NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-07-1075-PaAK
COLLEGE PROPERTIES, LTD.;, COLLEGE PROPERTIES, II, LTD.,	Bk. Nos. 05-10095 05-15155 (jointly administered)
Debtors.	
ANTHONY DEPETRIS and PATRICIA PALMER,	
Appellants,	**M E M O R A N D U M**[1]
v.	
BRIAN J. MULLEN, Chapter 11 Trustee,	
Appellee.	

Argued and Submitted on July 26, 2007
at Phoenix, Arizona

Filed - August 14, 2007

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

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Before: PAPPAS, AHART[2] and KLEIN, Bankruptcy Judges.

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[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. Alan M. Ahart, United States Bankruptcy Judge for the Central District of California, sitting by designation.

This is an appeal from the bankruptcy court's approval of a settlement agreement and comprehensive release ("the SACR") entered into between the Debtors, the debtor in a related bankruptcy case, Debtors' chapter 11[3] trustee, and several other parties to two adversary proceedings in the bankruptcy cases. We DISMISS this appeal on the grounds of equitable mootness.

FACTS

The settlement agreement at issue in this appeal involves complex interactions and transactions among numerous parties.

The Parties and the Real Property

Debtors College Properties, Ltd. ("CPI"), formed February 20, 1985, and College Properties, II, Ltd. ("CPII"), formed June 26, 1985, are limited partnerships established to acquire real property for investment purposes. The disclosure statements attached to the limited partner solicitations described these investments as "highly speculative." Investors made small down payments and additional investments over the years. Thomas D'Ambrosio ("D'Ambrosio") is the general partner of both Debtors. Appellants Anthony DePetris and Patricia Palmer, along with Landis Mitchell, were among the limited partners.[4]

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 10908, April 20, 2005, 119 Stat. 23.

[4] Although Mitchell joined with DePetris and Palmer in challenging the SACR in the bankruptcy court, he has not joined in this appeal, and has accepted the settlement agreement and received a distribution from Trustee.

Shortly after their formation, in two transactions on March 29, 1985, and July 19, 1985, Debtors acquired parcels of undeveloped real property in Black Mountain Estates, Pinal County, Arizona (the "Real Property") for $826,000.

In 1999 and 2000, Debtors sold the Real Property in two transactions to Casa Del Oro Development, LLC ("Casa Del Oro"), receiving $300,000 in cash, together with a single consolidated note ("Debtors' Consolidated Note") for the unpaid portion of the purchase price in the amount of $2,025,000.[5] Debtors' Consolidated Note was secured by deeds of trust on the Real Property. Casa del Oro was controlled by Stephen J. Canzoneri.

Shortly after the 2000 transaction, Debtors agreed to subordinate their trust deeds to another encumbrance, which is not identified in the record. Thus, following these events, Debtors' sole asset consisted of Debtors' Consolidated Note, which was purportedly fully secured by the second priority trust deeds on the Real Property.

Casa Del Oro is the sole owner of Black Mountain Homes, Inc. ("Black Mountain"). At some point in time not clear in the record, but before the merger discussed below, Casa Del Oro quitclaimed all of the Real Property to Black Mountain. Black Mountain was then substituted for Casa Del Oro as the payor under Debtors' Consolidated Note.

The Montage Merger

On May 8, 2002, D'Ambrosio and Scott Tomitz incorporated Montage Industries, Inc. ("Montage"). The original directors and

[5] There is an inconsistency in the record regarding the amount of the note: one reference is to $1,975,000, whereas other references are to $2,025,000. The correct amount is of no moment in this appeal.

officers of Montage were D'Ambrosio and Canzoneri (the controlling member of Casa Del Oro). At the time of incorporation, Montage had no assets and none of its stock was issued.

On or about January 30, 2003, Montage acquired three subsidiaries as part of a merger (the "Montage Merger"): Insulation Products-Arizona, Inc. ("IPAZ"), controlled by Joseph Dues (since deceased and whose interests in these disputes is represented by Luella Dues, together referred to as "Dues"); Black Mountain; and Rancho Grande Estates, Inc., controlled by D'Ambrosio Land and Development, Inc. Montage then issued two million shares of its stock to Casa Del Oro, two million shares to IPAZ, one million shares to D'Ambrosio Land and Development, Inc. and 2.5 million shares to CAH Investment, LLC ("CAH"), a legal entity with no operating business or source of income and whose only members were D'Ambrosio (67 percent interest), and Dues (33 percent interest). These 7.5 million shares comprised all of the authorized, outstanding shares of Montage.

Pursuant to an "Assumption and Substitution of Collateral Agreement" among Montage, CAH and Debtors, CAH assumed the debt owed to Debtors on the Real Property, and Debtors agreed to release the deeds of trust and to accept a pledge of 2,025,000 shares of Montage stock as substitute collateral for the debt. The "Assumption and Substitution of Collateral Agreement" was executed by D'Ambrosio as general partner of Debtors and as the managing member of CAH, as was the Montage stock pledge agreement. D'Ambrosio also executed the releases of the trust deeds. It is uncontroverted that D'Ambrosio is also the controlling person of Montage.

At the same time as the Montage Merger, Montage formed BMH, LLC ("BMH") as a wholly owned subsidiary, merged Black Mountain into BMH, and the Real Property was quitclaimed to BMH free and clear of any liens.[6] Shortly thereafter, BMH borrowed funds and granted the lender, the Jessen Trust, a $1,875,000 lien on the Real Property to secure the loan.

As a result of the Montage Merger and the other sundry transactions described above, Debtors' Consolidated Note, which was originally protected by the trust deeds on the Real Property, was now secured by a lien on a minority interest (27 percent) of the shares of Montage (i.e., those shares owned by CAH, which was in turn owned by D'Ambrosio and Dues). Arguably, these transactions significantly increased the risk of loss to the Debtors' limited partners.

The Pinal County Litigation

After learning of the Montage Merger, three limited partners of the Debtors, DePetris, Palmer and Mitchell, sued Montage, Debtors and D'Ambrosio in the Pinal County, Arizona, Superior Court. Mitchell et al. v. College Props. I Ltd. P'ship, et al, CV2-00400915 (filed August 10, 2004) (the "Pinal County Litigation"). The limited partners alleged that the Montage Merger represented a fraudulent scheme to dilute the limited partners' interests in the Real Property. They sought to undo the Montage Merger, stop any sale of the Real Property, and recover damages. Montage, Casa Del Oro and BMH joined in asserting counter-claims against the three limited partners and cross-claims

[6] We can not determine from our record whether Montage or Black Mountain executed this conveyance.

against Debtors, alleging that, acting through their general partner, D'Ambrosio, Debtors had misled them regarding Debtors' authority to enter into the Montage Merger.

On March 11, 2005, BMH, acting through D'Ambrosio, transferred the Real Property back to Debtors.[7] Debtors attempted to sell the Real Property but were unsuccessful. Debtors then filed a lawsuit against the three limited partners, seeking damages for the partners' alleged interference with the sale of the Real Property by filing the Pinal County Litigation (the "Maricopa County Litigation"). On August 19, 2005, the Maricopa County Litigation was consolidated with the Pinal County Litigation.

The Debtors' Bankruptcy Cases

On June 3, 2005, CPI filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On August 17, 2005, CPII filed a chapter 11 petition.[8]

The bankruptcy court entered orders on September 9, 2005, for joint administration of CPI and CPII, and for appointment of a chapter 11 trustee to oversee the cases. Brian J. Mullen ("Trustee") was appointed to serve as trustee for both cases on September 15, 2005.

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[7] Although it is uncontroverted that D'Ambrosio transferred ownership of the Real Property from BMH to Debtors, it is not clear under what legal authority he acted.

[8] D'Ambrosio's counsel admitted at the hearing on approval of the settlement agreement that the purpose of the CPI and CPII bankruptcy filings was "to place the [Real Property] under the protective umbrella of the bankruptcy court and allow for an orderly sale without interference from certain limited partners." Tr. Hr'g 14:3-5 (February 7, 2007).

On January 16, 2006, the consolidated Pinal County Litigation was removed to the bankruptcy court as an adversary proceeding in connection with the jointly administered chapter 11 cases. Mullen v. College Props. Ltd. P'ship, Adv. Pro. 06-00063 (henceforth, the "Pinal County Adversary"). At the time of the removal, Debtors' bankruptcy estates consisted of the Real Property and their claims in the adversary proceeding. The only creditors of the bankruptcy estates were those secured creditors holding liens on the Real Property, and the counter- and cross-claims asserted against Debtors in the Pinal County Adversary.

On March 10, 2006, BMH filed a chapter 11 petition, also in the Arizona Bankruptcy Court, which was assigned to the same judge presiding over the Debtors' cases.

On June 19, 2006, the bankruptcy court approved the sale of the Real Property for $5,825,000. After payment of the secured lien of Jessen trust, closing costs, real estate commissions and approved administrative expenses, the remaining $2,134,000 in sale proceeds were held by Trustee in an interest-bearing account.

On August 9, 2006, BMH filed an adversary complaint against Debtors and Trustee in Debtors' cases to avoid the transfer of the Real Property or, in the alternative, to avoid a preferential transfer, seeking turnover of the proceeds from the sale of the Real Property. BMH v. College Props., Ltd., et al., Adv. Proc. 06-742 (the "BMH Adversary").

The SACR

By the time the BMH Adversary was commenced, the various parties in these disputes had incurred over $800,000 in legal fees and costs. Following the sale of the Real Property and resolution

of the details regarding the claim of the secured creditor, the parties requested that the bankruptcy court allow them to attempt a consensual resolution of their competing claims. The bankruptcy court ordered them to attend a settlement conference with another bankruptcy judge. The parties in the three bankruptcy cases and two adversary proceedings, including DePetris, attended the settlement conference on October 26, 2006.

Although the initial conference did not lead to an immediate settlement, the parties continued to negotiate and eventually reached an agreement, the SACR, on January 8, 2007. The SACR provided for the exchange of complete releases among the parties as consideration for payments to them from the sale proceeds held by Trustee. Those payments included:

- $500,000 to D'Ambrosio;
- $325,000 to Montage and its subsidiaries, including BMH;
- $425,000 for Trustee and professional fees; and
- $850,000 to be distributed to the limited partners.

In addition to these cash payments, the other issues resolved in the SACR included:

- Trustee agreed not to seek compensation in excess of $100,000, even though under § 326(a), he could ask for reasonable fees up to $198,000, based on distributions.
- The parties agreed to dismiss the Pinal County Adversary.
- BMH gave up any claims to the Real Property, agreed to dismiss the BMH Adversary, and committed to seek dismissal of its bankruptcy case; and
- D'Ambrosio gave up any claims as a limited partner.

On February 7, 2007, the bankruptcy court conducted a hearing on Trustee's motion to approve the SACR. Counsel for all parties to the SACR, as well as counsel for DePetris and Palmer, were present and argued to the court. In addition, the court called

and examined Trustee as a witness regarding his business judgment, the Woodson/A&C factors, and the overall reasonableness of the settlement.

The bankruptcy court announced its decision to approve the SACR. It stated, in part:

> I can tell you that a bankruptcy case where a property has been sold and what you're fighting over is how much the equity holders get is, by definition, a success because most bankruptcy cases where the – the investors, the limited partners, the ones who have taken the risk and get the upside, are the ones who are left holding the bag. . . .
>
> So, based on the presentation I've heard and the arguments and so on, my review of the record, I'll find that the Trustee's exercise – it was business judgment – satisfies the Woodson factors as required under applicable law, that it's well within the realm of reasonableness, and I'll approve the settlement.

Tr. Hr'g 39:11-16, 42:3-8.

The bankruptcy court entered an order approving the SACR on February 12, 2007, in Debtors' cases and in the BMH bankruptcy case. Appellants timely filed an appeal of the order approving the SACR in Debtors' cases on February 21, 2007. However, Appellants did not seek a stay of the bankruptcy court's order pending this appeal. Since there was no stay, Trustee and the other parties implemented the terms of the SACR. On February 27, 2007, Trustee distributed $500,000 to D'Ambrosio and $325,000 to Montage. And on March 12, 2007, he distributed $466,807 to 19 different limited partners.[9]

[9] While not appearing in the record, Trustee has apparently made additional distributions from the sale proceeds. At the oral argument before the Panel, Trustee's counsel informed the Panel that, as of that date, Trustee had issued a total of 57 checks to various parties pursuant to the SACR.

In addition, also pursuant to the SACR, the bankruptcy court entered orders approving stipulated motions for dismissal with prejudice of both the Pinal County Adversary and the BMH Adversary on March 26, 2007. The court also dismissed the BMH bankruptcy case on June 29, 2007, observing in its order that BMH "has been able to substantially reduce debt owed to both secured and unsecured creditors in this matter through . . . settlement agreements. As a result, the Debtor is no longer in need of bankruptcy relief and has agreed to dismissal of this case."

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 1334 and under several paragraphs of § 157(b)(2). Trustee challenges our jurisdiction to review the bankruptcy court's orders approving the SACR on grounds of equitable mootness, which we discuss below. If the appeal is not moot, we have jurisdiction pursuant to 28 U.S.C. § 158(b).

ISSUES

1. Whether this appeal is moot.
2. Whether the bankruptcy court abused its discretion in approving the SACR.

STANDARDS OF REVIEW

We examine our own jurisdiction, including mootness issues, de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 110 (9th Cir. BAP 2005).

The bankruptcy court's approval of a compromise or settlement agreement is reviewed for abuse of discretion. Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001).

DISCUSSION

I.

This appeal is moot and is dismissed.

Trustee argues that we lack jurisdiction to decide this appeal because the issues are moot. We agree.

Equitable mootness prevents an appellate court from reaching the merits when an appellant has "'failed and neglected diligently to pursue their available remedies to obtain a stay'" and changes in circumstances "'render it inequitable to consider the merits of the appeal.'" Darby v. Zimmerman (In re Popp), 323 B.R. 260, 271 (9th Cir. BAP 2005)(quoting Focus Media, Inc. v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004)). Our court of appeals invokes equitable mootness when an appellant fails to obtain a stay and transactions in reliance upon the order appealed have occurred which are "complex and difficult to unwind." Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 933 (9th Cir. 1999). In deciding whether to exercise jurisdiction on appeal, the court of appeals cautions that we must consider the consequences of the remedy and the number of third parties who have changed their position in reliance on the order on appeal. Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi Ohana, Ltd.), 873 F.2d 1302, 1306 (9th Cir. 1989). Respect for the equitable mootness doctrine has a long history in our circuit,

predating the Bankruptcy Code. Ewell v. Diebert (In re Ewell), 958 F.2d 276, 280 (9th Cir. 1992) (appeal held moot because transfer of property had already occurred as of time appellant sought stay pending appeal); Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 925 (9th Cir. 1990)(appeal of order modifying stay held moot for failure to seek stay pending appeal); Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797-98 (9th Cir. 1981) (in a pre-code case, appeal was moot because large number of third parties had relied on finality of bankruptcy court's order); BC Brickyard Assocs., Ltd. v. Ernst Home Ctr., Inc. (In re Ernst Home Ctr., Inc.), 221 B.R. 243, 247 (9th Cir. BAP 1998)(transfer of real property after denial of committee's motion for stay pending appeal); cf. Popp, 323 B.R. 260, 272 (appeal not equitably moot because it was a simple transaction involving only one third party).

Appellants did not seek a stay pending appeal. The SACR resolves complex issues involving a significant number of parties, many of whom have now acted in reliance on the bankruptcy court's order.

For example, 20 limited partners are involved in CPI; CPII has 16 limited partners. Relying on the bankruptcy court's approval of the SACR, and Appellants' decision not to seek a stay pending appeal, Trustee has distributed over $1.2 million in settlement funds to D'Ambrosio ($500,000), Montage ($325,000) and 19 of the limited partners ($466,807). In addition, three different bankruptcy cases have been impacted by the settlement and the bankruptcy court's orders. Indeed, the BMH bankruptcy case was dismissed by the bankruptcy court expressly because the

SACR provided sufficient funds to BMH such that it no longer needed bankruptcy relief. And, based upon their execution of the SACR, Trustee and the other parties have stipulated to dismissal with prejudice of the two adversary proceedings where the principal disputes in these cases were to be litigated.

In this instance, we think the bankruptcy court's orders would be extraordinarily difficult to unwind, with more than a significant potential for inequity in doing so, even if it were possible. Simply put, if this Panel were to reverse the bankruptcy court's approval of the SACR, to provide effective relief, the Panel may be required to order disgorgement of over $1.2 million distributed by Trustee via dozens of separate disbursements. It is unclear how the Panel could reverse the effects of the dismissal of the adversary proceedings "with prejudice," or the voluntary dismissal of the BMH bankruptcy case.[10] Given the long history of litigation among the parties, and that the limited partners have waited over 20 years for a return on their investments, we think it improbable that the parties could be restored to the status quo ante without substantial prejudice and inequity.[11]

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[10] We have little information about the BMH bankruptcy case in the record of this appeal. However, at oral argument, counsel for BMH represented that all creditors of BMH had been paid, presumably using the funds received from the settlement, and that the bankruptcy case was closed.

[11] While we do not purport to find facts, we note that Trustee's special litigation counsel estimates that reopening the various litigations could require as much as $500,000 in new legal costs, in addition to the $800,000 that has already been incurred. At oral argument, Trustee's counsel informed the Panel that there were insufficient funds in the Debtors' bankruptcy estates to pursue such litigation, and that most of the remaining funds were earmarked for payment of accrued administrative expenses.

We have held that an appeal is moot where the failure to obtain a stay causes "such a comprehensive change of circumstances as to make it inequitable to consider the merits of the appeal." Beatty v. Traub (In re Beatty), 162 B.R. 853, 856 (9th Cir. BAP 1994). This is such a case. We therefore conclude that this appeal must be DISMISSED on the grounds of equitable mootness.[12]

II.

The bankruptcy court did not abuse its discretion in approving the Settlement Agreement and Comprehensive Release.

Though the issues on appeal are equitably moot, the Panel deems it appropriate under the circumstances to discuss the

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[12] Given our decision, we need not decide Trustee's Motion to Dismiss this appeal filed on April 30, 2007. In his Motion, Trustee argued to dismiss not only for equitable mootness, but also because the appeal constituted an improper collateral attack on the bankruptcy court's order approving SACR in the BMH bankruptcy case, an order not appealed. While we agree with Trustee's equitable mootness argument above, we reach no decision concerning Trustee's collateral attack argument.

With his Motion to Dismiss, Trustee also submitted a Motion to Supplement the Record on Appeal, asking leave to include in the record: (1) the Notice of Trustee's Compliance with Settlement Agreement and Comprehensive Release; (2) correspondence from Trustee's and D'Ambrosio's counsel to Appellants' counsel regarding the distributions; and (3) the orders dismissing with prejudice the Pinal County Adversary and the BMH Adversary. Appellants did not oppose the Motion to Supplement. Then, on July 17, 2007, Trustee also submitted a Request for Judicial Notice, asking us to take notice of the order dismissing the BMH bankruptcy case entered on June 29, 2007. Appellants also did not object to the Request.

Although we do not ordinarily consider documents that were not available to the bankruptcy court at the time it entered the order that is on appeal, Morrison v. Hall, 261 F.3d 896, 900 n.4 (9th Cir. 2001), we "may take judicial notice of court filings and other matters of public record." Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006). The orders dismissing the adversary proceedings and closing the BMH bankruptcy case are clearly matters of public record, and are relevant to the mootness issues on appeal. Thus, we may and do take judicial notice of these orders. However, we do not find it necessary or appropriate to take judicial notice of, or include in the record, the Notice of Trustee's Compliance or the correspondence among the parties.

merits. Thus, even if this appeal were not moot, we would conclude that the bankruptcy court did not abuse its discretion in approving the SACR.

The authority for the bankruptcy court's approval of a compromise is Rule 9019(a): "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. . . ." The bankruptcy court is vested with considerable discretion in approving compromises and settlements. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). To approve a compromise, the bankruptcy court must be satisfied that its terms are "fair, reasonable and equitable." Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1382 (9th Cir. 1986). To determine the reasonableness of a proposed compromise by a trustee, the bankruptcy court should consider several factors:

> (a) The probability of success in the 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 necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id.[13]

The bankruptcy court explicitly acknowledged the primacy of the Woodson factors in its ruling: "I find that the Trustee's exercise – it was business judgment – satisfies the Woodson factors as required under applicable law, that it's well within

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[13] These factors were repeated in a later court of appeals decision, Woodson, 839 F.2d at 720, and are now frequently referred to as the Woodson factors. See also Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003).

the realm of reasonableness, and I'll approve the settlement." Tr. Hr'g 42:3-8. The record amply supports the bankruptcy court's conclusion that the settlement was fair and reasonable according to Woodson.

The bankruptcy court had a wealth of information before it regarding the events leading to the settlement and the SACR. These facts included the complete docket with all pleadings from the Pinal County Litigation, all pleadings filed in the Debtors' bankruptcy cases, and the uncontradicted testimony of Trustee at the February 7, 2007 hearing, together with the arguments of counsel.[14]

Besides the Real Property, the only asset in the Debtors' estates would have been any recovery in the Pinal County Adversary. Trustee argued that the primary goal of this action had already been achieved before the SACR was negotiated – the Real Property had been reconveyed to Debtors, it was sold, and the funds were under Trustee's control. Continuing with the Pinal County Adversary raises difficulties in proving any claim for damages, and in defending the bankruptcy estates against the claims of the other litigants. Many of the claims in the Pinal County Adversary involved allegations of malfeasance by D'Ambrosio. Counsel for D'Ambrosio elaborated on the difficulties of proving malfeasance by D'Ambrosio:

> Mr. D'Ambrosio made many tough decisions through the years, and that would be the subject of the underlying litigation that the trustee would have to evaluate as things progressed. . . .

[14] In addition, the bankruptcy judge presiding in Debtors' cases is the same judge assigned to the BMH bankruptcy case, and is therefore presumably aware of issues raised in that bankruptcy case that may be relevant in Debtors' cases.

> Now if this case were to be litigated, the central issue would be, did Mr. D'Ambrosio violate the business judgment rule or was the diminishment of funds available for distribution to the limited partners and the limited partnerships a result of certain interfering limited partners who sought to inject themselves, contrary to Arizona law, into the management of the limited partnership?

Tr. Hr'g 13:19-22, 15:6-12.

Given that D'Ambrosio would be the focus of any renewal of the Pinal County Adversary, Trustee pointed out two other problems. First, D'Ambrosio is 80 years old and in poor health; this could lead to difficulties in a prolonged litigation. Second, a former employee of D'Ambrosio had stolen or destroyed allegedly vital business records relating to Debtors and those records had not been recovered or replaced. The employee, Geraldine Draper, was sentenced to seven years in prison for embezzlement. According to counsel for D'Ambrosio, this theft creates "huge evidentiary hurdles in proving any case for malfeasance against the general partner." In short, there was adequate evidence before the bankruptcy court to allow it to conclude that the first Woodson factor, a lack of probability of success on the merits, had been shown by Trustee.

There was also ample evidence submitted regarding the second Woodson factor, difficulty of collection. Trustee argued that he applied his business judgment in deciding that collection from D'Ambrosio would not be worth the cost and effort needed to obtain any recovery. Trustee reasoned that, "While Mr. D'Ambrosio may possess sufficient assets to satisfy a potential judgment, the other parties asserting claims against the estate could ultimately succeed on their claims, thus negating any potential recovery by

the estates on claims [against D'Ambrosio]." The Trustee was also well aware that the BMH Adversary posed a potential for removing all proceeds from the sale of the Real Property from the Debtors' estates. Finally, Trustee noted that the SACR's provision whereby D'Ambrosio gave up his limited partnership rights (and possible additional $300,000 compensation) provided a greater pro-rata share to Debtors' other limited partners. Thus, the bankruptcy court, relying on the business judgment of Trustee, could conclude that the second Woodson factor, collectibility, weighed against attempted collection from D'Ambrosio.

There is little doubt that the third Woodson factor, the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it, favored approval of SACR. The bankruptcy court was given uncontroverted evidence that the litigation costs to that date had reached $800,000, and had reasoned arguments from qualified counsel that additional costs could reach $300,000 - $500,000. The bankruptcy estates had limited assets available to fund any future litigation. Litigating the two adversary proceedings would be complex because they involve three bankruptcy cases, numerous parties and entities, and could require production of thousands of documents and records originating over two decades. According to Trustee's special counsel, further litigation could involve, in addition to attorney's fees, upwards of 15 depositions, expert witness fees, appraisals, court costs and related expenses even before the trial could begin. After the trial, given the litigious history of these proceedings, a lengthy appeal could not be ruled out.

The bankruptcy court therefore had more than sufficient evidence in the record to support a ruling that the third Woodson factor also favored approval of the SACR: the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it.

Finally, based on the record, the fourth Woodson factor, the paramount interest of those impacted by the SACR, in these cases, the limited partners,[15] and giving proper deference to their reasonable views, is promoted by approving the SACR.

D'Ambrosio, at the request of Trustee, canvassed the limited partners as to their views on the SACR. A solid majority (75 of 105 partnership units voting) favored approval of the SACR. The bankruptcy court also was given evidence that a majority of the limited partners opposed the Pinal County Litigation when it was commenced, opposed Appellants' attempt at class certification in state court, and supported D'Ambrosio's proposal to place Debtors in chapter 11 so that the Real Property could be sold.

The SACR provides a return of equity to the limited partners, along with some interest payments. The bankruptcy court was aware that the limited partners entered into their partnership agreements knowing that the venture was "highly speculative." The court pointed out that a return of equity to the owners of a

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[15] The facts here are not typical of those envisioned by the A&C Props. or Woodson courts. In this case, the creditors were never consulted for the simple reason that their claims were fully protected by liens on the Real Property and they have been fully paid. However, we believe that the spirit of our circuit's case law would dictate that where, as here, the creditors are fully paid and it is the equity holders whose interests are at risk, that our analysis under the fourth Woodson factor should address the rights of those equity holders, here, the limited partners of the Debtors.

bankrupt company is rare, but not as rare as a bankruptcy that returns equity and interest. The bankruptcy court had solid justification for finding that the SACR promoted the interests of equity.

In short, the bankruptcy court did not abuse its discretion in deciding to approve the SACR.

CONCLUSION

This appeal is DISMISSED based upon equitable mootness.