

DEC 31 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NOT FOR PUBLICATION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.	WW-08-1104-KaJuPa
)		
DOUGLAS RAY,)	Bk. No.	00-36568
)		
Debtor.)		
<hr/>			
BATTLE GROUND PLAZA, LLC,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
ESTATE OF IRWIN JESSEN; DEAN)		
MALDONADO; DOUGLAS RAY,)		
)		
Appellees.)		
<hr/>			

Argued and submitted on October 17, 2008 at
Seattle, Washington

Filed - December 31, 2008

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Before: KAUFMAN,² JURY and PAPPAS, 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.

²Hon. Victoria S. Kaufman, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal concerns the finality of an order approving a
2 debtor's sale of real property free and clear of, inter alia, a
3 right of first refusal ("RFR") that was not properly exercised
4 and whether the bankruptcy court had jurisdiction, after it had
5 confirmed the debtor's chapter 11³ plan and entered a final
6 decree in the case, to determine the impact of the court's sale
7 order on the RFR. Following the entry of the final decree, the
8 holder of the RFR (the appellant in this appeal) sued the debtor,
9 a co-owner/seller, the buyer of the real property and the buyer's
10 successor entities in state court for, among other things,
11 specific performance of the RFR. The state court referred the
12 appellant's causes of action to the bankruptcy court. Pursuant
13 to a motion for summary judgment, the bankruptcy court held that
14 the appellant could not collaterally attack the sale by pursuing
15 specific performance of the RFR in the state court. We AFFIRM.

16 I. FACTS

17 A. The Real Property and the RFR

18 On August 10, 2000, Douglas M. Ray (the "Debtor") filed a
19 chapter 11 petition. At the time the petition was filed, the
20 Debtor and Irwin P. Jessen ("Jessen") were co-owners of
21 commercial real estate consisting of a shopping center commonly
22 known as the Battle Ground Plaza Shopping Mall ("BG Plaza
23 Property"). In December 2000, the Debtor and Jessen entered into
24

25 ³ Unless otherwise indicated, all "Code," chapter and
26 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330 prior to its amendment by the Bankruptcy Abuse Prevention
28 and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23,
as the case from which this appeal arises was filed before
October 17, 2005. All "Rule" references are to the Federal Rules
of Bankruptcy Procedure, and all "FRCP" references are to the
Federal Rules of Civil Procedure as amended in 2007.

1 a purchase and sale agreement with Bruce Feldman, Inc. for the
2 sale of the BG Plaza Property ("BG Plaza Agreement"). On June 8,
3 2001, the bankruptcy court approved the sale. Bruce Feldman,
4 Inc. subsequently assigned its interest under the BG Plaza
5 Agreement to BG Plaza LLC.⁴

6 The BG Plaza Agreement included a right of first refusal for
7 an adjoining ½ acre vacant parcel ("½ Acre Parcel") owned by the
8 Debtor and Jessen. The RFR provides in relevant part as follows:

9 This Right of First Refusal means that Seller
10 may not sell or become contractually obligated
11 to sell the adjacent parcel without giving
12 written notice to Purchaser of all of the
13 terms and conditions upon which Seller is
14 willing to sell the adjacent property and
15 giving Purchaser the opportunity to buy the
16 adjacent land on those terms. Purchaser shall
17 have seventy-two (72) hours from receipt of
18 any such written notice within which to accept
19 Seller's offer by serving a written and signed
20 acceptance upon Seller [I]n the event
21 that Seller becomes willing to sell upon terms
22 that are different than those contained in the
23 original notice, then Purchaser's Right of
24 First Refusal shall again apply and must be
25 satisfied (including a new notice) before sale
26 or voluntary transfer of the adjacent property
27 to any other party.

28 (Emphasis added).

29 In December 2002, the Debtor and Jessen executed and
30 recorded a Deed of Easement, as contemplated in a "counter offer"
31 executed when the BG Plaza Agreement was signed. This easement
32 conveyed a 35-foot wide strip over the BG Plaza Property to the ½
33 Acre Parcel for ingress and egress. However, this easement did
34 not provide for cross-parking on these two lots.

35 ⁴When BG Plaza LLC filed its Notice of Appeal, the sale of
36 the BG Plaza Property had not yet closed, nor had it closed as of
37 the date that this appeal was argued.

1 An order confirming the Debtor's Third Amended Plan of
2 Reorganization (the "Plan") was entered on March 7, 2002. The
3 terms of the Plan provided for the sale of the ½ Acre Parcel
4 either to BG Plaza LLC pursuant to the RFR or to some other party
5 if BG Plaza LLC did not elect to exercise the RFR. The Plan
6 further provided that the bankruptcy court would retain
7 jurisdiction "to determine any controversies in connection with
8 assets of the bankruptcy estate"

9 B. The First Approved Sale of the ½ Acre Parcel

10 In June 2005, the Debtor and Jessen entered into a purchase
11 and sale agreement dated May 18, 2005 ("½ Acre Parcel
12 Agreement"), to sell the ½ Acre Parcel to Dean Maldonado
13 ("Maldonado") for \$380,000. The sale was to be closed on or
14 before August 20, 2005. The following additional conditions were
15 contained with the ½ Acre Parcel Agreement:

- 16 3. Conditions to Purchase. Buyer's obligation
17 to purchase the Property is conditioned on
18 the following . . . Review and acceptance of
the cross parking agreements and a
satisfactory Level I Environmental Survey . . .
- 19 5. Seller's Documents. Within ten (10) days
20 after the Execution Date, Seller shall
21 deliver to Buyer, at Buyer's address shown
22 below, legible and complete copies of the
23 following documents and other items relating
24 to the ownership, operation, and maintenance
of the Property, to the extent now in
existence and to the extent such items are
within Seller's possession or control: Cross
easement for access and parking, rules for
shopping center, management and advertising.

25 (Emphasis in original).

26 BG Plaza LLC was notified of the proposed sale by way of a
27 letter dated May 27, 2005, which included a copy of the ½ Acre
28 Parcel Agreement. At that time, BG Plaza LLC elected not to

1 exercise its RFR, contending that its RFR was not ripe until its
2 purchase of the BG Plaza Property was closed. Instead, BG Plaza
3 LLC filed an objection to the sale. Overruling this objection,
4 on July 5, 2005, the bankruptcy court entered an order approving
5 the sale of the ½ Acre Parcel to Maldonado free and clear of
6 liens and encumbrances pursuant to section 363, "including but
7 not limited to the right of first refusal granted to Battle
8 Ground Plaza LLC" ("July 2005 Sale Order"). Order Approving Sale
9 of Real Estate Free and Clear of Liens and Encumbrances, July 5,
10 2005 at 2. The July 2005 Sale Order was never appealed.

11 In August 2005, counsel for Jessen prepared a Reciprocal
12 Easement Agreement. Within this agreement, the BG Plaza Property
13 is referred to as "Parcel 1," and the ½ Acre Parcel is referred
14 to as "Parcel 2." The agreement provides in relevant part as
15 follows:

16 JESSEN & RAY and MALDONADO wish to establish an
17 easement for the mutual use of a common driveway
18 and cross parking for customers by Parcels 1 and 2
19 and to provide for the maintenance of the
20 driveway. The driveway shall be the established
21 driveway presently located in Parcel 1 and the
22 cross parking shall be the existing parking areas
23 on Parcel 1 and the parking areas designated on
24 Parcel 2's site plan ("Easement Area").

21 On August 5, 2005, counsel for Jessen sent a draft of the
22 document to the Debtor's attorney, the selling agent, and
23 Maldonado. The Reciprocal Easement Agreement, however, was not
24 executed at this time.

25 C. The Modification of the ½ Acre Parcel Agreement

26 The parties later discovered that a sewer pipe needed to be
27 removed on the ½ Acre Parcel. On October 8, 2005, the parties
28 entered into an addendum to the ½ Acre Parcel Agreement reducing

1 the purchase price from \$380,000 to \$365,000 and changing the
2 closing date to November 15, 2005, with a possible 30-day
3 extension ("Addendum B"). The purchase price reduction related
4 to the cost of removing the sewer pipe.

5 By letter dated October 18, 2005, BG Plaza LLC was notified
6 of the reduced purchase price for the sale of the ½ Acre Parcel
7 and provided a copy of Addendum B. On October 21, 2005, BG Plaza
8 LLC gave notice of its intent to exercise its RFR. BG Plaza LLC
9 subsequently provided a \$5,000 earnest money promissory note
10 stating that both principal and interest would be payable on or
11 before December 19, 2005, or upon satisfaction or waiver of
12 contingencies pursuant to the ½ Acre Parcel Agreement.

13 By letter dated October 25, 2005, BG Plaza LLC requested all
14 cross parking agreements and other documents referenced in the ½
15 Acre Parcel Agreement from the Debtor and Jessen. Jessen's
16 counsel did not provide the unexecuted draft of the Reciprocal
17 Easement Agreement because he believed BG Plaza LLC did not have
18 an interest in the ½ Acre Parcel and thus had no reason to
19 receive a copy of the unexecuted agreement.

20 D. The Second Approved Sale of the ½ Acre Parcel

21 On October 24, 2005, the Debtor filed a motion to approve
22 the sale of the ½ Acre Parcel to Maldonado, as modified by
23 Addendum B. The Debtor contended that BG Plaza LLC had not duly
24 exercised its RFR, because the terms set forth in BG Plaza LLC's
25 promissory note differed from the terms set forth in Addendum B.
26 Most importantly, Addendum B provided for a closing date of no
27 later than December 15, 2005, but the terms of BG Plaza LLC's
28 promissory note authorized a later closing date. On October 27,

1 2005, BG Plaza LLC objected to the proposed sale, asserting that
2 it had met the conditions of the RFR.

3 After a hearing on November 1, 2005, the bankruptcy court
4 approved the sale of the ½ Acre Parcel to Maldonado ("November
5 2005 Sale Order"). The November 2005 Sale Order approved the
6 sale free and clear of liens and encumbrances pursuant to section
7 363, including the RFR granted to BG Plaza LLC. The bankruptcy
8 court held that BG Plaza LLC's attempt to exercise the RFR was
9 not sufficient because the terms of its offer were different from
10 those set forth in Addendum B. For example, BG Plaza LLC did not
11 propose to close as required by Addendum B.

12 On November 4, 2005, BG Plaza LLC filed a motion to alter or
13 amend the November 2005 Sale Order pursuant to Rule 9023 and FRCP
14 59(e) (the "59(e) Motion"). On November 9, 2005, the bankruptcy
15 court found that BG Plaza LLC had not shown manifest error, new
16 facts, or legal authority that could not have been brought to the
17 court's attention earlier with reasonable diligence. The
18 bankruptcy court entered an order denying the 59(e) Motion. BG
19 Plaza LLC did not appeal the November 2005 Sale Order or the
20 Order denying the 59(e) Motion.

21 On November 23, 2005, the Debtor, Jessen and Maldonado
22 executed the Reciprocal Easement Agreement. The Debtor and
23 Jessen conveyed the ½ Acre Parcel to Mills End LLC, an assignee
24 of Maldonado, by statutory warranty deed recorded November 30,
25 2005.

26 The Debtor's share of the net sale proceeds from the ½ Acre
27 Parcel enabled the Debtor to pay in full all the remaining
28 creditor claims due and payable under the terms of the Plan. On

1 December 29, 2005, the bankruptcy court entered a final decree
2 closing the case.

3 E. The Development of the ½ Acre Parcel and BG Plaza LLC's
4 Initiation of State Court Litigation

5 Following the entry of the November 2005 Sale Order,
6 Maldonado constructed a building on the ½ Acre Parcel and leased
7 the spaces in the building.

8 In June 2006, BG Plaza LLC obtained a copy of the Reciprocal
9 Easement Agreement, which had been executed by the Debtor, Jessen
10 and Maldonado on November 23, 2005. BG Plaza LLC contended that
11 it was unaware of this agreement until that time. On July 5,
12 2006, BG Plaza LLC commenced a lawsuit in the Clark County
13 Superior Court ("State Court") against the Debtor, Jessen,
14 Maldonado and Maldonado's successor entities alleging breach of
15 contract related to the RFR and seeking specific performance,
16 damages and declaratory relief. BG Plaza LLC alleged that the
17 Debtor and Jessen did not comply with the terms of the RFR
18 because they failed to advise BG Plaza LLC of their intent to
19 execute the Reciprocal Easement Agreement.

20 On December 12, 2006, the State Court issued a letter ruling
21 concluding that it would be appropriate to "remand"⁵ the State
22

23 ⁵ The State Court and BG Plaza LLC have incorrectly used the
24 term "remand" to describe the State Court's reference of a
25 portion of BG Plaza LLC's action to the bankruptcy court. Under
26 28 U.S.C. § 1452(b), "remand" refers to a district or bankruptcy
27 court's decision, following removal, to return a claim or cause
28 of action to the court from which the claim or cause of action
originated. Instead, we consider the effect of the State Court's
order to have been the imposition of a stay on further
proceedings in that court concerning BG Plaza LLC's causes of
action while the parties sought a decision from the bankruptcy
court regarding the effects of its prior orders in this dispute.

1 Court action to the bankruptcy court for further proceedings. On
2 motion of the Debtor, the Debtor's bankruptcy case was reopened
3 in January 2007.

4 On January 19, 2007, the State Court entered an Order
5 referring BG Plaza LLC's causes of action against the defendants
6 to the bankruptcy court for further proceedings.⁶ The State
7 Court retained jurisdiction over certain cross-claims filed by
8 Maldonado and other related parties.

9 F. The Bankruptcy Court's Resolution of the Renewed ½ Acre
10 Parcel Dispute

11 The Debtor asked the bankruptcy court to determine the
12 effect of the bankruptcy court's prior rulings on the causes of
13 action referred by the State Court. On July 31, 2007, the
14 bankruptcy court heard oral argument on whether it should
15 exercise jurisdiction over the dispute. On August 28, 2007, the
16 bankruptcy court entered an order "retain[ing] jurisdiction to
17 hear and decide the claim for specific performance made by Battle
18 Ground Plaza LLC," and "reserv[ing] jurisdiction at this time
19 over the claim made by Battle Ground Plaza LLC, concerning the
20 rights of the respective parties under the reciprocal easement
21 agreement." Order Retaining Jurisdiction to Hear and Decide
22 Battle Ground Plaza LLC Claim, Aug. 28, 2007 at 2.

23 At a hearing held on August 21, 2007, when articulating
24 its decision to retain jurisdiction, the bankruptcy court noted
25 that BG Plaza LLC could not obtain specific performance of its
26 RFR without invalidating the bankruptcy court's November 2005
27

28 ⁶That order was entitled "Order Remanding Matter to U.S.
Bankruptcy Court for the Western District of Washington."

1 order that approved the sale of the ½ Acre Parcel to Maldonado
2 free and clear of BG Plaza LLC's RFR. The bankruptcy court
3 concluded that it was "best suited to determine the factors it
4 considered in ruling that the right of first refusal was not
5 properly exercised and whether any disclosures were required, and
6 if so, what is the effect." Trial Tr. Aug. 21, 2007 at 10. As
7 the bankruptcy court stated during the August 21, 2007 hearing,
8 "The primary reason that I'm retaining jurisdiction on . . .
9 specific performance - - because I couldn't get around the
10 feeling that it was an interpretation of my prior order. And I
11 thought it was unfair for the state court to have to interpret
12 what I was doing and going back and looking at a bankruptcy court
13 record." Id. at 15.

14 On January 11, 2008, Jessen having passed away since the
15 sale of the ½ Acre Parcel, Jessen's probate estate (the "Jessen
16 Estate") filed a Motion for Summary Judgment, asserting that
17 there were no issues of material fact that Jessen and the Debtor
18 had given BG Plaza LLC sufficient notice of all conditions upon
19 which they would sell the ½ Acre Parcel to Maldonado.

20 In its response, BG Plaza LLC argued that the Reciprocal
21 Easement Agreement constituted a different term for the sale of
22 the ½ Acre Parcel and that it should have been given notice of
23 this term either when a draft of the Reciprocal Easement
24 Agreement was circulated in August 2005, or when the parties
25 executed the agreement in November 2005. On February 26, 2008,
26 the bankruptcy court entered an order granting summary judgment
27 to the Jessen Estate (the "Summary Judgment Order"), holding
28 that, as a matter of law, the "sale of the ½ Acre Parcel approved

1 by this Court pursuant to 11 U.S.C. § 363 may not be collaterally
2 attacked" by way of BG Plaza LLC's action filed in the State
3 Court seeking specific performance of its RFR. Order Granting
4 Jessen Estate Summary Judgment, Feb. 26, 2008 at 2. The
5 bankruptcy court also remanded the matter to the State Court for
6 further proceedings.

7 On March 3, 2008, BG Plaza LLC filed a motion to alter or
8 amend the Summary Judgment Order pursuant to Rule 9023 and FRCP
9 59(e), contending that the State Court action constituted a
10 permissible independent action pursuant to Rule 9024 and FRCP
11 60(d)(1) and (3), or a motion for relief from a judgment or order
12 pursuant to Rule 9024 and FRCP 60(b). On April 10, 2008, the
13 bankruptcy court denied that motion, finding that BG Plaza LLC
14 had not established grounds under FRCP 59(e) for the bankruptcy
15 court to alter or amend the Summary Judgment Order. On April 14,
16 2008, BG Plaza LLC timely filed a notice of appeal.

17 **II. ISSUES**

18 A. Whether the bankruptcy court had jurisdiction to evaluate BG
19 Plaza LLC's right to seek specific performance of the RFR in the
20 State Court action, despite the provisions of the July and
21 November 2005 Sale Orders;

22 B. Whether the Debtor and Jessen complied with the terms of BG
23 Plaza LLC's RFR;

24 C. Whether BG Plaza LLC appropriately and timely sought to set
25 aside the bankruptcy court's orders allowing the sale of the ½
26 Acre Parcel free and clear of BG Plaza LLC's RFR; and

27 D. Whether the bankruptcy court should have granted BG Plaza
28 LLC's motion to alter or amend the Summary Judgment Order.

1 Rider & Family v. Wyle (In re United Energy Corp.), 102 B.R. 757,
2 760 (9th Cir. BAP 1989) (citing Am. Fed'n v. Stephens (In re
3 Stephens), 51 B.R. 591, 594-95 (9th Cir. BAP 1985)). Rather, the
4 reviewing court must stand in the same position as the court
5 below and apply the standards set forth in FRCP 56(c).

6 Summary judgment is proper "if the pleadings, depositions,
7 answers to interrogatories, and admissions on file, together with
8 the affidavits, if any, show that there is no genuine issue as to
9 any material fact and that the moving party is entitled to a
10 judgment as a matter of law." FRCP 56(c).

11 **V. DISCUSSION**

12 A. Jurisdiction to Enter the Order Granting Summary Judgment

13 Appellant's first argument is that the bankruptcy court did
14 not have jurisdiction to review the impact of the State Court
15 action on the July and November 2005 Sale Orders. As set forth
16 more fully below, the bankruptcy court had both ancillary
17 jurisdiction and "arising under" jurisdiction to determine the
18 impact of the July and November 2005 Sale Orders on BG Plaza
19 LLC's ability to obtain specific performance of the RFR in
20 another court.

21 1. Ancillary Jurisdiction

22 Ancillary jurisdiction may rest on one of two bases: (1) to
23 permit disposition by a single court of factually interdependent
24 claims, and (2) to enable a court to vindicate its authority and
25 effectuate its decrees. Sea Hawk Seafoods, Inc. v. Alaska (In re
26 Valdez Fisheries Dev. Ass'n, Inc.), 439 F.3d 545, 549 (9th Cir.
27 2006) (citing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375,
28 379-80, 114 S.Ct. 1673, 1676, 128 L.Ed.2d 391 (1994)).

1 A bankruptcy court's ancillary jurisdiction is not
2 terminated when a plan has been confirmed or a case has been
3 closed or dismissed. See, e.g., Tsafaroff v. Taylor (In re
4 Taylor), 884 F.2d 478, 481 (9th Cir. 1989) ("bankruptcy court
5 retains subject matter jurisdiction to interpret orders entered
6 prior to dismissal of the underlying bankruptcy case and to
7 dispose of ancillary matters"); Beneficial Trust Deeds v.
8 Franklin (In re Franklin), 802 F.2d 324, 325 (9th Cir.
9 1986) (bankruptcy court retains jurisdiction to construe its own
10 orders after the dismissal of the underlying bankruptcy
11 proceeding); Aheong v. Mellon Mortg. Co. (In re Aheong), 276 B.R.
12 233 (9th Cir. BAP 2002) (after case dismissed, bankruptcy court
13 had jurisdiction to determine effect of its dismissal order on
14 creditor's postpetition foreclosure action); Hawaiian Airlines,
15 Inc. v. Mesa Air Group, Inc., 355 B.R. 214, 218 (D. Haw.
16 2006) ("bankruptcy court retains post-confirmation jurisdiction to
17 interpret and enforce its own orders").

18 In Aheong, the debtor contended that the bankruptcy court
19 did not have jurisdiction to enter an order annulling the
20 automatic stay, after the court had re-opened the debtor's
21 previously-dismissed chapter 13 case. The debtor had filed her
22 chapter 13 petition one day before a hearing on a secured
23 creditor's foreclosure action. After the debtor filed her
24 petition, and despite the provisions of a General Order of the
25 bankruptcy court, she did not notify the secured creditor or the
26 state court of her bankruptcy filing. The state court hearing
27 went forward, the debtor did not appear, and the state court
28 granted the secured creditor's summary judgment motion.

1 The debtor thereafter dismissed her chapter 13 case, and it
2 was closed. More than two years later, the debtor contended in
3 state court that the secured creditor's foreclosure was void
4 because it was obtained in violation of the automatic stay. The
5 secured creditor moved to reopen the bankruptcy case for the
6 limited purpose of considering its motion to annul the automatic
7 stay. The bankruptcy court reopened the case and granted the
8 motion annulling the automatic stay.

9 The debtor contended that the bankruptcy court did not have
10 jurisdiction to annul the automatic stay in her dismissed case.
11 This panel held that the bankruptcy court had ancillary
12 jurisdiction. As the panel explained:

13 By granting Mellon's Motion to Annul the Stay the
14 bankruptcy court was acting to "interpret" and
15 "effectuate" General Order No. 1, which directed
16 Debtor to notify Mellon and the state court of her
17 bankruptcy filing and provided that "failure to
18 give such notice . . . may constitute cause for
19 nullification of the automatic stay." The
20 bankruptcy court interpreted General Order No. 1
21 by deciding whether the facts presented by Mellon
22 did in fact constitute cause to nullify the
23 automatic stay and, having determined that such
24 cause was shown, it enforced General Order No. 1
25 by granting the Motion to Annul the Stay.

26 Aheong, 276 B.R. at 240.

27 Similar to the bankruptcy court in Aheong, which was asked
28 to effectuate its order in a long-since dismissed case, the
29 bankruptcy court here was asked to effectuate the July and
30 November 2005 Sale Orders. In this case, the State Court
31 referred BG Plaza LLC's claims against the Debtor and Jessen,
32 among others, to the bankruptcy court, so that the bankruptcy
33 court could evaluate whether BG Plaza LLC's claims could proceed
34 despite the provisions of the sale orders. The bankruptcy court

1 then agreed to evaluate whether BG Plaza LLC's action for
2 specific performance, which would, if successful, eviscerate the
3 previously approved sale of the Debtor's interest in the ½ Acre
4 Parcel, could proceed. Like the court in Aheong, the bankruptcy
5 court had ancillary jurisdiction to interpret and enforce its
6 prior orders.

7 2. "Arising Under" Jurisdiction

8 In addition to ancillary jurisdiction, in order to resolve
9 the conflict between the State Court action and the November 2005
10 Sale Order, the bankruptcy court could exercise its jurisdiction
11 "of all civil proceedings arising under title 11" pursuant to 28
12 U.S.C. § 1334(b). "Arising under" jurisdiction "includes
13 proceedings based on a right or cause of action created by title
14 11." Aheong, 276 B.R. at 243. Moreover, "arising under"
15 jurisdiction "does not depend on the present existence of an open
16 case or a non-dismissed case. It depends solely on the existence
17 of civil proceedings arising under title 11." Id. at 244.

18 "Requests for bankruptcy courts to construe their own orders
19 must be considered to arise under title 11 if the policies
20 underlying the Code are to be effectively implemented."
21 Franklin, 802 F.2d at 326; see also McCowan v. Fraley (In re
22 McGowan), 296 B.R. 1, 4 (9th Cir. BAP 2003) (holding that "where a
23 proceeding is brought to execute on a judgment entered by the
24 bankruptcy court, the proceeding is a continuation of the
25 original proceeding" and thus, any proceeding to enforce a
26 judgment that "arose under" the Code continues to be a matter
27 "arising under" the Code).

28

1 In Franklin, after filing their second bankruptcy petition,
2 the debtors entered into an agreement with a secured creditor
3 stipulating that the automatic stay would be lifted on June 14,
4 1982 and that this relief would be "effective as against any
5 subsequent [bankruptcy] filings on the part of these Debtors as
6 to the above-described properties . . ." 802 F.2d at 325.
7 Although signed and authorized earlier, the stipulation was
8 entered shortly after the debtors' second bankruptcy petition was
9 dismissed, the secured creditor foreclosed on the real property
10 and the debtors filed their third bankruptcy petition.

11 Subsequently, the debtors filed a complaint in state court
12 to set aside the foreclosure sale as being in violation of the
13 automatic stay. The secured creditor filed an ex parte
14 application in the bankruptcy court to determine the validity of
15 its foreclosure sale. The bankruptcy court concluded that the
16 third bankruptcy petition did not impose the automatic stay on
17 the secured creditor and that the foreclosure sale was valid as
18 provided in the stipulated agreement.

19 The Ninth Circuit held that the bankruptcy court had subject
20 matter jurisdiction to construe the effect of the stipulation to
21 relief from the automatic stay, entered in the debtors' dismissed
22 case. The Ninth Circuit explained that the secured creditor's ex
23 parte application

24 was basically in the nature of a declaratory judgment
25 action requiring the bankruptcy court to construe the
26 validity and effect of its prior order. . . . We
27 believe that [the secured creditor]'s action before
28 [the bankruptcy court] was one 'arising under' title
11. Simply put, bankruptcy courts must retain
jurisdiction to construe their own orders if they are
to be capable of monitoring whether those orders are
ultimately executed in the intended manner.

1 Franklin, 802 F.2d at 326.

2 Here, the bankruptcy court had jurisdiction based on the
3 "arising under" language in 28 U.S.C. § 1334(b). BG Plaza LLC's
4 pursuit of specific performance in the State Court required
5 resolution of a substantial question of bankruptcy law, i.e., the
6 impact of the bankruptcy court's November 2005 Sale Order,
7 arising under section 363(b), that authorized the now-consummated
8 sale of the Debtor's interest in the ½ Acre Parcel to Maldonado
9 free and clear of BG Plaza LLC's RFR.

10 B. The Debtor and Jessen's Compliance with the Terms of BG
11 Plaza LLC's RFR

12 A right of first refusal is a contract that gives the
13 prospective purchaser the right to buy upon terms the seller
14 establishes in the event the seller decides to sell. The seller
15 is obligated not to sell to any other party unless the
16 prospective purchaser decides not to buy. Bennett Veneer
17 Factors, Inc. v. Brewer, 441 P.2d 128 (Wash. Ct. App. 1968).
18 Rights of first refusal are valid contracts, and thus, their
19 words are given ordinary meaning. Davis v. Dep't of Transp., 159
20 P.3d 427 (Wash. Ct. App. 2007).

21 In accordance with BG Plaza LLC's RFR, the Debtor and Jessen
22 had to give written notice "of all the terms and conditions upon
23 which Seller is willing to sell [the ½ Acre Parcel] and giving
24 Purchaser the opportunity to buy [the ½ Acre Parcel] on those
25 terms." On May 27, 2005, BG Plaza LLC received written notice of
26 the ½ Acre Parcel Agreement from Debtor and Jessen. Paragraph 3
27 of the ½ Acre Parcel Agreement, titled "Conditions to Purchase,"
28 provided that Maldonado's obligation to purchase the ½ Acre

1 Parcel was conditioned on his "[r]eview and acceptance of the
2 cross-parking agreements."

3 On October 18, 2005, the Debtor and Jessen once again
4 complied with BG Plaza LLC's RFR when they notified BG Plaza LLC
5 of different terms for the sale of the ½ Acre Parcel to Maldonado
6 (Addendum B). The RFR provided that "in the event that Seller
7 becomes willing to sell upon terms that are different than those
8 contained in the original notice, then Purchaser's Right of First
9 Refusal shall again apply and must be satisfied (including new
10 notice) before sale or voluntary transfer of the [½ Acre Parcel]
11 to any other party." Pursuant to Addendum B, the terms of the
12 sale were changed to provide for a reduced purchase price, from
13 \$380,000 to \$365,000, and an extended closing date of November
14 15, 2005, with a possible 30-day additional extension. BG Plaza
15 LLC received notice of those changed terms.

16 BG Plaza LLC contends that the drafting of the Reciprocal
17 Easement Agreement re-activated its RFR because that agreement
18 constituted a different term to the ½ Acre Parcel Agreement. We
19 agree with the bankruptcy court that the draft Reciprocal
20 Easement Agreement circulated in August 2005 did not constitute a
21 different term to the sale. As stated in the bankruptcy court's
22 Memorandum of Decision, the Reciprocal Easement Agreement, both
23 when drafted and when executed, "was merely a fulfillment of the
24 arrangements contemplated by and set forth in Paragraphs three
25 and five [of the ½ Acre Parcel Agreement]." Mem. Feb. 26, 2008
26 at 13.

27 Furthermore, the parties did not execute the Reciprocal
28 Easement Agreement until after the bankruptcy court had approved

1 the sale of the ½ Acre Parcel to Maldonado at the reduced price,
2 free and clear of BG Plaza LLC's RFR. As noted by the bankruptcy
3 court, "Under BG Plaza LLC's approach, parties to a purchase and
4 sale agreement could not years later execute a document that was
5 contemplated by an agreement . . . without retriggering a party's
6 right of first refusal. This would lead to endless litigation
7 and undermine the policy of finality of a court-approved sale."

8 Id.

9 Lastly, as the bankruptcy court explained, given BG Plaza
10 LLC's status as the purchaser of the BG Plaza Property, BG Plaza
11 LLC was well aware of the need for a cross-parking arrangement
12 between that property and the adjacent ½ Acre Parcel.

13 [I]f BG Plaza LLC had had concerns about possible
14 or probable cross parking easements, it could have
15 raised these concerns when it first was presented
16 the ½ Acre [Parcel] Agreement. It did not. . . .
17 [F]rom the time that the BG Plaza [Property]
18 Agreement and counter offer were executed in 2000,
19 BG Plaza LLC was well acquainted with access
20 issues concerning the ½ Acre Parcel. It should
21 not now be allowed to have a second 'bite at the
22 apple' when it failed to act the first time
23 around.

24 Id. at 14.

25 Like Maldonado in May 2005, BG Plaza LLC could have agreed
26 to purchase the ½ Acre Parcel subject to the parties' entry into
27 an acceptable cross-parking agreement. Just as Maldonado had no
28 guarantee that an acceptable cross-parking agreement would be
prepared and finalized, BG Plaza LLC could have taken the risk
that, after exercising its RFR, the sale of the ½ Acre Parcel
would not close because BG Plaza LLC could not secure an
acceptable cross-parking arrangement. After BG Plaza LLC failed
to exercise its RFR, the Debtor and Jessen were not obligated to

1 inform BG Plaza LLC that a condition to the sale of the ½ Acre
2 Parcel, disclosed in May 2005, was potentially satisfied (based
3 on the draft Reciprocal Easement Agreement) or subsequently
4 satisfied (based on the executed Reciprocal Easement Agreement).

5 C. BG Plaza LLC's Ability to Initiate the State Court Action
6 Despite the Provisions of the November 2005 Sale Order

7 "The law is fairly well-settled that 'an order confirming a
8 sale of assets is considered a final judgment.'" Third Nat'l Bank
9 v. Fischer (In re Fischer), 184 B.R. 293, 301 (Bankr. M.D. Tenn.
10 1995) (quoting Cedar Island Builders v. S. County Sand & Gravel
11 (In re Cedar Island Builders), 151 B.R. 298, 300 (D. R.I. 1993));
12 see also In re Sax, 796 F.2d 994, 996 (7th Cir. 1986) (holding
13 that bankruptcy sale orders are final decisions). Furthermore,
14 "[a] bankruptcy sale under 11 U.S.C. § 363, free and clear of all
15 liens, is a judgment that is good as against the world, not
16 merely as against parties to the proceedings." Regions Bank v.
17 J.R. Oil Co., LLC, 387 F.3d 721, 732 (8th Cir. 2004); see also
18 Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1017 (7th
19 Cir. 1988) ("A proceeding under section 363 is an in rem
20 proceeding. It transfers property rights and property rights are
21 rights good against the world, not just against parties to a
22 judgment or persons with notice of the proceeding.").

23 The policy behind the finality of section 363 sales supports
24 this treatment of sale orders. As recognized by the Seventh
25 Circuit, "the importance of finality in judicial sales in
26 bankruptcy" is a "highly relevant concern." Met-L-Wood Corp.,
27 861 F.2d at 1018.

28 [I]f parties are to be encouraged to bid at judicial
sales there must be stability in such sales and a time

1 must come when a fair bid is accepted and the
2 proceedings are ended." In re Webcor, 392 F.2d [893,
3 899 (7th Cir. 1968), cert. denied 393 U.S. 837, 89
4 S.Ct. 113, 21 L.Ed.2d 107(1968)]. This policy of
finality protects confirmed sales unless "compelling
equities" outweigh the interest in finality.

5 In re Chung King, Inc., 753 F.2d 547, 550 (7th Cir. 1985); see
6 also Winget v. JP Morgan Chase Bank, 537 F.3d 565, 579 (6th Cir.
7 2008) ("A sale order signals an end to litigation in a bankruptcy
8 proceeding If sale orders were not final, parties could
9 continue to litigate issues regarding the assets long after their
10 sale, which is certainly an outcome worth prohibiting."); In re
11 Transcon. Energy Corp., 683 F.2d 326, 328 (9th Cir. 1982)
12 ("Because of the great interest in the finality of judicial
13 sales, the standard for setting aside a confirmed sale is
14 stricter than the standard for rejecting a proposed sale.");
15 Taylor v. Lake (In re Cada Investments, Inc.), 664 F.2d 1158,
16 1162 (9th Cir. 1981) ("the policy of finality normally protects
17 confirmed sales from orders to set aside").

18 Other than appealing the sale order, the appropriate method
19 to attack a court-approved sale is by a motion to vacate the sale
20 order under FRCP 60(b), made applicable by Rule 9024. See, e.g.,
21 Lange v. Schropp (In re Brook Valley VII Jt. Venture), 496 F.3d
22 892, 899 (8th Cir. 2007) (FRCP 60(b) governs the ability to obtain
23 relief from a sale order, which is a final judgment); Valley
24 Nat'l Bank of Ariz. v. Needler (In re Grantham Bros.), 922 F.2d
25 1438, 1442 (9th Cir. 1991) (affirming order imposing Rule 11
26 sanctions against debtor's counsel because debtor's counsel
27 collaterally attacked a sale order and did not seek "any review,
28 reconsideration, or stay of the bankruptcy court's order");

1 Newman Grill Sys., LLC v. Ducane Gas Grills (In re Ducane Gas
2 Grills), 320 B.R. 324, 333 (Bankr. D.S.C. 2004) (individual may
3 challenge order authorizing sale of estate assets by either (1)
4 objecting to proposed sale and then appealing the sale order, or
5 (2) attacking the order pursuant to FRCP 60(b)).

6 The bankruptcy court initially approved the ½ Acre Parcel
7 Agreement on July 5, 2005, over BG Plaza LLC's objection. BG
8 Plaza LLC did not appeal the July 2005 Sale Order, and the time
9 for appeal has passed. On November 1, 2005, over BG Plaza LLC's
10 objection, the bankruptcy court approved an amended sale order
11 based on Addendum B, which changed, in part, the ½ Acre Parcel
12 Agreement. BG Plaza LLC sought reconsideration of the November
13 2005 Sale Order, which the bankruptcy court denied. BG Plaza LLC
14 did not appeal the November 2005 Sale Order or the Order denying
15 reconsideration. These orders are final.

16 BG Plaza LLC argues that it did not appeal the two sale
17 orders because it did not know of the Reciprocal Easement
18 Agreement until after the orders were entered. Nonetheless,
19 rather than seek relief in the bankruptcy court by way of a FRCP
20 60(b) motion, BG Plaza LLC filed suit in state court, claiming
21 that it was denied its RFR because Jessen and the Debtor failed
22 to provide notice of all of the terms of the sale. "Even though
23 an action has an independent purpose and contemplates some other
24 relief, it is a collateral attack if it must in some fashion
25 overrule a previous judgment." Miller v. Meinhard-Commercial
26 Corp., 462 F.2d 358, 360 (5th Cir. 1972) (citing Mitchell v.
27 Village Creek Drainage Dist., 158 F.2d 475, 478 (8th Cir. 1946));
28 Ducane Gas Grills, 320 B.R. at 333 (holding that a suit for

1 specific performance represented "an improperly disguised
2 collateral attack" on an order approving the sale of the debtor's
3 assets free and clear of all liens, claims, encumbrances and
4 other interests under section 363(b)).

5 Among other relief requested in its State Court lawsuit, BG
6 Plaza LLC sought specific performance entitling it to exercise
7 its RFR. However, the relief requested by BG Plaza LLC would
8 have had the effect of overruling the July and November 2005 Sale
9 Orders, approving the sale of the ½ Acre Parcel free and clear of
10 BG Plaza LLC's RFR in accordance with section 363. Thus, BG
11 Plaza LLC was impermissibly attacking the section 363 sale of the
12 ½ Acre Parcel by way of the State Court lawsuit.

13 We agree with the bankruptcy court's conclusion that there
14 are no issues of material fact regarding the nature of the State
15 Court lawsuit and the procedural posture of the section 363
16 proceedings in the Debtor's bankruptcy case. Because the July
17 and November 2005 Sale Orders were not appealed and remain valid,
18 and because BG Plaza LLC did not pursue relief in the bankruptcy
19 court pursuant to FRCP 60(b), summary judgment was properly
20 granted for Jessen as a matter of law. The July and November
21 2005 Sale Orders are final orders good against the world, and
22 they may not be collaterally attacked in the State Court action.

23 D. FRCP 59(e) and the Summary Judgment Order

24 Following the bankruptcy court's entry of the Summary
25 Judgment Order, BG Plaza LLC filed a motion to alter or amend the
26 order under FRCP 59(e).

27 Although FRCP 59(e) permits a court to reconsider and amend
28 a previous order, "the rule offers an extraordinary remedy, to be

1 used sparingly in the interests of finality and conservation of
2 judicial resources." Kona Enter., Inc. v. Bishop, 229 F.3d 877,
3 890 (9th Cir. 2000) (internal citations omitted). A motion for
4 reconsideration should not be granted, absent highly unusual
5 circumstances, unless the court is presented with newly
6 discovered evidence, committed clear error, or if there is an
7 intervening change in the controlling law. Id. "A Rule 59(e)
8 motion may *not* be used to raise arguments or present evidence for
9 the first time when they could reasonably have been raised
10 earlier in the litigation." Id. (emphasis in original).

11 Here, in its motion to alter or amend the Summary Judgment
12 Order, BG Plaza LLC did not present newly discovered evidence,
13 nor assert any intervening change in the controlling law.
14 Instead, BG Plaza LLC contended, for the first time, that its
15 litigation in the State Court was appropriate based on the
16 provisions set forth in FRCP 60(d).⁷ In addition, BG Plaza LLC
17 contended that the bankruptcy court should have treated its
18 action in the State Court as a motion under FRCP 60(b) and ruled
19 "on the substance of that request."

20 With respect to BG Plaza LLC's FRCP 60(d) argument, the
21 bankruptcy court appropriately denied BG Plaza's motion to alter
22 or amend the Summary Judgment Order on the basis that BG Plaza
23 LLC did not refer to the provisions in FRCP 60(d) before the
24
25

26 ⁷ FRCP 60(b) used to provide: "This rule does not limit the
27 power of a court to entertain an independent action to relieve a
28 party from a judgment, order, or proceeding . . . or to set aside
a judgment for fraud upon the court." Effective December 1,
2007, these provisions were relocated to FRCP 60(d)(1) and (3).

1 bankruptcy court ruled on the Jessen Estate's summary judgment
2 motion.

3 As concerns BG Plaza LLC's FRCP 60(b) argument, BG Plaza LLC
4 has provided no support for its position that its action in State
5 Court, i.e., seeking specific performance of the RFR, should or
6 could be characterized as a FRCP 60(b) motion. Contrary to BG
7 Plaza LLC's position, a motion brought under FRCP 60(b) must be
8 filed in the court and in the action in which the original order
9 or judgment was entered. Bankers Mortg. Co. v. United States,
10 423 F.2d 73, 78 (5th Cir. 1970), cert denied, 399 U.S. 927, 90
11 S.Ct. 2242, 26 L.Ed.2d 793 (1970); Taft v. Donellan Jerome, Inc.,
12 407 F.2d 807, 809 (7th Cir. 1969); Porcelli v. Joseph Schlitz
13 Brewing Co., 78 F.R.D. 499, 500 (E.D. Wis. 1978), aff'd, 588 F.2d
14 838 (7th Cir. 1978).

15 Furthermore, BG Plaza LLC's arguments that it was entitled
16 to specific performance were not presented to the bankruptcy
17 court until more than one year after the entry of the November
18 2005 Sale Order.⁸ As a result, even if BG Plaza's opposition to
19 the summary judgment motion is characterized as a request for
20 relief from the July and November 2005 Sale Orders, BG Plaza LLC
21 failed to act timely under FRCP 60(c)(1). Therefore, BG Plaza
22 LLC may not receive relief from the sale orders pursuant to FRCP
23 60(b)(2) or (3). Kathe v. United States, 284 F.2d 713, 715 (9th
24

25
26 ⁸A motion under FRCP 60(b) "must be made within a reasonable
27 amount of time." FRCP 60(c). If the motion is based on newly
28 discovered evidence, or fraud, misrepresentation, or misconduct
by the opposing party, it must be made no more than one year
after the entry of the final judgment or order at issue. FRCP
60(c)(1).

1 Cir. 1960); see also, Wright, Miller & Kane, 11 Fed. Prac. &
2 Proc. Civ.2d § 2866 (2008).

3 Lastly, as discussed at length above, because BG Plaza LLC
4 did not exercise its RFR in May 2005, and did not properly
5 exercise its RFR in October 2005, BG Plaza LLC was not entitled
6 to notice of the draft Reciprocal Easement Agreement. That
7 agreement did not change the terms to the sale of the ½ Acre
8 Parcel, but simply satisfied a condition to the sale.
9 Consequently, in accordance with the standards set forth in FRCP
10 60(b),⁹ BG Plaza LLC was not entitled to relief from the July and
11 November 2005 Sale Orders, and the bankruptcy court did not abuse
12 its discretion when it denied BG Plaza LLC's motion to alter or
13 amend the Summary Judgment Order.

14 VI. CONCLUSION

15 The bankruptcy court had jurisdiction on two independent
16 grounds. First, the bankruptcy court had ancillary jurisdiction
17 to interpret and effectuate its July and November 2005 Sale
18 Orders. Second, the State Court's referral of BG Plaza LLC's
19 request for specific performance to the bankruptcy court, so the
20 bankruptcy court could interpret and effectuate the July and
21 November 2005 Sale Orders, commenced a "civil proceeding[]
22 arising under title 11" within the meaning of 28 U.S.C.

23
24
25 ⁹In pertinent part, FRCP 60(b) states, "[o]n motion and just
26 terms, the court may relieve a party or its legal representative
27 from a final judgment, order, or proceeding for the following
28 reasons: . . . (2) newly discovered evidence that, with
reasonable diligence, could not have been discovered in time to
move for a new trial under [FRCP] 59(b); [and] (3) fraud (whether
previously called intrinsic or extrinsic), misrepresentation, or
misconduct by an opposing party."

1 § 1334(b). Moreover, the bankruptcy court properly held that BG
2 Plaza LLC could not collaterally attack the sale of the ½ Acre
3 Parcel, free and clear of BG Plaza LLC's RFR, by pursuing
4 specific performance of the RFR in state court. Lastly, the
5 bankruptcy court did not abuse its discretion when it denied BG
6 Plaza LLC's motion to alter or amend the Summary Judgment Order.

7 The summary judgment of the bankruptcy court is AFFIRMED.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28