

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No. AK-09-1260-JuPD
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GLACIER VALLEY TOURS, LLC,)	Bk. No. 08-00213-DMD
)	
Debtor.)	
)	
GLACIER VALLEY TOURS, LLC,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
ESTATE OF JOSEPH SMITH; LARRY)	
D. COMPTON, Chapter 7 Trustee,)	
)	
Appellees.)	
)	

Argued and Submitted on March 19, 2010
at Pasadena, California

Filed - April 9, 2010

Appeal from the United States Bankruptcy Court
for the District of Alaska

Hon. Donald MacDonald IV, Chief Bankruptcy Judge, Presiding.

Before: JURY, PERRIS² and DUNN, 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. Elizabeth L. Perris, Chief Judge of the Bankruptcy Court for the District of Oregon, sitting by designation.

1 Debtor Glacier Valley Tours, LLC ("GVT") appeals the
2 bankruptcy court's judgment (1) granting the Estate of Joseph M.
3 Smith's ("Smith") Motion for Reconsideration; (2) granting the
4 chapter 7 trustee's Motion to Sell Property Free and Clear of
5 Liens; and (3) denying GVT's Motion to Convert Case to One Under
6 Chapter 11.

7 Having reviewed the parties' briefs and the record, we
8 DISMISS this appeal as moot.

9 **I. FACTS**

10 In 2001, GVT entered into a lease with Smith for 160 acres of
11 remote wilderness property near Haines, Alaska.³ The lease
12 included an option to purchase the property for \$800,000.

13 GVT's managing members, Albert Gilliam ("Gilliam") and his
14 sister Pam Coulter ("Coulter"), planned to generate income from
15 the property by offering "Fly In Fly Out" tours marketed to the
16 cruise line industry and by mining it. Soon after its tour
17 business began to develop, GVT shut down operations because the
18 airstrip on the property became unuseable due to water erosion.
19 GVT stopped making the lease payments.

20 Numerous disputes between GVT and Smith ensued, eventually
21 ending in a 2004 settlement agreement whereby GVT purchased the
22 property from Smith at a reduced price of \$600,000 and took on the
23 responsibility of repairing the airstrip. Along with initial
24 payments, GVT executed a promissory note for \$360,000 in favor of
25 Smith which was secured by a first deed of trust on the property.

26 Subsequently, GVT defaulted, and Smith commenced a non-

27 ³ The property is formally known as United States Mineral
28 Survey 1564.

1 judicial foreclosure proceeding in January 2008 with the sale
2 scheduled for April 23, 2008. GVT asked Smith to postpone the
3 sale to give GVT time to obtain financing. Smith refused, and GVT
4 filed a state court civil action against Smith alleging breach of
5 contract and fraud. GVT's action was partially based on
6 allegations that Smith, or his nephew Todd Smith, had buried
7 hazardous waste material on the property and caused survey markers
8 to be removed.

9 **A. The Bankruptcy Filing**

10 GVT filed for chapter 7 relief on April 22, 2008. The
11 petition stayed the foreclosure sale scheduled for the next day.

12 GVT scheduled the property with a value of \$600,000 and
13 indicated it was encumbered by a deed of trust in favor of Smith
14 with an outstanding balance of \$318,594.18. GVT's scheduled
15 personal property consisted of the state court action against
16 Smith valued at \$350,000 and \$71,265 in other assets, including
17 four vehicles, some excavating and office equipment, an airboat,
18 and \$3,000 in a checking account. Besides Smith's secured claim,
19 GVT's scheduled liabilities included \$9,358 in priority unsecured
20 debt and \$6,163 in general unsecured debt.

21 Larry D. Compton was appointed the chapter 7 trustee. No
22 activity occurred in the case for almost a year. Smith, who was
23 in poor health, passed away on September 29, 2008.

24 **B. The Trustee's Motion to Sell the Property And GVT's Motion to**
25 **Convert its Case to One Under Chapter 11**

26 On July 2, 2009 the trustee filed an application to employ a
27 real estate agent and moved to sell the property free and clear of
28

1 liens under § 363.⁴ The proposed sale was to a third party buyer
2 for \$280,000 subject to overbid. Although the purchase price was
3 less than the balance due on the Smith deed of trust, Smith's
4 estate consented to the proposed sale.⁵

5 Other terms included: (1) the sale was free and clear of any
6 interest that Gilliam purported to own in three mining claims on
7 the property, providing that such interests would attach only to
8 the proceeds of the sale; (2) the trustee's realtor would receive
9 an 8% commission on the sale, plus reimbursement of actual costs;
10 (3) the bankruptcy estate would receive 8% of the gross sale
11 proceeds; and (4) the balance would be paid to Smith's estate.

12 Four days after the trustee filed his motion to sell the
13 property, GVT filed a motion to convert its case to chapter 11 to
14 prevent the trustee's sale. GVT conceded that it did not have an
15 absolute right to convert under the holding in Marrama v. Citizens
16 Bank of Mass., 549 U.S. 365 (2007), but argued that it sought
17 conversion in good faith and could propose a confirmable chapter
18 11 plan.⁶ Relying also on In re FMO Assocs. II, LLC, 402 B.R.

20 ⁴ Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

22 ⁵ The Smith family agreed to let the trustee handle the sale
23 of the property to avoid further fees and costs in litigating with
Gilliam and Coulter and to bring a neutral into the equation.

24 ⁶ In Marrama, the United States Supreme Court held that a
25 debtor's right to convert from chapter 7 to chapter 13 was
26 limited by the bankruptcy court's power to take any action
27 necessary to prevent bad-faith conduct or abuse of the bankruptcy
28 process. Thus, a debtor had no absolute right to convert a case
if there was evidence of atypical conduct which could be equated
to bad faith. The Marrama court concluded that the debtor had
made numerous statements about his house which were misleading and

(continued...)

1 546, 551-52 (Bankr. E.D.N.Y. 2009), GVT argued that under the
2 totality of circumstances test its motive for seeking conversion
3 was made in good faith.⁷

4 The trustee objected to GVT's motion to convert on the ground
5 that GVT could not propose a confirmable plan and, therefore,
6 selling the property was in the best interests of the creditors
7 and the estate. The trustee argued that GVT had been in default
8 under one agreement or another between it and Smith for the last
9 ten years. Moreover, GVT had assured the trustee from the
10 inception of its bankruptcy case that there was a financial savior
11 around the corner, but no money or savior ever materialized.
12 Finally, the trustee observed that GVT's members could bid on the
13 property.

14 The bankruptcy court heard GVT's motion to convert and the
15 trustee's motion to sell in tandem. At the July 29, 2009 hearing,

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17 ⁶(...continued)
18 inaccurate and, therefore, forfeited his purportedly absolute
19 right to proceed under Chapter 13.

20 ⁷ Relevant factors under a totality of circumstances test
21 include whether:

22 (1) the debtor has only one asset; (2) the debtor has
23 few unsecured creditors whose claims are small in
24 relation to those of the secured creditors; (3) the
25 debtor's one asset is the subject of a foreclosure
26 action as a result of arrearages or default on the debt;
27 (4) the debtor's financial condition is, in essence, a
28 two party dispute between the debtor and secured
creditors (sic) which can be resolved in the pending
state foreclosure action; (5) the timing of the debtor's
filing evidences an intent to delay or frustrate the
legitimate efforts of the debtor's secured creditors to
enforce their rights; (6) the debtor has little or no
cash flow; (7) the debtor can't meet current expenses
including the payment of personal property and real
estate taxes; and (8) the debtor has no employees.

FMO, 402 B.R. at 551-52.

1 GVT offered testimony from two witnesses interested in investing
2 in the property. GVT had executed a working agreement with one of
3 the witnesses under which GVT would receive a \$25,000
4 nonrefundable down payment and a 15% royalty on gold mined from
5 the property. The witness had not confirmed that gold existed on
6 the property, but if it did, he estimated that GVT could receive
7 up to \$90,000 between the end of 2009 and the spring of 2010 from
8 the royalty agreement.

9 The second witness testified that he had offered GVT \$350,000
10 for a 40% share in GVT's tourism operations on the property. He
11 had signed an intent to invest document three days before the
12 hearing, but had not executed an investment agreement. The
13 witness did not make his offer until GVT contacted him a week
14 before the hearing, and he was not aware that he could have
15 purchased the entire property from the trustee for \$285,000. At
16 the conclusion of the hearing, the court orally stated it intended
17 to deny GVT's motion to convert and grant the trustee's motion to
18 sell based on the best interests of creditors.

19 After the hearing, the court reviewed the holding in Marrama
20 and concluded that it had applied the wrong standard to GVT's
21 motion to convert because, unlike the debtor in Marrama, GVT had
22 made no fraudulent statements during its bankruptcy proceeding.
23 On July 31, 2009 the court held another hearing and found that GVT
24 sought conversion in good faith. Accordingly, the court reversed
25 its previous oral rulings, granted GVT's motion to convert, denied
26 the trustee's motion to sell and entered the orders and judgment
27 on the same day.

28 One hour later, Smith's estate filed a Motion for

1 Reconsideration, arguing that the court should deny GVT's motion
2 to convert based on factors indicative of bad faith set forth in
3 FMO, 402 B.R. at 551-52. GVT received notice of the Motion for
4 Reconsideration on the afternoon of July 31, 2009. The bankruptcy
5 court sua sponte set a hearing on the motion for the afternoon of
6 August 3, 2009, but did not request opposition from GVT under its
7 Bankruptcy Local Rule 9023-1.

8 On August 4, 2009, the day after the hearing on the Motion
9 for Reconsideration, the court vacated and reversed its July 31,
10 2009 orders and judgment in a written decision. The court granted
11 the Smith estate's Motion for Reconsideration, granted the
12 trustee's motion to sell the property for \$280,000 to the third
13 party buyer and denied GVT's motion to convert its case. GVT
14 timely appealed the bankruptcy court's judgment.

15 **C. Post-Judgment Proceedings**

16 At the same time that GVT filed its appeal of the bankruptcy
17 court's August 4, 2009 judgment, GVT moved for a stay pending
18 appeal in the bankruptcy court. The bankruptcy court denied GVT's
19 motion in a written decision.

20 GVT filed an emergency motion for a stay pending appeal with
21 this panel. We granted a temporary stay of the trustee's sale.
22 On August 18, 2009, we denied GVT's motion to stay the sale
23 pending appeal, but extended the temporary stay to August 28,
24 2009.

25 GVT appealed this panel's Order Denying Motion for Stay
26 Pending Appeal to the Ninth Circuit Court of Appeals, which
27 ordered the appeal dismissed unless GVT could show cause why the
28 appeal should not be dismissed on jurisdictional grounds.

1 On September 1, 2009 the trustee deeded the property to the
2 third party buyer. Two days later, the trustee closed the sale
3 and distributed \$233,342.88 of the sale proceeds to Smith's estate
4 and retained \$22,400 for the bankruptcy estate.

5 On December 10, 2009 the Ninth Circuit Court of Appeals
6 dismissed GVT's appeal of the Order Denying Motion for Stay
7 Pending Appeal as moot.

8 II. JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
10 and § 157(b)(2)(A) and (N). We have jurisdiction to determine our
11 jurisdiction. Hupp v. Educ. Credit Mgmt. Corp. (In re Hupp), 383
12 B.R. 476, 478 (9th Cir. BAP 2008).

13 III. ISSUE

14 Whether the appeal is moot.

15 IV. DISCUSSION

16 It is well established that we lack jurisdiction to hear moot
17 cases. United States v. Pattullo (In re Pattullo), 271 F.3d 898,
18 900 (9th Cir. 2001).

19 The record shows that the trustee has sold the property in
20 accordance with the bankruptcy court's August 4, 2009 order and
21 distributed the proceeds to Smith's estate and the bankruptcy
22 estate. The trustee argues the closing of the sale without more
23 than a temporary stay pending appeal renders this appeal moot.⁸

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25 ⁸ 11 U.S.C. § 363(m) provides:

26 The reversal or modification on appeal of an authorization
27 under subsection (b) or (c) of this section of a sale or
28 lease of property does not affect the validity of a sale or
lease under such authorization to an entity that purchased or
leased such property in good faith, whether or not such

(continued...)

1 We agree.

2 Section 363(m) protects the interests of good faith
3 purchasers who buy property pursuant to a sale authorized under
4 § 363(b) or (c) when a party in interest has failed to stay the
5 sale pending appeal. See Onouli-Kona Land Co. v. Estate of
6 Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1171 (9th
7 Cir. 1988) ("Bankruptcy's mootness rule applies when an appellant
8 has failed to obtain a stay from an order that permits a sale of a
9 debtor's assets."). It is undisputed that GVT failed to obtain
10 more than a temporary stay pending appeal and, therefore, the
11 protection offered under § 363(m) applies to the sale – a point
12 that GVT concedes.⁹

13 GVT challenges several of the bankruptcy court's rulings and
14 argues that these additional assignments of error are not moot.
15 Summarized, these errors include: (1) GVT complains that it was
16 denied due process because it did not have adequate notice or a
17 meaningful opportunity to respond to the Motion for
18 Reconsideration; (2) the bankruptcy court erred in granting the
19 Smith estate's Motion for Reconsideration because the trustee did
20 not raise the issue of bad faith at the initial hearing and failed
21 to identify the FMO factors; and (3) the bankruptcy court erred in
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25 ⁸(...continued)
26 entity knew of the pendency of the appeal, unless such
27 authorization and such sale or lease were stayed pending
28 appeal.

29 ⁹ GVT has not raised any issue regarding the purchaser's lack
30 of good faith in this appeal. Thus, the argument has been waived.
31 Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

1 denying GVT's motion to convert.¹⁰

2 GVT fails to explain why these claims have continuing
3 viability given the change of circumstances, nor does it address
4 the crucial question of whether it is too late for this panel to
5 offer it some effective relief since its primary asset has been
6 sold. GVT also does not argue that any of the exceptions to
7 bankruptcy mootness apply, but simply contends that it "has
8 presented serious legal questions that need to be resolved on
9 appeal."¹¹

10 From the record before us, we conclude that GVT's appeal of
11 the judgment denying its motion to convert is both
12 constitutionally and equitably moot. We have previously explained
13 the distinction between the two mootness doctrines:

14 Constitutional mootness derives from Article III of the
15 United States Constitution, which provides that the
16 exercise of judicial power depends on the existence of a
17 case or controversy. The doctrine of constitutional
18 mootness is essentially a recognition of Article III's
19 prohibition against federal courts' issuing advisory
20 opinions. While the Article III mootness doctrine has a
21 'flexible character,' it applies when events occur
22 during the pendency of the appeal that make it
23 impossible for the appellate court to grant effective
24 relief. If no effective relief is possible, we must
25 dismiss for lack of jurisdiction.

22 ¹⁰ At oral argument, both parties urged the panel to consider
23 their arguments regarding the proper standard for bad faith
24 determinations in a conversion context. However, in light of our
25 conclusion that this appeal is moot, we decline to reach the
26 merits of the bankruptcy court's decision on the conversion issue.

25 ¹¹ There are four recognized exceptions to the mootness
26 doctrine: (1) collateral legal consequences; (2) wrongs capable
27 of repetition yet evading review; (3) voluntary cessation; and (4)
28 class actions where the named party ceases to represent the class.
Pilate v. Burrell (In re Burrell), 415 F.3d 994, 999 (9th Cir.
2005). We cannot place GVT's due process challenge or its other
assignments of court error within any of the mootness exceptions.

1 A variation of the mootness rule, the equitable mootness
2 doctrine, 'applies when appellants have failed and
3 neglected diligently to pursue their available remedies
4 to obtain a stay and circumstances have changed so as to
render it inequitable to consider the merits of the
appeal.'

5 United States v. Gould, 401 B.R. 415, 421 (9th Cir. BAP 2009).

6 Here, we cannot separate the remaining issues in this appeal
7 from the sale of the real property. The record shows that GVT's
8 conversion request and subsequent reorganization plan were
9 entirely dependent on GVT keeping the property. GVT's
10 reorganization plan was to obtain a cash infusion from an investor
11 and mine for gold on the property in order to pay Smith and
12 unsecured creditors. Obviously, this plan is no longer workable
13 because it involved using the property.

14 GVT cannot propose another reorganization or liquidation plan
15 that involves the sale of other assets or an equity infusion
16 because it owns no other valuable assets. While this appeal was
17 pending, the trustee noticed a sale of GVT's personal property – a
18 boat, trailer and van – to GVT's managing members, Gilliam and
19 Coulter, for \$25,000 cash. The court approved the sale by order
20 entered on March 15, 2010.¹² This transaction leaves GVT's estate
21 with few or no remaining assets to reorganize.

22 GVT does not contend that it is able to propose a
23 reorganization plan in the absence of these assets. Therefore, by
24 converting the case to chapter 11 on appeal, this panel could not
25 grant effective relief to GVT, and thus the remaining issues in

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27 ¹² We take judicial notice of the motion and order docketed
28 and imaged in debtor's bankruptcy case at Dkt. Nos. 78 and 81,
respectively. O'Rourke v. Seaboard Surety Co. (In re Fegert,
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 this appeal are constitutionally moot.

2 We conclude the equitable mootness doctrine also applies in
3 this case. There is no feasible reorganization or liquidation
4 plan that GVT could utilize now that its real property and few
5 remaining assets belong to third parties who are not parties to
6 this appeal. Thus, even if it were theoretically possible to
7 provide some relief, circumstances have changed so as to render it
8 inequitable to consider the merits of the conversion-related
9 issues on appeal. Gould, 401 B.R. at 421; Varela v. Dynamic
10 Brokers, Inc. (In re Dynamic Brokers, Inc.), 293 B.R. 489, 494
11 (9th Cir. BAP 2003) (comprehensive changes of circumstances during
12 pendency of appeal may render appeal equitably moot when, as a
13 practical matter, the court cannot grant effective relief).

14 V. CONCLUSION

15 Accordingly, we DISMISS this appeal as moot because the order
16 approving the sale is statutorily moot under § 363(m) and the
17 other aspects of the order are constitutionally and equitably
18 moot.

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