March 19, 2004.

22 3. For the above mentions [sic] proceeds, NT\$12,000,000 and
23 NT\$21,000,000 were remitted to us on July 28, 2005 and
24 March 23, 2007 respectively, in the total amount of
25 NT\$33,000,000 to repay the balance you owed to our Southgate
26 Branch and the promissory note debt in our Los Angeles Branch
27 (i.e., Promissory Note No. CA3548886 in the amount of
28 NT\$5,775,000 and Promissory Note No. CA354884 in the amount of
NT\$11,550,000, the total amount of those two promissory notes
comes to NT\$17,325,000).

29 Id. The letter referred to in paragraph 2 is the Settlement Proposal.
30 The promissory note numbers referred to in paragraph 3 correspond with
31 the check numbers, not the loan numbers of the loans made by Bank Los
32 Angeles to Cal-Rainbow.

33 Debtor objected to the Bank's claim on 28 September 2007, arguing
34 that the settlement with Bank Southgate released his liability on his

1 personal guarantees of the Bank Los Angeles loans to Cal-Rainbow. After
2 a hearing, the bankruptcy court sustained debtor's objection, entering
3 its order on 14 December 2007. The Bank moved for reconsideration, which
4 the bankruptcy court granted, vacating the order and setting the matter
5 for an evidentiary hearing. That hearing took place on 29 and 30 April
6 2009; the court overruled the objection and entered its findings and
7 conclusions and the order on appeal.

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II. JURISDICTION

10 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
11 § 157(b)(1) and (b)(2)(B), and we do under 28 U.S.C. § 158.

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III. ISSUE

14 Whether the bankruptcy court clearly erred in finding that the
15 debtor's settlement with Bank Southgate did not release his obligations
16 under the Cal-Rainbow guarantees.

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IV. STANDARD OF REVIEW

19 We review findings of fact for clear error. Rule 8013.⁵ A factual
20 finding is clearly erroneous if the appellate court, after reviewing the
21 entire record, has a firm and definite conviction that a mistake has been
22 committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). If two
23 views of the evidence are possible, the trial judge's choice between them
24 cannot be clearly erroneous. Id. at 574. We give findings of fact based

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⁵ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. "FRE" references are to the Federal Rules of Evidence, Rules 101-1103.

1 upon credibility particular deference. Id. at 575. See also
2 In re Lehtinen, 332 B.R. 404, 411 (9th Cir. BAP 2005).

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4 **V. DISCUSSION**

5 When a claim is objected to, the court is to determine the amount
6 of the claim and allow it, "except to the extent that . . . such claim
7 is unenforceable against the debtor and property of the debtor, under any
8 agreement" § 502(b). A proof of claim, properly filed, is prima
9 facie evidence of the validity and amount of the claim. Rule 3001(f).
10 An objecting debtor has the burden of bringing forth evidence to rebut
11 the presumption of validity. In re Garvida, 347 B.R. 697, 706-07
12 (9th Cir. BAP 2006). If the debtor produces evidence sufficient to rebut
13 the presumption, the burden shifts back to the claimant to provide
14 further evidence to support its claim. Id. at 707.

15 It is appellant's burden to provide an adequate record on appeal;
16 we will not reverse the bankruptcy court's findings of fact without that
17 record. In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995). We may
18 properly affirm for lack of an adequate record alone.

19 The bankruptcy court found that the Bank did not release Cal-Rainbow
20 from its obligation to pay back the two loans made to it, nor did it
21 release the debtor from his guarantee of those loans, based primarily on
22 the letters and other documents presented at the evidentiary hearing.
23 The court further found that those claims were excluded from the
24 settlement between Bank Southgate and Chin Mu Metal, Chin Mu Hsu, and
25 debtor. Debtor argues that the bankruptcy court clearly erred in this
26 finding. Debtor has provided only 30 pages of trial transcript of at

1 least 132 pages (132 is the highest page number in the record submitted;
2 appellee's brief says the transcript exceeds 300 pages).

3 To support his assertion of clear error, debtor points out that Hsu
4 Cheng Tung, debtor's brother, testified that the settlement was intended
5 to include the cancellation of the Cal-Rainbow obligations, and that at
6 the time of the settlement, Chin-Mu Metal's indebtedness to the Bank was
7 only NT\$28 million, thus making a settlement of NT\$33 million illogical.
8 Debtor does not cite to the record, but the excerpts include some of
9 Cheng Tung's testimony, indicating he was present at a meeting with the
10 bank manager and his uncle, at which it was agreed that the NT\$33 million
11 would "resolve all problems." The witness was also apparently shown a
12 document identified as Exhibit 12, which he testified was Bank's
13 agreement to use the NT\$33 million to "take care of the debt obligations,
14 including the Los Angeles portion." Transcript, 30 April 2009, page 95.
15 No testimony about the loan balance appears in that excerpt. The Bank
16 has provided an excerpt from the evidentiary hearing in which the bank
17 manager testified that she did not recall such a meeting. Transcript,
18 29 April 2009, pages 76-77. Even without this latter testimony, the
19 record excerpt provided by debtor is insufficient to show clear error.
20 The bankruptcy court was entitled to weigh both the testimony and the
21 credibility of the witness. See Anderson, 470 U.S. at 573-74.

22 Debtor also argues that the court should have accorded greater
23 "credibility" to the translation of the 19 March 2004 letter he presented
24 at trial because it was translated by a court-certified translator. That
25 version of the letter translated the Chinese characters "ben piao" as
26 "promissory notes" rather than "auxiliary pledges." Translation of a
27 foreign language is a factual question. United States v. Gonzalez,

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1 319 F.3d 291, 296 (7th Cir. 2003). Again, the bankruptcy court was
2 entitled to weigh the evidence. Debtor does not explain why court
3 certification matters, nor does he argue that the translators were not
4 qualified as expert witnesses as required under FRE 604.

5 And nothing in debtor's brief or in the record he has provided
6 indicates he ever objected to the qualifications of the Bank's
7 translators or the introduction of its translations. While the Final
8 Joint Pretrial Order, which is in the record, indicates in Part IV that
9 there were evidentiary objections which the court had ruled on in its
10 tentative ruling, debtor has not seen fit to include that ruling in the
11 record. We are entitled to presume that he does not regard it as helpful
12 to his appeal. Gionis v. Wayne (In re Gionis), 170 B.R. 675, 680-81
13 (9th Cir. BAP 1994), aff'd mem., 92 F.3d 1192 (9th Cir. 1996); In re
14 McCarthy, 230 B.R. 414, 416-417 (9th Cir. BAP 1999).

15 In any event, it does not appear that the bankruptcy court chose one
16 translation over another or relied on either in finding that, while the
17 documents containing those phrases were "not without ambiguity," they
18 "consistently refrained from stating that the settlement releasing Cal-
19 Rainbow from its loans to [sic] the Los Angeles Branch or the debtor from
20 his guarantee of those loans." Finding 17, at page 13. Debtor has not
21 established clear error in that finding.

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23

VI. CONCLUSION

24 Debtor-Appellant has not shown that the bankruptcy court clearly
25 erred in finding that the settlement did not release him from his
26 obligations to Bank Los Angeles.

27

We AFFIRM.

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**U.S. Bankruptcy Appellate Panel
of the Ninth Circuit**

125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No.: CC-09-1242-BMoPA

RE: ERIC T.Y. HSU & MAN LING CHENG

A separate Judgment was entered in this case on **03/24/2010**.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. 9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$455 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was transmitted this date to all parties of record to this appeal.

By: Vincent Barbato, Deputy Clerk

Date: March 24, 2010