

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re)	Case No, 07-0153
)	
LEVEL PROPANE GASES, INC, <i>et al.</i> ,)	Bankruptcy Case No. 02-16172
)	(Jointly Administered)
Debtors.)	
_____)	Judge; ANN ALDRICH
)	
WILLIAM H. MALOOF,)	
)	Magistrate Judge: PERELMAN
Appellant,)	
)	
-vs-)	
)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,)	
)	
Appellees.)	

MOTION TO STRIKE

Level Propane Gases, Inc. (“Level”) and its affiliated debtors and debtors in possession in those certain cases under chapter 11 of Title 11 (the “Bankruptcy Code”) of the United States Code currently pending in the United States Bankruptcy Court for the Northern District of Ohio (collectively, the “Appellees”) hereby move (the “Motion”) the Court for an order (a) striking from the record on appeal the pleadings filed with this Court by William H. Maloof (“Appellant”) subsequent to the transmission of the record from the Bankruptcy Court and denominated (i) “Appellants’ Reply Brief Appendix” and (ii) “Appellant’s Supplemental Appendix to Reply Brief” as such filings are not permitted under the procedural rules applicable to this appeal and the documents contained therein were not presented to the Bankruptcy Court by Appellant nor considered by the Bankruptcy Court in rendering the decision being appealed by Appellant and (b) directing

Appellant to desist from making any further attempts to supplement the record in this appeal. In further support of this Motion, Appellees state as follows:

BACKGROUND

1. On June 6, 2006, Appellant filed the *Motion of William H, Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered Into On June 11, 2002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002* (the “Motion to Vacate”) in the Debtors’ chapter 11 cases currently pending before the United States Bankruptcy Court for the Northern District of Ohio. (B.R. 2969- Motion to Vacate).

2. On November 28, 2006, following due notice and a hearing, the Bankruptcy Court entered a Memorandum of Opinion and Order denying the Renewed Motion. (B.R. 3039 – Memorandum of Opinion and Order). The Bankruptcy Court also issued a separate judgment with respect to its decision denying the Renewed Motion. (B.R. 3040 - Judgment).

3. On December 5, 2006, Appellant filed a notice of appeal with respect to the Bankruptcy Court’s denial of the Motion to Vacate.

4. On December 15, 2006, Appellant filed his Designation of Items to be Included on Appeal. (D.Ct. Docket No. 4). Appellees did not designate any additional items for inclusion in the record on appeal.

5. On March 2, 2007, Appellant filed with this Court a pleading captioned “Appellant’s Reply Brief Appendix” consisting of the following Exhibits:

A. Emails between William Maloof and Steven Sues.

B. Statement of Samantha Whitesel executed on February 28, 2007.

- C. Statement of Suzanne Arena
- D. Statements of Jeff Kessler executed on March 1, 2007
- E. First and Final Application for Compensation and Reimbursement of Expenses for Development Specialists, Inc. (June 17, 2002 through September 30, 2002).

[D. Ct. Docket No. 8].

6. On March 15, 2007, Appellant filed with this Court a pleading denominated “Appellant’s Supplemental Appendix to Reply Brief” containing two statements of Jeff Kessler dated March 9, 2007 and March 6, 2007 respectively. [D.Ct. Docket No. 11].

REQUESTED RELIEF AND LEGAL AUTHORITY

7. By this Motion, Appellees request that both “Appellant’s Reply Brief Appendix” and “Appellant’s Supplemental Appendix to Reply Brief” be stricken from the record of this appeal as (a) supplemental designations are not permitted by the applicable procedural rules and (b) the documents contained therein were not presented to the Bankruptcy Court in support of the Motion to Vacate nor considered by the Bankruptcy Court in rendering its decision on the Motion to Vacate. Appellees further request that the Court direct Appellee to desist from making any further attempts to supplement the record in this appeal.

8. Rule 8006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) provides, in pertinent part, that:

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after

the service of appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal. . . ***The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order or decree appealed from and any opinion, findings of fact and conclusions of law of the court.***¹

As the plain language of Bankruptcy Rule 8006 makes clear, the record on appeal is limited to the documents designated by the parties in those designations filed in compliance with the specific time limits set forth therein. Nothing in Bankruptcy Rule 8006 permits a party to supplement the record with additional designations. To hold otherwise would render the specific deadlines set forth in Bankruptcy Rule 8006 superfluous.

9. Further, since the job of an appellate court is to review the actions of the court below, an appeal does not present a party with a license to build a new record.² As noted by the First Circuit Court of Appeals in reversing a district court decision to expand the record on appeal to include a purchase and sale agreement that had not been offered in evidence in the bankruptcy court:

In an appeal from the bankruptcy court, the district court sits in an appellate capacity, Fed.R.Bankr.P 8001, and, just as a circuit court is limited to the district court record; 16A Wright, Miller & Cooper, Federal Practice and Procedure § 3956.2. at 337 (3d ed. 1999), so the district court is normally limited to the evidentiary record compiled in the bankruptcy court, *Crawford v. Lamantia*, 34 F.3d 28, 31, (1st Cir.), *cert. denied*, 514 U.S. 1032, 115 S.Ct. 1393, 131 L.Ed.2d 244 (1995); *In re Armorflite Precision, Inc.*, 48 B.R. 994, 997 (D. Me. 1985).

In rejecting the trustee's motion to strike, the district court said in substance that the purchase agreement and sale agreement was material to the dispute. This is at least arguably so. But when a party that has favorable evidence fails to proffer it before the trial court decides a matter, the fact that the evidence would have been material if offered does not mean that it can be considered on appeal. The reason is obvious: the

¹ FED.R.BANKR.P. 8006 (emphasis added).

² *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981).

procedures used on appellate review are not designed to vet new evidence or allow an effective evidentiary response to it.

...

Limiting the evidence to that properly before the trier of fact is not some ritual or formality. If [the appellant] had offered the agreement in the bankruptcy court in timely fashion, the trustee would have been entitled to dispute the validity or significance of the agreement or offer counter-evidence of his own . . .³

Thus, only those papers and exhibits actually considered by the bankruptcy court in reaching a decision may be included in the record in an appeal of that decision.⁴

10. In this instance, Appellant is attempting to supplement the record in this appeal with documents that Appellant failed to present to the Bankruptcy Court in connection with Appellant's prosecution of the Motion to Vacate. Specifically, these documents are the e-mails between William Maloof and Steven Sues, the Statement of Suzanne Arena⁵ and the Final Fee Application filed by Development Specialists' Inc. attached as Exhibits A, C and E to Appellant's Reply Brief Appendix. As these

³ *Crefisa Incorporated v. Washington Mut. Bank, F.A. (In re Colonial Mortgage Bankers Corporation)*, 186 F.3d 46, 49-50 (1st Cir. 1999). See also *Hartford Fire Ins. Co. v. Norwest Bank (In re Lockwood Corp.)*, 223 B.R. 170, 174 (8th Cir. BAP 1998) (Documents presented for the first time at the appellate stage are generally not considered part of the record for review by the appellate court).

⁴ *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 194 B.R. 728, 733 (S.D.N.Y. 1995) (Affidavits not available to bankruptcy court below are not appropriate for consideration on appeal of propriety of bankruptcy court orders); *In re Davis*, 169 B.R. 285, 293 (E.D.N.Y. 1994) (On appeal from an order of the bankruptcy court, the district court should not consider any evidence not before the bankruptcy court at the original hearing); *Commercial Credit Corp. v. Reed*, 154 B.R. 471, 474 (E.D. Tex. 1993) (A district court, acting as an appellate court in a bankruptcy case, may only consider evidence which was presented before the bankruptcy court and made part of the record); *In re Bartlett*, 9 B.R. 14 (E.D.N.C. 1988) (same); *Metro North State Bank v. Barrick Group, Inc.*, 100 B.R. 152, 154 (Bankr. D. Conn. 1989) (An item that was not considered by the trial court in reaching its decision should be stricken from the record on appeal); *Daly-Murphy v. Winston*, 820 F.2d 1470, 1473 (9th Cir. 1987) (same).

⁵ The Statement of Suzanne Arena was filed with the Bankruptcy Court on August 3, 2006 as part of Appellant's Sixth Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for Supplemental Examiner. Thus, this filing took place after the hearing on the Motion to Vacate held by the Bankruptcy Court on June 26, 2006. Nothing in the record indicates that Appellant directed the Bankruptcy Court's attention to this statement in connection with its consideration of the Motion to Vacate.

documents were not presented to the Bankruptcy Court by Appellant as evidence in connection with Appellant's prosecution of the Motion to Vacate, they cannot be considered by this Court in its review of the Bankruptcy Court's decision to deny the Motion to Vacate.

11. Appellant has also attempted to supplement the record in this appeal with (a) the statement of Samantha Whitesel executed on February 28, 2007 (attached as Exhibit B to Appellant's Reply Brief Appendix) and (b) four statements of Jeff Kessler two of which were executed on March 1, 2007 (attached as Exhibit D to Appellant's Reply Brief Appendix) and two executed on March 9, 2007 and March 6, 2007 respectively, attached to Appellant's Supplemental Appendix to Reply Brief. The bankruptcy court judgment which is the subject of this appeal was entered on November 28, 2006. Obviously, these declarations were neither presented to nor considered by the Bankruptcy Court below in rendering its decision denying the Renewed Motion. Accordingly, they cannot be considered by this Court in its review of the Bankruptcy Court's decision on the Renewed Motion and must be stricken from the record.⁶

⁶ *In re Yepremian*, 116 F.3d 1295, 1297 (9th Cir. 1997) (Deposition and declaration taken after bankruptcy court granted summary judgment not part of the record on appeal and could not be considered by appellate court).

WHEREFORE, Appellees respectfully request the entry of an order (a) striking Appellant's Reply Brief Appendix and Appellant's Supplemental Appendix to Reply Brief from the record in this appeal and (b) directing Appellant to desist from making any further attempts to supplement the record in this appeal.

Dated: Cleveland, Ohio
March 16, 2007

Respectfully submitted,

/s/ Michael D. Zaveron
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2007, the foregoing Motion to Strike was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Michael D. Zaverton