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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NOT FOR PUBLICATION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-06-1351-BPaMk
)
PHILLIP J. GRECO and JANE)
ANN FISHER,) Bk. No. SV 04-12773-MT
) (jointly administered with
Debtors;) SV 04-13842-MT and
) SV 04-15449-MT
_____)

In re:)
)
STALLION RECOVERIES, LTD.,)
)
Debtor;)
_____)

In re:)
)
STALLION USA, LLC,)
)
Debtor.)
_____)

JESSE S. VENABLE,)
)
Appellant,)

MEMORANDUM¹

v.)
)
DAVID K. GOTTLIEB, Chapter 7)
Trustee; HOWARD HOWELL;)
AUCTIONS BY THE BAY, INC.,)
)
Appellees.)
_____)

Argued and Submitted on May 17, 2007
at Pasadena, California

Filed - June 12, 2007

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

3 Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

4
5 Before: BRANDT, PAPPAS and MARKELL,² Bankruptcy Judges.
6

7 The chapter 7³ trustee of three related bankruptcy estates moved to
8 compromise the claim of Howell, a creditor of one of the estates. In the
9 compromise Howell agreed to reduce his claim in exchange for an allowed
10 secured claim secured by ancient artifacts owned by any of the three
11 estates. The bankruptcy court approved the compromise over the objection
12 of Venable, an unsecured creditor of one of the other estates. This
13 appeal ensued.

14 Concluding the bankruptcy court did not abuse its discretion in its
15 evidentiary ruling or in approving the compromise, we AFFIRM.
16

17 **I. FACTS**

18 Phillip J. Greco and Jane A. Fisher (jointly, "Greco") filed a joint
19 chapter 11 petition on 19 April 2004. On Schedule B they listed "Ancient
20 Artifacts from Expeditions in Asia" ("Artifacts") with a value of \$10
21

22 ² Hon. Bruce A. Markell, U.S. Bankruptcy Judge for the
23 District of Nevada, sitting by designation.

24 ³ Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
28 which this appeal arises was filed before its effective date
(generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure. "FRE" references are to the Federal Rules of Evidence.

1 million, located in Kuala Lumpur, New Jersey, Los Angeles, Las Vegas, and
2 Tampa.

3 Two companies controlled by Greco filed chapter 11 petitions shortly
4 thereafter: Stallion USA, LLC ("SUSA") filed 23 April 2004 in the
5 Bankruptcy Court for the Middle District of Florida. On Greco's motion,
6 venue was transferred to the Bankruptcy Court for the Central District
7 of California on 27 July 2004 (04-15449). Stallion Recoveries, Ltd.
8 ("SRL"), a Samoan corporation, filed in the Bankruptcy Court for the
9 Central District of California on 2 June 2004 (04-13842). The Artifacts
10 were also listed on SRL's schedules, with the notation, "[t]hese assets
11 are intermingled with the assets of DIP Phillip Greco, Jane Fisher, and
12 Stallion USA LLC. They are listed here, however, for purposes of
13 notice." SUSA's schedules are not in the excerpts of record; apparently
14 SUSA never filed schedules. See Transcript, 20 September 2006
15 ("Transcript"), page 37.

16 The Greco case was converted to chapter 7 on 7 July 2004, and David
17 K. Gottlieb ("the Trustee") was appointed chapter 7 trustee. Shortly
18 thereafter, by stipulation, the SUSA and SRL cases were also converted,
19 to be jointly administered by the Trustee.

20 Greco International, Inc., claimed an ownership interest in the
21 Artifacts based on a pre-petition transfer from SUSA to it. The Trustee
22 commenced an adversary proceeding against Greco International and others
23 to determine the validity of the transfer and whether it could be avoided
24 as a fraudulent conveyance. The bankruptcy court ruled that there was
25 no valid transfer and found that "[t]he Artifacts are property of one or
26 more of the bankruptcy estates of Phillip J. Greco and Jane A. Fisher,
27 Stallion Recoveries, Ltd. and Stallion USA LLC." Judgment, Case No. 05-
28 01066-MT.

1 Dr. Howard L. Howell, creditor of the SUSA estate, moved for relief
2 from stay on 25 March 2005, seeking to foreclose on his perfected
3 security interest in the Artifacts owned by SUSA. He claimed a pre-
4 petition amount owing of \$456,912.43 (\$370,000 plus interest, fees, and
5 costs). The security agreements and financing statements referred to the
6 collateral as inventory, accounts, general intangibles, contract rights,
7 and proceeds. Howell claimed there was no equity in the Artifacts
8 comprising his collateral, based on the declaration of appraiser Lark
9 Mason, who valued the items stored in the Gateway Warehouse in New Jersey
10 between \$125,000 and \$250,000.

11 Trustee thereafter moved for approval of a stipulation with Howell
12 settling the amount of his claim and the avoidability of his security
13 interests. Gateway Warehouse and Appellant objected. Gateway claimed
14 a warehouseman's lien on the Artifacts for post-petition storage fees
15 exceeding \$180,000. Trustee ultimately withdrew his motion.

16 On 15 August 2006, the Trustee again moved for approval of a
17 stipulation with Howell, providing:

18 Howell is deemed to have an allowed secured claim against
19 SUSA of \$300,000, deemed secured by a lien on any Artifacts
20 that are property of the combined estates, as well as
21 accounts, general intangibles, and notes receivable that were
22 SUSA's property as of 23 April 2004, and proceeds thereof;

23 Trustee will use reasonable efforts to determine which
24 Artifacts are estate assets, and to dispose of those
25 Artifacts;

26 Upon sale of the Artifacts, the costs of sale (subject to
27 certain dollar limitations) and Gateway Warehouse claim shall
28 be paid in full prior to any payment on Howell's claim;

Remaining sale proceeds are to be distributed as follows:

- a. The difference (if any) between Costs of
Disposition and \$100,000 shall be split
50/50 between Howell and Trustee;

1 **IV. STANDARDS OF REVIEW**

2 We review the bankruptcy court's evidentiary rulings for abuse of
3 discretion. To reverse an evidentiary ruling, we must conclude both that
4 there was an abuse of discretion and that the error was prejudicial.
5 Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004).

6 Likewise, we review a bankruptcy court's order approving a trustee's
7 proposed compromise for abuse of discretion. In re A & C Properties, 784
8 F.2d 1377, 1380 (9th Cir. 1986); In re Mickey Thompson Entm't Group,
9 Inc., 292 B.R. 415, 420 (9th Cir. BAP 2003).

10 A bankruptcy court necessarily abuses its discretion if it bases its
11 decision on an erroneous view of the law or clearly erroneous factual
12 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).
13 We may reverse for abuse of discretion only when we have a definite and
14 firm conviction that the bankruptcy court committed a clear error of
15 judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d
16 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP
17 1998).

18 We review the bankruptcy court's findings of fact for clear error
19 and its conclusions of law de novo. In re Lawson, 122 F.3d 1237, 1240
20 (9th Cir. 1997). "A finding is 'clearly erroneous' when, although there
21 is evidence to support it, the reviewing court on the entire evidence is
22 left with the definite and firm conviction that a mistake has been
23 committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). If two
24 views of the evidence are possible, the trial judge's choice between them
25 cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564,
26 573-575 (1985).

1 in 2002, wherein he alleged that he had been promised 50% of the profits
2 from the sale of the Artifacts, and civil minutes entered in the same
3 case prohibiting the sale, assignment, or transfer of the Artifacts.

4 And, of course, prejudice is a necessary predicate for reversal of
5 an evidentiary ruling. Latman, 366 F.3d at 786. The court did not abuse
6 its discretion in admitting the transcript.

7
8 **B. Compromise**

9 The party proposing a compromise has the burden of persuading the
10 bankruptcy court that it is fair and equitable:

11 In determining the fairness, reasonableness and adequacy of a
12 proposed settlement agreement, the court must consider:

13 (a) The probability of success in the litigation; (b) the
14 difficulties, if any, to be encountered in the matter of
15 collection; (c) the complexity of the litigation involved, and
16 the expense, inconvenience and delay necessarily attending it;
17 (d) the paramount interest of the creditors and a proper
18 deference to their reasonable views in the premises.

19 A & C Properties, 784 F.2d at 1381 (citations omitted).

20

21 **1. Trustee's Conflict of Interest?**

22 Venable interprets the settlement as encumbering property of the
23 Greco and Stallion Recoveries estates to secure a debt of SUSA. He
24 argues that the settlement created an actual conflict for the Trustee
25 warranting the appointment of separate trustees pursuant to Rule 2009(d).
26 That rule provides: "On a showing that creditors or equity security
27 holders of the different estates will be prejudiced by conflicts of
28 interest of a common trustee who has been elected or appointed, the court
29 shall order the selection of separate trustees for estates being jointly
30 administered." (Emphasis added.) But appellant brought no motion under
31 that rule.

1 The Trustee submitted a declaration with his motion to approve the
2 compromise, stating that he had considered how he would have handled the
3 matter had he been sole trustee for either of the other estates. He
4 concluded:

5 Looking solely at the interests of the [Greco and SRL]
6 estates, I simply would not want to expose the estate[s] to
7 the time, risks, and expense of litigation with Dr. Howell .
8 . . when I could enter into a stipulation that resolves the
9 disputes, reduces Dr. Howell's secured claim, eliminates all
10 interest on that claim, facilitates a disposition of the
11 Estate Artifacts by providing for the payment of the Costs of
12 Disposition without the necessity and uncertainty of surcharge
13 litigation, and even provides for recoveries to the Estates
14 before Dr. Howell's claim is fully paid.

15 Declaration of [the Trustee], 5 August 2005, paragraph 20. The
16 bankruptcy judge, acknowledging that the issue was intermingled with the
17 fairness of the settlement, considered whether there was a conflict or
18 prejudice to any of the estates as a result of being administered by a
19 single trustee.

20 The court concluded that there was no conflict, and no prejudice,
21 because the evidence showed that there were complex unresolved issues -
22 the ownership and value of the Artifacts, whether they were inventory,
23 whether the transfer to Howell was fraudulent - which would be very
24 expensive, time-consuming, and difficult to litigate, at least in part
25 because witnesses with pertinent information were no longer available.
26 The record is not clear on this latter point, but it appears Greco and/or
27 other witnesses had absconded with some of the Artifacts. See
28 Transcript, pages 39-40. Further, there were no funds in any of the
estates to pay for the litigation. The court concluded that, were the
estates administered by different trustees, those trustees would each be
looking for a reasonable way to get the assets sold and "split the

1 difference." Transcript, page 40. The proposed compromise does just
2 that.

3 The court found that no creditor would clearly be prejudiced by the
4 settlement. That one creditor might fare better under one scenario than
5 another did not lead to the conclusion that the settlement was
6 prejudicial:

7 I think the scenario you want to play out is that Mr. Venable
8 gets the Trustee and his counsel to pursue lengthy, complex,
9 speculative litigation at their own expense for the benefit of
10 your client, and that is not required of a Trustee. That is
11 simply above and beyond the Trustee's fiduciary duty to
12 balance all the interests of all the creditors and the debtor
13 [T]he only prejudice you've identified is that your
14 client didn't get to get the Trustee to do a litigation your
15 client thought needed to be done.

16 Transcript, page 43.

17 Venable has not demonstrated that these findings were clearly
18 erroneous, and thus has not shown a prejudicial conflict of interest.
19

20 **2. Fair and Equitable?**

21 The bankruptcy court found:

22 ● The settlement requires Howell to give up some of his
23 claims;

24 ● There are numerous unsettled issues that would be
25 complex and expensive to litigate: ownership and value of the
26 artifacts, whether they are inventory, and whether Howell's
27 security interest can be avoided as a fraudulent transfer;
28 The settlement preserves the possibility of something coming
into the estate, while litigation could completely deplete all
three estates;

● The settlement appears to be the only way to get an
auctioneer to sell the Artifacts, and the only way to monetize
the assets is to get the right person to sell them when there
is no money in the estate; and

● The settlement is not newly encumbering assets of the
Greco and Recoveries estates; rather it is recognizing the
fact that Howell may have a valid lien in Artifacts owned by
them. The liens are given in exchange for some chance of
recovery. There is no evidence of any chance of recovery
otherwise.

1 Transcript, pages 61-63.

2 The undisputed evidence submitted by Trustee supports the bankruptcy
3 court's conclusions. His declaration in support of the motion indicated
4 that the value of the Artifacts is uncertain, with estimates ranging from
5 \$125,000 to several million dollars. Further, he stated that it took him
6 over a year to find a qualified auctioneer willing to agree to a
7 "compensation structure appropriate for the Estates' cash situation" and
8 indicated that if that auctioneer were employed and the sale approved,
9 the first auction could take place in 120 days.

10 In addition, Trustee stated that, in evaluating the settlement, he
11 considered the expense and difficulty in obtaining evidence of ownership
12 and value of the Artifacts, and proving a fraudulent transfer, given the
13 fact that witnesses were no longer available. Considerations he cited
14 in favor of approving the settlement included a reduction in Howell's
15 claim, facilitation of a sale of the Artifacts, and the fact that the
16 settlement was structured so as to provide payment to the estates before
17 full payment of Howell's claim, all without the expenditure of time or
18 money for litigation.

19 Venable argues that the settlement was not fair and equitable
20 because the record is devoid of evidence that the Artifacts are
21 inventory, and thus Howell had no likelihood of success in prevailing on
22 the relief from stay motion (and presumably on any dispute over whether
23 his claim is secured). But Trustee did submit evidence that the
24 Artifacts were inventory: the unofficial § 341 meeting transcript
25 wherein Greco testified that the artifacts were held for sale; Venable's
26 own district court complaint against SRL and Greco alleging that Greco
27 promised Venable 50% of the profits realized by Stallion from the sale
28 of recovered artifacts, and civil minutes entered in 2004 in the same

1 district court action that prohibited sale, transfer, or assignment of
2 the artifacts. The bankruptcy court's determination that the compromise
3 was the only way to realize anything for the creditors was not clearly
4 erroneous, nor was the bankruptcy court's finding that there was no
5 prejudice in a single trustee administering the three estates.
6 Transcript, pages 61-64 and 42.

7 Viewing the evidence in light of the A & C Properties factors, we
8 cannot conclude that the bankruptcy court abused its discretion in
9 approving the settlement. The probability of success in litigation was
10 uncertain, given the absence of key witnesses; the issues were complex,
11 and litigation would be expensive and would further delay administration
12 of cases pending since 2004. Regarding the paramount interests of
13 creditors, the bankruptcy court correctly concluded that the settlement
14 likely provides more benefit to creditors generally than the pursuit of
15 difficult litigation which would primarily benefit one creditor. The
16 record contains no evidence as to the fourth A & C factor, difficulties
17 in collection, but its pertinence in this context is conjectural: without
18 the settlement, the Trustee would have no funds with which to obtain,
19 much less collect, a judgment.

20

21

VI. CONCLUSION

22 The bankruptcy court did not abuse its discretion in admitting the
23 § 341 transcript, as there was no prejudice.

24 Nor did the bankruptcy court abuse its discretion in approving the
25 trustee's motion to compromise.

26 Accordingly, we AFFIRM.

27

28