

OCT 24 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP Nos. CC-08-1021-PaMkK
)	CC-08-1044-PaMkK
BRANFORD PARTNERS, LLC,)	(related appeals)
)	
Debtor.)	Bk. No. SV 06-12551-KT
)	
_____)	Adv. No. SV 07-01137-KT
ALL-TEX, INC.,)	
)	
Appellant,)	
)	MEMORANDUM¹
v.)	
)	
BRANFORD PARTNERS, LLC,)	
)	
Appellee.)	
)	
_____)	
ALL-TEX, INC.,)	
)	
Appellant,)	
)	
v.)	
)	
BRANFORD PARTNERS, LLC; BERT F.)	
FORNACIARI and LINDA COX)	
FORNACIARI, individually and as)	
co-trustees of the Fornaciari)	
Family Revocable Trust,)	
)	
Appellees.)	
)	
_____)	

Argued and Submitted on September 19, 2008,
at Pasadena, California

Filed - October 24, 2008

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

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.

1 Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

2 _____
3
4 Before: PAPPAS, MARKELL and KLEIN,² Bankruptcy Judges.
5

6 Creditor All-Tex, Inc. ("All-Tex") appeals two orders of the
7 bankruptcy court. In the first appeal, No. CC-08-1021, it seeks
8 review of an order granting summary judgment dismissing an
9 adversary proceeding in which All-Tex asserted a right to payment
10 of its claim superior to those of certain secured creditors. The
11 second appeal, No. CC-08-1044, is from an order allowing
12 distribution of the second in priority secured claim. We AFFIRM
13 the bankruptcy court's order in No. CC-08-1021, and DISMISS the
14 appeal as moot in No. CC-08-1044.
15

16 **FACTS**

17 Branford Partners, LLC ("Branford") filed a petition for
18 relief under chapter 11³ on December 26, 2006, and has continued
19 to operate as debtor-in-possession.

20 Branford was formerly known as Sunquest Development II, LLC
21 ("Sunquest II"). While at some time not clear in the record
22 Sunquest II changed its name to, or began operating as, Branford,
23

24 _____
25 ² Hon. Christopher M. Klein, Chief Judge of the United
States Bankruptcy Court for the Eastern District of California,
sitting by designation.

26 ³ Unless specified otherwise, all references are to the
27 Bankruptcy Code, 11 U.S.C. §§ 101-1532. The Federal Rules of
Bankruptcy Procedure, Rules 1001-9037, are referred to as Rules.
28 The Federal Rules of Civil Procedure are referred to as Civil
Rules.

1 most prepetition documents refer to Sunquest II.⁴ In any event,
2 it is not disputed that Sunquest II and Branford are the same
3 entity.

4 The other key facts about the parties, assets, and
5 liabilities involved in these appeals are as follows:

- 6 • The sole asset of Branford at the time of the bankruptcy
7 filing was approximately 32.5 acres of land, consisting of
8 three parcels in the Sun Valley area of the San Fernando
9 Valley, California (referred to as Parcels A, B, and C, and
collectively, the "Property"). The Property was sold on May
29, 2007, pursuant to § 363(b), to TC Branford Associates,
LLC for \$18,750,000.
- 10 • The holder of the first priority lien on the Property (and
11 consequently the sale proceeds) is California Environmental
12 Redevelopment Fund, LLC ("CERF"), a private, for-profit
13 corporation that finances the cleanup of contaminated sites
in California. CERF filed a proof of claim in the bankruptcy
case for \$5,765,343.41. CERF has been paid approximately
\$4.6 million on its claim.
- 14 • Bert and Linda Fornaciari hold the second priority secured
15 claim on the Property. The Fornaciaris lent \$6 million to a
16 predecessor of Branford, Sunquest Development, LLC,
17 ("Sunquest I") for the purchase of Parcel A. The Fornaciaris
filed a proof of claim in the amount of \$11.5 million. The
Fornaciaris have been paid approximately \$10.6 million from
the sale proceeds on their claim.
- 18 • MCOM, LLC, holds the third priority lien on the Property.
19 Bert Fornaciari is a member of MCOM. MCOM lent funds to
20 Branford for operating expenses and payment of Branford's
legal bills. MCOM filed a proof of claim in the amount of
\$440,000. Apparently, no part of this claim has been paid.
- 21 • Sunquest I is a limited liability company that continues to
22 exist and is not presently connected with Sunquest
23 II/Branford. It was the owner of Parcel A before it was
transferred to Sunquest II, and was the party that allegedly
contracted with All-Tex, as explained below.
- 24 • The appellant, All-Tex, a corporation, is also known as In-
25 line Distributing. On May 14, 2007, All-Tex filed an
26 unsecured proof of claim in the bankruptcy case for
\$26,288,126.84, alleging it has suffered damages for breach
27 of contract by Branford's predecessors in a construction and
real estate dispute.

28 ⁴ We will therefore refer to the prepetition debtor as
Sunquest II and the postpetition debtor as Branford.

1 At about this same time, Sunquest I was attempting to obtain
2 a construction loan from Genesis L.A., Real Estate Fund LLC (the
3 "Genesis Loan"). In January 2001, Genesis and Sunquest I agreed
4 to the terms of a loan secured by a deed of trust on the Property
5 (the "Genesis Deed of Trust"); the Fornaciaris agreed to

6
7 ⁵(...continued)

8 "tabs" in the excerpts, or to a docket number in the adversary
9 proceeding or bankruptcy case, not to specific excerpt page
10 numbers. As a result, the Panel was required to search literally
11 hundreds of pages of material to locate the particular documents
12 on which All-Tex relies.

13 In both appeals, All-Tex cites the transcripts of hearings in
14 the bankruptcy court on November 16, 2007, and January 7, 2008.
15 Neither transcript is included in its excerpts of record (except
16 for a few pages of "snippets" that do not adequately address the
17 particular issues referenced in the briefs). In fact, these
18 transcripts (other than their initial page) are not even included
19 in the adversary proceeding or bankruptcy case dockets and are
20 thus not available to this Panel.

21 Failure to include the transcripts of hearings upon which the
22 appellant relies in the excerpts of record is a violation of Rule
23 8009(b)(9). Moreover, the Panel is not obligated to examine
24 portions of the record not included in the excerpts. Kritt v.
25 Kritt (In re Kritt), 190 B.R. 382, 386-87 (9th Cir BAP 1995). And
26 neither the Panel nor the appellees should be asked to search an
27 entire record unaided for error. Dela Rosa v. Scottsdale Mem.
28 Health Sys., Inc., 136 F.3d 1241, 1243 (9th Cir. 1998) ("With
increasing frequency, attorneys are filing briefs and excerpts of
record with this court that fall well below the standards of
professional conduct we expect from individuals educated in the
law. . . . We are, however, reaching the end of our patience in
these matters and therefore declare that this habit of
noncompliance must end.").

29 In addition, All-Tex simply ignores 9th Cir. BAP Rule
30 9010(a)-1(a) mandating that briefs use a 14-point proportional
31 font. All-Tex's use of a much smaller font allowed All-Tex to
32 exceed the maximum length of the brief by over 10 percent.

33 Simply put, All-Tex's counsel's cavalier approach to assembly
34 of the excerpts, citations to the record, and compliance with the
35 Panel's rules and the Rules is unacceptable.

36 Finally, the Panel is compelled to comment on the statements
37 made in All-Tex's brief in No. CC-08-1021, where All-Tex describes
38 the bankruptcy court's findings of fact as "nothing more than the
Debtor's briefs turned almost verbatim into hostile, inflammatory
and argumentative findings." In a footnote, All-Tex characterizes
the court's findings as "heinous." We have carefully examined the
record and find nothing to justify use of these offensive terms to
describe the work-product of the bankruptcy court. This approach
to appellate argument is, in the Panel's view, beyond the bounds
of permissible advocacy.

1 subordinate their secured interest to the Genesis Deed of Trust.

2

3

The Liens on the Property

4

Sunquest I defaulted on the Genesis loan in Summer 2002.

5

On September 17, 2002, Plutus Alternative Strategies ("PAS")

6

purchased the Genesis loan and Deed of Trust, which was secured by

7

Parcel A.

8

On December 16, 2002, PAS and Sunquest I formed a new entity,

9

Sunquest Development II, LLC ("Sunquest II") after PAS acquired

10

the Genesis loan. The City of Los Angeles sold Parcels B and C to

11

Sunquest II by grant deed on January 28, 2003. Sunquest then

12

transferred Parcel A to Sunquest II by quitclaim deed, dated

13

October 7, 2003. As a result of these transactions, Sunquest II

14

owned all three parcels of the Property, and assumed the debt

15

obligations secured by Parcel A, including the Genesis and

16

Fornaciari Deeds of Trust.

17

A year later, on December 29, 2003, Sunquest I, the

18

Fornaciari Trust,⁶ and PAS executed the "Second Amendment to

19

Operating Agreement of Sunquest Development II, LLC." (The "Second

20

Amendment"). Under the terms of the Second Amendment, Sunquest I

21

had no further relationship with Sunquest II, and PAS released the

22

Genesis Deed of Trust with its Fornaciari subordination agreement

23

in return for modification of rights to cash distributions and

24

profit allocations.

25

26

⁶ At some time in 2003 not clear in the record, the Fornaciari transferred the Fornaciari loan and Deed of Trust to "The Fornaciari Family Revocable Trust Dated January 15, 2002." (The "Fornaciari Trust"). Bert and Linda Fornaciari are co-trustees of the Fornaciari Trust, and it is undisputed that they continue in effective control of the Fornaciari claim.

27

28

1 Two days later, on December 31, 2003, Sunquest II entered
2 into two contracts. It obtained a \$5 million construction loan
3 from CERF. This loan was secured by a deed of trust in favor of
4 CERF on Parcels A, B, and C. The same day, Sunquest II and the
5 Fornaciari Trust agreed that the Fornaciari Deed of Trust would be
6 modified to include all three Parcels, and would be subordinated
7 in favor of the CERF Deed of Trust. The CERF Deed of Trust and
8 the modified Fornaciari Deed of Trust were recorded on January 7,
9 2004.

10 Thus, from early 2004 through the filing of the bankruptcy
11 petition in 2006, Sunquest II/Branford owned all three Parcels of
12 the Property, the Genesis Deed of Trust was extinguished, and CERF
13 held a first lien and the Fornaciari Trust held a second lien on
14 all three parcels of the Property.

15

16

Events Leading to the Bankruptcy

17 By mid-2004, All-Tex alleges that Sunquest II had breached
18 the All-Tex Contract by failing to construct the building and
19 transfer the Property to All-Tex, and that Sunquest I and Sunquest
20 II had encumbered the Property in violation of the All-Tex
21 Contract. Consequently, on October 24, 2004, All-Tex filed a
22 lawsuit in Los Angeles Superior Court, All-Tex, Inc. v. Sunquest
23 Development, LLC, et al., Case No. BC-323517, against Sunquest I,
24 Sunquest II, and others, alleging breach of contract, fraud,
25 breach of the covenant of good faith and fair dealing, and breach
26 of fiduciary duty (the "State Court Action"). The state court
27 complaint was amended three times to add claims for, among other
28 remedies, specific performance of the All-Tex Contract and for

1 declaratory relief. Significantly, All-Tex never recorded a lis
2 pendens concerning the State Court Action.

3 To pay some of its operating and legal expenses in 2006,
4 Sunquest II/Branford sought loans from MCOM and, in exchange for
5 these funds, granted MCOM a third in priority deed of trust
6 against Parcels A, B, and C, which was recorded on September 28,
7 2006. However, the infusion of MCOM funds was inadequate to
8 sustain Sunquest II, and the company ran out of cash. Sunquest II
9 defaulted on payments to CERF, which then scheduled a foreclosure
10 sale of the Property to occur on December 27, 2006.

11 Sunquest II, now known as Branford, filed its chapter 11
12 petition on December 26, 2006.

13 14 The All-Tex Claim and the Adversary Proceeding

15 On March 1, 2007, Branford filed a motion in the bankruptcy
16 court to sell the Property free and clear of liens and claims,
17 with all valid liens to attach to the proceeds. Auction sale
18 procedures were approved by the bankruptcy court on March 27,
19 2007, and bids for the Property were solicited. A sale to the
20 winning bidder, TC Branford Associates, LLC, for \$18,750,000, was
21 approved by the bankruptcy court on May 29, 2007.

22 All-Tex actively participated in the chapter 11 case prior to
23 this sale, and during that time did not assert that it held any
24 secured or ownership interest in the Property. In particular,
25 All-Tex neither objected to the sale of the Property, nor did it
26 assert that it held any sort of equitable interest, lien, or other
27 claim with respect to the Property or to the sale proceeds.

28 On May 14, 2007, the day before the bar date, All-Tex filed a

1 proof of claim in the bankruptcy case asserting it held an
2 unsecured claim against Branford for \$26,288,126.84, based on the
3 claims asserted in the State Court Litigation. Branford filed an
4 objection to the All-Tex proof of claim on June 6, 2007, arguing
5 that it was unenforceable and should be disallowed pursuant to
6 § 502(b)(1).

7 Then, on July 11, 2007, after the bar date, All-Tex filed a
8 purported amendment to its proof of claim in which it sought to
9 change its status from an unsecured claim to a secured claim.
10 All-Tex also responded to Branford's objection to its claim on
11 August 10, 2007, with several supporting declarations.

12 While the parties were exchanging volleys over All-Tex's
13 claims, All-Tex filed an adversary proceeding against Branford and
14 the lien holders on June 25, 2007. In an amended complaint filed
15 on September 4, 2007, it asserted seven claims for relief:

- 16 • the first through fourth claims were for a determination that
17 Branford's interest in the Property on the petition date was
18 subject to the rights of All-Tex; that All-Tex held a
19 vendee's lien against the Property; that All-Tex held
20 specific performance rights which attached to the proceeds of
21 sale; and that All-Tex held equitable liens against the
22 Property; and
- 23 • the fifth, sixth, and seventh claims against CERF, the
24 Fornaciari, and MCOM, respectively, asserted that their
25 interests under the deeds of trust were all subject to All-
26 Tex's equitable lien.

27 On October 8, 2007, Branford moved to dismiss the adversary
28 proceeding for failure to state a claim pursuant to Rule 7012(b),
which incorporates Civil Rule 12(b)(6). Branford's argument for
dismissal had four components. It urged that:

- 29 • any attempt by All-Tex to change its unsecured claim to a
30 secured claim should be disallowed because it was time-barred
31 and, if allowed, would irreparably harm Branford's other
32 creditors;

- 1 • that All-Tex's alleged equitable interests or liens in the
2 Property were defeated by Branford's strong-arm powers under
3 § 544(a);
- 4 • that All-Tex's alleged vendee's lien could be avoided by
5 Branford under § 545;
- 6 • that because All-Tex had a remedy at law for damages for the
7 alleged breach of contract, California law would not allow
8 any claim against Branford for specific performance.

9 In the bankruptcy case, Branford submitted a nearly identical
10 motion for partial summary judgment concerning its objection to
11 All-Tex's purported amended, secured proof of claim.

12 All-Tex filed an opposition to Branford's dismissal motion in
13 the adversary proceeding on October 23, 2007, together with a
14 similar opposition to the motion for partial summary judgment. In
15 an accompanying Request for Judicial Notice, All-Tex asked the
16 bankruptcy court to take notice of twelve documents outside the
17 pleadings in the adversary proceeding in its consideration of the
18 dismissal motion.

19 The bankruptcy court conducted an omnibus hearing on November
20 16, 2007, at which it considered Branford's motion to dismiss the
21 All-Tex adversary proceeding and Branford's motion for partial
22 summary judgment in the claim contest. After considering the
23 arguments of the parties, the bankruptcy court ruled at the
24 hearing that Branford could, as a matter of law, through trustee
25 avoidance powers exercised in its capacity as debtor-in-possession
26 performing the duties of the trustee, defeat or avoid each of the
27 alleged equitable interests, liens, and remedies asserted by All-
28 Tex in connection with the Property. It thus granted Branford's
partial summary judgment motion in the claim litigation, and
dismissed All-Tex's first through fourth claims for relief in the

1 adversary proceeding. The bankruptcy court requested supplemental
2 briefing from the parties as to the effect of its ruling on the
3 fifth through seventh claims in the All-Tex complaint.

4 On January 3, 2008, the bankruptcy court entered decisions
5 and orders in which it granted a summary judgment against All-Tex,
6 dismissing all claims against all parties in the adversary
7 proceeding, and a partial summary judgment disallowing All-Tex's
8 amended, secured proof of claim. To support its decision, the
9 bankruptcy court entered thirty pages articulating facts not in
10 dispute and conclusions of law regarding Branford's dismissal
11 motion, now converted to summary judgment. Among the conclusions,
12 the court decided:

- 13 • Branford's dismissal motion should be treated as a summary
14 judgment motion because, at least in part, All-Tex had
15 requested that the court take notice of and consider several
16 documents outside the adversary proceeding pleadings.
- 17 • There were numerous grounds for rejecting All-Tex's purported
18 amendment attempting to change its unsecured proof of claim
19 to secured, including: an amendment cannot be used to
20 circumvent the bar date, changing an unsecured claim to a
21 secured claim equates to filing a new claim, and there was no
22 valid reason for All-Tex's failure to file a secured claim on
23 time.
- 24 • All-Tex had not shown that there were genuine issues of
25 material fact requiring a trial because all of All-Tex's
26 alleged interests and vendee's lien in the Property were
27 avoidable by Branford under § 544 and § 545, respectively.

28 All-Tex filed a timely appeal from the summary judgment
dismissing the adversary proceeding on September 13, 2008, which
we consider below in No. CC-08-1021.⁷

⁷ All-Tex also appealed the bankruptcy court's partial
summary judgment disallowing its amended, secured proof of claim.
That appeal, however, was dismissed by the Panel as interlocutory.
All-Tex, Inc. v. Branford Partners, LLC, BAP No. CC-08-1019 (9th
Cir. BAP March 12, 2008).

1 The Distribution of the Fornaciari Claim

2 Shortly after the sale of the Property, Branford moved on
3 June 1, 2007, for bankruptcy court approval to disburse sale
4 proceeds to CERF and the Fornaciaris. Several intercreditor
5 disputes concerning rights in the funds were pending at the time,
6 and numerous objections were filed to Branford's motion to
7 disburse the sale funds. Nevertheless, a compromise was reached
8 that allowed a disbursement to pay most of the CERF claim. All-
9 Tex agreed to that disbursement.

10 On October 24, 2007, the Fornaciaris asked the bankruptcy
11 court to order a disbursement from the sale proceeds in payment of
12 their second priority secured claim. The hearing on the
13 Fornaciari disbursement motion was originally scheduled for
14 November 16, 2007, but was continued several times to permit the
15 bankruptcy court to rule on the other contested matters and
16 adversary proceedings.

17 Between January 3 and January 8, 2008, the bankruptcy court
18 entered a series of judgments disposing, in its view, of any
19 impediments to the Fornaciari disbursement. Moreover, as
20 discussed above, in the disputes between All-Tex and Branford, the
21 bankruptcy court had determined that All-Tex could not assert any
22 rights to the Property that were not avoidable by Branford.
23 Consequently, the bankruptcy court concluded that All-Tex had no
24 standing to assert those rights against the Fornaciaris. Having
25 disposed of all pending objections, the bankruptcy court granted
26 the Fornaciaris' disbursement motion on January 22, 2008,
27 compelling Branford to pay the Fornaciari claim, less a 10 percent
28 holdback.

1 All-Tex filed a timely appeal of this disbursement order on
2 February 1, 2008, our No. CC-08-1044. All-Tex did not request a
3 stay of the order pending appeal, and \$10.6 million was disbursed
4 by Branford to the Fornaciaris.

6 JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
8 and 157(b) (2) (A). The Panel has jurisdiction under 28 U.S.C.
9 § 158(b).

11 ISSUES

- 12 1. Whether the bankruptcy court erred entering a summary
13 judgment dismissing the All-Tex adversary proceeding.
- 14 2. Whether the bankruptcy court abused its discretion in
15 authorizing a distribution of sale proceeds to the
16 Fornaciaris.

18 STANDARDS OF REVIEW

19 A trial court's decision to treat a motion to dismiss
20 under Civil Rule 12(b) (6) as a summary judgment motion is reviewed
21 for abuse of discretion. Lowe v. Town of Fairland, Ok., 143 F.3d
22 1378, 1381 (10th Cir. 1998); accord, 5C Charles Alan Wright &
23 Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1366 (2004).
24 We review a court's entry of summary judgment following conversion
25 from a motion for dismissal de novo. Jacobson v. AEG Capital
26 Corp., 50 F.3d 1493, 1496 (9th Cir. 1995).

27 An order allowing distribution of the proceeds from the sale
28 of a debtor's property outside a confirmed chapter 11 plan is

1 reviewed for abuse of discretion. Rosenberg Real Estate Equity
2 Fund III v. Air Beds, Inc. (In re Air Beds, Inc.), 92 B.R. 419,
3 422 (9th Cir. BAP 1988).

4
5 **DISCUSSION**

6 I.

7 The bankruptcy court did not err in entering a summary judgment
8 dismissing All-Tex's adversary proceeding.

9 A.

10 The bankruptcy court properly treated Branford's motion
11 to dismiss the adversary proceeding as a
12 motion for summary judgment.

13 Rule 7012(b) incorporates Civil Rule 12(b)-(h). Civil Rule
14 12(d) provides that:

15 If, on a motion under Rule 12(b)(6) or 12(c), matters
16 outside the pleadings are presented to and not excluded
17 by the court, the motion must be treated as one for
18 summary judgment under Rule 56. All parties must be
given a reasonable opportunity to present all the
material that is pertinent to the motion.

19 Civil Rule 12(d) (emphasis added).

20 The Ninth Circuit has held that, for purposes of this rule, a
21 party has a "reasonable opportunity to present material" if the
22 non-moving party [here, All-Tex] is fairly apprised that the trial
23 court will look beyond the pleadings in deciding the motion to
24 dismiss. Rothery v. Cunningham, 143 F.3d 546, 549 (9th Cir.
25 1998). A party is "fairly apprised" if that party "submits
26 matters outside the pleadings to the judge and invites
27 consideration of them." Id. The court has explained:

28 When a party is represented by counsel, not only may
formal notice be unnecessary, a represented party who

1 submits matters outside the pleadings to the judge and
2 invites consideration of them has notice that the judge
3 may use them to decide a motion originally noted as a
4 motion to dismiss, requiring its transformation to a
5 motion for summary judgment.

6 San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470,
7 477 (9th Cir. 1998).

8 All-Tex complains in its brief that Branford sought to
9 "unilaterally" convert its motion to dismiss to a motion for
10 summary judgment after All-Tex filed its opposition, "just days"
11 before the hearing on the Branford motion to dismiss. The
12 ultimate fallacy of All-Tex's argument is that the summary
13 judgment treatment was self-inflicted by virtue of All-Tex's
14 presentation of matters outside the record.

15 Branford's motion to dismiss the adversary proceeding for
16 failure to state a claim, filed on October 8, 2007, included a
17 request to convert the motion to dismiss to summary judgment if
18 the bankruptcy court decided to consider matters outside the
19 pleadings. This, of course, is mandated by Civil Rule 12(d),
20 incorporated in Rule 7012(b).

21 Then, on October 23, 2007, All-Tex filed a Request for
22 Judicial Notice ("RJN") addressed to five motions then pending
23 before the court, one of which was "The Motion fir [sic] Dismissal
24 of Complaint to Dismiss [sic] Filed by the Debtor." In doing so,
25 All-Tex invited the bankruptcy court to consider twelve documents
26 it had submitted in its opposition to Branford's objection to
27 claim in the main bankruptcy case.

28 Moreover, at the same time, All-Tex filed its Opposition to
Branford's motion to dismiss the adversary proceeding. In that
Opposition, All-Tex states: "In order to place the Motion [to

1 Dismiss] in context, All-Tex has filed herewith its 'Request for
2 Judicial Notice' as to pleadings filed by All-Tex in connection
3 with the All-Tex claims asserted against the Debtor and
4 incorporates the same as if set forth fully herein." (Emphasis
5 added.)

6 Finally, on November 5, 2007, Branford filed its "Reply to
7 Opposition of All-Tex to Debtor's Motion to Dismiss Complaint (or
8 for Summary Judgment)." In its Reply, Branford observed that All-
9 Tex had suggested that the bankruptcy court should consider
10 documents outside the pleadings, and thus All-Tex had, in effect,
11 asked the court to convert the dismissal motion to a summary
12 judgment motion. In response, Branford "agreed" with All-Tex that
13 a summary judgment analysis by the bankruptcy court was proper.

14 The record is plain that Branford did not unilaterally seek to
15 convert the motion to dismiss to one for summary judgment a few
16 days before the hearing.⁸ Rather, All-Tex's submission of
17 documents outside the pleadings compelled the bankruptcy court to
18 exercise its discretion whether to exclude those documents. The
19 court chose not to exclude the documents, to consider them, and to
20 treat Branford's motion to dismiss as a motion for summary
21 judgment as required by Civil Rule 12(d).

22 All-Tex did not provide a copy of the transcript of the
23 November 16, 2007, hearing at which the bankruptcy court
24 considered the motion to dismiss the adversary proceeding. Thus,
25 we do not know the reasons, if any, upon which the bankruptcy

26
27 ⁸ Even if we were to accept All-Tex's argument that Branford
28 unilaterally moved for summary judgment on November 5, such a
motion would have been timely in light of the November 16 hearing.
See Civil Rule 56(c) (requiring 10 days' notice of hearing on
motion for summary judgment).

1 based its decision not to exclude the documents referenced in the
2 All-Tex RJN. However, All-Tex cannot be heard to object to the
3 court's failure to exclude documents that All-Tex itself proffered
4 to the court. Ball v. Union Carbide Corp., 385 F.3d 713, 717 (6th
5 Cir. 2004).

6 When the bankruptcy court did not exclude the proffered
7 documents, it automatically converted the motion to dismiss to
8 summary judgment. Carter v. Stanton, 405 U.S. 669, 671 (1972)
9 (failure to exclude documents submitted outside the pleadings in a
10 motion to dismiss requires the court to convert to summary
11 judgment). Indeed, the Ninth Circuit has instructed that when a
12 trial court fails to exclude documents and yet dismisses under
13 Civil Rule 12(b), on review, the Panel should review the decision
14 as a summary judgment under Civil Rule 56. Jacobson v. AEG
15 Capital Corp., 50 F.3d 1493, 1496 (9th Cir. 1995).

16 The bankruptcy court did not err in treating the motion to
17 dismiss as one for summary judgment.

18
19 B.

20 Branford was not required to file a separate adversary proceeding
21 to avoid All-Tex's alleged liens and interests
22 in the Property.

23 All-Tex asserts that Branford could not avoid its alleged
24 lien and equitable property rights under §§ 544 and 545 via a
25 motion to dismiss or for summary judgment in the All-Tex adversary
26 proceeding. All-Tex contends that, instead, Branford was required
27 to file a separate adversary proceeding if it wished to avoid the
28 interests All-Tex was attempting to enforce in this adversary

1 proceeding. Consequently, according to All-Tex, the bankruptcy
2 court erred when it granted Branford a summary judgment and, in
3 effect, declared All-Tex's rights avoidable. We disagree with
4 this characterization of the proceedings and with All-Tex's
5 premise.

6 The first problem with the All-Tex argument is that the
7 bankruptcy court's summary judgment dismissing the adversary
8 proceeding did not "avoid" All-Tex's interests in the Property.
9 In fact, it granted Branford and the other lien holders no
10 affirmative relief at all. Instead, the bankruptcy court ruled
11 that, assuming any All-Tex equitable interests or liens may exist,
12 they would be subject to avoidance and could therefore be defeated
13 by Branford in its capacity as chapter 11 debtor-in-possession.
14 The court therefore dismissed the adversary proceeding in which
15 All-Tex sought enforcement of its interests.

16 All-Tex, citing the Rules, insists that an adversary
17 proceeding is required for any "proceeding to determine the
18 validity, priority or extent of a lien or other interest in
19 property[.]" Rule 7001(2). We agree that, with limited
20 exceptions,⁹ an adversary proceeding is required to obtain such
21 relief. Indeed, a bankruptcy court's determination of property
22 rights has strong due-process implications, and the bankruptcy
23 code reflects that those rights should not be modified without the
24 comprehensive procedural protections prescribed for adversary
25 proceedings. Expeditors Int'l v. Citicorp N. Am. (In re

26
27 ⁹ For example, under Rule 7001(2), an adversary proceeding
28 is not required where a request is made by a debtor to avoid liens
on exempt property under § 522(f); that request is made by motion.
Rule 4003(d).

1 Colortran), 218 B.R. 507, 510 (9th Cir. BAP 1997) (reversing the
2 bankruptcy court's decision sua sponte to invalidate a lien,
3 because creditor was denied the proper procedure). These concerns
4 are the foundation for Rule 7001(2) and its implicit ban on
5 determination of most lien rights by motion in contested matters.
6 Johnson v. TRE Holdings, LLC (In re Johnson), 346 B.R. 190, 195
7 (9th Cir. BAP 2006) (a court is not authorized to enter orders
8 that determine interests in property in a contested matter).

9 Although we agree that an adversary proceeding is required by
10 the Rules, All-Tex has provided no authority for its proposition
11 that a separate adversary proceeding was required in this context.
12 Here, Branford's avoidance arguments were advanced in an adversary
13 proceeding as a defense to All-Tex's prayer that the bankruptcy
14 court declare its interests in the Property enforceable and
15 superior to those held by the various defendants. In this
16 setting, while perhaps stating the obvious, the bankruptcy court
17 correctly observed that it could not determine the validity of the
18 All-Tex interests and liens without examining if those interests
19 were avoidable by the debtor-in-possession. The question is so
20 inextricably linked to All-Tex's claim for relief that the
21 avoidance arguments are necessarily implicated by the All-Tex
22 Complaint. We see no reason why these avoidance issues cannot be
23 interposed defensively in an adversary proceeding prosecuted by
24 the holder seeking to recognize and enforce liens and interests.

25 Moreover, Ninth Circuit precedent supports the bankruptcy
26 court's conclusion that a "separate" adversary proceeding is not
27 required to address whether a creditor's interest in property is
28 avoidable. Chbat v. Tleel (In re Tleel), 876 F.2d 769 (9th Cir.

1 1989). In circumstances similar to this appeal, plaintiff-
2 creditor Chbat commenced an adversary proceeding requesting that
3 the bankruptcy court enforce a constructive trust in favor of the
4 creditor on the proceeds of property the debtor had agreed to sell
5 to the creditor. However, the bankruptcy court granted the
6 defendant trustee's motion for summary judgment on the basis that
7 the creditor's interest was avoidable under the trustee's strong-
8 arm powers in § 544(a)(3). Id. at 769. The Ninth Circuit
9 affirmed our affirmance of the bankruptcy court's decision. Id.
10 at 773. Hence, the Ninth Circuit has approved the very approach
11 taken by the bankruptcy court in this instance.¹⁰

12 The decisions relied upon by All-Tex do not advance its
13 position. For example, to support its contention that Branford
14 could not raise §§ 544 and 545 avoidance claims in defense of the
15 All-Tex adversary proceeding, All-Tex cites an out-of-circuit
16 bankruptcy court decision, WorldClass Processing, Inc. v. AT&T
17 Capital Corp. (In re WorldClass Processing, Inc.), 323 B.R. 164,
18 171 (Bankr. W.D. Pa. 2005), that is not on point.

19 In WorldClass Processing, a chapter 11 debtor commenced an
20 adversary proceeding alleging only common law torts. In a summary
21 judgment motion made by the plaintiff without having amended its
22 complaint, it asserted a § 547 preference claim that was unrelated

23
24 ¹⁰ In rejecting All-Tex's argument, the bankruptcy court also
25 relied upon Ziegler v. Hathaway Ranch P'ship (In re Hathaway Ranch
26 P'ship), 127 B.R. 859 (Bankr. C.D. Cal. 1990). In that decision,
27 a creditor filed an adversary proceeding against a chapter 11
28 debtor-in-possession asserting an interest in property of the
debtor's bankruptcy estate. The debtor filed a motion to dismiss the
action for failure to state a claim, arguing that the debtor could
avoid the creditor's alleged interest under § 544(a)(3). Id. at
861-862. The bankruptcy court agreed with the debtor-in-
possession and dismissed the complaint without leave to amend.
Id. at 864.

1 to the tort claims. The bankruptcy court's reference to the
2 requirement of an adversary proceeding for avoidance claims was
3 made in the context of a straightforward application of the
4 unremarkable proposition that a plaintiff cannot obtain summary
5 judgment for a claim that the plaintiff had not asserted in its
6 complaint. Id. at 170-71. In other words, the assertion of the
7 avoidance theory in the summary judgment motion was procedurally
8 incorrect because the claim was not in the complaint.

9 As can be seen, then, WorldClass Processing adds nothing to
10 All-Tex's argument. The bankruptcy court in WorldClass Processing
11 was dealing with a debtor-plaintiff who, through a summary
12 judgment motion, effectively sought to amend its complaint to
13 assert a totally new claim for affirmative relief (i.e.,
14 preference avoidance) that had nothing to do with the claims
15 stated in its original complaint (i.e., common law torts). In
16 addition, in WorldClass Processing, the debtor had confirmed a
17 chapter 11 plan that set a deadline for the assertion of claims by
18 or against the debtor. Id. at 170.

19 In this case, Branford's avoidance defenses were asserted in
20 response to the All-Tex claims in its Complaint asserting that it
21 held valid and superior liens and interests in the Property. It
22 is procedurally correct for a defendant to assert avoidance
23 defenses in a motion made under Civil Rule 12.

24 Nor does the Third Circuit decision upon which All-Tex relies
25 in its Reply Brief advance its cause. There are two problems.
26 First, the decision merely holds that a provision of a confirmed
27 chapter 13 plan does not trump the procedural requirement that
28

1 lien invalidation requires an adversary proceeding. SLW Capital,
2 LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F.3d 230 (3d
3 Cir. 2008). It says nothing about whether such a claim may be
4 asserted defensively in an existing adversary proceeding. Second,
5 the law of the Ninth Circuit is squarely in conflict with that of
6 the Third Circuit in Mansaray-Ruffin. In this circuit, a chapter
7 13 plan is permitted to trump the procedural requirement of an
8 adversary proceeding. Espinosa v. United Student Aid Funds, Inc.,
9 ___ F.3d ___, ___, 2008 WL 4426634 at n.6 (9th Cir. 2008),
10 overruling Educ. Credit Mgmt. Corp. v. Repp (In re Repp), 307 B.R.
11 144 (9th Cir. BAP 2004).

12 In this case, the issue of the validity of All-Tex's alleged
13 interests in the Property was litigated in an adversary
14 proceeding, with all the procedural protections that the adversary
15 proceeding process entailed. Unlike in Mansaray-Ruffin, All-Tex
16 suffered no prejudice in being required to advance its interests
17 in this setting.

18 In summary, Branford was not required to file a separate
19 adversary proceeding to determine the avoidability of All-Tex's
20 alleged lien and property rights. The bankruptcy court did not
21 err in adjudicating whether the All-Tex interests were enforceable
22 when raised as a defense by Branford in this adversary proceeding.

23
24 C.
25 The bankruptcy court did not err in determining that All-Tex's
26 interests in the Property could be avoided by Branford under
27 §§ 544(a) or 545(2).

28 In granting summary judgment dismissing All-Tex's adversary

1 proceeding, the bankruptcy court decided that any interests All-
2 Tex may assert in the Property could be avoided by Branford in its
3 status as a chapter 11 debtor-in-possession exercising the
4 avoiding powers through §§ 544(a)(3) and 545(2). We agree with
5 the bankruptcy court.

6 All-Tex first argues that the bankruptcy court erred by
7 referring in its decision to its claims to the Property as
8 "inchoate equitable interests/liens/remedies/claims
9 (Finding 32)"¹¹ All-Tex contends that this characterization of its
10 rights amounts to an error of law and fact, because All-Tex was
11 not seeking the imposition of a constructive trust or to enforce
12 amorphous equitable remedies. Instead, in its brief, All-Tex
13 urges that it was "asserting actual, existing pre-bankruptcy
14 property rights that it ha[d] held since October 2000 as a matter
15 of California law[.]"

16 All-Tex does not cogently explain what it means by "actual,
17 existing pre-bankruptcy property rights," or more importantly, how
18 such rights differ from equitable rights. Moreover, All-Tex's
19 position appears inconsistent with the position that it took
20 throughout the bankruptcy case.

21 For example, in Branford's motion to dismiss the All-Tex
22 adversary complaint, it frequently refers to All-Tex's claims as
23 "equitable." In its Opposition to the motion, All-Tex did not
24

25 ¹¹ To be precise, the bankruptcy court did not refer to
26 "inchoate equitable interests . . ." as quoted by All-Tex but,
27 instead, wrote that the "alleged equitable
28 interests/liens/remedies/claims of All-Tex are not evidenced by a
recorded instrument[.]" The court did employ the phrase "inchoate
equitable interest" elsewhere in Finding 32, and in the heading to
this section of its factual recitation.

1 object to that characterization. In fact, it, too, described the
2 liens and interests it was asserting as equitable:

- 3 • "The All-Tex Contract transferred equitable title to the All-
4 Tex Property to All-Tex (Response, p. 14)."¹²
- 5 • "All-Tex has an equitable lien for its various interests in
6 Lots A and C under the All-Tex Contract (Response, p. 29)."
- 7 • In the chart outlining the All-Tex Complaint, All-Tex refers
8 to its equitable lien and equitable property rights in Counts
9 4-8.

10 More importantly, though, how All-Tex's alleged property
11 interests are described by the parties and bankruptcy court is not
12 as important as whether those interests are enforceable in
13 Branford's bankruptcy case, the central issue in this appeal.

14 Ninth Circuit case law consistently holds that when a party
15 asserts an interest in real property owned by a debtor, which is
16 not evidenced by a recorded instrument or recognized by a court, a
17 trustee (or chapter 11 debtor-in-possession), standing in the
18 shoes of a hypothetical bona fide purchaser ("BFP") of real
19 property from the debtor as of the start of the case, may, under
20 § 544(a)(3),¹³ avoid that interest. In re Seaway Express, 912 F.2d

21 ¹² The Response All-Tex cites in its Opposition to the Motion
22 to Dismiss is the response it submitted in the bankruptcy case to
23 Branford's objection to its claim.

24 ¹³ Section 544(a)(3) provides that:

25 **Trustee as lien creditor and as successor to certain**
26 **creditors and purchasers.**

27 (a) The trustee shall have, as of the commencement of
28 the case, and without regard to any knowledge of the
trustee or of any creditor, the rights and powers of, or
may avoid any transfer of property of the debtor or any
obligation incurred by the debtor that is voidable by -

. . .

(3) a bona fide purchaser of real property, other than
fixtures, from the debtor, against whom applicable law
permits such transfer to be perfected, that obtains the

(continued...)

1 1125, 1128 (9th Cir. 1990); In re Tleel, 876 F.2d at 774; Wolf v.
2 Mahrtdt (In re Chenich), 100 B.R. 512, 515 (9th Cir. BAP 1987)
3 ("Even if an equitable lien was established, the trustee as a
4 hypothetical bona fide purchaser could also avoid the unrecorded
5 transfer. . . . Also, it is recognized that a trustee takes title
6 to the real property free from all equitable liens."). The powers
7 and limitations on a trustee's avoidance powers are defined by
8 state law. In re Tleel, 876 F.2d at 772.

9 All-Tex apparently does not dispute the application of
10 § 544(a)(3) and these precedents. Instead, All-Tex argues that,
11 under California law, a potential purchaser from Branford would
12 have had constructive or inquiry notice¹⁴ of All-Tex's alleged
13 interests arising from the All-Tex Contract, and as a result,
14 Branford's hypothetical BFP status would not defeat All-Tex's
15 claims.¹⁵

16 _____
17 ¹³(...continued)
18 status of bona fide purchaser at the time of the commencement
of the case, whether or not such a purchaser exists

19 And, subject to certain exceptions not relevant here, § 1107(a)
20 grants a chapter 11 debtor-in-possession all the rights and powers
given by the Code to a trustee.

21 ¹⁴ A third type of notice, actual notice, i.e., personal
22 knowledge of a fact, would defeat BFP status under California law.
CAL. CODE CIV. PRO. 1214, 1217. However, a trustee's avoidance
23 powers under §544(a)(3) are not limited by "any knowledge of the
trustee [here, the debtor-in-possession] or of any creditor."
24 Thus, it is of no moment that Branford or the other lien creditors
may have been aware of facts and documents establishing All-Tex's
25 claim to an interest in the Property. Robertson v. Peters (In re
Weisman), 5 F.3d 417, 419 (9th Cir. 1993); Taxel v. Chase
Manhattan Bank (In re Deuel), 361 B.R. 509, 514 (9th Cir. BAP
26 2006) ("The trustee's status as a hypothetical bona fide purchaser
is 'without regard to' any actual knowledge of the trustee or of
27 any creditor. 11 U.S.C. § 544(a)(3)".).

28 ¹⁵ All-Tex argues that, under California law, the burden of
proof is on the party claiming BFP status to show it acquired its
interests in property without notice of a prior interest by the
(continued...)

1 In California, to impart constructive notice of its contents,
2 an instrument or document (such as the All-Tex Contract) must be
3 recorded. CAL. CIV. CODE §§ 1213, 1214; CAL. CODE CIV. PRO. § 405.24;
4 Hochstein v. Romero, 219 Cal. App.3d 447, 452 (1990) (a document
5 must be "recorded as prescribed by law" before constructive notice
6 will be presumed in law). A real property instrument is "recorded
7 as prescribed by law" when it is received by the county recorder,
8 contains the required contents, recording fees are paid,
9 reproduced in the public record, and properly indexed. CAL. GOV.
10 CODE §§ 27201, 27320-27337.¹⁶

11 In addition, interpreting California law, the Ninth Circuit
12 has held that California law requires that recording of a lis
13 pendens in the real property records is essential to effective
14 notice of the filing of a state court complaint by a party
15 asserting equitable interests and claims with respect to real
16 property. Hence, without a recorded lis pendens there is not

17
18 ¹⁵(...continued)
19 opposing party. Although generally true, it does not apply to the
20 facts of this case. Under § 544(a)(3), the BFP status bestowed
21 upon the chapter 11 debtor-in-possession is hypothetical; the Code
22 presumes that hypothetical party lacks actual notice of any prior
23 interests. Moreover, under state case law, if the party opposing
24 the record owner's title claims an equitable, rather than legal
25 interest, as in this case, the burden is on the party asserting
26 equitable title. First Fid. Thrift & Loan Ass'n v. Alliance Bank,
27 60 Cal. App.4th 1433, 1442 (Cal. Ct. App. 1998).

28 ¹⁶ Even when a recordation satisfies the formal requirements
of the state statutes, courts in California may not allow that it
provides constructive notice unless that document can be located
by a title search. Dyer v. Martinez, 147 Cal. App.4th 1240, 1242
(2007). As an example, California will not impute constructive
notice to a subsequent purchaser if the real property title
indexes are faulty. Hochstein, 219 Cal. App.3d at 453-54.
Additionally, only filing records with the proper office provides
constructive notice. A real estate instrument "must be recorded
by the County Recorder of the county in which the real property
affected thereby is situated." CAL. CIV. CODE § 1169. We mention
this because, as discussed below, none of the information in the
"public records" upon which All-Tex relies comes from the county
real property records.

1 constructive notice to a future purchaser of the existence of
2 those interests. In re Tleel, 876 F.2d at 770 n.2, 772.

3 All-Tex acknowledges that since neither the All-Tex Contract
4 nor a lis pendens had been recorded, an uninformed potential
5 purchaser from Branford would not be subject to the type of
6 constructive notice imparted by a recorded document.

7 Nevertheless, conceding that there was not constructive
8 notice, All-Tex resorts to so-called "inquiry notice." All-Tex
9 argues that, under these facts, a hypothetical BFP would be
10 subject to "inquiry notice"¹⁷ because a portion of the Property had
11 formerly been used by the county as a landfill.¹⁸ It therefore
12 contends that any reasonably prudent person interested in
13 purchasing this particular tract of property from Branford would
14 inquire with local authorities concerning Branford's
15 "entitlements" to the Property, and that such inquiry would have
16 inevitably led to discovery of information and documents
17 concerning the existence of the All-Tex Contract and its interests

21 ¹⁷ The terms "constructive notice" and "inquiry notice" are
22 used inconsistently by federal and California decisions.
23 Sometimes they are used interchangeably and are even used together
24 as "constructive/inquiry notice." For our purposes here, we
25 understand true constructive notice to be that which arises only
26 from recorded documents. While it may be another variety of
27 constructive notice, inquiry notice, which is the focus of All-
28 Tex's argument, arises from a potential purchaser's awareness of
circumstances that would lead a reasonably prudent person to make
further inquiry.

¹⁸ While the record is less than clear on this point, it is
apparently undisputed that Parcel C has been used as a county
landfill, and perhaps, also a portion of Parcel B. Nothing in the
record shows us that Parcel A, the primary subject of the All-Tex
Contract, was ever a landfill. Because we find the All-Tex
position on this point lacks merit, whether this is correct is
insignificant.

1 in the Property.¹⁹ All-Tex's argument stretches the concept of
2 California inquiry notice further than the case law allows.

3 Whether a potential purchaser of real property should be
4 charged with constructive or inquiry notice under California law
5 is governed by Cal. Civ. Code § 19. Harvey v. Johnson Corp. (In
6 re Harvey), 222 B.R. 888, 893 (9th Cir. BAP 1998). Section 19
7 provides:

8 § 19. Constructive notice

9 Every person who has actual notice of circumstances
10 sufficient to put a prudent man upon inquiry as to a
11 particular fact, has constructive notice of the fact
itself in all cases in which, by prosecuting such
inquiry, he might have learned such fact.

12 CAL. CIV. CODE § 19 (West 1997). See also In re Weisman, 5 F.3d at
13 420-21.

14 A leading treatise on California real property law,
15 interpreting this statute as it applies to a purchaser of real
16 property, notes:

17 When a person receiving an interest in real property has
18 knowledge of facts or circumstances that would prompt a
reasonable and prudent person to investigate a possible
19 prior interest in the same property, it is presumed that
he or she has made an inquiry and the law implies notice
20 as to all information that would have been discovered by
a reasonable investigation.

21 Harry D. Miller & Marvin B. Starr, CAL. REAL ESTATE 3D ¶ 11.75
22 (Thomson/West 2008); Ocean Shore R. Co. v. Spring Val. Water Co.,

23

24

25 ¹⁹ All-Tex represents that it submitted over 500 pages of
documents to the bankruptcy court which were available from
26 different public sources that would have notified the reader of
All-Tex's claims to an interest in the Property under the All-Tex
27 Contract. However, All-Tex did not include this documentation in
the excerpts, choosing instead to include a sort of summary, table
of contents of the documents in Appendix A to its Opening Brief.
28 Since the Panel rejects the notion that a reasonably prudent
purchaser of the Property from Branford should be required to
consult this sort of information, this serious deficiency in the
record is of no moment.

1 218 Cal. 86, 88 (1933). As can be seen, to impart inquiry notice,
2 both the statute and commentary require that the circumstances
3 give rise to a duty to inquire about a particular fact, that is,
4 whether a possible prior interest in the property may exist.

5 The most common example of notice by inquiry, as pointed out
6 by the bankruptcy court, involves facts that are apparent from
7 "walking the property." California requires a purchaser of real
8 property to physically inspect the property, and charges a
9 purchaser with knowledge of the information that would be revealed
10 by a reasonable visible inspection. Preston v. Goldman, 42 Cal.3d
11 108, 123 (1986). Indeed, there is considerable case law dealing
12 with facts where the required physical examination of the property
13 gave rise to facts that would, in the mind of a reasonable
14 potential purchaser, create a suspicion of a prior interest in the
15 property. See, e.g., In re Weisman, 5 F.3d at 417, 420 (while
16 records indicated that house was owned by married couple, physical
17 inspection revealed husband was in possession with "new" wife);
18 Bank of Mendocino v. Baker, 82 Cal. 114 (1889) (open and notorious
19 possession of land by entity without recorded title puts potential
20 purchaser on inquiry notice to find facts of title); Lindsay v.
21 King, 138 Cal. App.2d 333 (Cal. Ct. App. 1956) (purchaser of farm
22 had notice of neighboring ranch's shared water rights based upon
23 open and notorious use); Ocean Shore R. Co. v. Spring Val. Water
24 Co., 218 Cal. 86 (1933) (golf club not BFP without notice of
25 easement because walking property would have disclosed existence
26 of a railroad right of way). Simply put, in California, if the
27 "visible state of affairs" of the property reveals facts
28 inconsistent with the record title, a potential purchaser is duty-

1 bound to investigate, and charged with notice of any information
2 such an inquiry would reveal.

3 In addition, California case law instructs that an
4 examination of recorded documents related to a prior sale also may
5 require an inquiry into any suspicious elements. Triple A. Mgmt.
6 Co. Inc. v. Frisone, 69 Cal. App.4th 520, 530-32 (Cal. Ct. App.
7 1999) (purchasing party is on inquiry notice to investigate
8 ambiguities appearing in record title); First Fidelity Thrift &
9 Loan Ass'n v. Alliance Bank, 60 Cal. App.4th 1433 (Cal. Ct. App.
10 1998) (discrepancy in loan application regarding reconveyance of
11 deed of trust put loan officer on inquiry notice to investigate);
12 Rotea v. Rotea, 93 Cal. App.2d 827 (Cal. Ct. App. 1949) (quitclaim
13 deed signed solely by person known to be married puts purchaser on
14 inquiry notice to determine rights of spouse); Rabbit v. Atkinson,
15 44 Cal. App.2d 752, 757-58 (Cal. Ct. App. 1941) (significant
16 inadequacy of purchase price may put potential purchaser on
17 inquiry notice that seller may not be true owner).

18 Finally, the cases recognize that inquiry notice may arise
19 from personal communications with the purchaser prior to a sale by
20 persons asserting an interest in the property. DelGeorgio v.
21 Powers, 27 Cal. App. 2d 668 (Cal. Ct. App. 1938) (personal
22 communication alleging partnership interest in a mining claim
23 several days before individual purchased that claim from another
24 party put purchaser on inquiry notice to determine extent of all
25 parties' interests).

26 In our view, all of the cases have one feature in common: in
27 each, some fact or circumstance readily apparent to a potential
28 purchaser suggests that a prior interest in the property may

1 exist.

2 In this appeal, All-Tex argues that a reasonably prudent
3 person purchasing property that, at one time, may have been used,
4 at least in part, as a landfill, would be required to inquire into
5 the owner's entitlements, which would lead to examination of
6 public records other than recorded documents, and would require
7 further inquiry with the owner. All-Tex contends that, based on
8 such an investigation, the purchaser would have become aware of
9 the All-Tex Contract. In its view, in this case, the
10 "circumstance" giving rise to inquiry notice as to its interests
11 was the fact that a portion of the Property had been used as a
12 landfill. As counsel for All-Tex explained at oral argument, any
13 acquisition of real property formerly used as a landfill requires
14 a "different level of inquiry" from that required for the purchase
15 of, say, a house, and that such inquiry should include all
16 publicly available records, documents and other information, not
17 just that appearing in the real estate records.²⁰

18 The Panel disagrees with All-Tex's position concerning the
19 scope of required investigation by a potential purchaser of
20 property under the rule embodied in Cal. Civil Code § 19 and
21 decisional law. We think the legislature and case law prescribes
22 that a duty to inquire is triggered only when the circumstances
23 point to the possible existence of a prior interest in the real
24 property. More particularly, like the bankruptcy court, we
25 conclude that there is nothing inherent in the purchase of a

26 _____
27 ²⁰ Indeed, in response to a comment from a member of the
28 Panel, counsel for All-Tex suggested that "anything publicly
available" would include any relevant information on the Internet.

1 former landfill site that would, based solely on that prior use,
2 require a purchaser to exhaustively research a broad scope of
3 public records and information to check for possible prior
4 unrecorded interests in the land. This pushes beyond the limit of
5 what is reasonable.

6 While a reasonably prudent person purchasing a landfill
7 property may choose to investigate unrecorded "entitlements," the
8 scope of the purchaser's due diligence would, obviously, be a
9 matter of discretion. We do not understand California law to
10 impose on a buyer a duty to scour every conceivable public
11 authority for all information generally available to the public in
12 search of competing ownership interests in the absence of other
13 facts suggesting another party may claim an interest in the land.

14 In addition to asserting that it held a variety of equitable
15 rights in the Property, All-Tex also argues it held an enforceable
16 state-law vendee's lien. The applicable California statute
17 provides that:

18 PURCHASER'S LIEN ON REAL PROPERTY. One who pays to the owner
19 any part of the price of real property, under an
20 agreement for the sale thereof, has a special lien upon
21 the property, independent of possession, for such part
22 of the amount paid as he may be entitled to recover
23 back, in case of a failure of consideration.

24 CAL. CIV. CODE § 3050.

25 Even assuming state law would allow All-Tex to assert a
26 vendee's lien, it is clear that its lien rights would be avoidable
27 by Branford under § 545(2), which provides that:

28 the trustee may avoid a statutory lien on property of the
debtor to the extent that such lien . . . (2) is not
perfected or enforceable at the time of the commencement of
the case against a bona fide purchaser that purchases such
property at the commencement of the case, whether or not such

1 purchaser exists [except in tax cases not relevant here].
2 The discussion of § 544(a)(3) above is equally applicable to
3 Branford's rights as a BFP to avoid statutory liens under
4 § 545(2). Although All-Tex is asserting a vendee's lien, it
5 concedes that a vendee's lien is trumped by a BFP. CAL. CIV. CODE
6 § 3048. Consequently, § 545(2) provides an independent basis for
7 avoiding All-Tex's alleged lien. See El Paso v. Am. W. Airlines,
8 Inc. (In re Am. W. Airlines, Inc.), 217 F.3d 1161, 1164 (9th Cir.
9 2000) (where the state law denies enforcement of a statutory lien
10 against a BFP, the lien is avoidable pursuant to § 545(2)).

11 All-Tex's claim that it is entitled to an order compelling
12 specific performance of the All-Tex Contract must also fail for
13 several reasons. In its complaint in the State Court Action, All-
14 Tex made a specific demand for recovery of monetary damages: "at a
15 minimum Plaintiff's damages are not less than \$25 million, plus
16 prejudgment interest thereon at the legal rate of interest through
17 and including the date of judgment in this action." Settled
18 California law holds that specific performance of a contract may
19 be decreed only where there is no adequate remedy at law. Thayer
20 Plymouth Ctr., Inc. v. Chrysler Motors Corp., 255 Cal. App.2d 300,
21 306 (Cal. Ct. App. 1967); Shive v. Barrow, 88 Cal. App.2d 838, 844
22 (Cal. Ct. App. 1948) ("There is a long line of decisions in this
23 state to the effect that the law gives plaintiffs an adequate
24 remedy for breach of the agreement, for the money advanced and for
25 compensation for the services rendered, and that equity will not
26 grant quasi specific performance of the agreement where such
27 remedies are available."). As the bankruptcy court correctly
28 observed, "the state court complaint makes clear that All-Tex is

1 seeking monetary damages, and that there is no need to invoke the
2 equitable remedy of specific performance - All-Tex has no valid
3 claim for specific performance."

4 All-Tex asserts that it amended the complaint in the state
5 court action to include a count for specific performance. Even if
6 so,²¹ the bankruptcy court ruled, correctly, that where All-Tex has
7 a right to obtain a money judgment, and an alternative right to
8 specific performance, the latter becomes a contingent claim and
9 can be discharged in bankruptcy. Sulmeyer v. Sycamore Inv. Co.
10 (In re Aslan), 65 B.R. 826, 831 (Bankr. C.D. Cal. 1986).

11 Finally, All-Tex argues in a mere two paragraphs in its brief
12 that § 365(j) protects its rights to the Property. Section 365(j)
13 provides:

14 A purchaser that treats an executory contract as
15 terminated under subsection (I) of this section, or a
16 party whose executory contract to purchase real estate
17 from the debtor is rejected and under which such party
18 is not in possession, has a lien on the interest of the
debtor in such property for the recovery of any portion
of the purchase price that such purchaser or party has
paid.

19 The bankruptcy court rejected this argument, and we find no
20 reversible error.

21 First, the bankruptcy court found that under Ninth Circuit
22 precedent, the All-Tex Contract is not an executory contract. See
23 Employees' Ret. Sys. of the State of Hawaii v. Osborne (In re THC

24
25 ²¹ We give All-Tex the benefit of the doubt on this point
26 because it failed to include a copy of this critical document in
27 the excerpts of record, and we are unable to locate it in the
28 bankruptcy or adversary dockets. Additionally, All-Tex has
discussed specific performance only in very general terms, and has
not explained how any right to specific performance is implicated
now that the Property has been sold.

1 Fin. Corp.), 686 F.2d 799, 804 (9th Cir. 1982) (noting that courts
2 have "consistently held" that contracts that require only the
3 payment of money by one party to the other are not executory).

4 Second, even if the All-Tex contract was executory for
5 purposes of § 365, there is nothing in the record to show that
6 Branford rejected the All-Tex Contract, or that All-Tex ever
7 sought an order compelling Branford to assume or reject the All-
8 Tex Contract in the bankruptcy court. § 365(d)(2) (providing
9 that, in a chapter 11 case, a trustee may (but is not required to)
10 assume or reject an executory contract at any time before
11 confirmation of a plan.) Indeed, the bankruptcy court correctly
12 determined that even if executory, the All-Tex Contract need not
13 be rejected by Branford. See Diamond Z Trailer, Inc., v. JZ, LLC
14 (In re JZ LLC), 371 B.R. 412, 424 (9th Cir. BAP 2007) (an
15 executory contract need not be assumed or rejected and can pass
16 through a chapter 11 case).

17 Finally, assuming § 365(j) applied, it would benefit All-Tex
18 only to the extent of "a lien on the interest of the debtor in
19 such property for the recovery of any portion of the purchase
20 price that such purchaser or party has paid." There are two
21 implications from this provision. At most, All-Tex would be
22 entitled to a lien for the \$500,000 deposit that it paid in 2000,
23 and not for the full amount of its claim. And more importantly,
24 "[b]ecause the lien granted under [§ 365(j)] is in the nature of
25 an equitable lien, and because Congress has not expressly mandated
26 otherwise, the lien is subject to preexisting encumbrances."
27 3 COLLIER ON BANKRUPTCY ¶ 365.11[4] (Alan N. Resnick & Henry J.
28 Sommer, eds., 15th ed. rev. 2008) (citing Aetna Bank v. Dvorak,

1 176 B.R. 160, 164 (N.D. Ill. 1994) (“§ 365(j) does not alter the
2 otherwise applicable priorities among secured creditors.”)). Even
3 if All-Tex could show that it was entitled to a \$500,000 lien on
4 the proceeds of the sale of the Property, its rights to payment
5 would be subordinate to those of the other secured creditors,
6 whose claims alone exceed the amount of proceeds. In short, even
7 if the bankruptcy court erroneously denied All-Tex lien status
8 under § 365(j), under these facts, that error was harmless.

9 We conclude that the bankruptcy court did not err in entering
10 a summary judgment dismissing All-Tex's adversary proceeding
11 because any equitable rights or liens it asserted in the Property
12 would be avoidable by Branford as a debtor-in-possession under
13 § 544(a)(3) or § 545(2). All-Tex presented no evidence to show
14 that a hypothetical BFP would have constructive or inquiry notice
15 of its alleged interests in the Property so as to survive
16 avoidance by Branford.

17
18 II.

19 The bankruptcy court did not abuse its discretion in
20 authorizing distribution of sale proceeds to the Fornaciaris.

21 Authorizing payment of secured claims in a chapter 11 case
22 before confirmation of a plan is a matter committed to the sound
23 discretion of the bankruptcy court. In re Air Beds, 92 B.R. at
24 419. However, a distribution to a secured creditor should be
25 allowed only if it would not render reorganization impractical or
26 infeasible. Contrarian Funds LLC v. Westpoint Stevens, Inc. (In
27 re WestPoint Stevens, Inc.), 333 B.R. 30, 52-53 (S.D.N.Y. 2005).

28 All-Tex has neither challenged the legitimacy of the

1 Fornaciari claim nor has Branford objected to allowing it. It is
2 also undisputed that the first-priority secured claim, held by
3 CERF, has been substantially paid, and that the Fornaciari claim
4 is secured by a valid second-priority lien on the Property.
5 Finally, neither CERF nor MCOM, the holder of the third-priority
6 lien, has objected to the disbursement to the Fornaciaris.

7 There is no evidence in the record before us that payment of
8 the Fornaciari claim renders the reorganization of Branford
9 impractical or infeasible. In addition, it appears that the
10 bankruptcy court delayed payment to the Fornaciaris until it had
11 disposed of the various adversary proceedings and other contests
12 that might affect payment of the Fornaciari claim.²² None of the
13 other parties in those adversary proceedings, except All-Tex, have
14 appeared in this appeal.

15 All-Tex pursued the adversary proceeding (and a related
16 motion to amend its unsecured claim) in an attempt to establish
17 that it held superior rights to the Property and sale proceeds to
18 that held by the Fornaciaris. In disposing of appeal No.
19 CC-08-1021 above, we affirm the bankruptcy court's order
20 dismissing that adversary proceeding. The bankruptcy court denied
21 All-Tex's attempt to amend its proof of claim to secured. The
22 collective result of these decisions is that All-Tex holds no
23 rights to the proceeds from the sale of the Property.

24 During the course of an appeal, the appellant must continue
25 to have "a personal stake in the outcome." Lewis v. Cont'l Bank

27
28 ²² Although the decisions in those adversary proceedings were
appealed to the District Court, All-Tex did not seek a stay
pending appeal.

1 Corp., 494 U.S. 472, 478 (1990); United States v. Verdin, 243 F.3d
2 1174, 1177 (9th Cir. 2001) (instructing that the "requisite
3 personal interest that must exist at the commencement of a case
4 must continue throughout its existence.") At any stage of a
5 proceeding, a case becomes moot when "it no longer presents a case
6 or controversy under Article III, § 2 of the Constitution."
7 Spencer v. Kemna, 523 U.S. 1, 7 (1998). The Supreme Court refers
8 to this notion as the "doctrine of standing set in a time frame."
9 Friends of the Earth, Inc. v. Laidlaw Evtl. Servs., Inc., 528
10 U.S. 167 (2000); Arizonians for Official English v. Arizona, 520
11 U.S. 43, 68 (1997).

12 Here, we have determined that All-Tex has not shown it is
13 entitled to share in the sale proceeds of the Property. Thus,
14 All-Tex lacks any pecuniary interest in the bankruptcy court's
15 order to disburse those sale proceeds. This appeal is therefore
16 moot and should be dismissed.

17 Even were we to address the merits of All-Tex's appeal, we
18 conclude that the bankruptcy court did not abuse its discretion in
19 allowing a disbursement to the Fornaciaris. As noted above, the
20 Fornaciaris have a secured claim that has not been disputed and
21 has been allowed. Neither of the other lien holders, nor any
22 creditor other than All-Tex, has challenged the disbursement order
23 in this appeal. Consequently, payment of this claim will not
24 adversely impact Branford's reorganization efforts.

25 Conversely, though, failure to pay this secured claim as soon
26 as possible could drain estate funds. The Fornaciaris' claim of
27 \$11.5 million is over-secured, and as such, the creditor may
28 recover accruing interest. § 506(b). Thus, there is a cost to

1 any delay in payment of this claim. Allowing Branford and the
2 bankruptcy estate to avoid that cost cannot amount to an abuse of
3 discretion. In addition, the bankruptcy court required a holdback
4 of more than \$1 million from the payment of the claim to cover any
5 possible administrative expenses incurred in connection with the
6 sale of the Property.

7 All-Tex raises two additional matters that we will address.

8 First, it complains that while the bankruptcy court directed
9 Branford to prepare a draft of the disbursement order that
10 included a "reservation of the rights," the draft order submitted
11 by Branford and entered by the court contained no such protection.

12 As noted above, All-Tex did not include a transcript of the
13 bankruptcy court hearing where this topic was discussed, and does
14 not cite to the record so the Panel could consider any support for
15 its argument. As a result, we do not know if or why the
16 bankruptcy court directed that a reservation of rights be included
17 in the order, or if or why Branford ignored the court's direction.
18 Since All-Tex chose to omit this transcript, we are entitled to
19 presume that All-Tex does not think that the transcript would be
20 helpful to its cause. Gionis v. Wayne (In re Gionis), 170 B.R.
21 675, 681 (9th Cir. BAP 1994), aff'd mem., 92 F.3d 1192 (9th Cir.
22 1996). As we are unable to evaluate this issue, we decline to
23 find an abuse of discretion for this reason. In re Friedman, 126
24 B.R. 63, 68 (9th Cir. BAP 1991) (where appellant alleges
25 bankruptcy court made an error in a verbal holding, failure to
26 provide transcript of hearing is grounds for affirmance of the
27 bankruptcy court); FED. R. APP. P. 10(b).

28 Second, All-Tex argues that the bankruptcy court committed an

1 error of fact when it stated in its memorandum decision that there
2 had been no objections to the Fornaciari disbursement. All-Tex is
3 correct; our review of the docket indicates that objections to the
4 disbursement motion were filed not only by All-Tex, but also by
5 creditors Longboat, WRC, and Deep Blue. However, the bankruptcy
6 court addressed the rights of all of the objecting parties in its
7 memorandum decision supporting entry of the disbursement order.
8 Further, none of those parties except All-Tex have appealed the
9 disbursement order, and All-Tex's interests have been addressed
10 both in the bankruptcy court's memorandum and in this appeal.
11 Thus, even though there was an apparent error in the disbursement
12 memorandum, it does not require reversal, or even remand.

13 In sum, the Panel concludes that the All-Tex appeal from the
14 disbursement order is now moot, and therefore, it will be
15 dismissed. But even were the issues not moot, we would conclude
16 that the bankruptcy court did not abuse its discretion in this
17 case by allowing a partial payment of the Fornaciari secured
18 claim.

19 **CONCLUSION**

20 We AFFIRM the bankruptcy court's summary judgment dismissing
21 the All-Tex adversary proceeding in No. CC-08-1021. We DISMISS
22 the All-Tex appeal from the disbursement order as MOOT in No. CC-
23 08-1044. Even if the issues in that appeal were not moot, we
24 would affirm.

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