

MAR 17 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-08-1204-HJuMk
)		
RICHARD L. HATFIELD,)	Bk. No.	08-30154
)		
Debtor.)	Adv. No.	08-03040
)		
_____)		
JENNIFER M. MOORE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
JANINA M. ELDER, Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on January 22, 2009
at San Francisco, California

Filed - March 17, 2009

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

Honorable Thomas E. Carlson, Bankruptcy Judge, presiding

Before: HOLLOWELL, JURY and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Jennifer Moore ("Moore") appeals an order of the bankruptcy
2 court granting summary judgment in favor of the chapter 7 trustee
3 ("Trustee"), authorizing the Trustee to sell real property co-
4 owned by the debtor and his ex-domestic partner, Moore. Moore
5 asserts the bankruptcy court erred in granting summary judgment
6 to the Trustee because (1) before a sale can be authorized free
7 of her co-owner interest, the Trustee must demonstrate there is
8 equity in the co-owned property for the bankruptcy estate; and
9 (2) the bankruptcy court wrongly determined that the equity issue
10 could be deferred until the Trustee brought a motion to sell the
11 property under § 363(b) and (f). We find no error and therefore
12 AFFIRM.

13 I. FACTS

14 Richard Hatfield ("Debtor") filed a chapter 11 bankruptcy
15 case on January 31, 2008 which was subsequently converted to
16 chapter 7.² Debtor's primary assets are real property (single
17 family residences) at 35 Echo Lane in Woodside, California
18 ("Echo") and 351 Arbor Avenue in South San Francisco, California
19 ("Arbor"). Debtor currently resides at Echo. Arbor has been
20 sold by the Trustee and is not a subject of this appeal.

21 Debtor and Moore began living together in 1990. They never
22 legally married, but continued their domestic relationship until
23 September 2001.³ Debtor and Moore purchased Arbor in 1990,
24

25
26 ² Unless otherwise indicated, all chapter, "Code," and
27 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
1532 and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

28 ³ Hatfield and Moore did have a wedding ceremony, but no
marriage license was filed.

1 taking title as husband and wife, tenants in common. Echo, on
2 the other hand, was purchased in 1993 by Debtor as an "unmarried
3 man." When the relationship between Debtor and Moore ended,
4 Moore undertook litigation to obtain a share of all the assets
5 they acquired during their thirteen year relationship, including
6 Echo.

7 **A. Moore's Interest in Echo.**

8 On December 17, 2001, Moore filed a petition for dissolution
9 of marriage in the San Mateo Superior Court of California,
10 seeking one-half community property interest in all of Debtor's
11 assets ("Dissolution Action"). Marriage of Hatfield, Case No.
12 FL-068286. On June 2, 2002, Moore recorded a lis pendens in
13 order to provide constructive notice of her purported community
14 property claim ("2002 Lis Pendens").

15 In January, 2003, the Superior Court concluded that Moore
16 and Debtor were not legally married and ordered Moore's petition
17 dismissed. An order expunging the 2002 Lis Pendens on Echo was
18 entered January 3, 2003 ("Expungement Order"). The Expungement
19 Order was not recorded.

20 Moore subsequently filed a second action in the San Mateo
21 Superior Court of California on August 21, 2003, a Complaint for
22 Breach of Agreement, For Constructive Trust, Accounting and
23 Breach of Agreement for Support. Moore v. Hatfield, Case No.
24 CIV433625. In the complaint, Moore asserted an equitable
25 ownership of one-half of Debtor's property under the principles
26 set forth in Marvin v. Marvin, 18 Cal.3d 660 (1976) (we refer to
27 Moore's August 21, 2003 complaint as the "Marvin Action").
28

1 Moore filed a second lis pendens related to the Marvin
2 Action on February 1, 2006 ("Marvin Lis Pendens"). On January
3 22, 2007, the California Superior Court determined that a
4 contractual relationship existed between Debtor and Moore and
5 that Debtor's and Moore's assets, including Echo, should be
6 divided equally, subject to any separate property interest Debtor
7 could establish by contributions of his holdings that existed
8 before 1990.

9 **B. Liens and Judgments Encumbering Echo.**

10 **1. WaMu Deed of Trust**

11 Debtor purchased Echo for \$950,000 using purchase money
12 financing in the amount of \$665,000. In April 2001 (prior to the
13 Dissolution Action), the property was refinanced. In conjunction
14 with that refinancing, a new \$985,000 first deed of trust with
15 Indymac Bank was recorded. At the same time, a \$205,000 line of
16 credit was obtained and secured by a second deed of trust in
17 favor of Greenpoint Mortgage Funding. In February 2004, Debtor
18 refinanced the Indymac Bank and Greenpoint Mortgage Funding
19 obligations and executed a \$1,210,000 deed of trust in favor of
20 Preferred Financial Group. That deed of trust is still secured
21 by Echo and is now held by Washington Mutual Bank ("WaMu") ("WaMu
22 Deed of Trust").⁴

23 Even though the WaMu Deed of Trust was recorded after the
24 Expungement Order of the 2002 Lis Pendens and prior to the filing
25 of the Marvin Lis Pendens, WaMu stipulated with Moore, in
26

27
28 ⁴ According to the Trustee, the Debtor is not paying on the
WaMu Deed of Trust and as a result, the "carrying costs" for Echo
are about \$10,000 per month.

1 December 2007 (after Moore's victory in the Marvin Action), that
2 the WaMu Deed of Trust only encumbered Debtor's one-half interest
3 in Echo ("WaMu Stipulation").⁵ The WaMu Stipulation was
4 submitted in a separate civil partition action, brought by Moore
5 in May 2007, against Hatfield and other lienholders on Echo
6 ("Partition Action").⁶ Moore v. Hatfield, et.al., Case No.
7 CIV463382. The WaMu Stipulation was not signed by all the
8 parties to the litigation. There is no record of an order
9 approving the WaMu Stipulation either in the record on appeal or
10 on the Partition Action docket.⁷

11 Besides the WaMu Deed of Trust, there were two other major
12 encumbrances on Echo that grew out of Debtor's businesses.

14 ⁵ The WaMu Stipulation states, in part. "On June 19, 2002,
15 [Moore] filed a *Lis Pendens* on the Property [Echo]. The *Lis*
16 *Pendens* is prior to WAMU's Deed, and by way of this stipulation,
17 it is acknowledged by WAMU that [Moore] holds a ½ (one-half)
interest in the Property that is not subject to WAMU's Deed."

18 ⁶ Moore recorded a third lis pendens May 30, 2007, against
19 Echo in conjunction with the Partition Action (the "Partition Lis
Pendens").

20 ⁷ Because the parties presented scant information as to the
21 context or effect of the WaMu Stipulation, we have taken judicial
22 notice of the docket in the Partition Action, Moore v. Hatfield,
23 et. al., Case No. CIV463382 filed in San Mateo Superior Court.
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989).

24 The WaMu Stipulation was filed on December 17, 2007 for the
25 judge's signature but "sent back with note form [sic] Judge
26 Freeman." Counsel for Moore admits the judge refused to sign the
27 WaMu Stipulation because not all parties were signatories. We
28 note that at paragraph 1 of the WaMu Stipulation, the parties
agreed WaMu would not be required to appear or file a responsive
pleading in the action. We see from the docket that WaMu's
counsel filed an answer to the complaint. Therefore, we assume
the WaMu Stipulation was not effective or binding on the parties.

1 **2. Sand Hill Deed of Trust**

2 A second position deed of trust was recorded against Echo in
3 February 2004 to secure loans in the amount of \$1,509,984.92 in
4 favor of Sand Hill Venture Group ("Sand Hill") ("Sand Hill Deed
5 of Trust"). Sand Hill's address in the Sand Hill Deed of Trust
6 is the same as the address of one of Debtor's companies. Sand
7 Hill was controlled by Melvin Slager, an employee of the Debtor.
8 The Sand Hill Deed of Trust also secures obligations in favor of
9 other entities controlled by Slager, which we refer to as the
10 "Sand Hill and IP Entities."

11 The Sand Hill and IP Entities brought suit to enforce their
12 contractual rights in the United States District Court, Eastern
13 District of Michigan, on March 16, 2006. I.P. Enterprises
14 Pension Fund, et. al. v. Hatfield et. al., Case No. 06-11162.
15 The action did not include a cause of action for judicial
16 foreclosure but sought a judgment on eight different notes. A
17 settlement was reached in December 2006, giving the Sand Hill and
18 IP Entities a money judgment in the amount of \$2,375,836.44.

19 **3. Judgment Liens**

20 In addition to the WaMu and Sand Hill Deeds of Trust, two
21 judgment liens against Debtor as judgment debtor were recorded
22 against Echo in favor of individual investors for prepetition
23 debts in the approximate amount of \$2,000,000 ("Judgment Liens").
24 The Judgment Liens were recorded in November and December 2007,
25 within 90 days of Debtor's bankruptcy filing.

26 On July 11, 2008, the Trustee filed an adversary proceeding
27 against the Sand Hill and IP Entities, Moore, and the Judgment
28 Lienholders, seeking: (1) a determination that the WaMu Deed of

1 Trust is secured by the entire fee of Echo; (2) the avoidance of
2 the Sand Hill Deed of Trust under California's "one form of
3 action" law and as a fraudulent transfer; and (3) the avoidance
4 of the Judgment Liens as preferences ("Sand Hill Adversary").
5 The Sand Hill Adversary was still pending at the time the Trustee
6 sought authorization to sell Arbor and Echo free of Moore's
7 interest.

8 **C. Trustee's Request to Sell Echo.**

9 On May 8, 2008, the Trustee filed a Complaint to Sell Real
10 Property Free and Clear of Co-Owner's Interest in order to
11 acquire the authority to sell Arbor and Echo free and clear of
12 Moore's co-tenancy interest (the "Adversary Proceeding"). At the
13 same time, in the main bankruptcy case, the Trustee filed an Ex
14 Parte Motion to Employ Real Estate Broker to sell Arbor and Echo
15 ("Motion to Employ").

16 Moore responded to these actions by filing:

- 17 (1) in the main case, on May 21, 2008, an Opposition to the
18 Motion to Employ which included, as exhibits, Debtor's
19 bankruptcy schedules, the statement of decision in the
20 Marvin Action, WaMu's proof of claim, and the WaMu
21 Stipulation, to support her argument there was no
22 equity in the properties, and therefore nothing for a
23 real estate agent to sell;
- 24 (2) in both the main case and the Adversary Proceeding, on
25 May 28, 2008, a Motion to Consolidate the Motion to
26 Employ with the Adversary Proceeding ("Motion to
27 Consolidate");

1 (3) in the main case, on May 30, 2008, an Amended and
2 Restated Motion for Relief from Stay in order to permit
3 Moore to proceed in state court with her Partition
4 Action and an action for child support;

5 (4) in the Adversary Proceeding on June 10, 2008, a Motion
6 to Dismiss Complaint Pursuant to Rule 7012 along with a
7 request to the bankruptcy court to take judicial notice
8 of Debtor's bankruptcy schedules (included as
9 exhibits), as evidence of the lack of equity in the
10 Echo and Arbor properties ("Motion to Dismiss").

11 Because Moore included Debtor's schedules in her Motion to
12 Dismiss, the Motion to Dismiss was treated as a motion for
13 summary judgment under Federal Rule of Civil Procedure 12(d) and
14 Rule 7012(b). The Trustee filed a Counter Motion for Summary
15 Judgment on June 27, 2008 ("Counter Motion"). Moore filed a
16 Combined Memorandum in Support of Motions by Jennifer Moore and
17 in Opposition to Motions by the Trustee ("Opposition"). The
18 Opposition reiterated Moore's argument that without establishing
19 equity in Echo the Trustee could not properly sell it under
20 § 363(h). The Trustee did not file a reply to Moore's
21 Opposition.

22 On July 17, 2008, the day before the hearing on the Motion
23 to Dismiss and the Counter Motion, the bankruptcy court issued a
24 Tentative Ruling Re Defendant's Motion to Dismiss and Plaintiff's
25 Counter-Motion for Summary Judgment ("Tentative Ruling"). The
26 bankruptcy court held, in its Tentative Ruling, that the Trustee
27 had met the requirements of § 363(h) and authorized the Trustee
28 to sell Echo and Arbor free of Moore's interest.

1 After the Tentative Ruling was issued, Moore filed a
2 supplement to her Opposition addressing the findings made in the
3 Tentative Ruling. The bankruptcy court then amended its
4 Tentative Ruling, reiterating its conclusion that the Trustee was
5 entitled to summary judgment and determining that the Trustee
6 made a "plausible case" for establishing equity in Echo and that
7 final determination of whether the Trustee's interest was
8 overencumbered was not necessary prior to authorization of a sale
9 under § 363(h).

10 Oral argument was held the following day, on July 18, 2008.
11 It does not appear from the record that oral argument altered the
12 bankruptcy court's Tentative Ruling, as amended.⁸ After the
13 hearing, Moore filed an objection to the Trustee's proposed
14 orders on the Motion to Dismiss and Counter Motion on the basis
15 that the bankruptcy court did not explain the grounds for its
16 decision and that the ruling was erroneous because it did not
17 include a finding that a sale would benefit the estate. The
18 bankruptcy court declined to make specific findings of fact
19 beyond those made in its Tentative Ruling and its amended
20 Tentative Ruling and overruled Moore's objections by written
21 order dated July 23, 2008. It entered its order and Judgment
22 Authorizing Sale of Real Property Free and Clear of Co-Owner's
23 Interest on July 24, 2008, granting Trustee's Counter Motion and
24 denying Moore's Motion to Dismiss ("Judgment Authorizing Sale").

25 Moore's Motion to Consolidate and the Trustee's Motion to
26 Employ were also set for hearing on July 18, 2008. The record

27
28 ⁸ No transcript of the July 18, 2008 hearing is available
either in the record on appeal or on the bankruptcy case dockets.

1 does not contain a ruling made on the Motion to Consolidate.
2 However, the bankruptcy court apparently approved the Motion to
3 Employ because Moore made an objection to the form of order
4 proposed by the Trustee. The Trustee then filed an Ex Parte
5 Motion for Modified Order on July 22, 2008. The bankruptcy court
6 approved the Trustee's motion the following day, directing the
7 parties to work together on sale terms prior to marketing the
8 properties ("Modified Employment Order").

9 On July 25, 2008, the Trustee sought further hearing on the
10 Motion to Employ in order to consider marketing terms ("Amended
11 Motion to Employ"). The hearing was held August 1, 2008. After
12 further declarations were submitted, the bankruptcy court entered
13 its Order Granting Trustee's Amended Motion to Employ, on August
14 4, 2008, along with an accompanying memorandum concluding that
15 there was no basis to sustain Moore's objection to the employment
16 of the real estate broker and any objection regarding the sale
17 price could be raised if and when the Trustee filed a motion
18 under § 363(b) and (f) ("Order to Employ").

19 **D. Moore's Appeal**

20 Moore filed a notice of appeal on August 2, 2008 which
21 appealed the Judgment Authorizing Sale and the Modified
22 Employment Order entered July 24, 2008.

23 When Moore appealed the Modified Employment Order, there had
24 just been further hearing on the Amended Motion to Employ and the
25 bankruptcy court had not yet entered the Order to Employ. Moore
26 did not file a notice of appeal of the Modified Employment Order
27 (or the Order to Employ) in the main bankruptcy case.

1 On August 12, 2008, Moore filed an Amended Notice of Appeal
2 to include the Order to Employ. Moore's Amended Notice of Appeal
3 states she is appealing (1) the Modified Employment Order
4 approving the Trustee's Motion to Employ, entered July 24, 2008;
5 (2) the Judgment Authorizing Sale (along with the Tentative
6 Ruling, the amended Tentative Ruling, and the order overruling
7 Moore's objection to the form of order); and (3) the Order to
8 Employ.

9 Moore has withdrawn her appeal as far as the Judgment
10 Authorizing Sale relates to the Arbor property which has now been
11 sold with Moore's consent.

12 II. ISSUE

13 Did the bankruptcy court err in entering the Judgment
14 Authorizing Sale, as well as the Modified Employment Order and
15 Order to Employ, which allowed the Trustee to market and sell
16 Echo free and clear of Moore's interest?

17 III. JURISDICTION

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 § 157(b)(2)(B). We have jurisdiction to hear appeals from final
20 judgments, orders, and decrees under 28 U.S.C. § 158(c).

21 The Judgment Authorizing Sale entered in favor of the
22 Trustee, is "a complete act of adjudication," that "ends the
23 litigation on its merits and leaves nothing for the court to do
24 but execute a judgment". Slimick v. Silva (In re Slimick), 928
25 F.2d 304, 307 (9th Cir. 1990) (quoting Firestone Tire & Rubber
26 Co. v. Risjord, 449 U.S. 368, 373-74, 101 S.Ct. 669, 673-74
27 (1981)).

1 material fact and that the moving party was entitled to judgment
2 as a matter of law. Id.

3 **V. DISCUSSION**

4 A bankruptcy trustee is required to collect and reduce to
5 money property of the estate as expeditiously as is compatible
6 with the best interests of the parties involved. 11 U.S.C.
7 § 704(a)(1); Cnty. Nat'l Bank & Trust Co. of N.Y. v. Persky (In
8 re Persky), 893 F.2d 15, 19 (2d Cir. 1989). Here, the Trustee
9 sought a declaratory judgment under § 363(h) to allow her to
10 realize the value of Debtor's property through a sale of Echo
11 free and clear of Moore's interest. Rule 7001(3). Section
12 363(h) was enacted by Congress to "facilitate the bankruptcy goal
13 of effective distribution of the property of the bankruptcy
14 estate by the trustee." Coan v. Bernier (In re Bernier), 176
15 B.R. 976, 985-86 (Bankr. D.Conn. 1995). It "makes significant
16 changes in what constitutes property of the estate. . . . These
17 changes will bring anything of value that the debtors have into
18 the estate . . . for a coherent valuation of its value and
19 transferability, and then to dispose of it for the benefit of
20 debtor's creditors." Id. (citing H.R. Rep. No. 595, 95th Cong.
21 2d Sess. 175-75 (1977) reprinted in 1978 U.S.C.C.A.N. 5963, 6136-
22 37 (1977)). Section 363(h) provides:

23 Notwithstanding subsection (f) of this section, the
24 trustee may sell both the estate's interest, . . .
25 and the interest of any co-owner in property in which
26 the debtor had, at the time of the commencement of
27 the case, an undivided interest as a tenant in
28 common, joint tenant, or tenant by the entirety, only
if-

(1) partition in kind of such property among the
estate and such co-owners is impracticable;

1 (2) sale of the estate's undivided interest in
2 such property would realize significantly less
3 for the estate than sale of such property free
of the interests of such co-owners;

4 (3) the benefit to the estate of a sale of such
5 property free of the interests of co-owners
6 outweighs the detriment, if any, to such co-
owners; and

7 (4) such property is not used in the production,
8 transmission, or distribution, for sale, of
9 electric energy or of natural or synthetic gas
for heat, light, or power.

10 11 U.S.C. § 363(h).

11 Moore contends the Trustee must demonstrate equity in Echo
12 before a sale free of Moore's co-ownership interest can be
13 authorized under § 363(h). Moore bases this argument on her
14 interpretation of the introductory language of § 363(h), which
15 grants a bankruptcy trustee the right to sell co-owned property
16 "notwithstanding" § 363(f). According to Moore, the use of the
17 word "notwithstanding" in subsection (h) means that courts must
18 "forget" about subsection (f) in considering sales of co-owned
19 property under § 363(h).

20 Moore's contention that § 363(h) effectively "writes out" or
21 supplants § 363(f) when a trustee is attempting to sell co-owned
22 property is based upon the mistaken premise that § 363(h) is a
23 limitation of a trustee's powers to sell under § 363(f).

24 However, § 363(h) is actually an expansion of those rights.

25 Section 363(f) permits a trustee "to maximize the recovery from
26 an asset without being unduly entangled at an early stage of the
27 proceedings in controversies concerning the existence, validity
28 and priority of liens and other interests in the property sought

1 to be sold." In re Takeout Taxi Holdings, Inc., 307 B.R. 525,
2 528 (Bankr. E.D. Va. 2004); see also, Moldo v. Clark (In re
3 Clark, 266 B.R. 163, 171 (9th Cir. BAP 2001).

4 A trustee must be able to satisfy one of the conditions
5 specified in § 363(f) in order to proceed with a sale. In re
6 Takeout Taxi Holdings, Inc., 307 B.R. at 529. In cases where
7 there is no bona fide dispute about a co-owner's interest in
8 property, the co-owner does not consent to the sale, and, state
9 law will not permit a "money partition" of the property, § 363(f)
10 will not provide a trustee with the power to sell the co-owned
11 property.

12 However, § 363(h) "provides a method by which the estate may
13 realize on the value of a debtor's interest in [co-owned]
14 property" by permitting the bankruptcy trustee to sell such
15 property without obtaining the consent of the co-owner as
16 otherwise may be required under applicable state law. H.R. Rep.
17 No. 95-595, 95th Cong., 1st Sess. 1977, 175-177, reprinted in
18 1978 U.S.C.C.A.N. 5963, 6136-38 (1977). Section 363(h),
19 therefore, does not supplant § 363(f) when co-owned property is
20 being sold, but rather permits a sale which might not otherwise
21 be possible under § 363(f). If the trustee satisfies the
22 requirements of § 363(h), then a sale can be pursued under
23 §§ 363(b) and (f).

24 **A. The Trustee May Sell Echo Because it is Property of the**
25 **Estate.**

26 Moore asserts that under accountings which are to take place
27 in the Marvin and Partition Actions, she will be granted such a
28 large interest in Echo that the Trustee will be left with either

1 no interest in Echo or an interest which is completely
2 encumbered. Moore contends that the Trustee is subject to her
3 to-be-determined larger interest because she filed lis pendens in
4 the Marvin and Partition Actions.⁹

5 Moore relies on Warwick w. Yassian (In re Rodeo Canon Dev.
6 Corp.), 262 F.3d 603 (9th Cir. 2004) and Darby v. Zimmerman (In
7 re Popp), 323 B.R. 260 (9th Cir. BAP 2005) to support her
8 contention that the Trustee has no interest to sell. Those cases
9 are not applicable here. In both In re Rodeo Canon Dev. Corp.
10 and In re Popp there was a pending adversary proceeding regarding
11 whether the bankruptcy estate held any title to the property at
12 the time the motion to sell was filed. In this case, it is
13 undisputed that, as of the commencement of the bankruptcy case,
14 the state court had awarded Moore 50% of the Debtor's undivided
15 interest in Echo, leaving the Debtor with the other 50% interest
16 which the Trustee now owns.

17 Property of the estate is broadly defined and not limited to
18 property that may have equity value for creditors. 11 U.S.C.
19 § 541(a). It encompasses all property in which the debtor has an
20 interest at the time the debtor files bankruptcy. Id.
21 Accordingly, we agree with the bankruptcy court that the Trustee
22 is the co-owner of Echo and may sell it free of Moore's interest
23

24
25 ⁹ To the extent that Moore is asserting equitable claims,
26 such as a constructive trust, such claims can generally be
27 avoided by the Trustee. 11 U.S.C. § 544. A constructive trust
28 is "not the same kind of interest in property as a joint tenancy
or a remainder. It is a remedy, flexibly fashioned in equity to
provide relief where a balancing of interests in the context of a
particular case seems to call for it." Chbat v. Tleel (In re
Chbat), 876 F.2d 769, 771 (9th Cir. 1989).

1 if she can meet the requirements of § 363(h).

2 The parties agree that partition of Echo as a single family
3 residence is impracticable. Further, the parties agree that Echo
4 is not used in the production, transmission, distribution or
5 sale, of electric energy or of natural or synthetic gas for heat,
6 light, or power. Therefore, the only issues in this dispute are
7 whether the second and third conditions for a sale under § 363(h)
8 have been satisfied.

9 **B. Selling Moore's and Debtor's Interest in Echo Will Realize**
10 **More Value than Selling the Debtor's Interest Alone.**

11 Moore argues the Trustee failed to meet the requirement of
12 § 363(h)(2), that a sale of the estate's partial interest in Echo
13 would realize significantly less than a sale of all of Echo,
14 because the Trustee did not demonstrate there was equity for the
15 estate in Echo.

16 However, in order to satisfy § 363(h)(2), the Trustee must
17 only demonstrate that selling Debtor's and Moore's interests
18 together will realize more value from a sale than selling the
19 Debtor's interest alone. Yoppolo v. Schwenker (In re Zeigler),
20 396 B.R. 1, 4 (Bankr. N.D. Ohio 2008). Echo is a single family
21 residence. It is "generally accepted" that a sale of only the
22 debtor's undivided interest in a single family residence would
23 significantly diminish the value of the property. Id.; Brown v.
24 Phillips (In re Phillips), 379 B.R. 765, 796 (Bankr. N.D. Ill.
25 2007) (citations omitted).

26 Both parties submitted declarations from real estate brokers
27 who evaluated the fair market value of Echo if it were sold in
28 its entirety. Moore presented detailed listing information and

1 market analysis for single family homes (without any co-owner's
2 interest attached to the property). The Trustee's and Moore's
3 real estate brokers determined Echo could sell at a price between
4 \$1,900,000 and \$2,225,000. Neither party submitted any evidence
5 or argued that Echo could fetch more than that amount if only the
6 Debtor's interest was sold.

7 Therefore, we find there is no genuine issue of fact about
8 whether the sale of the entire property would provide more value
9 than selling Echo with Moore's interest attached and agree with
10 the bankruptcy court's determination that the Trustee satisfied
11 § 363(h) (2).

12 **C. Benefit to the Estate From a Sale of Echo Outweighs**
13 **Detriment to Moore.**

14 The third condition for a § 363(h) sale is that the benefit
15 to the estate of selling the property as a whole outweighs any
16 detriment to the co-owner. 11 U.S.C. § 363(h) (3); see e.g.,
17 Gazes v. Roswick (In re Roswick), 231 B.R. 843, 859-64 (S.D.N.Y.
18 1999) (balancing the non-consenting co-owner's detriment,
19 economic and non-economic, against the benefit to the estate);
20 Bakst v. Griffin (In re Griffin), 123 B.R. 933, 936-37 (Bankr.
21 S.D. Fla. 1991) (applying the benefit/detriment balancing test of
22 § 363(h) (3)). The detriment to a co-owner can be composed of
23 psychological or emotional injury to the person who is forced to
24 give up his or her interest in property. See In re Persky, 893
25 F.2d 15, 20-21 (2d Cir. 1989). Moore does not have a possessory
26 interest in Echo; therefore, a sale of Echo would not displace
27 her or uproot her from her community. See In re Roswick, 231
28 B.R. at 859-64; In re Griffin, 123 B.R. at 936.

1 Moore provided no evidence, and did not argue, that a sale
2 of Echo would be detrimental to her. At oral argument, the Panel
3 asked Moore what the detriment would be if Echo were sold free of
4 her interest. Moore answered the detriment was a concern that
5 the Trustee's valuation of Echo was too low. But Moore's
6 financial interests are protected by other subsections of § 363,
7 including the right to obtain her share of the net proceeds under
8 § 363(j) and a right of first refusal to purchase Echo at the
9 sale price under § 363(I).

10 Rather than demonstrating that a sale of Echo would be
11 detrimental to her, Moore argues that the phrase "benefit to the
12 estate" in § 363(h) (3) requires the Trustee to demonstrate the
13 existence of equity in the property to be sold. However, because
14 the question of equity is considered when a sale motion is
15 brought under §§ 363(b) and (f), the Trustee is not required to
16 demonstrate equity to satisfy § 363(h). Further, even if we were
17 to agree with Moore's interpretation of § 363(h) (3), we find the
18 Trustee presented sufficient evidence to demonstrate that she
19 could create equity in Echo through the pursuit of litigation to
20 avoid certain liens and to establish that the WaMu Deed of Trust
21 encumbers all of Echo.

22 The Trustee asserts the Sand Hill Deed of Trust can be
23 avoided because the Sand Hill and IP Entities sought a money
24 judgment on the underlying notes and not a judicial foreclosure,
25 which bars them from enforcing their deed of trust under
26 California's "one form of action rule." See CAL. CODE CIV. P.
27 § 726. Further, the Trustee argues the transfer of the Sand Hill
28 Deed of Trust was a fraudulent transfer. See e.g., Pajaro Dunes

1 Rental Agency, Inc. v. Spitters (In re Pajaro Dunes Rental
2 Agency, Inc.), 174 B.R. 557, 572-73 (Bankr. N.D. Cal. 1994); 11
3 U.S.C. § 548.

4 In support of her contention that the Sand Hill Deed of
5 Trust can be avoided, the Trustee provided the underlying
6 documentation for, and recordation of, the Sand Hill Deed of
7 Trust which shows the address of Sand Hill to be the same as that
8 of one of Debtor's companies. She submitted deposition testimony
9 evidencing Slager's position as an employee of the Debtor.
10 Further, the Trustee provided evidence of the action the Sand
11 Hill and IP Entities brought in the Eastern District of Michigan
12 for a money judgment instead of judicial foreclosure.

13 The Trustee argues the Judgment Liens are avoidable as
14 preferences because they were recorded within 90 days of the
15 Debtor filing bankruptcy and are to "insiders" of the Debtor.
16 See 11 U.S.C. § 547(b). In support of this argument, the Trustee
17 provided the documentation of the underlying obligations giving
18 rise to the Judgment Liens and the recording of them in November
19 and December 2007.

20 To support her assertion that the WaMu Deed of Trust
21 encumbers all of Echo, the Trustee provided the statement of
22 decision in the Dissolution Action denying Moore marital
23 community property rights, the Expungement Order of the 2002 Lis
24 Pendens, and the statement of decision in the Marvin Action
25 entitling Moore to 50% interest in Echo, as well as the
26 underlying obligations supporting all prior deeds of trust which
27 were replaced by the WaMu Deed of Trust in 2004. The Trustee
28 further requested the bankruptcy court take judicial notice of

1 all pleadings, orders, and papers filed in the Debtor's main
2 bankruptcy case.

3 The Trustee argues that the evidence supports her contention
4 that a potential sale of Echo in the amount of approximately
5 \$1,900,000 would realize a significant benefit to the estate once
6 the Sand Hill Deed of Trust and the Judgment Liens are avoided,
7 and a determination is made that the WaMu Deed of Trust encumbers
8 both Moore and Debtor's interest in Echo.

9 Moore did not dispute the evidence submitted by the Trustee
10 regarding the avoidability of the Sand Hill Deed of Trust and
11 Judgment Liens under §§ 548 and 544. Moore suggested the
12 judgment in the District Court Action may be enforceable despite
13 California's "one action rule," but she did not counter the
14 Trustee's allegation that the Sand Hill Deed of Trust is
15 avoidable as a fraudulent transfer. Therefore, we find that
16 Moore failed to demonstrate the existence of an issue of material
17 fact regarding the Trustee's ability to avoid the Sand Hill Deed
18 of Trust and Judgment Liens.

19 Moore did contest the Trustee's assertions regarding the
20 scope of the WaMu Deed of Trust, but the only evidence she
21 submitted to counter the Trustee's assertion was the WaMu
22 Stipulation, which was not given effect; her 2002 Lis Pendens,
23 which was expunged; along with reference to the Marvin Lis
24 Pendens and the Partition Lis Pendens recorded after the WaMu
25 Deed of Trust. We do not find this evidence is sufficient to
26 create a genuine issue of material fact regarding the extent of
27 the WaMu Deed of Trust.

28

1 Nevertheless, to the extent Moore is correct in her
2 contention that the WaMu Deed of Trust only attaches to the
3 estate's interest, a sale of Echo may still result in the
4 satisfaction of WaMu's claim. That, in and of itself, is
5 beneficial to the estate. "The satisfaction of a claim against
6 the estate clearly confers a benefit on the estate." Spear v.
7 Crow Canyon Office Park Partners (In re Haley), 100 B.R. 13, 17
8 (Bankr. N.D. Cal. 1989); Behm v. Bell (In re Bell), 80 B.R. 104,
9 107 (Bankr. M.D. Tenn. 1987); In re Roswick, 231 B.R. 843, 860
10 (Bankr. S.D.N.Y. 1999).

11 The complete determination of the extent of the encumbrances
12 and the amount of equity available in Echo is not a determination
13 that needs to be made here. Section § 363(h)(3) only requires
14 that a sale of the property free of the co-owner's interest offer
15 a benefit to the estate that is not outweighed by any detriment
16 to a co-owner. In this case, the Trustee demonstrated the
17 benefit to the estate is that Echo will bring a higher price if
18 sold in its entirety rather than if the Debtor's interest alone
19 were sold. Additionally, the Trustee demonstrated she can
20 realize a benefit from the sale of Echo as successor to any
21 avoided liens and by paying off claims against the estate. See
22 11 U.S.C. § 544. Moore presented no evidence that a sale of Echo
23 was detrimental to her, so there is nothing against which to
24 balance these benefits to the estate. See e.g., In re Roswick,
25 231 B.R. at 859-64.

26 Moore's "stated objective," as articulated in her briefs on
27 appeal, is "to assure the maximum value is obtained by the sale
28 of Echo." However, Moore may raise this issue if and when the

1 Trustee brings a motion to sell under §§ 363(b) and (f).
2 Accordingly, we agree with the bankruptcy court that a final
3 determination of whether the Trustee's interest in Echo is over
4 encumbered is not necessary to a § 363(h) determination and that
5 the Trustee was entitled to judgment as a matter of law under
6 § 363(h).

7 **VI. CONCLUSION**

8 Moore failed to demonstrate the existence of a material fact
9 under either §§ 363(h) (2) or (h) (3) to bar granting summary
10 judgment to the Trustee. Moore's assertion that §§ 363(h) (2) and
11 (h) (3) require a showing of equity for the estate in co-owned
12 property before it can be sold is simply incorrect. Because we
13 conclude the Trustee satisfied the conditions of § 363(h), we
14 AFFIRM the bankruptcy court's Judgment Authorizing Sale.