NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. EW-07-1210-KMoJ
SPOKANE RACEWAY PARK, INC.,	)	Bk. No. 06-01966
Debtor.	)	
ROBERT E. KOVACEVICH,	)	
Appellant,	)	
v.	)	**MEMORANDUM**[*]
JOHN D. MUNDING, Chapter 11 Trustee,	)	
Appellee.	)	

Argued and Submitted on November 30, 2007
at Seattle, Washington

Filed – December 13, 2007

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

Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and JURY, Bankruptcy Judges.

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[*]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.

Debtor is a closely held corporation that filed for chapter 11 reorganization while it was a party to numerous lawsuits pending in both federal and state court. Through mediation, partial settlement of the disputes between the debtor and its partnership, on the one hand, and the opposing party, on the other hand, was reached. The bankruptcy court granted the chapter 11 trustee's motion to approve the settlement over objection by the appellant creditor, who was also a shareholder, officer, and former attorney of debtor.

As there has not been a stay pending appeal of the court order, the settlement has been concluded in circumstances that would be difficult to unravel. Accordingly, we DISMISS this appeal as moot.

Alternatively, we AFFIRM the trial court's approval of the trustee's motion to approve the settlement agreement.

FACTS

Spokane Raceway Park, Inc. ("SRP") was formed as a closely held corporation in the state of Washington in 1971 to manage and oversee the development of a motor racing stadium complex on 640 acres of vacant land located in the vicinity of Airway Heights, Washington.

After SRP's formation, Washington Motorsports Limited ("WML"), a general partnership, was created to own, develop, operate, and be the general manager of the motor racing stadium to be known as "Spokane Raceway Park." WML owns the land upon which the raceway was constructed. SRP was designated as WML's sole general partner.

In 1994, SRP entered into an agreement with the Kalispel Tribe of Indians ("Tribe") creating a joint venture known as the KNAEZ Joint Venture ("Joint Venture") to develop, for profit, a business enterprise zone of 20 acres of a 40-acre property adjacent to the Spokane Raceway Park.[1] The 40-acre property is currently the subject of litigation in state court.

A number of other agreements and leases were entered into between the parties.

As a result of various disputes, SRP, WML, and the Tribe have been involved in various legal actions pending in state and federal court since 2003: (1) the United States District Court for the Eastern District of Washington, Kalispel v. Spokane Raceway Park, Inc., Case No. 03-CV-0423-EFS ("Federal Court Action"); (2) the Spokane County Superior Court, Spokane Raceway Park, Inc. v. Kalispel Tribe of Indians, Case No. 03-02-07706-7 ("State Court Action"); (3) the Spokane County Superior Court, Materne, et al. v. Spokane Raceway Park, Inc., Case No. 03-2068564 ("Receivership Action"); and (4) the United States Bankruptcy Court for the Eastern District of Washington, In re Spokane Raceway Park, Inc., Case No. 06-01966-PCW11 ("Bankruptcy Case").

On August 17, 2006, SRP filed for chapter 11 bankruptcy relief in Washington. The bankruptcy court appointed appellee

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[1]Previously, SRP, as general partner of WML, gift-deeded the 40-acre property to the United States in trust for the Tribe. In 1996, the Bureau of Indian Affairs proclaimed the entire 40-acre property to be part of the Kalispel Indian Reservation. WML owns the other land immediately to the north and west of the 40-acre property, on which SRP operated its raceway complex.

John D. Munding ("trustee") as the chapter 11 trustee, pursuant to 11 U.S.C. § 1104.

In the State Court Action, the state court entered an order dissolving the Joint Venture, on October 22, 2004 (Case No. 03-02-07706-7). Furthermore, in the Receivership Action, on June 1, 2006, the state court determined that any interest SRP had in the Joint Venture was held for the benefit of WML. Accordingly, in the Bankruptcy Case, by order of the bankruptcy court on January 30, 2007, any interest SRP may have had in the Joint Venture was abandoned from the bankruptcy estate by the trustee.

On February 1, 2007, in attempting to resolve the disputes between the Tribe and SRP and WML, the trustee, on behalf of SRP, WML's receiver, on behalf of WML, and the Tribe engaged in an all-day mediation. Partial settlement was reached, memorialized by the "Settlement Agreement and Mutual Release" ("Settlement Agreement"), which resolved certain claims between SRP and WML, on the one hand, and the Tribe, on the other hand, subject to the terms and conditions set forth therein.[2] However, the Settlement Agreement did not resolve any of the pending disputes in the foregoing litigation or otherwise which exist solely between SRP and WML, nor did the Settlement Agreement attempt to allocate settlement proceeds.

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[2]Under the Settlement Agreement, the Tribe released WML and SRP, and WML and SRP released the Tribe from litigation in the Federal Court Action (Case No. CS-03-0423-EFS) and in the State Court Action (Case No. 03-2-07706-7), as well as any current or potential counterclaims. The mutual releases between SRP and WML, on the one hand, and the Tribe, on the other hand, further applied to any current or potential claims in the Receivership Action (Case No. 03-2068564) and in the SRP Bankruptcy Case (Case No. 06-01966-PCW11).

Subject to approval by (1) the bankruptcy court in SRP's bankruptcy case, (2) the state court in the Receivership Action, and (3) the Tribal Council for the Tribe, and in exchange for mutual releases from the claims between WML and SRP on the one hand and the Tribe on the other, the Tribe agreed to pay $2.45 million to WML and SRP jointly in consideration for WML's and SRP's conveyance of their interests in approximately 2.9 acres of real property commonly known as "Pit Road," upon which the Tribe agreed to convey to WML whatever interest it had in approximately 10 acres of WML's property.[3]

The trustee filed a motion seeking approval of the Settlement Agreement under Federal Rule of Bankruptcy Procedure 9019 on February 15, 2007.[4]

Appellant Robert E. Kovacevich, a 10 percent shareholder of SRP who holds a general unsecured claim for unpaid attorney's fees, objected to the settlement.[5] Appellant also formerly served as legal counsel and tax advisor to SRP, and was an officer of SRP.

Appellant objected to the settlement because the Tribe allegedly owed SRP over $17 million as a result of the

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[3]Pit Road, a part of the WML property where SRP operated its raceway, runs along Sprague next to the Tribe's Northern Quest Casino. The casino is located on the Tribe's trust lands.

[4]Trustee's motion to approve the compromise and settlement was served on over 626 parties in interest, only four of which filed objections. By the time of the hearing, only SRP president and majority shareholder, Orville Moe, and appellant continued to oppose the settlement.

[5]Currently, there has been no objection to the proof of claim.

arbitrator's decision on June 8, 2005. In addition, appellant argued that the Tribe's $2.4 million total payment to SRP and WML in consideration for 2.9 acres of Pit Road was unfair, given that the arbitrators had valued the land at $3.1 million per acre.

At the request of the trustee, a briefing schedule and evidentiary hearing were set to allow the bankruptcy court to consider the merits of and objections to the proposed settlement. The appellant chose to rest on the merits of his objection in his brief, while the trustee submitted a brief and declarations in support of the motion.

An all-day evidentiary hearing on the motion for approval of the compromise and settlement occurred on May 10, 2007.[6] The bankruptcy court reviewed the briefs and evidence submitted by the parties, including direct evidence through the declarations offered by the trustee; cross examination; and exhibits from the trustee, WML's receiver, and the appellant.

Subsequently, the bankruptcy court made oral findings of fact and conclusions of law on May 15, 2007. After examining whether the Settlement Agreement is fair and equitable, and taking into account the four factors required by the Ninth

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[6]Because of appellant's status as an insider of SRP, at the evidentiary hearing, the bankruptcy court first dealt with the issue of whether the appellant, as debtor's former lawyer, who holds a general unsecured claim under the Bankruptcy Code, had a right to object to the debtor's proposed settlement of litigation where the appellant holding the unsecured claim formerly represented the debtor in that litigation. Although it recognized issues of potential conflicts of interest and issues of attorney-client privilege, the bankruptcy court concluded that the appellant, even though he was former counsel for debtor, may file the objection to the motion to approve the settlement (which he did), and may participate in the proceeding regarding such motion, in his capacity as an unsecured creditor of SRP.

Circuit: (1) the probability of success in litigation; (2) the difficulty of collection; (3) the complexity and expense of litigation; and (4) interests of the creditors,[7] the bankruptcy court concluded that the compromise was fair and equitable as to SRP, and approved the Settlement Agreement.

The bankruptcy court's order authorizing compromise of claims and approving the Settlement Agreement was entered on May 17, 2007.

Also, within the same period of time, the state court in the Receivership Action heard a similar motion filed by WML's receiver regarding approval of the same Settlement Agreement. The state court granted approval of the Settlement Agreement as to WML after the bankruptcy court approved the settlement.

Appellant timely appealed the bankruptcy court's order.

There has been no stay pending appeal of this court order.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

(1) Whether this appeal is moot.

(2) Whether the court erred in approving the Settlement Agreement between WML and SRP, on the one hand, and the Kalispel Tribe of Indians, on the other hand, based on the evidence presented.

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[7] See Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986).

STANDARD OF REVIEW

Mootness is a jurisdictional issue that we may raise and resolve sua sponte. S. Or. Barter Fair v. Jackson County, Or., 372 F.3d 1128, 1133 (9th Cir. 2004).

The bankruptcy court's decision to approve the Settlement Agreement is reviewed for abuse of discretion. A & C Props., 784 F.2d at 1380; Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415 (9th Cir. BAP 2003) ("Mickey Thompson").

A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Otherwise, we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Mickey Thompson, 292 B.R. at 420.

DISCUSSION

Beyond the appellant's position that he opposes the Settlement Agreement, it is difficult to follow his arguments. Providing neither citations to the record nor adequate excerpts of record in support of his position on appeal, the appellant appears to be challenging the underlying factual findings of the bankruptcy court. Instead of providing arguments for reversal of the court's decision, the appellant merely reargues the merits and contends that the trustee was negligent and foolish in failing to properly perform his duties.

In response, the trustee contends that the bankruptcy court was correct in determining that the settlement was fair and equitable in light of the four required factors. In addition, the trustee argues that the present appeal is frivolous and requests that the appellant be required to show cause why sanctions should not be levied against appellant and his attorney pursuant to Federal Rule of Bankruptcy Procedure 8020. However, the trustee did not file a separate motion required by Rule 8020.

We first recognize that the issue is moot in light of recent developments. However, regardless of the mootness issue, we nevertheless hold that the bankruptcy court did not abuse its discretion in approving the settlement. Finally, we address the trustee's argument that the present appeal is frivolous and warrants sanctions.

I

A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Kescoli v. Babbitt, 101 F.3d 1304, 1308 (9th Cir. 1996). An appeal is moot and vulnerable to dismissal if an event occurs while the case is pending on appeal that makes it impossible for the court to grant any effectual relief whatsoever to a prevailing party. IRS v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001).

Although the appellant appeals the court order approving the Settlement Agreement, the order was not stayed pending this appeal. Thus, the trustee was free to act, and the settlement has been concluded. The appellant did not offer any contrary

evidence that the agreement between SRP and WML, on the one hand, and the Tribe, on the other hand, has not been concluded. Nor, after being asked at oral argument, did he offer any meaningful suggestion as to how effective appellate relief could be afforded.

We lack jurisdiction to hear a moot appeal and are persuaded that it is moot. See Pattullo, 271 F.3d at 901. Accordingly, we dismiss this appeal as moot.

II

In the alternative, if the appeal is not moot, then we nevertheless hold that the bankruptcy court did not abuse its discretion in granting the trustee's motion for approval of the Settlement Agreement.

The bankruptcy court has great latitude in the approval of compromise agreements, as long as it is fair and equitable to the creditors. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 619 (9th Cir. 1987).

In determining whether a settlement is fair and equitable, the court must consider the following four factors:

(a) the probability of success in litigation;

(b) the difficulties, if any, to be encountered in the matter of collection;

(c) the complexity of the litigation involved, and the expense, inconvenience, and delay attending it; and

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Woodson, 839 F.2d at 620; A & C Props., 784 F.2d at 1381; Mickey

Thompson, 292 B.R. at 420.

In applying the four required factors to the evidence presented during the day-long evidentiary hearing, the parties' briefs, declarations, and exhibits, the bankruptcy court concluded that the Settlement Agreement was fair and equitable as to SRP and subsequently approved it.

Reviewing each of the factors examined by the bankruptcy court, we hold that the bankruptcy court did not abuse its discretion in this regard. The court made sufficient factual findings to support its conclusion that the Settlement Agreement was fair and equitable and should be approved. See A & C Props., 784 F.2d at 1383.

A

As to the first factor, the bankruptcy court concluded that the probability of SRP's success in litigation was uncertain.

When assessing a compromise, courts need not rule upon disputed facts and questions of law, but rather need only canvass the issues. Burton v. Ulrich (In re Schmitt), 215 B.R. 417, 423 (9th Cir. BAP 1997). A mini-trial on the merits is not required. Id.

In determining that the possibility of debtor's success in litigation was questionable, the court discussed the complex issues involved in the two underlying lawsuits (Federal Court Action and State Court Action). The court noted that the complicated factual disputes embedded in the lengthy relationship between the Joint Venture and the Tribe would require significant discovery efforts and significant amount of trial time to

resolve.

Although the appellant attempts to argue the merits and raise factual disputes in his brief, it was sufficient for the court merely to detail the numerous issues without conducting a mini-trial on the merits.

By weighing the complexity of the issues involved in the pending actions, the court did not err in its determination that SRP's probability of success in litigation was uncertain.

B

The court then examined the difficulty of collecting any judgment by noting that the issue of the Tribe's sovereign immunity may apply, which also complicates SRP's likelihood of success on the merits.

By determining that collection of any judgment against the Tribe could be difficult and would require litigation specifically relating to those collection efforts, the court considered evidence of the Joint Venture agreement provision that limited the Tribe's liability by providing that the Tribal trust lands or proceeds therefrom could not be used to pay any resulting judgment.[8]

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[8]The relevant portion of the Joint Venture agreement limiting the Tribe's liability provides:

> In no event will a decision against the Tribe subject Tribal trust lands or proceeds from those lands to be a part of a judgment.

Appellee's E.R. Tab 18 at 268 (Decl. of James H. Jordan Re Reasonableness of Settlement, Attach. 2 at 5).

The court also recognized that, because the nature and extent of the waiver of sovereign immunity contained in the Joint Venture agreement was also in dispute, complex sovereign immunity issues would further complicate the likelihood of success on the merits and collection of a judgment by SRP.

Moreover, the evidence before the court established an additional hurdle to collecting any proceeds in the fact that the state court had previously ruled that SRP's interest in the Joint Venture litigation was held for the benefit of WML.

In light of the evidence presented to the court, the court's assessment of the difficulty of collecting any judgment was not in error.

C

Next, the court analyzed the complexity of litigation and the expense and delay to the debtor.

The function of compromise is to avoid litigation involving delay and expense unless there appears to be a sound legal basis for the litigation and the likelihood of substantial ultimate benefit to the estate. Official Creditors' Comm. v. Beverly Almont Co. (In re The General Store of Beverly Hills), 11 B.R. 539, 541 (9th Cir. BAP 1981).

The court considered the evidence of the Tribe's commitment to continue to litigate the sovereign immunity issues through the entire appellate process, the complexity of sovereign immunity issues itself, the doubt as to whether the debtor had the financial resources to carry the pending litigation to final resolution, and the delay to creditors.

The evidence established numerous complex issues, including jurisdictional questions between the state and federal court, whether the United States is a necessary party, overlapping rights of SRP and WML, and sovereign immunity, in addition to the underlying merits.

In reviewing the court's analysis, we agree that the evidence relied on by the court established the complexity of litigation, and the attendant expense and delay. A sound legal basis for litigation does not appear to exist to accept the delay and expense surrounding litigation.

D

Finally, the fourth factor requires an examination of the interest of creditors with deference to their reasonable views.

The trustee contends that the evidence establishes that the trustee satisfied his duty to the creditors of SRP's estate by considering and evaluating the risks of litigation, potential for recovery, numerous documents, court records, and the position of the appellant, prior to mediation.

In its analysis, the court considered the interests of all the creditors, including WML and the objecting creditors, appellant and the SRP president. Recognizing the objecting creditors' concern that WML's exchange of 2.9 acres in consideration for $2.45 million was unfair because the fair market value of the land was allegedly greater, the court reiterated that SRP does not own, manage or have an interest in

that acreage, WML does.[9] Consequently, as to the debtor SRP, the court determined that the settlement was fair and equitable.

The court noted that the state court Receivership Action was still pending and in the process of evaluating the Settlement Agreement from the perspective of WML. In fact, after the bankruptcy court's approval of the settlement, the state court has also approved the Settlement Agreement as to WML.

While creditors' objections to a compromise are afforded due deference, such objections are not controlling. A & C Props., 784 F.2d at 1382. And, while the court must preserve the rights of creditors, it must also weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate. Id.

In addressing the creditors' objections, the court also considered the interest of SRP as the bankrupt estate and determined the settlement was fair and equitable as to SRP. We agree.

The court also noted that the Settlement Agreement was not intended to be a global settlement among all parties, and thus, it did not affect the claims in litigation among the remaining parties.

While an approval of a compromise, without a factual foundation sufficient to establish that it is fair and equitable, may constitute an abuse of discretion, the record in the case

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[9]The situation was further clouded by SRP's potential additional exposure due to its status as WML's former general partner and the state court's ruling that SRP had breached its fiduciary duties.

before us provides a solid factual foundation to support the bankruptcy court's approval of the compromise. See A & C Props., 784 F.2d at 1383.

The appellant did not articulate a coherent explanation of the threat posed to his claim by the compromise. See id. at 1384.

The policy of the law favors compromise over litigation, and so long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision will be affirmed. A & C Props., 784 F.2d at 1381.

Thus, we hold that the court did not abuse its discretion in approving the settlement because the court examined all four factors adequately in making a full and independent assessment that the compromise was fair and equitable. This determination is supported by the record, including record of the day-long evidentiary hearing. Id. at 1384.

III

In his brief, the trustee requests that we find the present appeal frivolous and impose sanctions against the appellant and his attorney, pursuant to Rule 8020. The trustee contends that the appellant's brief does not comply with bankruptcy appellate procedure, does not apply the appropriate standard of review, mischaracterizes the bankruptcy court's ruling, improperly reargues the issue de novo without citations to evidence in support of his arguments, misstates facts, and is a personal attack on the trustee himself.

Rule 8020 allows the bankruptcy appellate panel to award sanctions for a frivolous appeal only after a separately filed motion or notice from the bankruptcy appellate panel and reasonable opportunity to respond. Fed. R. Bankr. P. 8020; Simpson v. Burkart (In re Simpson), 366 B.R. 64, 77 (9th Cir. BAP 2007). This Rule is strictly enforced. Tanzi v. Comerica Bank-California (In re Tanzi), 297 B.R. 607, 613 (9th Cir. BAP 2003). A request for sanctions in a party's appellate brief is insufficient to allow for the imposition of sanctions. Simpson, 366 B.R. at 77.

No separate motion was filed requesting that sanctions be imposed for an allegedly frivolous appeal. Thus, although we recognize the inadequacy of appellant's brief, appellant was not given sufficient notice and opportunity to respond to the request. Tanzi, 297 B.R. at 613. Accordingly, we deny the trustee's request for sanctions without prejudice.

CONCLUSION

Without a stay pending appeal, the Settlement Agreement between SRP and WML, on the one hand, and the Tribe, on the other hand, has been concluded in circumstances too complex to be unraveled. Thus, we DISMISS this appeal as moot.

Alternatively, if the appeal is not moot, we AFFIRM the trial court's approval of the Settlement Agreement. The court adequately examined the various factors in making its assessment that the settlement was fair and equitable as to the debtor SRP. Thus, the court did not abuse its discretion in approving the Settlement Agreement between WML and SRP, on the one hand, and

the Kalispel Tribe of Indians, on the other hand, based on the evidence presented.

Further, we deny the trustee's request for sanctions, without prejudice, as procedurally incorrect.