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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NOT FOR PUBLICATION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

6	In re:)	BAP No. CC-07-1416-MoDMk
)	
7	KAVEH LAHIJANI,)	Bk. No. SV 98-15561-GM
)	
8	Debtor.)	
	_____)	
9)	
10	KAMIAR SIMANTOB; NASSER)	
	LAHIJANI,)	
11	Appellants,)	
)	
12	v.)	MEMORANDUM¹
)	
13	JOHN M. WOLFE, CHAPTER 7)	
	TRUSTEE,)	
14	Appellee.)	
15	_____)	

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.

¹This 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 In 2005, we reversed and remanded an order of the bankruptcy
2 court approving a sale by a chapter 7 trustee of all of the
3 estate's assets. Thereafter, a new chapter 7 trustee was
4 appointed and two non-debtor corporations were consolidated with
5 the debtor's estate, thereby adding significant new assets to the
6 estate. Following our reversal of the order approving the first
7 sale, the new trustee withdrew the original motion to sell assets
8 and filed a new motion to sell all of the assets (including the
9 newly acquired assets) for a substantially greater price.

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

17 I. FACTS

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

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

1 consistent with this opinion," holding that when avoidance
2 actions are being sold, the bankruptcy court must analyze the
3 sale under standards for approval of asset sales under 11 U.S.C.
4 § 363² as well as the standards for approving a compromise under
5 Rule 9019(a). Simantob v. Claims Prosecutor, LLC (In re
6 Lahijani), 325 B.R. 282, 284 (9th Cir. BAP 2005).

7 We remanded because the record was not sufficiently
8 developed to determine whether the sale satisfied the fair and
9 equitable settlement standard set forth in Martin v. Kane (In re
10 A & C Props.), 784 F.2d 1377, 1380-81 (9th Cir. 1986), and
11 Goodwin v. Mickey Thompson Ent. Group, Inc. (In re Mickey
12 Thompson Ent. Group, Inc.), 292 B.R. 415, 420 (9th Cir. BAP
13 2003). Lahijani, 325 B.R. at 290-91. In particular, to
14 determine whether the sale satisfied the "fair and equitable"
15 settlement standard, the bankruptcy court should have considered
16 "(a) probability of success in the litigation; (b)
17 collectability; (c) complexity, expense, inconvenience, and delay
18 attendant to continued litigation; and (d) the interests of
19 creditors, which are said to be 'paramount.'" Id. at 290.
20 "None of this analysis, which is inherently fact-intensive,
21 relative, and contextual, was undertaken by the bankruptcy
22 court." Id.

25 ²Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
28 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.

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

13 On October 3, 2005, the bankruptcy court entered an order
14 substantively consolidating Debtor's estate with two nondebtor
15 corporations, Elan Enterprises, Inc. ("Elan") and Vista Lane, LLC
16 ("Vista").⁴ Simantob v. Lahijani (In re Lahijani), 2005 WL
17 4658490 (Bankr. C.D. Cal., Oct. 5, 2005). As a result, Debtor's
18 estate acquired significantly more assets. On October 18, 2006,
19 Trustee filed a motion to sell all of the estate's assets
20 (including those of Elan and Vista) to Micha Mottale ("Mottale")
21 for \$3.5 million, subject to overbids (the "New Sale Motion").

22
23 ³The Former Trustee and Claims Prosecutor appealed our
24 reversal, but after the present trustee John M. Wolfe ("Trustee")
25 obtained an order from the Ninth Circuit dismissing that appeal.

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

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

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

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

19 On September 21, 2007, Appellants filed a motion for order
20 requiring compliance with the mandate of this panel in the prior
21 appeal (the "Mandate Motion"). Appellants contended our reversal
22 and remand of the original sale order constituted an affirmative
23

24 ⁵Because Trustee was not going forward with the initial sale
25 of the assets to Claims Prosecutor, the bankruptcy court entered
26 an order authorizing the return of \$169,438.66 to Claims
27 Prosecutor. Appellants appealed that order (BAP No. CC-07-1230),
28 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.

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

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

14 II. ISSUE

15 Did the bankruptcy court err in denying the Mandate Motion?

16 III. STANDARD OF REVIEW

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

19
20 ⁶The bankruptcy court also held in its tentative decision
21 that it did not have jurisdiction to decide the Mandate Motion as
22 Appellants had appealed the order permitting Trustee to return to
23 Claims Prosecutor the deposit for the initial sale. As discussed
24 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.

25 We believe that the bankruptcy court did have jurisdiction
26 to rule on the Mandate Motion. Even if the appeal of the order
27 allowing Trustee to refund the purchase deposit to Claims
28 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.

1 369 B.R. 506, 509 (9th Cir. BAP 2007); Litton Loan Serv'g, LP v.
2 Garvida (In re Garvida), 347 B.R. 697, 703 (9th Cir. BAP 2006).

3 IV. JURISDICTION

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

7 V. DISCUSSION

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

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

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

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

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

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

4 **VI. CONCLUSION**

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

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17 ⁷Appellants' own language in their opening brief underscores
18 the futility of prosecuting the Initial Sale Motion: "the
19 bankruptcy court must determine if a sale at \$175,000 [is] fair
20 and equitable, which it clearly is not, now that the debtor has
21 offered \$3.5 million for the very same [assets]." Appellants'
22 Opening Brief, page 24 (emphasis in original). Yet, even with
23 this admission that a sale at \$175,000 is not fair and equitable,
24 Appellants contend that our mandate requires the bankruptcy court
25 to accept their overbid if it exceeds \$175,000. Id. In other
26 words, they contend that -- under the mandate -- a bid slightly
27 more than \$175,000 must be accepted even though the estate could
28 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.