

DEC 17 2007

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NOT FOR PUBLICATION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

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|----|----------------------------|---|-------------------|-------------------|
| 6 | In re: |) | BAP No. | CC-07-1161-MkKuPa |
| 7 | SHERMAN ALEXANDER HEMSLEY, |) | Bk. No. | LA-02-13025-BB |
| 8 | Debtor. |) | Adv. No. | LA-06-01575-BB |
| 9 | HELEN RYAN FRAZER, |) | | |
| 10 | Chapter 7 Trustee, |) | | |
| 11 | Appellant, |) | | |
| 12 | v. |) | MEMORANDUM | ¹ |
| 13 | DAVID PULLMAN; STRUCTURED |) | | |
| 14 | ASSET SALES, LLC, |) | | |
| 15 | Appellees. |) | | |

Argued and Submitted on November 29, 2007
at Pasadena, California

Filed - December 17, 2007

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: Markell, Kurtz² 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.

² Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 This is an appeal of the bankruptcy court's finding that
2 Helen Frazer (the "Trustee") was not entitled to damages, fees,
3 or punitive damages, despite a previous holding that David
4 Pullman ("Pullman") and Structured Asset Sales, LLC ("SAS")
5 (collectively "Appellees") along with William Little ("Little")
6 attempted to, and did, control the sales price of certain
7 television residuals otherwise due to the debtor, Sherman Hemsley
8 ("Hemsley"), in violation of section 363(n).³

9 The bankruptcy court's order is AFFIRMED.

10 **I. FACTS**

11 On February 1, 2002, Hemsley, of "All in the Family" and
12 "The Jefferson's" fame, filed a voluntary chapter 7 petition.
13 Helen Frazer was appointed as trustee.

14 Hemsley was entitled to residuals from not only his
15 performance in the role of George Jefferson but from a number of
16 other performances as well. The Trustee disposed of certain,
17 though unspecified, residuals in settlement of a dispute with
18 Sony Pictures Entertainment, Inc. ("Sony"). The Trustee
19 advertised the remaining residuals ("Residuals") for sale at
20 public auction on an "as-is" basis without representations or
21 warranty as to value. The Trustee required only a \$4,000 deposit
22 to bid.

24 ³ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as
26 enacted and promulgated prior to the effective date (October 17,
27 2005) of the relevant provisions of the Bankruptcy Abuse
28 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036.

1 At the auction, held on April 27, 2005, participation was
2 active until bidding reached the \$70,000 range. Thereafter, a
3 two-way bidding war ensued, which Pullman ultimately won with a
4 bid of \$215,000, outbidding Little's final bid of \$214,000. On
5 May 9, 2005, the bankruptcy court approved the sale to Pullman.
6 On May 15, 2005, Pullman defaulted, forfeiting his \$4,000 deposit
7 but incurring no other damages.

8 After the auction but before defaulting on his agreement to
9 purchase the Residuals, Pullman negotiated an agreement with
10 Little. Under this agreement, Pullman and Little would share the
11 cost of default and Little would attempt to negotiate a private
12 purchase of the Residuals with the Trustee ("Bid Agreement").
13 The parties did not execute their collusive agreement, however,
14 until after Little had reached agreement with the Trustee to
15 purchase the Residuals at a price of \$85,000. After notice and a
16 hearing, the court entered an Order Approving Sales of Residuals
17 After Default by the Highest Bidder on July 6, 2005. Little paid
18 the purchase money to the Trustee.

19 The Trustee learned of the Bid Agreement after Little filed
20 a complaint seeking rescission of the Bid Agreement in Los
21 Angeles County Superior Court. Thereafter, she filed an
22 adversary proceeding against Pullman, SAS, and Little for
23 entering into a collusive agreement in violation of section
24 363(n). The Trustee reached, and on October 24, 2006, the
25 bankruptcy court approved, a settlement with Little to dismiss
26 the claims against him in return for a payment of an additional
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1 \$85,000.⁴ At this point the Trustee had collected \$170,000 with
2 respect to the Residuals.

3 On December 13, 2006, the bankruptcy court entered an order,
4 which held that Pullman and Little violated section 363(n). It
5 did require, however, an evidentiary hearing concerning the
6 Trustee's claims for recovery of damages and fees.

7 On March 22, 2007, the bankruptcy court expanded on its
8 previous finding that section 363(n) was violated, holding that
9 the Bid Agreement was "a collusive agreement, the intent of which
10 was to control the bidding, that actually resulted in controlling
11 the bidding." Hr'g Transcript at 226:9-12. The court, however,
12 also found that the Trustee had not met her burden of proof as to
13 the value of the Residuals and therefore was not entitled to
14 damages. Because she was not entitled to recover damages, the
15 court found that she was also not entitled to an award of costs,
16 attorneys' fees, or expenses. Finally, the bankruptcy court
17 found that the defendants did not enter the Bid Agreement with
18 willful disregard of the statute and therefore, the Trustee was
19 not entitled to an award of punitive damages. The Trustee
20 appeals.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
23 §§ 157(b) (2) (A) and (O). We have jurisdiction pursuant to 28
24 U.S.C. §§ 158(a) (1) and (b).

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27 ⁴ The bankruptcy court dismissed the adversary against
28 Little after ruling on the damages issue.

1 **III. ISSUES**

2 1) Whether the bankruptcy court erred in finding that the
3 Residuals' value did not exceed the collusive sales price, and
4 therefore, that the Trustee was not entitled to an award of
5 damages.

6 2) Whether the bankruptcy court erred in not awarding costs,
7 attorneys' fees, or expenses to the Trustee because the Trustee
8 did not recover damages.

9 3) Whether the bankruptcy court erred in not awarding
10 punitive damages on a finding that the collusive agreement was
11 not made in willful disregard of section 363(n).

12 **IV. STANDARDS OF REVIEW**

13 "We review the bankruptcy court's conclusions of law and
14 questions of statutory interpretation de novo, and factual
15 findings for clear error." Village Nurseries v. Gould (In re
16 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. B.A.P. 1999)
17 (citations omitted). A factual finding is clearly erroneous if
18 the appellate court, after reviewing the record has a firm and
19 definite conviction that a mistake has been committed. Wall St.
20 Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th
21 Cir. B.A.P. 2006).

22 **V. DISCUSSION**

23 At issue in this appeal is the Trustee's right, in light of
24 the bankruptcy court's earlier separate holding that the Bid
25 Agreement violated section 363(n), to damages, and to costs,
26 attorneys' fees, or expenses, and to punitive damages. Section
27 363(n) provides that, when a collusive agreement controls the
28 sales price, the trustee has two options: she may avoid the sale

1 or she may recover damages.⁵ In addition, under certain
2 circumstances the statute allows a trustee to recover costs,
3 attorneys' fees, expenses of avoidance or recovery, and punitive
4 damages.⁶

5 1) DAMAGES

6 A trustee may recover damages from a party to a collusive
7 agreement in an amount by which the value of the property sold
8 exceeds the price at which such sale was consummated. 11 U.S.C.
9 § 363(n).

10 The collusive price at which Little bought the Residuals was
11 \$85,000, leaving the question for the bankruptcy court of whether
12 the Residuals had a value in excess of that collusive sales
13 price. The bankruptcy court considered three "theories" put
14 forward by the Trustee to establish that the Residuals were worth
15 more than \$85,000: the sales price at auction established value;
16 Pullman's conduct after default was an admission of value

18 ⁵ The Trustee did not seek to avoid the sale in this case.

19 ⁶ Section 363(n) provides in full that:

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21 The trustee may avoid a sale under this section if the
22 sale price was controlled by an agreement among
23 potential bidders at such sale, or may recover from a
24 party to such agreement any amount by which the value
25 of the property sold exceeds the price at which such
26 sale was consummated, and may recover any costs,
27 attorneys' fees, or expenses incurred in avoiding such
28 sale or recovering such amount. In addition to any
recovery under the preceding sentence, the court may
grant judgment for punitive damages in favor of the
estate and against any such party that entered into
such an agreement in willful disregard of this
subsection.

1 established at the auction; and Pullman's expert appraisal with
2 adjustments by the Trustee established value. Ultimately the
3 court found that, despite this evidence, the Trustee did not, as
4 a factual matter, meet her burden of proof that the Residuals'
5 value exceeded \$85,000.

6 Although the record is not entirely clear as to whether the
7 bankruptcy court considered the sales price at auction as
8 evidence, both parties at hearing conceded that it did. After
9 considering it, however, the court discounted the \$215,000 bid
10 because it found that while a sales price at auction may
11 generally constitute evidence of value, it was not persuasive
12 evidence in this case.

13 The bankruptcy court based its conclusion on the fact that
14 there was a question in the bidders' and the Trustee's minds as
15 to whether the settlement with Sony removed the receivables due
16 for Hemsley's role as George Jefferson ("Jefferson Residuals")
17 from the estate. The inclusion of the Jefferson Residuals would
18 have made the Residuals significantly more valuable. Uncertainty
19 of what the asset was, however, was offset by the relatively low
20 cost of liquidated damages in the form of the \$4,000 deposit.
21 Therefore although the Residuals were sold "as is," the court
22 found that the bid price was not indicative of actual value.

23 The court also considered, but rejected, the Trustee's two
24 other theories as to value: that Pullman's conduct was an
25 admission of value and that appraisal by Pullman's expert could
26 establish value with proper adjustments.

27 As to Pullman's conduct, the bankruptcy court rejected the
28 Trustee's assertion that Pullman evidenced a willingness to pay

1 his bid price of \$215,000 by not backing out of the deal until
2 after having reached agreement with Little. The court agreed
3 that Pullman and Little had reached a deal in principle if not a
4 binding deal, prior to the actual default. The bankruptcy court,
5 however, believed Pullman's conduct was better interpreted as an
6 issue of timing rather than evidence of intent going to value.
7 It reached this conclusion on the basis that Pullman incurred
8 additional costs of hiring an attorney to formalize the agreement
9 prior to the default.

10 As to the expert valuation, the bankruptcy court agreed that
11 the Trustee had done an effective job refuting the assumptions
12 used by Pullman's expert. It found, however, that without the
13 aid of her own expert as to what the proper assumptions were,
14 mere assertions by the Trustee were not persuasive evidence as to
15 value. The court did not find an exact value based on the
16 expert's testimony. Rather, it found on balance that the Trustee
17 simply did not meet her burden of proof as to value against
18 expert testimony that was otherwise credible and plausible.

19 We give deference to the court with respect to factual
20 findings and particular deference to findings of fact based on
21 credibility. Anderson v. City of Bessemer City, N.C., 470 U.S.
22 564, 573-575 (1985); U.S. v. Hovsepian, 422 F.3d 883, 885 (9th
23 Cir. 2005); Hansen v. Moore (In re Hansen), 368 B.R. 868, 875
24 (9th Cir. B.A.P. 2007). See also Rule 8013. We cannot reverse
25 simply because we might have decided the case differently.
26 Anderson, 470 U.S. at 573. The bankruptcy court's findings have
27 a reasonable basis in the evidence. Therefore, the bankruptcy
28 court did not clearly err in deciding that the Trustee did not

1 meet her burden to prove that the value exceeded the collusive
2 sales price, and, thus, she was not entitled to damages.

3 2) FEES

4 A trustee may avoid a collusive sale or recover damages and
5 "may recover any costs, attorneys' fees, or expenses incurred in
6 avoiding such sale or recovering such amount." 11 U.S.C.
7 § 363(n).

8 By the plain language of the statute, the Trustee's recovery
9 of costs, attorneys' fees, and expenses is not absolute, but is
10 conditioned on either avoiding the sale or recovering some amount
11 in damages. Because the Trustee neither avoided the sale nor was
12 entitled to recover damages against either Pullman or SAS, the
13 bankruptcy court concluded she is not entitled to an award of
14 costs, attorneys' fees, or expenses. We agree with the
15 bankruptcy court and conclude that it did not err by declining to
16 award the Trustee any costs, attorneys' fees, or expenses.

17 3) PUNITIVE DAMAGES

18 A court may grant judgment to the trustee for punitive
19 damages only if a collusive agreement is entered in willful
20 disregard of the statute. 11.U.S.C. § 363(n). In order to
21 establish a "willful" violation of a statute, the defendant must
22 act with knowledge that his conduct was unlawful. McLaughlin v.
23 Richland Shoe Co., 486 U.S. 128 (1988) (adopting standard of
24 willfulness under the Age Discrimination Act as adopted in Trans
25 World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) under the
26 Fair Labor Standards Act). See Farmers Ins. Group v. Compos (In
27 re Compos), 768 F.2d 1155, (1985) (finding "willful" as used in
28 bankruptcy code to mean "deliberate or intentional").

1 In evaluating willful disregard of the statute, the
2 bankruptcy court considered correspondence between Pullman and
3 Little, the Bid Agreement, Pullman's statement that he had never
4 bid in a bankruptcy sale, testimony regarding assignment of the
5 Residuals to Pullman, and the Pullman/Little litigation.

6 The court found that, after Little entered into the
7 agreement with the Trustee for private sale of the Residuals,
8 Pullman had requested Little to instruct the Trustee to assign
9 the residuals directly to Pullman. It found this, along with the
10 fact that the parties had taken their dispute to a public forum,
11 to be persuasive evidence that Pullman did not know he was
12 violating section 363(n) when he entered into the Bid Agreement
13 with Little.

14 There is no other evidence in the record to support a
15 finding that Pullman willfully disregarded section 363(n).
16 Therefore, the bankruptcy court did not clearly err in not
17 awarding punitive damages.

18 VI. CONCLUSION

19 Giving deference to the bankruptcy court's findings of the
20 facts, as it must, the panel AFFIRMS the bankruptcy court's
21 order.

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