

FEB 24 2005

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

ORDERED PUBLISHED

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

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In re:)	BAP No.	CC-04-1071-MkMaMo
)		
RONALD FREDERICK POPP,)	Bk. No.	RS 01-27670 DN
)		
Debtor.)		
_____)		
RODNEY F. DARBY,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
P.J. ZIMMERMAN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on
November 18, 2004 at Pasadena, California

Filed - February 24, 2005

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

Honorable David N. Naugle, Bankruptcy Judge, Presiding

Before: MARKELL¹, MARLAR and MONTALI, Bankruptcy Judges.

¹Honorable Bruce A. Markell, Bankruptcy Judge for the District
of Nevada, sitting by designation.

1 MARKELL, Bankruptcy Judge:

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INTRODUCTION

4 Appellant Rodney Darby ("Darby") appeals from two bankruptcy
5 court orders authorizing the sale of a 4.88 acre parcel of
6 unimproved real property in Riverside County, California (the
7 "Property"). The first order granted the Trustee's "Motion to
8 Sell Real Property Under Section 363(f)" (the "Sale Motion"). The
9 second denied Darby's "Motion for Reconsideration of the Sale
10 Order" (the "Motion for Reconsideration").

11 Darby argues that both orders were error under Warnick v.
12 Yassian (In re Rodeo Canon Dev. Corp.), 362 F.3d 603 (9th Cir.
13 2004), because the trial court did not make sufficient findings
14 that the estate had an interest in the Property that could be sold
15 under Section 363.² Appellee P.J. Zimmerman, the chapter 7
16 trustee ("Trustee"), contends that the sale was proper under
17 Rodeo. She also maintains that this Court does not have
18 jurisdiction over Darby's appeal because Darby lacks standing, and
19 that since the sale has already been consummated, the matter is
20 moot.

21 We reverse.

22

FACTS

23 Darby holds a deed of trust on the Property recorded on
24 October 4, 1995 (the "Deed of Trust"). The original debt secured
25 by the Deed of Trust was stated as \$20,000, which, with interest,
26

27 ²Unless otherwise indicated, all chapter, section, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 had grown to \$37,592.65 by the time the Trustee filed the Sale
2 Motion.

3 The parties dispute title to the Property. Before the 1990s,
4 the debtor in this case, Ronald Popp ("Popp"), had a 50% interest
5 in the Property. From that point of seeming clarity, however, a
6 chain of events and transactions began that has all the hallmarks
7 of a crude, yet complex, shell game.³

8 The first relevant transfer occurred in May of 1995, when
9 Popp and the other co-owners of the Property conveyed it to
10 Investors Co-Op, a general partnership ("IC"). The partners in IC
11 were Popp's father, Fred Popp (who died in February 1999), and
12 Popp's girlfriend of 15 to 20 years, Deborah Turner ("Turner").

13 The next transfer occurred five months later, on October 2,
14 1995, when IC entered into a contract for deed to sell the
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16

17 ³Popp supplied a narrative of the changes in ownership of the
18 Property. It states:

19 50% of this land was purchased by me, somewhere maybe in
20 the 1970's. [¶] In 1995 both the other 50% owners and
21 myself transferred the property to Investors Co-Op a
22 general Partnership. [¶] At this time we were not paid
23 for the purchase. The property was then sold by a
24 contract for deed sale. A trust deed was recorded for
25 \$20,000 against the property. [¶] The Partnership
26 Deborah Turner and Fred Popp. [sic] The sales contract
27 was to Rodney F. Darby. [¶] The Partnerships [sic]
28 interest in the sales contract was assigned to Worthmore
in 1997. [¶] In 1998 the other 50% original owners were
paid off by Worthmore. [¶] Leaving a contract to sell
still in effect and a \$20,000.00 trust Deed [sic]
recorded against the property. [¶] When the contract is
completed the deed will have to be recorded to the new
owner or Worthmore if the sale is not completed.

27 Given the confusing nature of this explanation, we attempt in
28 the body of the Opinion to sort out the transfers with more
precision.

1 Property to Darby⁴ for \$40,000. Of this amount, Darby was to pay
2 half at the time of contracting, with the remainder due "on or
3 before" October 2, 1997. Darby's deposit was refundable if Darby
4 did not complete the sale. To secure IC's contingent obligation
5 to pay Darby an amount equal to the deposit, IC gave Darby a
6 promissory note for \$20,000, and secured it with the Deed of
7 Trust.

8 Finally, on February 3, 1997, Darby signed yet another
9 contract conveying his interest in the Property back to IC. This
10 transfer was accomplished by quit claim deed subject to the Deed
11 of Trust. The terms of this contract provided that interest would
12 accrue on the amount secured by the Deed of Trust at an annual
13 rate of 10%.⁵

14 Although Popp is not listed as a partner in IC's partnership
15 agreement, that agreement gave him authority to sign binding
16 contracts for IC. Indeed, Popp's signature purports to bind IC in
17 all of the above transactions, except for the October, 1995
18 promissory note to Darby, which was executed by Turner on IC's
19 behalf.⁶

21 ⁴Popp and his family have known Darby since Popp was a child.

22 ⁵In addition to the above convoluted facts, at least two
23 entities involved in these transactions have registered the name
24 "Investors Co-Op" as a fictitious business name. On May 12, 1995,
25 Fred Popp and Deborah Turner registered the name for IC, and on
26 October 3, 1995, Popp registered the name for himself. Both
27 registrations contain the same address.

28 ⁶There is also some evidence that during all of these
29 transactions little or no money changed hands. Since 1997, when
30 Darby executed the quit claim deed conveying his interest in the
31 Property back to IC, Darby has received neither interest nor
32 principal payments, nor has he taken action to enforce his right
(continued...)

1 In late 2001, Popp filed bankruptcy. On May 28, 2002, the
2 Trustee filed an adversary proceeding seeking, among other
3 remedies, a declaratory judgment that IC was an alter ego of Popp
4 ("Alter Ego Adversary"). Popp, Turner, the estate of Popp's
5 father, Popp's mother and IC were all named defendants.

6 The third cause of action in the Alter Ego Adversary sought a
7 declaration that the Property was property of Popp's bankruptcy
8 estate. It also sought an injunction against IC's further
9 transfer of the Property. After a hearing, the court granted this
10 request and entered a preliminary injunction against all
11 defendants - including the record title holder, IC - prohibiting
12 them from any sale or transfer of the Property.

13 In October 2003, before the Alter Ego Adversary was
14 concluded, the Trustee filed the Sale Motion, which requested
15 authority to sell the Property for \$22,500. Essential to that
16 motion was a finding that the Property belonged to Popp's
17 bankruptcy estate. The Sale Motion thus constituted a proceeding
18 parallel to, and in many respects duplicative of, the Alter Ego
19 Adversary.

20 Darby, Popp, and Turner each opposed the Sale Motion. In
21 particular, Darby objected on the grounds that the estate lacked
22 title to the Property, and that the Property could not be sold
23 free of his interest without paying him in full. The court
24 overruled all objections and granted the Sale Motion on December
25 3, 2003 (the "Sale Order"). Although the court had before it the
26

27 ⁶(...continued)
28 to receive them.

1 convoluted evidence sketched above, the full extent of the court's
2 findings on ownership was that Popp's estate had "some interest in
3 the property."⁷

4 Darby did not seek a stay of the Sale Order. The sale to the
5 purchaser, Nancy R. Redding ("Redding"), was consummated, and the
6 grant deed was recorded on December 23, 2003.⁸

7 On December 15, 2003, Darby filed the Motion for
8 Reconsideration. The court heard this motion after recordation of
9 the deed, and on January 26, 2004, the bankruptcy court denied it
10 ("Reconsideration Order"). At that time, the bankruptcy court
11 took evidence of Redding's good faith, and found that she was a
12 good faith purchaser within the meaning of Section 363(m). Darby
13 filed a Notice of Appeal from the Reconsideration Order on
14 February 5, 2004.⁹ Redding is not a party to this appeal.

15 At oral argument, the parties informed the Panel that the
16 Alter Ego Adversary was still pending, and that after the sale
17 order was entered the trustee had added Darby to the list of
18 defendants who she alleged were alter egos of Popp.

19
20 ⁷At best, the evidence submitted to the bankruptcy court
21 regarding ownership was equivocal.

22 ⁸In light of the Trustee's disclaimers as to the warranty of
23 title explored infra, we think the grant deed was more akin to a
quit claim deed.

24 ⁹Darby's Notice of Appeal refers only to the Motion for
25 Reconsideration; however, the Appellant's Opening Brief makes it
26 clear that Darby's appeal encompasses the bankruptcy court's Sale
27 Order as well. In similar situations, the Ninth Circuit has held
28 that "[u]nless the opposing party can show prejudice, courts of
appeal may treat an appeal from a postjudgment order as an appeal
from the final judgment." Ward v. San Diego County, 791 F.2d
1329, 1331 (9th Cir. 1986) (citing Foman v. Davis, 371 U.S. 178
(1962)). This line of cases negates the Trustee's argument
regarding Darby's failure to appeal directly from the Sale Order.

1 **ISSUES**

2 1. Does Darby lack standing to object to the sale because he
3 is a lien holder and not an owner of the Property?

4 2. Was the maintenance of parallel proceedings, each seeking
5 a determination that the estate had an interest in the Property,
6 impermissible under Rodeo?

7 3. If the bankruptcy court improperly countenanced parallel
8 proceedings, what, if any, remedy is appropriate and within this
9 court's jurisdiction to grant?

10 **STANDARD OF REVIEW**

11 This court reviews "appeals from orders to sell property of
12 the estate other than in the ordinary course of business pursuant
13 to 11 U.S.C. § 363(b) for abuse of discretion." Rosenberg Real
14 Estate Equity Fund III v. Air Beds, Inc. (In re Air Beds, Inc.),
15 92 B.R. 419, 422 (9th Cir. BAP 1988) (citing Comm. of Equity Sec.
16 Holder v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071
17 (2d Cir. 1983); Big Shanty Land Corp. v. Comer Props., Inc., 61
18 B.R. 272, 277 (N.D. Ga. 1985)). A court abuses its discretion if
19 "it does not apply the correct law or if it rests its decision on
20 a clearly erroneous finding of material fact." United States v.
21 Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998) (citation omitted).
22 The reversal of an order for abuse of discretion requires "a
23 definite and firm conviction that the court below committed clear
24 error of judgment in the conclusion it reached upon weighing the
25 relevant factors." Stine v. Flynn (In re Stine), 254 B.R. 244,
26 248 (9th Cir. BAP 2000) (citing In re Cortez, 191 B.R. 174, 177
27 (9th Cir. BAP 1995)). Similarly, this court will not reverse a
28 finding of fact unless it is clearly erroneous. Sierra Steel,

1 Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.), 96 B.R.
2 275, 277 (9th Cir. BAP 1989).

3 DISCUSSION

4 Standing

5 The Trustee claims that Darby, as a lien holder, does not
6 have standing to appeal the Sale Order. Darby responds that the
7 Sale Order had the type of direct and adverse pecuniary effect on
8 him that is sufficient to give him standing. We agree with Darby.

9 "To have standing to appeal a decision of the bankruptcy
10 court, an appellant must show that it is a 'person aggrieved' who
11 was 'directly and adversely affected pecuniarily by an order of
12 the bankruptcy court.'" McClellan Fed. Credit Union v. Parker (In
13 re Parker), 139 F.3d 668, 670 (9th Cir. 1998) (citing Fondiller v.
14 Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983);
15 Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d
16 673, 675 (9th Cir. 1996)). A "person aggrieved" is someone whose
17 interest is directly affected by the bankruptcy court's order,
18 either by a diminution in property, an increase in the burdens on
19 the property, or some other detrimental effect on the rights of
20 ownership inherent in the property. In re Fondiller, 707 F.2d at
21 442-43.

22 Darby does not claim a fee interest or any residual ownership
23 in the Property. Instead, he has a lien on the Property in the
24 form of the Deed of Trust. The Trustee believes that this lesser
25 property interest is insufficient to allow Darby to challenge the
26 Trustee's proposed sale. We disagree.

27 It is instructive to examine the circumstances in which the
28 Code and case law permit creditors and lien holders to object to a

1 sale under Section 363 of the Code. With respect to creditors,
2 case law permits any creditor to challenge transfers because of
3 the estate's lack of the power to sell. Duckor Spradling &
4 Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 778
5 (9th Cir. 1999). With respect to lien holders, the Code
6 supplements the list of challenges by allowing a secured creditor
7 to object to a sale free and clear unless that secured creditor's
8 claim is paid in full. 11 U.S.C. § 363(f)(3).

9 Darby's objection in the trial court included an objection
10 that the Trustee did not own the Property, and that Darby's claim
11 was not proposed to be paid in full. On appeal, however, Darby
12 has not renewed his objection under Section 363(f)(3). Seizing on
13 this omission, the Trustee essentially argues that Section 363(f)
14 constitutes an exclusive list of possible objections to a sale
15 under Section 363.

16 We do not agree. Initially, we note that Section 363(f) does
17 not provide an exclusive set of objections. Indeed, even before
18 one gets to Section 363(f), Section 363(b), as interpreted by
19 Rodeo, requires that the estate demonstrate that the property it
20 proposes to sell is "property of the estate." Darby's objection
21 thus rests at this fundamental level, and we read Ninth Circuit
22 law to permit even unsecured creditors to challenge proposed sales
23 on this ground.

24 P.R.T.C. demonstrates this point. There, a chapter 7 trustee
25 had sold avoiding-powers actions to a trust, with the
26 understanding that the trust, and not the trustee, would pursue
27 the litigation. When sued by that trust, a defendant raised the
28 issue that, unlike chapter 11, nothing in chapter 7 authorized

1 such a sale. The trustee countered that the litigation defendant
2 did not have standing to raise that issue.

3 The Ninth Circuit rejected the challenge. After discussing
4 Fondiller, which we cite above, the court noted that “[a] creditor
5 does . . . have a direct pecuniary interest in a bankruptcy
6 court’s order transferring assets of the estate.” 177 F.3d at
7 778. The creditor’s pecuniary interest arises from the fact that,
8 by the sale, the mix of assets held by the estate from which to
9 pay creditors is irrevocably altered. In this sense, P.R.T.C.
10 presents a weaker standing claim than that present here: P.R.T.C.
11 recognized standing to challenge a sale based on the expectations
12 of an unsecured creditor. In the current case, Darby’s status is
13 stronger. As an undersecured creditor, he possesses both secured
14 and unsecured claims. 11 U.S.C. § 506(a).

15 Given this discussion, there are two consequences that flow
16 from the sale proposed here that cement Darby’s standing. First,
17 the sales price established that Darby has an unsecured deficiency
18 claim along with his secured claim. See 11 U.S.C. § 506(a).
19 Under P.R.T.C., that unsecured claim gives him standing to
20 challenge the sale.

21 If Darby’s unsecured claim bestows standing, it would be odd
22 if the Trustee’s attempt to strip Darby’s lien from the Property
23 did not achieve the same result. Seeking to avoid inconsistency,
24 we hold that the sale and lien stripping in this case also confers
25 standing. Section 363(f)(3) recognizes that a lien holder has an
26 interest in a sale of its collateral, and can successfully oppose
27 the sale if the proceeds do not pay the full amount of debt
28 secured by the property being sold. While Darby did not

1 specifically cite Section 363(f)(3) on appeal, the same interest
2 is encompassed and inherent in the argument he does make: that the
3 estate does not own his collateral. Indeed, Rodeo requires that
4 the Trustee establish that the property to be sold is "property of
5 the estate" before invoking Section 363(f)'s extraordinary power
6 to strip liens. As a result, the necessary pecuniary interest
7 for standing is present when a proposed Section 363 lien stripping
8 diminishes, burdens, or otherwise alters a lien holder's state law
9 property rights. In re Fondiller, 707 F.2d at 442-43.

10 The sale and lien stripping here certainly affected Darby's
11 state law property rights in a way contemplated by Fondiller's
12 standing analysis.¹⁰ This is best seen from the perspective of the
13 sale as one "free and clear" of Darby's lien. Such a sale
14 necessarily resulted in a change in Darby's collateral. Before
15 the sale, his security was real estate. After the sale, it was
16 cash, and less cash than Darby's debt. Among the consequences of
17 this change was Darby's loss of his nonbankruptcy right to delay
18 foreclosure until real property prices rose. This transformation
19 of collateral and change in foreclosure rights establish Darby's
20 status as a "person aggrieved" under Fondiller and similar cases,
21 especially since he was undersecured at the time the court ordered
22 his lien stripped. Cf. 11 U.S.C. § 1111(b) (preserving
23 nonrecourse creditor's right to look to property appreciation for
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27 ¹⁰We do not address the issue of Darby's standing had the sale
28 been subject to Darby's lien.

1 repayment).¹¹

2 The Trustee responds by noting that the Property had been on
3 the market for eighteen months and that the sale price was the
4 best possible result for all concerned. Therefore, the Trustee
5 argues, land values and Darby's failure to ask for loan payments,
6 not the Sale Order, caused any loss. This practical argument
7 succeeds only if the value of the Property is static, and if the
8 Trustee had used available legal theories under Section 502(d) and
9 Rule 3012 to value Darby's interest in the Property, thus
10 quantifying the extent of Darby's secured claim. See In re
11 Canonigo, 276 B.R. 257 (Bankr. N.D. Cal. 2002). Darby could
12 prefer an investment in real estate to a cash investment, and the
13 Sale Order affected his interest in the Property by involuntarily
14 depriving him of that choice.

15 Darby also successfully distinguishes the only two cases
16 cited by the Trustee for the proposition that lien holders do not
17 have standing to dispute ownership. The first, Cassirer v.
18 Sterling Nat'l Bank & Trust (In re Schick), 246 B.R. 41, 46
19 (Bankr. S.D.N.Y. 2000), holds that strangers who will not benefit

21 ¹¹The dissent questions the use of Section 1111(b) in this
22 chapter 7 liquidation case. Indeed, given that Popp's obligations
23 secured by the Deed of Trust are recourse obligations, Section
24 1111(b) would be of little use even if Popp's case were filed
25 under chapter 11. As the "cf." signal indicates, however, we cite
26 Section 1111(b) only to show that the interest of a lien holder in
27 any future appreciation of its collateral is an interest
28 recognized elsewhere in the Code. See, e.g., Dukor Spradling &
Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774 (9th
Cir. 1999) (finding that, notwithstanding absence of statutory
authority, court had power to authorize chapter 7 trustee to
transfer avoiding-powers actions to litigation trust; creditor
sued by trust had standing to challenge transfer of estate assets,
and thus had standing to challenge transfer of estate's causes of
action).

1 from a constructive trust do not have standing to sue to impose
2 one. The second, Tilley v. Vucurevich (In re Pecan Groves), 951
3 F.2d 242, 245 (9th Cir. 1991), rules that creditors have no
4 standing to object to a violation of an automatic stay, because
5 the automatic stay "is intended solely to benefit the debtor
6 estate." As Darby points out, neither case is directly applicable
7 to the question of whether a lien holder has standing to object to
8 an unauthorized sale of the property that serves as collateral for
9 his lien.

10 Darby has thus established that he is an "aggrieved party"
11 under Fondiller and P.R.T.C. and therefore has standing.¹²

12 **Is the Property Part of Popp's Estate?**

13 Darby argues that both the Sale Order and the Reconsideration
14 Order were an abuse of discretion under Rodeo because the Property
15 had not been finally determined to be the property of Popp's
16 bankruptcy estate. In response, the Trustee maintains that the
17 orders were not abuses of discretion because the bankruptcy court
18 found that Popp had "some interest in the property," and that
19 finding was supported by sufficient evidence. We disagree with
20 the Trustee.

21 In Rodeo, the Ninth Circuit considered the sale of real

22 ¹²The dissent's position that Darby lacks standing has odd
23 consequences. Consider, for example, a hypothetical chapter 7
24 filing by a business which stores towed and seized cars. Assume
25 that the trustee takes the position that possession of the stowed
26 cars gives her the ability to sell the cars free and clear of any
27 liens. She then notices a sale of all such cars, and for whatever
28 reason, the cars' owners do not object (they could have abandoned
them because they believe the liens against them left no equity).
It would blink reality to say that the banks and credit unions who
lent money on the cars would lack standing to object to the sale
on the basis of a lack of ownership, yet that is the result the
dissent would have us adopt.

1 property that was the subject of an ownership dispute. Warnick v.
2 Yassian (In re Rodeo Canon Dev. Corp.), 362 F.3d 603, 605-06 (9th
3 Cir. 2004). The debtor there had record title to the property
4 being sold, which under California law created a rebuttable
5 presumption that it held at least equitable ownership. Rodeo, 362
6 F.3d at 608 (citing Cal. Evid. Code § 662). The appellant,
7 however, claimed that the equitable owner of the property was a
8 partnership in which the appellant and the debtors were the two
9 general partners because the property had been acquired using that
10 partnership's funds. Id. at 605-06.

11 To resolve the ownership issue, an adversary proceeding had
12 started before the sale. But before issuing a dispositive motion
13 or holding trial in the adversary proceeding, the bankruptcy court
14 allowed the sale of the property under Section 363. The appellant
15 moved for reconsideration, contending that while it did not object
16 to the sale generally, it did object to any distribution of the
17 sale proceeds to satisfy interests or liens that were already in
18 dispute in the pending adversary proceeding. The trial court
19 overruled the objection and ordered a distribution based on an
20 assumed minimum ownership interest by the debtor. It did this,
21 however, without entering any order in the pending adversary
22 proceeding.

23 Adopting a rule designed to discourage piecemeal litigation,
24 the Ninth Circuit ruled that "[a] bankruptcy court may not allow
25 the sale of property as 'property of the estate' without first
26 determining whether the debtor in fact owned the property" and
27 found that the trial court had not done so. Id. at 608-09. The
28 court first noted the bankruptcy court's order "purported to find

1 the [p]roperty to be 'property of [Rodeo's] estate.'" But the
2 court found this "irreconcilable with [the bankruptcy court's]
3 decision to leave the ownership question open 'for another day,'"
4 because "a final decision . . . would have settled the very
5 question the court professed to leave open. Thus we cannot find
6 that the court finally resolved the ownership question in the face
7 of its express decision to leave it unresolved." Id. The court
8 also stated that the bankruptcy court's finding of ownership was
9 in conflict with its subsequent failure to resolve an adversary
10 proceeding in which the identical issue was presented. Id.

11 Although it concluded that "the sale was . . . not authorized
12 by law," and that Section "363 does not apply because the sale was
13 not of property of the estate," the Ninth Circuit did not
14 invalidate the sale. Id. at 610. Instead the court concerned
15 itself with "the disposition of the proceeds into which the
16 Property has now been converted," remanding the case to the
17 bankruptcy court to resolve the ownership dispute and order the
18 disgorgement of improperly distributed assets. Id. at 610-11.

19 Were the trial court's actions in this case consistent with
20 Rodeo? Rodeo is silent on how a court must determine whether
21 property is estate property. The facts in Rodeo led the Ninth
22 Circuit to conclude that the bankruptcy court's finding of
23 ownership with respect to the motion was "irreconcilable" with the
24 bankruptcy court's failure to dismiss the adversary proceeding.
25 It is unclear, however, if Rodeo forbids a bankruptcy court from
26 ever making such a finding in a contested matter (as opposed to an
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1 adversary proceeding)¹³ or whether Rodeo employs prudential
2 principles of efficient dispute resolution to channel disputes
3 over issues such as ownership into a single, appropriate forum.

4 We interpret Rodeo as standing for principles of efficient
5 judicial administration. Such principles, as applied here, lead
6 to reversal since the court's determination of disputed ownership
7 was duplicative and parallel to the essential subject of a pending
8 adversary proceeding.¹⁴

9 In Rodeo, reversal occurred because the bankruptcy court's
10 actions were inconsistent. The court made a finding of ownership
11 in the contested matter without carrying the consequences of that
12 finding through to the pending adversary proceeding. Here,
13 granting the Sale Motion – which necessarily involved a finding of
14 ownership – without applying that finding in the Alter Ego
15 Adversary presents the same incongruity: The trial court permitted
16 parallel and piecemeal proceedings to continue without regard to
17 the initial finding of ownership. This was duplicative and could
18 promote inconsistent and ultimately inconclusive litigation as to
19 the true ownership of the Property. As a result, it did not
20 provide a "sound basis for holding that the Property was property
21 of the estate." Id. at 609.

23 ¹³See BANKR. R. 7001(2) (providing that "a proceeding to
24 determine the validity, priority, or extent of a lien or other
25 interest in property" is an adversary proceeding).

26 ¹⁴Because both this case and Rodeo involve sale motions under
27 Section 363 made during the pendency of an adversary proceeding
28 contesting ownership, we do not decide whether a contested matter
brought in the absence of such an adversary proceeding can provide
a "sound basis for holding that the [property sought to be sold
is] property of the estate." Rodeo, 362 F.3d at 609.

1 Courts have long condemned duplicative and wasteful
2 litigation. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S.
3 180, 183 (1952). See also James P. George, Parallel Litigation,
4 51 BAYLOR L. REV. 769, 785-89 (1999). Other than Rodeo, we have not
5 found a case in which one court entertained the same substantive
6 issue involving the same parties in two separate proceedings
7 pending before it. In the analogous situation of two separate
8 actions pending involving the same issue before two different
9 courts, the Ninth Circuit has adopted a rule of comity in which
10 the second court presented with the issue defers to the first
11 court. Barapind v. Reno, 225 F.3d 1100, 1109 (9th Cir. 2000);
12 Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th
13 Cir. 1982); Church of Scientology v. United States Dep't of the
14 Army, 611 F.2d 738, 749 (9th Cir. 1980).

15 The policies behind the comity rule - promotion of efficient
16 judicial administration and avoidance of the risk of inconsistent
17 results, Pacesetter, 678 F.2d at 96 - apply with even more force
18 when only one court is involved, and when consolidation of the
19 actions is expressly permitted. See BANKR. RULE 7042 (permitting a
20 court to consolidate different actions if they present common
21 questions of law or fact); 9014 (making, among other things, Rule
22 7042 applicable to contested matters).

23 Although Rodeo does not refer to the rule of comity, it does
24 effectively extend the rule's sound policies. In observing that
25 the trial court divided the task of determining ownership into two
26 proceedings without giving finality to either, Rodeo highlighted
27 the same concerns expressed in the cases cited above regarding
28 parallel and piecemeal litigation. It then applied those policies

1 by reversing based on the lower court's lack of a "sound basis"
2 for proceeding in parallel on the ownership issue.

3 Against this background, Rodeo stands for the proposition
4 that courts must seek to promote consistent and unfragmented
5 decisionmaking when faced with the need to determine predicate
6 issues such as property ownership in the Section 363 context. The
7 trial court here did not adhere to this principle when it split
8 the litigation over the ownership of the Property, and then
9 purported to make a finding about ownership in one piece of the
10 litigation that was not binding in any way in the Alter Ego
11 Adversary. As a result, the bankruptcy court's factual
12 determination in this case that Popp had "some interest in the
13 property" effectively resolved nothing. Therefore, it cannot be
14 given any dispositive force.

15 Rodeo thus mandates reversal. In addition, reversal is
16 consistent with the equities of the underlying litigation. The
17 Trustee, for example, has argued that the \$22,500 offer she
18 received was the highest and best price for the Property, and
19 buttressed that assertion with evidence that she had marketed the
20 Property for more than eighteen months. This admission indicates
21 that, as estate representative, she had intended to sell property
22 titled in another for more than a year and a half. Nonetheless,
23 she declined or neglected to bring the issue of ownership to a
24 head in the pending Alter Ego Adversary. If the facts were so
25 clear that they could be decided in a separate contested matter,
26 the Trustee could have sought a similar determination by way of
27 summary judgment in the adversary proceeding or could have
28 requested an expedited trial on the issue.

1 Moreover, the contract between the buyer and the Trustee
2 indicates that each knew of the disputed ownership claims, and
3 they jointly allocated to Redding the risk that the estate would
4 not ultimately be found to own the Property. In Sections 7 and 8
5 of the purchase agreement, the Trustee disclaimed all warranties
6 of title, so Redding knowingly took the entire risk that the
7 estate did not have good title – or, for that matter, any title.¹⁵

8 To avoid pernicious piecemeal litigation, the bankruptcy
9 court should have insisted that the Trustee finish determining
10 ownership before stepping outside the Alter Ego Adversary to sell
11 the Property. Because the trial court did not, we must reverse
12 the determination that the estate had “some ownership” in the
13 Property, and thus reverse the order authorizing the Property’s
14 sale under Section 363.

15 **Appropriate Remedy**

16 Despite the invalidity of the Sale Order, the Trustee asserts
17 that Darby’s appeal is moot, either under the general mootness
18 rule, the doctrine of equitable mootness, or under Section 363(m),
19 because Darby did not request a stay and the sale had already been
20 consummated to a good faith purchaser.

21 The Constitution limits the power of the federal courts to
22 “the adjudication of actual cases and live controversies.” Luckie
23 v. EPA, 752 F.2d 454, 457 (9th Cir. 1985); U.S. Const. art. III,
24 § 2, cl. 1. The mootness doctrine, derived from this rule,
25

26 ¹⁵The clearest example of this risk shifting is found in
27 Section 8.02 of the Addendum to the Purchase Agreement, which
28 states that “[t]itle to the Property shall be transferred to the
Buyer by a bankruptcy trustee’s deed without warranties,
representations or recourse of any kind.”

1 prohibits a court from hearing an appeal "when . . . an event
2 occurs which renders it impossible for [the] court . . . to grant
3 [the plaintiff] any effectual relief whatsoever." Trone v.
4 Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797
5 (9th Cir. 1981) (quoting Mills v. Green, 159 U.S. 651 (1895)).

6 Our determination that Section 363 does not apply here,
7 however, does not permit us to simply reverse. We must consider
8 equitable mootness generally.¹⁶ In bankruptcy, courts apply
9 several variations of the equitable mootness rule. The first
10 applies when "events . . . occur that make it impossible for the
11 appellate court to fashion effective relief." Focus Media, Inc.
12 v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916,
13 922 (9th Cir. 2004) (citing Bennett v. Gemmill (In re Combined
14 Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977)).

15 Generally, a consummated sale to a third party who is not a party
16 to the appeal falls within this category. Focus Media, 378 F.3d
17 at 922. This is not, however, an ironclad rule. Id. at 923
18 ("However, '[t]he party asserting mootness has a heavy burden to
19 establish that there is no effective relief remaining for the
20 court to provide.'").

21
22 ¹⁶Section 363(m) codifies the mootness doctrine as it applies
23 to property sales governed by that section. In Rodeo, however,
24 the Ninth Circuit ruled that none of the salutary and protective
25 provisions of Section 363(m) apply without a dispositive and final
26 finding that the estate owned what it purported to sell. Because
27 the purported consummation of the sale here was also without
28 authority under Section 363, Section 363(m) is also not available.

25 We agree with the dissent that, if Section 363 applied, the
26 case would likely be moot for failure to obtain a stay pending
27 appeal. But that consequence shows the need to distinguish cases
28 such as this – where the predicate showings for application of
Section 363 have not been made – and those cases in which the
estate acts properly and does not attempt to expropriate nonestate
property.

1 A second, related variation of the mootness rule, the
2 equitable mootness doctrine, applies when appellants “‘have failed
3 and neglected diligently to pursue their available remedies to
4 obtain a stay’” and circumstances have changed so as to “‘render
5 it inequitable to consider the merits of the appeal.’” Focus
6 Media, 378 F.3d at 923 (citation omitted). Courts have applied
7 the doctrine of equitable mootness when the appellant has failed
8 to obtain a stay and the ensuing transactions are too “complex and
9 difficult to unwind.” Lowenschuss v. Selnick (In re Lowenschuss),
10 170 F.3d 923, 933 (9th Cir. 1999) (comparing In re Spirtos, 992
11 F.2d 1004, 1007 (9th Cir. 1993) with In re Roberts Farms, Inc.,
12 652 F.2d 793 (9th Cir. 1981) and In re Combined Metals Reduction
13 Co., 557 F.2d 179 (9th Cir. 1977)).

14 The Ninth Circuit has acknowledged that tension has developed
15 within mootness jurisprudence between these two “alternative
16 rationales.” See, e.g., Onouli-Kona Land Co. v. Estate of
17 Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th
18 Cir. 1988). Under the first rationale, courts look solely at
19 their ability to fashion an effective remedy. Id. Under the
20 second, courts go beyond remedial considerations and consider the
21 consequences of the remedy and the number of third parties who
22 have changed their position in reliance on the order that is being
23 appealed. Courts have described this rationale as the need to
24 assure “finality,” and under this rationale the failure of an
25 appellant to obtain a stay receives great weight. Id.

26 Here, although Redding is not a party to this appeal, this
27 Court is still able to afford Darby effective relief. One
28 consequence of this Court’s finding that the Sale Order was not

1 authorized by Section 363 is that Section 363(f) is not available
2 to permit the sale of the Property free of Darby's lien. Thus,
3 while the sale itself may not be rescinded, the Court may vacate
4 the transfer of Darby's lien to the sale proceeds, and hold that
5 it remains attached to the Property. See Beneficial California,
6 Inc. v. Villar (In re Villar), 317 B.R. 88 (9th Cir. BAP 2004)
7 (lien reinstated on property that may have been sold even though
8 purchaser was not a party to the appeal).

9 As a result, although Darby failed to request a stay of the
10 sale, we conclude that the equitable mootness doctrine does not
11 apply. The transaction is not "complex" or "difficult to unwind."
12 Lowenschuss, 170 F.3d at 933. There is only one third party who
13 may have relied on the Sale Order, rather than a large number as
14 in a reorganization. See, e.g., Trone v. Roberts Farms, Inc. (In
15 re Roberts Farms, Inc.), 652 F.2d 793, 797-98 (9th Cir. 1981)
16 Additionally, the third party buyer signed a sale agreement in
17 which she explicitly assumed the risk that the estate would have
18 nothing to sell.

19 To be candid, many, many cases from this circuit could be
20 read to require a stay pending appeal as a condition of avoiding
21 the consequences of equitable mootness. See, e.g., Ewell v.
22 Diebert (In re Ewell), 958 F.2d 276 (9th Cir. 1992) (appeal held
23 moot because transfer of property had already occurred as of time
24 appellant sought stay pending appeal); Mann v. Alexander Dawson,
25 Inc. (In re Mann), 907 F.2d 923, 925 (9th Cir. 1990) (appeal of
26 order lifting automatic stay held moot for failure to seek stay
27 pending appeal; secured creditor purchased property by credit
28 bid); Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi Ohana,

1 Ltd.), 873 F.2d 1302, 1306 (9th Cir. 1989) (appeal of District
2 Court order affirming Bankruptcy Court order ruling that contract
3 for sale of land was executory and could be rejected by corporate
4 debtor held moot in absence of stay pending appeal, where debtor
5 completed sale to third party prior to disposition by Court of
6 Appeals); BC Brickyard Assocs., Ltd. v. Ernst Home Ctr., Inc. (In
7 re Ernst Home Ctr., Inc.), 221 B.R. 243, 247 (9th Cir. BAP 1998)
8 (transfer of real property after denial of Landlord's Committee's
9 motion for a stay pending appeal).

10 Such a result, however, is not yet a rule. The relatively
11 simple transaction present here, in which a buyer expressly took
12 the risk of receiving less than marketable title, coupled with the
13 issues raised – the sale of property and the stripping of a
14 creditor's lien from that property without a proper determination
15 of its ownership – compel reversal notwithstanding arguments of
16 mootness.

17 We therefore REVERSE the decision below, and REMAND to the
18 bankruptcy court for proceedings not inconsistent with this
19 opinion.

20
21 MARLAR, Bankruptcy Judge, dissenting:

22 I respectfully disagree with my colleagues, and would
23 DISMISS either for lack of standing to appeal or for mootness.
24 Although the majority opinion is well-written and scholarly, I
25 believe that it is distracted by a tangential issue, that of who
26 owns the property. The crux of this appeal, in my view, is
27 whether Darby has standing to appeal the validity of the sale on
28 the grounds that the property was not property of the estate,

1 which is the only issue he has raised.

2 Darby's interest in the property sold by the trustee is that
3 of a lienholder. The outcome of an ownership controversy is of no
4 import to a lienholder; its interest is secured by the value of
5 its collateral regardless of who owns the property. In this case,
6 the value of Darby's lien was only as great as the value of his
7 collateral which was administered by the chapter 7 trustee. See
8 11 U.S.C. § 506(a).

9 Therefore, a lienholder has no basis to challenge a sale on
10 grounds that someone other than the debtor's estate owns it.
11 Because Darby has no pecuniary stake in any dispute as to who the
12 true owner of his collateral may be, his appeal on that ground
13 fails for lack of standing. See In re P.R.T.C., Inc., 177 F.3d
14 774, 777 (9th Cir. 1999) (appellant's interests must be directly
15 affected by a bankruptcy court order).

16 The majority relies on P.R.T.C. to support its conclusion
17 that a creditor has a pecuniary interest in a bankruptcy court's
18 order transferring assets of the estate. See id. at 778. This
19 broad statement is a true one, as a chapter 7 estate's ultimate
20 beneficiaries are a debtor's creditors. But that fact does not
21 confer standing on all estate issues. See 11 U.S.C. § 323
22 (trustee is the estate's representative).

23 Indeed, in P.R.T.C., the Ninth Circuit in making that
24 statement cited a case involving competing creditor claims to a
25 limited fund. See In re Int'l Envtl. Dynamics, Inc., 718 F.2d
26 322, 326 (9th Cir. 1983). Such facts, and those of P.R.T.C. are
27 distinguishable.

28 In P.R.T.C., there was no bankruptcy sale, no lienholder, and

1 no lien attached to the sale proceeds. There, the estate lacked
2 sufficient funds to pursue various avoidance actions and other
3 lawsuits, which were the estate's only assets. Therefore, the
4 litigation rights were assigned to the largest creditor, and
5 another creditor, who was a potential defendant, objected. The
6 Ninth Circuit held that the objecting creditor had standing to
7 object to the transfer because such transfer left the bankruptcy
8 estate without any other significant assets. P.R.T.C., 177 F.3d
9 at 778.

10 In contrast, here, the real property asset has simply been
11 transformed into cash proceeds, to which Darby's lien attached.
12 Furthermore, in this case, the parties who are debating ownership
13 are not parties to this appeal. Thus, they have waived any Rodeo
14 Canon arguments, and § 363 applies.

15 It is precisely because Darby, as a lienholder, is only
16 entitled to challenge the sale on one of the specific grounds of
17 § 363(f) that his arguments surrounding ownership ring hollow.
18 Even though, in bankruptcy court, Darby objected that the sale
19 price was inadequate to fully pay his lien (§ 363(f)(3)), he has
20 not raised any § 363(f)(1)-(f)(5) challenges to the sale in this
21 appeal. If he had done so, he might have fair game for an
22 appellate argument. Instead, he has waived any § 363(f)
23 challenges. See Laboa v. Calderon, 224 F.3d 972, 981 n.6 (9th
24 Cir. 2000) (appellate court ordinarily will not consider arguments
25 not raised in appellant's opening brief). Instead, his only
26 appellate issue concerns who owns the property, and his interest
27 is not claimed to be that of an owner.

28 Turning to the value side of the coin, a secured creditor's

1 lien attaches to collateral only to the extent of the collateral's
2 value. Any debt in excess of the collateral's value is unsecured.
3 See 11 U.S.C. § 506(a). Thus, by waiving the § 363(f)(3) argument
4 that the property was being undersold, Darby cannot complain that
5 his lien on land was transformed into a lien on cash. A
6 lienholder has no pecuniary interest in its collateral except as
7 may be necessary to pay the debt which is secured by it. When
8 collateral is sold, and a creditor's lien is transferred to cash,
9 the creditor is one step closer to what it bargained for--
10 repayment--and has no complaint that it was deprived of its right
11 to foreclose. Cf. Dewsnap v. Timm, 502 U.S. 410, 417 (1992)
12 (refusing chapter 7 debtor's attempt, prior to foreclosure, to
13 strip down a lien on real property to the value of the collateral,
14 pursuant to § 502(d), because a chapter 7 creditor's lien "stays
15 with the real property until the foreclosure").

16 Eventually, the validity, priority and extent of the Darby
17 lien, if the trustee disputes it, will be tested in the crucible
18 of an adversary proceeding. See Fed. R. Bankr. P. 7001(2). If
19 Darby wins, he will presumably be paid the sale proceeds.

20 Finally, a word addressed to the majority's analogy to
21 § 1111(b), as a method to protect lienholders. This section is
22 simply not applicable to chapter 7, by analogy or otherwise. See
23 § 103(g) (making subchapter I of chapter 11 applicable only in a
24 chapter 11 case, with the exception of § 901(a)).

25 Section 1111(b) has a sound policy reason for appearing in
26 the reorganization chapter that does not apply at all to
27 liquidations. Section 1111(b) applies where a debtor seeks to
28 retain secured real property, and at the same time prevents that

1 debtor from valuing the collateral for a sum less than the secured
2 debt without giving the creditor a unilateral option to elect to
3 be treated as if it were fully secured. The purpose is to
4 preserve the "upside" appreciation for a creditor who is deprived
5 of its immediate right to foreclose while the debtor continues to
6 use the property. Section 1111(b) thus shifts future appreciation
7 to the creditor's side of the equation. See In re Tuma, 916 F.2d
8 488, 491 (9th Cir. 1990). Those policy reasons are simply
9 inapplicable when the goal is liquidation in a chapter 7
10 proceeding. See, e.g., § 704(1) (trustee shall collect and reduce
11 the property of the estate to money as quickly as possible).

12 In addition, the § 1111(b) election option explicitly excepts
13 any nonrecourse holder whose secured property is sold pursuant to
14 § 363 or in a reorganization plan. See 11 U.S.C.
15 § 1111(b) (1) (A) (ii). The reason for this is that the secured
16 party has a right to bid the full amount of its secured claim at
17 any bankruptcy sale of its collateral. See In re Tampa Bay
18 Assocs., Ltd., 864 F.2d 47, 50 (5th Cir. 1989) (citing 124 Cong.
19 Rec. H11103-04 (daily ed. Sept. 28, 1978, at 32407)); 11 U.S.C.
20 § 363(k).

21 In summation, Darby has no standing to appeal the sale order
22 on the basis of ownership. He has no dog in that fight.

23 Alternatively, I conclude that this appeal is moot. Section
24 363(m) speaks to this subject loud and clear, and the majority's
25 efforts to slip-slide around its mandate is, in my opinion,
26 tortured. What § 363(m) means to Darby (assuming that he had
27 standing) is this: had he wished to stop the sale, he could have
28 applied for a stay pending appeal, and if the court required it,

1 posted a bond equal to the sale price, and could then have had his
2 appeal heard on the merits. But he never asked for a stay.

3 Therefore, § 363(m) describes the unequivocal consequence:

4 (m) The reversal or modification on appeal of an
5 authorization under subsection (b) or (c) of this section
6 of a sale or lease of property does not affect the
7 validity of a sale or lease under such authorization to an
8 entity that purchased or leased such property in good
9 faith, whether or not such entity knew of the pendency of
10 the appeal, unless such authorization and such sale or
11 lease were stayed pending appeal.

12 11 U.S.C. § 363(m).

13 Because the sale has now closed, Darby's appeal is moot and
14 should be dismissed.

15 For these reasons, I respectfully dissent, and would DISMISS.

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