

DEC 20 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	HI-07-1265-KuPaMk
)		HI-07-1270-KuPaMk
JAMES WILLIAM LULL,)		(Consolidated)
)		
Debtor.)	Bk. No.	06-00898
)		
)	Adv. No.	07-90017
THE PATTI K. IRVINE REVOCABLE)		
TRUST DATED DECEMBER 21, 1992,)		
)		
Appellant,)		
v.)	M E M O R A N D U M ¹	
)		
RONALD K. KOTOSHIRODO; Chapter)		
7 Trustee; JEFFREY L. ULDRICKS;)		
THERESA LULL,)		
)		
Appellees.)		

Argued by Telephone and Submitted
on November 29, 2007

Filed - December 20, 2007

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Honorable Robert J. Faris, Chief Bankruptcy Judge, Presiding

Before: KURTZ,² PAPPAS and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP R. 8013-1

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

1 In a series of transactions from October 9, 2003, to July 25,
2 2005, he borrowed \$4,000,000 from the Trust. Of that sum, only
3 \$1,000,000 was repaid. Lull's default and Uldricks' relationship
4 with the Trust are the subjects of pending state court
5 litigation. One of the allegations in that lawsuit is that
6 Uldricks, as the putative representative of the Trust, released a
7 lien on property pledged to the Trust as collateral for Lull's
8 indebtedness. Consequently, Lull was able to sell the property
9 without paying the Trust.

10 This litigation involves a different piece of property,
11 known as the Duffy property, located at 4030 Pali Moana Place,
12 Kilauea, Kauai, Hawaii. On January 7, 2004, Lull loaned \$250,000
13 to Richard Duffy, Bonnie Duffy and Darda Hollands. The debt was
14 evidenced by a promissory note and secured by a mortgage. On
15 July 12, 2004, Lull assigned the note and mortgage to Uldricks.
16 When Ms. Hollands and the Duffys defaulted on the note, Uldricks
17 nonjudicially foreclosed and in June of 2005, he acquired title
18 to the property, subject to an existing first mortgage.

19 Although the record title to the property does not reveal
20 that Lull retained any interest in the property, the parties
21 agree he did. Lull retained an unrecorded one-half interest in
22 the property, with each investor responsible for one-half of the
23 carrying cost, primarily consisting of the substantial payments
24 due on the first mortgage. In other words, they agreed to share
25 the cost and split the profit. According to Uldricks, however,
26 the agreement contained an additional condition - if Lull failed
27 to pay his share of the carrying cost, he would forfeit his
28 unrecorded interest in the property. The record does not reveal

1 whether Lull agrees with Uldricks' contention that he lost his
2 interest in the Duffy place by failing to pay his share of the
3 carrying cost.

4 After Uldricks foreclosed on the Duffy property, Lull
5 assigned his interest in the property to the Trust as security
6 for his loans. In the Loan and Security Agreement, the parties
7 provided:

8 Section 5. Assignment of Duffy Property Rights. In
9 consideration of the loan, Lull does, **as security for**
10 **repayment of the loan, hereby irrevocably assign to**
11 **lender all of Lull's rights and interest** in and with
12 respect to a piece of real property on the Island of
13 Kauai, State of Hawaii, recently acquired in
14 foreclosure from Richard Duffy, et al, in which Lull is
15 a coinvestor with Jeffrey L. Uldricks. Lull authorizes
16 lender to file and record a UCC I in order to secure
17 this right. (emphasis added)

18 Significantly, the agreement is signed by Uldricks as
19 representative of the Trust. Later, the Trust would argue that
20 the security agreement's "irrevocably assign" language
21 constituted an immediate and outright transfer of Lull's interest
22 in the Duffy property to the Trust. Based upon the documents,
23 which show an intent to create a secured rather than an ownership
24 interest, this contention is difficult to sustain.

25 In December of 2006, Lull filed a petition for relief under
26 chapter 7 of the Bankruptcy Code. Ronald K. Kotoshirodo was
27 appointed to serve as chapter 7 trustee. Upon learning of Lull's
28 interest in the Duffy property, he filed an adversary proceeding,
alleging the UCC I was recorded within the preference period, and
seeking to set aside the transfer to the Trust. Later, this
preference action became the vehicle by which Uldricks sought to
sell the property free and clear of liens and encumbrances.

1 At a deposition, Uldricks testified that Lull lost his
2 interest in the Duffy property shortly before he filed his
3 chapter 7 bankruptcy petition. According to Uldricks, Lull's
4 interest in the property terminated when Lull failed to make his
5 share of the payments on the first mortgage. He further
6 testified that his investment in the property was \$281,857.56,
7 compared to Lull's investment of approximately \$175,000.

8 Approximately one month after his former partner filed for
9 bankruptcy protection, Uldricks found a buyer for the Duffy
10 property. He agreed to sell the property for \$2,900,000.
11 Thereafter he obtained a preliminary title report that showed
12 Uldricks as the owner of the property, subject to a first
13 mortgage. The same title report revealed a number of title
14 issues, including litigation and the trustee's lis pendens, that
15 might have made closing the transaction difficult. For that
16 reason, Uldricks sought the assistance of the bankruptcy court
17 and filed a motion in the trustee's adversary proceeding to sell
18 the Duffy property free and clear of liens and encumbrances.

19 Uldricks' motion brought immediate opposition from the other
20 parties in that litigation. The trustee opposed the sale because
21 the sale offered no benefit to the estate. The Trust also
22 opposed the sale, arguing that the bankruptcy court lacked
23 authority to order the sale because the estate had no interest in
24 the property, Lull's interest having been transferred to the
25 Trust. Additionally, the Trust asserted that the proceeds from
26 any sale of the property should remain with the court, until
27 Uldricks accounted to the Trust for his Trust-related activities.
28 In other words, while the Trust generally opposed the sale, it

1 indicated some interest in a sale that left Uldricks' share on
2 the table to satisfy the Trust's claims against him.

3 After considering the parties' various positions, the court
4 questioned it's authority to sell the property in which the
5 estate held a disputed 50% interest and expressed a reluctance to
6 order a sale opposed by the trustee. Additionally, the court
7 doubted that it should become involved in the dispute between the
8 Trust and Uldricks, which was currently being played out in state
9 court. Arguably the court's tentative ruling placed Uldricks in
10 a difficult position. The court would not approve the sale
11 unless the estate had an interest in the property and would
12 benefit from the sale. And the sale likely could not close
13 without a court order authorizing a sale. In response to these
14 obstacles, Uldricks entered into an agreement with the trustee.

15 Uldricks agreed to acknowledge the estate's 50% interest in
16 the Duffy property in exchange for the trustee's agreement to
17 join in his motion to sell the property and to allow him to
18 recover his monies directly from the sale proceeds. This
19 agreement cleared up two of the three obstacles to obtaining the
20 court's authorization for the sale: the interest of the estate in
21 the transaction and the support of the trustee. The third
22 obstacle, the opposition of the Trust, remained unresolved.

23 Apparently persuaded by the stipulation between Uldricks and
24 the trustee, the court ruled that the joint motion for the sale
25 free and clear of liens and encumbrances should be granted. The
26 order contained the following:

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S T I P U L A T I O N

- 1 . Defendant Uldricks and the bankruptcy estate are
2 co-owners of the real property situated at 4030
3 Pali Moana Place, Kilauea, Hawaii (the "Real
4 Property") with each owning a 50% interest;
- 5 . Defendant Uldricks shall have an allowed claim
6 for any unreimbursed portion of James Lull's
7 ("Debtor") 50% share of the carrying costs of the
8 Real Property incurred by Defendant Uldricks from
9 and after December, 2005, each of the Defendant
10 Uldricks and the Trustee reserving their
11 respective rights and positions, however, with
12 respect to the issue of whether Defendant
13 Uldricks' allowed claim is secured by the Real
14 Property in whole or in part, or an unsecured
15 claim; and
- 16 . Each of the Defendant Uldricks and the Trustee
17 expressly reserves all other claims and rights
18 that each has or may have against the other.

13 In authorizing the sale, the court indicated that only the
14 estate's interest in the property would be sold free and clear of
15 liens, with liens attaching to the estate's share of the
16 proceeds. The court opined that it did not have authority to
17 order a sale of Uldricks' interest free and clear of liens. In
18 the court's opinion, this left the Trust and any other creditor
19 of Uldricks free to take action against Uldricks' share. In
20 effect, the court denied the Trust's request that Uldricks' share
21 of the sale proceeds remain under court control until Uldricks
22 accounted for his Trust-related financial activities and
23 authorized the disbursement of one-half of the net sale proceeds
24 to Uldricks.

25 The order authorizing the sale was entered on June 27, 2007.
26 The same day, the Trust appealed. The next day, the trustee
27 filed a motion to amend the sale order, to include a finding that
28 the trustee was selling the Duffy property to a good faith

1 purchaser. The Trust opposed this motion arguing that the appeal
2 divested the court of jurisdiction to enter an order that might
3 affect the outcome of the Trust's appeal. In response, the
4 trustee argued that the Trust's hasty filing of the notice of
5 appeal did not impair the authority of the bankruptcy court to
6 entertain a timely motion under Fed. R. Civ. P. to amend or add
7 to the findings of fact or conclusions of law. The court
8 accepted the trustee's argument and amended its order to include
9 a finding that the buyers of the real property were purchasing
10 the property in good faith. The amended order was entered on
11 July 5, 2007. The Trust appealed on the same day.

12 13 **JURISDICTION**

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 157 (b) (2) (F), and (N). This panel has jurisdiction pursuant
16 to 28 U.S.C. § 158.

17 18 **ISSUE**

19 The Trust appealed both the original and amended orders
20 authorizing a specific sale. After the appeal was filed, the
21 sale failed to close. The Trust offered to withdraw the appeal,
22 provided the other parties agreed to vacate the sale orders.
23 Uldricks refused, explaining that he was considering legal action
24 against the proposed purchaser for damages. Thereafter the
25 parties submitted the following stipulation to this court for
26 approval:

27 ...the amended sale order appeal shall be
28 dismissed and following issues shall be deemed

1 moot for purposes of this appeal:

2 A. Whether the U.S. Bankruptcy Court for the
3 District of Hawaii had jurisdiction to rule on the
4 Trustee's Motion to Approve Sale of Real Property
5 Situated at 4030 Pali Moana Place, Kilauea, Kauai,
6 Hawaii, Free and Clear of Liens and Encumbrances
7 after the June 28, 2007 Notice of Appeal was
8 filed;

9 B. Whether the U.S. Bankruptcy Court for the
10 District of Hawaii erred in applying the standard
11 of when a Motion to Amend Order can be granted
12 after a Notice of Appeal of the Order is filed;
13 and

14 C. Whether the U.S. Bankruptcy Court for the
15 District of Hawaii erred when it found that there
16 was sufficient basis for a finding of "good faith"
17 in the record even though it was not initially
18 requested by the Trustee or Uldricks in the
19 underlying Motion or specified in the Order.

20 The issue on appeal is whether the remaining issues are moot.

21

22 **STANDARD OF REVIEW**

23 Initially, the plaintiff bears the burden of establishing
24 that the court has jurisdiction. Fed. R. Civ. P. 12(b)(1). The
25 court, in turn, has an independent obligation to ensure that it is
26 acting within the scope of its jurisdictional authority, which
27 includes the obligation to consider the possibility of mootness.
28 In re Burrell, 415 F.3d 994, 997 (9th Cir. 2005). When a case

1 becomes moot on appeal, the appellate court usually vacates the
2 decision under review. The United States v. Munsingwear, Inc.,
3 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

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DISCUSSION

6 Does the fact that the sale fell through render all issues
7 raised in this appeal moot? The appeal is moot if no live
8 controversy remains at the time the Bankruptcy Appellate Panel
9 hears it. GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir.
10 1994). "Mootness is a jurisdictional question because the court
11 is not empowered to decide moot questions or abstract
12 propositions; our impotence to review moot cases derives from the
13 requirement of Article III of the Constitution under which the
14 exercise of judicial power depends upon the existence of a case or
15 controversy." North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct.
16 402, 30 L.Ed. 2d 413 (1971). In other words, an appeal is moot
17 when affirming the decision "would ostensibly require something to
18 be done which has already taken place," and a reversal of the
19 decision "would ostensibly avoid an event which has passed beyond
20 recall." Brownlowb v. Schwartz, 261 U.S. 216, 217-8, 43 S.Ct.
21 263, 67 L.Ed. 620 (1923). Consequently, if an appeal becomes moot
22 while pending, it must be dismissed. In re Pattullo, 271 F.3d
23 898, 900 (9th Cir. 2001).

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In this case, the Trust asks us to invalidate the sale order
because the court lacked authority to order a sale of the
property. The Trust also asks the panel to rule that the Trust
and Uldricks are co-owners of the Duffy property and that the

1 Trust is entitled to the remedy of an accounting before any sale
2 proceeds will be distributed.

3 In the briefs, only the trustee addresses the issue of
4 mootness. He concedes that most of the issues regarding the sale
5 are unique to the sale and moot. The one issue on appeal that the
6 trustee believes remains alive is whether Lull made an outright
7 conveyance to the Trust of his interest in the Duffy property.
8 The trustee argues that this issue is not moot because efforts are
9 being made to find a new buyer. If not resolved, the trustee
10 contends that this issue will again arise when a new buyer is
11 found and an order authorizing the sale is sought.

12 The mootness rule is designed to prevent the court from
13 offering advisory opinions. In our legal system, the trial court
14 gets the first opportunity to be right or wrong about a disputed
15 matter. There are four generally recognized exceptions to the
16 mootness doctrine. They are:

- 17 (1) The issue is a wrong capable of repetition yet
evading review;
- 18 (2) There are secondary or collateral injuries;
- 19 (3) The appellee or defendant voluntarily stops
the allegedly illegal practice but is free to
20 resume it at any time; and
- 21 (4) The action is a properly certified class
action suit.

22 In re Burrell, 415 F. 3d 994, 998 (9th Cir. 2005).

23 The trustee appears to be arguing the first exception. Stated
24 differently, he contends that the court's error will be repeated
25 and escape review.

26 The Trust maintains that there was an absolute assignment of
27 Lull's interest in the Duffy property and, as a consequence, Lull
28 had no interest in the property at the time he filed his

1 bankruptcy petition. The trustee disagrees. On appeal, the Trust
2 offers sparse authority for its position other than the language
3 of the document. By contrast, the trustee relies upon case law
4 and statutory authority, which provides that the transfer of an
5 interest in real property made as security for performance of
6 another act does not pass title. Haw. Rev. Stat. §506-1(a) (2007)
7 and Makuakane v. Tanigawa, 443 P.2d 153 (Hawaii 1968). At the
8 hearing on the motion to sell the property, the court did not
9 specifically address this issue. The court appeared to regard the
10 issue as one that should be considered after the property was
11 sold. When the court ordered the sale, the court avoided ruling
12 on the dispute between Uldricks and the Trust.

13 The trustee's issue does not fall within "capable of
14 repetition yet evading review" exception. In Weinstein v.
15 Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed. 2d 350,
16 (1975), the court held that the "capable of repetition yet evading
17 review" doctrine is limited to situations in which the following
18 two circumstances are simultaneously present: (1) the challenged
19 action was in duration too short to be fully litigated prior to
20 cessation or expiration, and (2) there was a reasonable
21 expectation that the same complaining party would be subjected to
22 the same action again." Id. Unless both prongs of the test are
23 met, the case will not escape mootness on this ground. Id. Here,
24 there is no reason why the trustee could not raise this issue
25 before the court prior to any sale. In fact, the issue should be
26 resolved before the court orders a sale. Darby v. Zimmerman (In
27 re Popp), 323 B.R. 260, 268-71 (9th Cir. BAP 2005) (holding the
28 court should not authorize sale of real property free and clear of

