FILED

JUN 11 2008

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NOT FOR PUBLICATION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. CC-07-1416-MoDMk
KAVEH LAHIJANI,	Bk. No. SV 98-15561-GM
Debtor.	
KAMIAR SIMANTOB; NASSER LAHIJANI,	
Appellants,	
v.	**M E M O R A N D U M**[1]
JOHN M. WOLFE, CHAPTER 7 TRUSTEE,	
Appellee.	

Argued and Submitted on May 22, 2008
at Pasadena, California

Filed - June 11, 2008

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN 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.

In 2005, we reversed and remanded an order of the bankruptcy court approving a sale by a chapter 7 trustee of all of the estate's assets. Thereafter, a new chapter 7 trustee was appointed and two non-debtor corporations were consolidated with the debtor's estate, thereby adding significant new assets to the estate. Following our reversal of the order approving the first sale, the new trustee withdrew the original motion to sell assets and filed a new motion to sell all of the assets (including the newly acquired assets) for a substantially greater price.

The appellants here (and in the prior appeal) opposed the new motion to sell and filed a motion for an order requiring compliance with this panel's 2005 mandate. They contended that our opinion required the trustee to continue prosecution of the prior sale motion and the bankruptcy court to consider it in a manner consistent with our instructions. The bankruptcy court denied the motion and we AFFIRM.

I. FACTS

In 2004, following an auction and contested sale hearing, the bankruptcy court entered an order approving the sale by former chapter 7 trustee Peter Anderson ("Former Trustee") of all assets (including avoidance actions) of the chapter 7 estate of Kaveh Lahijani ("Debtor") for $175,000 to Claims Prosecutor, LLC ("Claims Prosecutor"), an entity formed by Debtor's brother-in-law. Appellants Kamiar Simantob and Nasser Lahijani ("Appellants"), whose overbids had been rejected by the Former Trustee, appealed the order approving the sale.

On April 21, 2005, we issued an opinion reversing the sale order and remanding the matter "for further proceedings

consistent with this opinion," holding that when avoidance actions are being sold, the bankruptcy court must analyze the sale under standards for approval of asset sales under 11 U.S.C. § 363[2] as well as the standards for approving a compromise under Rule 9019(a). Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 284 (9th Cir. BAP 2005).

We remanded because the record was not sufficiently developed to determine whether the sale satisfied the fair and equitable settlement standard set forth in Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1380-81 (9th Cir. 1986), and Goodwin v. Mickey Thompson Ent. Group, Inc. (In re Mickey Thompson Ent. Group, Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003). Lahijani, 325 B.R. at 290-91. In particular, to determine whether the sale satisfied the "fair and equitable" settlement standard, the bankruptcy court should have considered "(a) probability of success in the litigation; (b) collectability; (c) complexity, expense, inconvenience, and delay attendant to continued litigation; and (d) the interests of creditors, which are said to be 'paramount.'" Id. at 290. "None of this analysis, which is inherently fact-intensive, relative, and contextual, was undertaken by the bankruptcy court." Id.

---

[2]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

We further stated that on remand "the bankruptcy court should consider the alternative of permitting the [Appellants] to sue in the name of the trustee, but at their own risk and expense, to recover the property allegedly transferred by the [D]ebtor." Id. at 291-92. We observed that because the bankruptcy court had not made a finding of good faith under section 363(m), which provides a statutory safe harbor from appellate remedies, we could reverse and remand "so that the trial court can evaluate the sale in a manner that gives appropriate value to the [A]ppellants' bid." Id. at 290. We also held that the present value of any percentage recovery included in a bid "should be taken into account."[3] Id.

On October 3, 2005, the bankruptcy court entered an order substantively consolidating Debtor's estate with two nondebtor corporations, Elan Enterprises, Inc. ("Elan") and Vista Lane, LLC ("Vista").[4] Simantob v. Lahijani (In re Lahijani), 2005 WL 4658490 (Bankr. C.D. Cal., Oct. 5, 2005). As a result, Debtor's estate acquired significantly more assets. On October 18, 2006, Trustee filed a motion to sell all of the estate's assets (including those of Elan and Vista) to Micha Mottale ("Mottale") for $3.5 million, subject to overbids (the "New Sale Motion").

---

[3]The Former Trustee and Claims Prosecutor appealed our reversal, but after the present trustee John M. Wolfe ("Trustee") negotiated a sale of all assets for $3.5 million, Trustee obtained an order from the Ninth Circuit dismissing that appeal.

[4]The original sale order was entered by Bankruptcy Judge Arthur M. Greenwald, who has since retired. Debtor's bankruptcy case is now pending before Bankruptcy Judge Geraldine Mund, who entered the substantive consolidation order and the order now on appeal.

Not surprisingly in light of our prior opinion, Trustee thoroughly analyzed and argued why the new sale satisfied the requisites of section 363(b) as well as Mickey Thompson.

At the hearing on the New Sale Motion, counsel for Appellants argued that the new sale could not go forward as our prior opinion would "be in place" and the court "couldn't ignore" it. According to Appellants, their prior bid of $165,000 plus a percentage recovery would be the winning bid if the old sale went forward. Trustee's counsel stated that based on the changed circumstances (the change in assets), Trustee would withdraw the prior sale motion. The court agreed that Trustee had the discretion to withdraw the motion.

On April 24, 2007, Trustee filed a conditional withdrawal of the original sale motion. Trustee conditioned the withdrawal on the entry of an order allowing the estate to return $169,438.66 to Claims Prosecutor.[5] Appellants did not object, although the conditional withdrawal did not set a deadline for objections and was not set for hearing.

On September 21, 2007, Appellants filed a motion for order requiring compliance with the mandate of this panel in the prior appeal (the "Mandate Motion"). Appellants contended our reversal and remand of the original sale order constituted an affirmative

---

[5]Because Trustee was not going forward with the initial sale of the assets to Claims Prosecutor, the bankruptcy court entered an order authorizing the return of $169,438.66 to Claims Prosecutor. Appellants appealed that order (BAP No. CC-07-1230), but we dismissed the appeal as they were not directly and adversely affected and thus did not have standing to appeal. On February 8, 2008, the Ninth Circuit dismissed the appeal of our dismissal.

directive that the original sale must proceed on the terms set forth in the opinion and, essentially, that the Trustee must accept Appellants' offer as the high bid. Trustee opposed the Mandate Motion, noting that he had withdrawn the original sale motion because of significant changed circumstances.

The bankruptcy court issued a tentative ruling noting that (1) the asset structure of the case had changed significantly since the first sale order, as evidenced by an increased sale price from $175,000 to $3.5 million, (2) Trustee had discretion to withdraw the original sale motion, and (3) Appellants were not reading and applying our prior opinion correctly.[6] Following a hearing, the bankruptcy court entered an order denying the Mandate Motion. Appellants filed a timely notice of appeal.

II. ISSUE

Did the bankruptcy court err in denying the Mandate Motion?

III. STANDARD OF REVIEW

We review findings of fact for clear error and issues of law de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),

---

[6]The bankruptcy court also held in its tentative decision that it did not have jurisdiction to decide the Mandate Motion as Appellants had appealed the order permitting Trustee to return to Claims Prosecutor the deposit for the initial sale. As discussed in footnote 5, that appeal has been dismissed. Nonetheless, in the event it did have jurisdiction over the Mandate Motion, the bankruptcy court also addressed the substantive merits of the Mandate Motion in its tentative decision.

We believe that the bankruptcy court did have jurisdiction to rule on the Mandate Motion. Even if the appeal of the order allowing Trustee to refund the purchase deposit to Claims Prosecutor had not been dismissed, nothing in that order precluded Appellants from proceeding with their overbid if they prevailed on the Mandate Motion. Having the court consider their overbid was the raison d'être of Appellants' Mandate Motion.

369 B.R. 506, 509 (9th Cir. BAP 2007); Litton Loan Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 703 (9th Cir. BAP 2006).

IV. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1) and (2)(A) and (N). We have jurisdiction under 28 U.S.C. § 158.

V. DISCUSSION

The bankruptcy court did not err in denying the Mandate Motion. As the court noted in its tentative ruling, Appellants are reading far too much into this Panel's prior opinion. We did not require that the prior sale go forward; rather, we reversed the approval of that sale and simply remanded "for further proceedings consistent with this opinion." Consideration of the New Sale Motion is not inconsistent with the opinion, as long as the court applies the appropriate analyses for approval of section 363 sales and for approval of compromises discussed in the opinion. We did not prohibit Trustee from modifying the terms of any sale; in fact, in requesting approval of the new sale, Trustee specifically addressed the concerns raised by us in the prior opinion (i.e., whether the sale satisfied the Mickey Thompson "fair and equitable" standard).

As the Supreme Court has held, on remand, a trial court "'may consider and decide any matters left open by the mandate of this court.'" Quern v. Jordan, 440 U.S. 332, 347 n. 18 (1979), quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1895). Our opinion set forth factors for the court to consider when evaluating a sale of all assets including avoidance actions. It did not compel the initial sale to go forward, and it did not

foreclose the bankruptcy court from considering any other sale of the assets, as long as the proper standards for section 363 sales and Rule 9019(a) compromises were applied. The bankruptcy court was thus free under Quern to disregard the initial sale motion and consider any subsequent or amended sale motion.

"While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." Quern, 440 U.S. at 347 n. 18, quoting Sprague v. Ticonic Natl. Bank, 307 U.S. 161, 168 (1939). As Appellants never requested that we compel the sale to go forward, we did not address whether such relief would have been appropriate. Our decision was limited to a reversal of the prior sale order and a remand "for further proceedings consistent with this opinion." A modification of the terms of that sale, either by amending the initial sale motion or filing a new one, was not inconsistent with either the spirit or express terms of the opinion, as long as the bankruptcy court adhered to the guidelines set forth in the opinion when evaluating the modified sale. We therefore affirm.

In any event, even if our mandate had required the bankruptcy court to consider only the Trustee's initial sale motion, we cannot see how the bankruptcy court could grant the motion and accept Appellants' bid given the dramatically different posture of the bankruptcy case and asset structure following remand. After we issued our opinion, significant new assets were added to the estate, and Trustee received an offer for those assets that exceeded the prior bids by more than three million dollars. Given these new developments, the bankruptcy

court would have no choice but to deny the Initial Sale Motion if the overbids fell short of the present known value of the assets, and entertaining it at this juncture would be pointless.[7]

VI. CONCLUSION

Because our prior opinion did not foreclose Trustee from presenting and the bankruptcy court from considering a sale of assets on terms different from those in the initial sale motion, the bankruptcy court did not err in denying the Mandate Motion. We therefore AFFIRM.

---

[7]Appellants' own language in their opening brief underscores the futility of prosecuting the Initial Sale Motion: "the bankruptcy court must determine if a sale at $175,000 [is] fair and equitable, which it clearly is not, now that the debtor has offered $3.5 million for the very same [assets]." Appellants' Opening Brief, page 24 (emphasis in original). Yet, even with this admission that a sale at $175,000 is not fair and equitable, Appellants contend that our mandate requires the bankruptcy court to accept their overbid if it exceeds $175,000. Id. In other words, they contend that -- under the mandate -- a bid slightly more than $175,000 must be accepted even though the estate could receive $3.5 million for its assets.

As the bankruptcy court stated, Appellants are reading too much into the mandate. At most, the mandate required that the bankruptcy court consider and value Appellants' cash and noncash overbids when approving any sale that includes avoidance actions (including the proposed new sale). The mandate did not require the court to accept a bid of Appellants as long as it exceeds $175,000.00. The mandate allows Appellants to play the game; it does not provide that they win the game.