UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-08-1021-PaMkK CC-08-1044-PaMkK
BRANFORD PARTNERS, LLC,	(related appeals)
Debtor.	Bk. No. SV 06-12551-KT
ALL-TEX, INC.,	Adv. No. SV 07-01137-KT
Appellant,	**M E M O R A N D U M**[1]
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.

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL and KLEIN,[2] Bankruptcy Judges.

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

FACTS

Branford Partners, LLC ("Branford") filed a petition for relief under chapter 11[3] on December 26, 2006, and has continued to operate as debtor-in-possession.

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

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

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

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

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

- The sole asset of Branford at the time of the bankruptcy filing was approximately 32.5 acres of land, consisting of three parcels in the Sun Valley area of the San Fernando 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.
- The holder of the first priority lien on the Property (and consequently the sale proceeds) is California Environmental Redevelopment Fund, LLC ("CERF"), a private, for-profit 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.
- Bert and Linda Fornaciari hold the second priority secured claim on the Property. The Fornaciaris lent $6 million to a predecessor of Branford, Sunquest Development, LLC, ("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.
- MCOM, LLC, holds the third priority lien on the Property. Bert Fornaciari is a member of MCOM. MCOM lent funds to 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.
- Sunquest I is a limited liability company that continues to exist and is not presently connected with Sunquest 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.
- The appellant, All-Tex, a corporation, is also known as In-line Distributing. On May 14, 2007, All-Tex filed an unsecured proof of claim in the bankruptcy case for $26,288,126.84, alleging it has suffered damages for breach of contract by Branford's predecessors in a construction and real estate dispute.

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

The All-Tex Contract

In December 1999, the Fornaciaris lent $6 million to Sunquest I to use to acquire Parcel A of the Property. Sunquest I executed a promissory note in favor of the Fornaciaris for this sum, secured by a first priority deed of trust (the "Fornaciari Deed of Trust") on Parcel A, which was recorded in the Los Angeles County records on December 22, 1999.

On October 26, 2000, Sunquest I and All-Tex entered into an "Agreement to Sell and Purchase and Escrow Instructions" (the "All-Tex Contract"), in which Sunquest I agreed to: (1) build a large industrial building with office space on part of Parcel A; (2) transfer title to the finished building and the surrounding land to All-Tex upon completion of the building; and (3) provide to All-Tex an easement in perpetuity over property Sunquest I agreed to acquire from the City of Los Angeles (i.e., Parcels B & C) to be used for parking for All-Tex and third-party lessees. In return, All-Tex agreed to pay to Sunquest I a total of $6,800,000, $500,000 of which was paid upon execution of the All-Tex Contract (the "Deposit"), with the remainder due upon the completion of the All-Tex Contract. Importantly, a provision of the All-Tex Contract prohibited the parties from recording the contract, or any notice of its existence, in the public records.[5]

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[5] The Panel has been handicapped by the inadequate excerpts of record and brief provided by All-Tex. For example, the All-Tex Contract, the complex agreement that is at the heart of the controversy, is not included in the excerpts of record. Instead, references to the All-Tex Contract in the All-Tex brief in No. CC-08-1021 direct the reader to the bankruptcy court adversary proceeding docket where the All-Tex Contract can eventually be located among 192 pages of exhibits to a pleading. Indeed, all references in All-Tex's briefs in both appeals are either to

(continued...)

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

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[5](...continued)
"tabs" in the excerpts, or to a docket number in the adversary proceeding or bankruptcy case, not to specific excerpt page numbers. As a result, the Panel was required to search literally hundreds of pages of material to locate the particular documents on which All-Tex relies.

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

Failure to include the transcripts of hearings upon which the appellant relies in the excerpts of record is a violation of Rule 8009(b)(9). Moreover, the Panel is not obligated to examine portions of the record not included in the excerpts. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 386-87 (9th Cir BAP 1995). And neither the Panel nor the appellees should be asked to search an entire record unaided for error. Dela Rosa v. Scottsdale Mem. 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.").

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

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

Finally, the Panel is compelled to comment on the statements made in All-Tex's brief in No. CC-08-1021, where All-Tex describes 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.

subordinate their secured interest to the Genesis Deed of Trust.

The Liens on the Property

Sunquest I defaulted on the Genesis loan in Summer 2002. On September 17, 2002, Plutus Alternative Strategies ("PAS") purchased the Genesis loan and Deed of Trust, which was secured by Parcel A.

On December 16, 2002, PAS and Sunquest I formed a new entity, Sunquest Development II, LLC ("Sunquest II") after PAS acquired the Genesis loan. The City of Los Angeles sold Parcels B and C to Sunquest II by grant deed on January 28, 2003. Sunquest then transferred Parcel A to Sunquest II by quitclaim deed, dated October 7, 2003. As a result of these transactions, Sunquest II owned all three parcels of the Property, and assumed the debt obligations secured by Parcel A, including the Genesis and Fornaciari Deeds of Trust.

A year later, on December 29, 2003, Sunquest I, the Fornaciari Trust,[6] and PAS executed the "Second Amendment to Operating Agreement of Sunquest Development II, LLC." (The "Second Amendment"). Under the terms of the Second Amendment, Sunquest I had no further relationship with Sunquest II, and PAS released the Genesis Deed of Trust with its Fornaciari subordination agreement in return for modification of rights to cash distributions and profit allocations.

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[6] At some time in 2003 not clear in the record, the Fornaciaris transferred the Foranciari 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.

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

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

Events Leading to the Bankruptcy

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

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

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

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

The All-Tex Claim and the Adversary Proceeding

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

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

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

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

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

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

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

On October 8, 2007, Branford moved to dismiss the adversary 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:

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

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

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

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

The bankruptcy court conducted an omnibus hearing on November 16, 2007, at which it considered Branford's motion to dismiss the All-Tex adversary proceeding and Branford's motion for partial summary judgment in the claim contest. After considering the arguments of the parties, the bankruptcy court ruled at the hearing that Branford could, as a matter of law, through trustee avoidance powers exercised in its capacity as debtor-in-possession performing the duties of the trustee, defeat or avoid each of the alleged equitable interests, liens, and remedies asserted by All-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

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

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

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

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]

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[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).

The Distribution of the Fornaciari Claim

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

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

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

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

JURISDICTION

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

ISSUES

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

STANDARDS OF REVIEW

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

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

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

DISCUSSION

I.

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

A.

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

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

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

Civil Rule 12(d)(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

[8] Even if we were to accept All-Tex's argument that Branford 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).

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

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

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

B.

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

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

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

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

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

[9] For example, under Rule 7001(2), an adversary proceeding 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).

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

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

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

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

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

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

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[10] In rejecting All-Tex's argument, the bankruptcy court also relied upon Ziegler v. Hathaway Ranch P'ship (In re Hathaway Ranch P'ship), 127 B.R. 859 (Bankr. C.D. Cal. 1990). In that decision, a creditor filed an adversary proceeding against a chapter 11 debtor-in-possession asserting an interest in property of the 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.

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

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

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

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

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

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

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

C.

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

In granting summary judgment dismissing All-Tex's adversary

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

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

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

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

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[11] To be precise, the bankruptcy court did not refer to "inchoate equitable interests . . ." as quoted by All-Tex but, instead, wrote that the "alleged equitable 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.

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

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

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

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

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

[13] Section 544(a)(3) provides that:

> **Trustee as lien creditor and as successor to certain creditors and purchasers.**
>
> (a) The trustee shall have, as of the commencement of 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...)

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

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

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[13](...continued)
status of bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists . . . .

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

[14] A third type of notice, actual notice, i.e., personal knowledge of a fact, would defeat BFP status under California law. CAL. CODE CIV. PRO. 1214, 1217. However, a trustee's avoidance powers under §544(a)(3) are not limited by "any knowledge of the trustee [here, the debtor-in-possession] or of any creditor." 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 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 2006)("The trustee's status as a hypothetical bona fide purchaser is 'without regard to' any actual knowledge of the trustee or of any creditor. 11 U.S.C. § 544(a)(3)".).

[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...)

In California, to impart constructive notice of its contents, an instrument or document (such as the All-Tex Contract) must be recorded. CAL. CIV. CODE §§ 1213, 1214; CAL. CODE CIV. PRO. § 405.24; Hochstein v. Romero, 219 Cal. App.3d 447, 452 (1990) (a document must be "recorded as prescribed by law" before constructive notice will be presumed in law). A real property instrument is "recorded as prescribed by law" when it is received by the county recorder, contains the required contents, recording fees are paid, reproduced in the public record, and properly indexed. CAL. GOV. CODE §§ 27201, 27320-27337.[16]

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

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

[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.

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

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

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

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[17] The terms "constructive notice" and "inquiry notice" are used inconsistently by federal and California decisions. Sometimes they are used interchangeably and are even used together as "constructive/inquiry notice." For our purposes here, we understand true constructive notice to be that which arises only from recorded documents. While it may be another variety of constructive notice, inquiry notice, which is the focus of All-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.

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

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

> § 19. Constructive notice
>
> Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

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

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

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

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

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[19] All-Tex represents that it submitted over 500 pages of documents to the bankruptcy court which were available from different public sources that would have notified the reader of All-Tex's claims to an interest in the Property under the All-Tex 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. 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.

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

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

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

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

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

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

exist.

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

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

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

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

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

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

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

CAL. CIV. CODE § 3050.

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

> 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

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

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

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

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

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

> A purchaser that treats an executory contract as terminated under subsection (I) of this section, or a party whose executory contract to purchase real estate from the debtor is rejected and under which such party 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.

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

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

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[21] We give All-Tex the benefit of the doubt on this point because it failed to include a copy of this critical document in the excerpts of record, and we are unable to locate it in the 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.

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

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

Finally, assuming § 365(j) applied, it would benefit All-Tex only to the extent of "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." There are two implications from this provision. At most, All-Tex would be entitled to a lien for the $500,000 deposit that it paid in 2000, and not for the full amount of its claim. And more importantly, "[b]ecause the lien granted under [§ 365(j)] is in the nature of an equitable lien, and because Congress has not expressly mandated otherwise, the lien is subject to preexisting encumbrances." 3 COLLIER ON BANKRUPTCY ¶ 365.11[4] (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2008) (citing Aetna Bank v. Dvorak,

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

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

II.

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

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

All-Tex has neither challenged the legitimacy of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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