

AUG 16 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-06-1074-KPaB
)
RODEO CANON DEVELOPMENT CORP.,) Bk. No. LA 99-49349-VZ
)
Debtor.)

FRED YASSIAN; BEVERLY RODEO
DEVELOPMENT CORP.,)

Appellants,)

v.)

MEMORANDUM*

BIJAN CHADORCHI; FERESHTEH)
CHADORCHI; THE CHADORCHI)
LIVING TRUST; LIBERTY MUTUAL)
INSURANCE CO.; AMERICAN)
GUARANTEE AND LIABILITY)
INSURANCE CO.; NATIONAL UNION)
FIRE INSURANCE CO.; SUSAN DEL)
PRETE; ROBERT L GOODRICH,)
Chapter 7 Trustee; NELSON)
SHELTON & ASSOCIATES, INC.,)

Appellees.)

Argued and Submitted on July 14, 2006
at Pasadena, California

Filed - August 16, 2006

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

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and BRANDT, Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrine of law of the case or the rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 This appeal is from an order denying appellants permission
2 to act in the name of the trustee when prosecuting a motion under
3 Federal Rule of Civil Procedure 60(b)(4) to vacate a 2001 sale
4 order and undo a 2001 real property sale with respect to which
5 there was a fraud that helped land the former bankruptcy trustee
6 in federal prison for bankruptcy crimes. The rationale for
7 denying the motion was that appellants are independently seeking
8 the same relief on their own account in a separate adversary
9 proceeding.

10 Appellants opposed the 2001 sale on the theory that the
11 debtor was merely a co-owner. The court authorized the sale
12 anyway. The former trustee is alleged to have artificially
13 chilled bidding. The purchaser is alleged to have participated
14 in a kickback scheme. The mortgagee contends it has not been
15 paid in full. Multiple appeals and lawsuits ensued. The end may
16 not yet be in sight and the underlying question remains what to
17 do about the sale.

18 Appellants prosecuted a variety of actions, one of which led
19 to a published decision by the Ninth Circuit that subsequently
20 was vacated on the assumptions that there had been a settlement
21 of the ownership issue and that the sale order was no longer
22 vulnerable to collateral attack. The appellants then realized
23 they had omitted to assert that the sale order should be vacated
24 as void under Rule 60(b)(4) and, possibly recognizing that their
25 long litigation history made it difficult for them to argue for a
26 new-found theory, sought to enlist the successor chapter 7
27 trustee in that cause even though they independently have
28 standing to make the motion.

1 After the court disapproved the successor trustee's proposed
2 sale of his Rule 60(b)(4) rights to appellants, appellants moved
3 for permission to bring a Rule 60(b)(4) motion in the name of the
4 trustee to vacate the original sale order. Although the motion
5 for permission was supported by the as-yet unpaid mortgage
6 creditor and was not opposed by the successor chapter 7 trustee,
7 the court denied the motion on the theory that other litigation
8 being prosecuted by appellants created too great a conflict to
9 permit them to act on behalf of the bankruptcy estate.

10 We AFFIRM without expressing a view on the ultimate merits
11 of applying Rule 60(b)(4) in this case.

12 13 Facts¹

14 Rodeo Canon Development Corporation ("debtor") initially
15 filed this bankruptcy case under chapter 11 in 1999. Upon
16 conversion to chapter 7, Robert D. Pryce became the trustee.

17 The debtor held record title to an office building at 9615
18 Brighton Way, Beverly Hills, California, that was valued at
19 \$14,000,000 on the original petition.

20 The building was operated by the 9615 Brighton Way
21 Partnership, a general partnership formed in 1990 to operate the
22 property in which the debtor and appellant Beverly Rodeo
23 Development Corporation ("Beverly Rodeo") were general partners.
24 Appellant Fred Yassian is the president and sole shareholder of
25 Beverly Rodeo. The general partnership was still in existence
26 when the chapter 11 case was filed.

27
28 ¹Background to this appeal appears in our memorandum
decision in Beverly Rodeo Dev. Corp. v. Liberty Mut. Ins. Co. (In
re Rodeo Canon Dev. Corp.), BAP Nos. CC-04-1169 & 1509-BMoR (9th
Cir. BAP Aug. 5, 2005).

1 The primary bone of contention throughout this case has been
2 the assertion that, notwithstanding the state of record title in
3 its co-general partner Rodeo Canon, Beverly Rodeo actually owns a
4 50 percent interest in the real estate.

5 In December 2000, Pryce made a motion to sell the property
6 under 11 U.S.C. § 363(f).

7 The court authorized the sale over the objection by Beverly
8 Rodeo that it was co-owned property subject to § 363(h) that
9 could not be sold without the adversary proceeding required by
10 Federal Rule of Bankruptcy Procedure 7001(2).

11 The Chadorchi Living Trust purchased the property for
12 \$10,500,000 in April 2001. The court denied Beverly Rodeo's
13 motion for stay pending appeal without bond and authorized
14 partial distribution of \$7,502,000 to secured creditors, of which
15 \$2,150,000 was in dispute. The net sales proceeds are the
16 estate's only remaining tangible asset.

17 Beverly Rodeo and Yassian appealed. In our No. CC-01-1428-
18 MaMoP (Nov. 8, 2002), we ruled that it was error to have
19 permitted Pryce to sell, and we reversed the distribution portion
20 of the sale order, remanding with a direction to disgorge the
21 disputed funds. The Ninth Circuit affirmed on a different theory
22 and remanded with a broader mandate to resolve all outstanding
23 issues, including ownership, but later vacated its opinion on the
24 understanding that the ownership dispute had been resolved.²
25 Warnick v. Yassian (In re Rodeo Canon Dev. Corp.), 362 F.3d 603
26 (9th Cir. 2004), vacated, 126 Fed. App'x 353 (9th Cir. 2005).

27
28 ²Some facets of the ownership issue appear not to have been
resolved and remain the subject of ongoing litigation.

1 Among the federal and state lawsuits spawned by the sale is
2 an adversary proceeding filed in April 2003 by Robert L.
3 Goodrich, the successor trustee appointed after Pryce resigned in
4 the face of a federal indictment for bankruptcy crimes. The
5 Goodrich action sought to vacate the sale order and to recover
6 professional fees and damages based on the premise that
7 skullduggery occurred in connection with the sale.

8 Goodrich alleged that Pryce engaged in a fraudulent scheme
9 with the real estate professionals employed to list the property
10 and that there was a \$100,000 kickback in which the purchaser
11 participated, all of which added up to a basis for vacating the
12 sale, *inter alia*, as a fraud on the court. The action was stayed
13 pending the outcome of criminal proceedings against Pryce – he
14 has since been convicted and is now in federal prison.

15 Goodrich settled part of his action and auctioned the rest.
16 Beverly Rodeo and Yassian, for a high bid of \$150,000 in
17 September 2004, acquired the estate's causes of action against
18 the purchasers to vacate the sale order as a fraud on the court
19 and for damages. That adversary proceeding in the name of the
20 estate is still pending and ties in with another pending action
21 by Beverly Rodeo being maintained on its own account.

22 In July 2003, Beverly Rodeo and Yassian filed an adversary
23 proceeding against Pryce, the issuers of Pryce's bond, the
24 purchaser and its principals, Pryce's alleged co-conspirators,
25 and others for damages under a panoply of theories. The
26 bankruptcy court dismissed and rejected attempts to amend.

27 We vacated that dismissal in August 2005 as to Beverly Rodeo
28 but not Yassian and dismissed as moot a consolidated appeal from

1 a fourth motion to amend that, cued by the 2004 Ninth Circuit
2 decision, included a request for relief from judgment. Beverly
3 Rodeo Dev. Corp. v. Liberty Mut. Ins. Co. (In re Rodeo Canon Dev.
4 Corp.), Nos. CC-04-1169 & 1509-BMoR (9th Cir. BAP Aug. 5, 2005).

5 In September 2005, the bankruptcy court denied Goodrich's
6 motion to sell to appellants, subject to overbids, the estate's
7 rights to assert voidness claims by way of relief from judgment
8 under Rule 60(b)(4).

9 Next comes the instant appeal. Frustrated in their effort
10 to purchase the estate's rights, Beverly Rodeo and Yassian filed
11 a motion for authority to prosecute Rule 60(b)(4) voidness claims
12 on behalf of the estate. The Warnick creditors, who had been the
13 appellants' adversaries before the Ninth Circuit, supported the
14 motion. The trustee took a neutral position. The purchaser and
15 Pryce's sureties opposed the motion. The order denying that
16 motion was entered February 10, 2006.

17 This timely appeal ensued.

18 19 Jurisdiction

20 The bankruptcy court had jurisdiction over this core
21 proceeding contested matter pursuant to 28 U.S.C. §§ 157(b)(2)(A)
22 and (O) and 1334(a). We have jurisdiction under § 158(a).

23 24 Issues

25 Whether the court correctly declined permission for
26 appellants to act in the name of the trustee when prosecuting a
27 Rule 60(b)(4) motion to vacate a sale order as void.

1 account of the estate.³

2 Second, the court was not persuaded that there would be a
3 benefit to the bankruptcy estate other than what would accrue to
4 the appellants.⁴

5

6 ³The court explained:

7 COURT: The fundamental context that's important – it
8 was important to keep straight in my mind, and I would think
9 anyone's mind trying to understand and, and resolve this
10 issue, is that the parties asking to have the authority on
11 behalf of the bankruptcy estate want to have that authority
12 so they can pursue claims saying that a sale ... that was
13 conducted by the bankruptcy estates representative should be
14 overturned as void because the Court lacked jurisdiction to
15 authorize the sale because the subject real property was not
16 property of the bankruptcy estate but indeed was property of
17 the moving party.

18 And the second part of that context that's important to
19 understand is that the moving parties have already asserted
20 and are busily litigating claims that the property that was
21 sold is indeed their property. So you have the moving party
22 asking to be authorized to pursue claims on behalf of a
23 bankruptcy estate with regards to the voidness of the sale
24 of that real property and is already litigating claims
25 saying that the sale should be undone because the property
26 belongs to these private parties.

27 I can't imag[ine] a more obvious conflict of interest.

28 Tr. 2/2/06 at pp. 30-31 (emphasis supplied).

⁴The court explained:

21 COURT: It seems to me that the remedy [allowing
22 someone to act on behalf of the trustee] exists so that a
23 creditor can pursue claims that will benefit the bankruptcy
24 estate in general. Not that particular creditor.

25 When I read these papers, all these papers, and I
26 review the litigation and the history of the litigations,
27 it's clear to me that the genesis of this motion and its
28 predecessor, although seeking different relief, i.e., a sale
of these claims from the estate to these moving parties, now
it's the moving parties asking to be authorized to pursue
the claims without a sale, it's part and parcel of the
moving parties seeking relief for their own benefit. It's
not the benefit of the bankruptcy estate it's the benefit to
(continued...)

1 The court noted that the trustee was no more than neutral
2 about the motion in circumstances in which it would have expected
3 to hear a more definitive statement of position so that it could
4 ascertain whether the trustee's position was unjustified.⁵

5 The court did not explore the scenarios of what might occur
6 if the sale order were to be vacated. In principle, what would
7 happen (subject to a court's discretion to craft a less drastic
8 equitable remedy) would be a return to the status quo ante by way
9 of rescinding the sale. The purchaser would be entitled to a
10 return of its \$10,500,000 purchase price, and an accounting for
11 (and allocation of) profits would be necessary. The estate would
12 have whatever interest in the property it had at the outset
13 (either all or one-half), which probably would have to be

14
15 ⁴(...continued)

16 moving parties. And I think that is clearly an element of
17 the claim – that's being sought today by the moving parties.
18 You have to prove that it's – that this authorization will
benefit the estate. It hasn't been proved to me. I don't
have evidence showing that this benefits the estate.

19 Tr. 2/2/06 at p. 32.

20 ⁵The court explained:

21 COURT: I have some very carefully crafted words from
22 trustee's counsel, I don't have an express statement of
consent and it's an easy thing to do. Hasn't been done.

23 ...

24 I have no – well there, there may be evidence but it
does not rise to the level of carrying the burden of
preponderance of the evidence to show that the trustees
25 refusal to pursue these claims is unjustified. There may be
very good reasons why the trustees not pursuing these
26 claims. I wish the trustee would tell me. Trustee hasn't
stepped up and – put it in writing ... that I can read and
27 see and anyone can read and see.

28 Tr. 2/2/06 at pp. 33-34.

1 litigated before the trustee could sell it. A new sale would
2 almost certainly realize a significantly higher price, which
3 could have the effect of resolving the Warnick dispute and
4 perhaps of paying unsecured creditors more than they otherwise
5 would realize.⁶ Hence, one could postulate the existence of a
6 benefit to the estate.

7 The ultimate result might not be much different than what
8 could occur in the litigation already being prosecuted by
9 appellants. The goal in that litigation is to unravel the sale,
10 either by vacating it for want of jurisdiction or recovering the
11 economic equivalent by way of damages. One could speculate that,
12 in the end, the net economic effect would be the same.

13 Although one might conjure a benefit to the estate from
14 expressly authorizing the appellants to act in the name of the
15 trustee, we cannot say that the court abused its discretion in
16 concluding that a benefit to the estate was not established. The
17 court did not have an incorrect view of the law. Nor did it
18 labor under a clearly erroneous view of the facts. That leaves
19 us only with the question whether we have the firm and definite
20 conviction that there was a clear error of judgment; we have no
21 such conviction. Hence, the court did not abuse its discretion
22 when it denied the motion.

24 II

25 Appellants make much of their assertion that the only
26 opposition to the motion came from persons who lacked standing.

27
28 ⁶The appellate record does not indicate what unsecured
claims, if any, exist. At oral argument, the parties indicated
that unsecured claims are "a five digit number."

1 While the appellants' view has merit, the bankruptcy court
2 finessed the question of standing. First, it indicated that it
3 was ruling without reference to the opposition.⁷ Second, it
4 indicated that the peculiar circumstances of a bankruptcy case in
5 which the trustee was convicted of a criminal bankruptcy fraud
6 involving the subject matter of the motion made it difficult to
7 refuse to hear anyone.⁸ Since the court made plain that it would
8 have reached the same conclusion regardless of the oppositions,
9 we have no occasion to reverse for want of standing.

10
11 _____
12 ⁷The court, after rendering its analysis of the merits of
13 the motion, explained:

14 COURT: And let me turn now to everyone, the, the
15 reference to everyone and this is the standing issue. The
16 concerns I have expressed and the reasons I have stated on
17 the record, ... [I]f I read only the moving papers and not
18 any opposition papers I have these concerns. So in a sense
19 the argument ... that the people who oppose this motion
20 don't have the standing to oppose the motion is
21 inconsequential. I had these concerns myself.

22 Tr. 2/2/06 at p. 34.

23 ⁸The court explained:

24 COURT: [I]n a bankruptcy case, especially this
25 bankruptcy case where a trustee has been convicted of
26 engaging in fraudulent criminal activity in the exercise of
27 his duties, you have to climb a very high mountain to tell
28 me somebody shouldn't be heard in this case.

...

[Acknowledging contrary standing decisions] I think the
cases cited to me frankly ... didn't have to deal with the
[criminal fraud] facts of this case which I've just
described. That would be difficult for me to conclude as a
matter of law that some party doesn't have standing or
should not have [its] voice heard with regards to the relief
sought today.

Tr. 2/2/06 at p. 35.

1 such party who participates also has standing to appeal if
2 aggrieved. There is no reason to think that a party who would
3 have standing to oppose and to appeal the sale order in the first
4 instance would not also have standing to seek relief under Rule
5 60(b)(4), even if the consequence of a successful motion would
6 redound to the benefit of the trustee.

7 Rule 60(b)(4) relief from a sale order differs from a
8 trustee avoiding power or a cause of action owned by the estate
9 as to which the trustee's rights are exclusive, unless and until
10 the court orders otherwise. Any party eligible to oppose and to
11 appeal the sale order has standing to seek relief from the order.

12 At oral argument of this appeal we asked the parties to
13 clarify the record regarding the standing of the appellants to
14 bring a Rule 60(b)(4) motion in their own right. The appellees
15 each unambiguously conceded that appellants have independent
16 standing to bring a Rule 60(b)(4) motion to challenge the sale.

17 In other words, either Beverly Rodeo or Warnick, have the
18 ability to seek Rule 60(b)(4) relief to have the sale order
19 determined to be void as having been based upon a fraud on the
20 court. To be sure, they may have a difficult persuasive task in
21 light of the litigation history of the case. But if it is true
22 that the purchaser participated in the kickback scheme that is
23 alleged to have been a facet of discouraging competitive bidding,
24 then the purchaser can hardly complain. If the sale order were
25 to be vacated, presumably the status quo ante would be restored,
26 which would necessarily bring the trustee back into play.

27 Indeed, it is conceivable that a court would conclude that the
28 cleanest solution to this messy situation would be to go back to

1 square one and start over.

2 Nor do we understand the court's ruling to foreclose
3 appellants from moving under Rule 60(b)(4) motion on their own
4 authority. Rather, it is a ruling that they cannot use the
5 mantle of the trustee when doing so. It would be premature for
6 us to pass on the prospective merits of a Rule 60(b)(4) motion at
7 this time. If appellants or the trustee were actually to make
8 such a motion and obtain a ruling, there would then be a record
9 that could enable review of the merits of the motion.

10 Moreover, even if appellants did not have standing to make a
11 Rule 60(b)(4) motion on their own account, the facts that would
12 support such a motion are central to two adversary proceedings
13 they presently are prosecuting, on their own behalf and the other
14 in the name of the estate. Success in that litigation could
15 place them in an economically similar situation to what could be
16 achieved by way of Rule 60(b)(4).

17

18 Conclusion

19 We are not persuaded that the bankruptcy court abused its
20 discretion when, perceiving insufficient benefit to the estate
21 under the circumstances, it denied the motion to act in the name
22 of the trustee to prosecute a Rule 60(b)(4) motion. For clarity,
23 we emphasize that the court did not determine that appellants
24 independently lacked standing to make a Rule 60(b)(4) motion; all
25 parties to the appeal, as well as this Panel, agree that
26 appellants do have such standing. We express no view on the
27 ultimate merits of applying Rule 60(b)(4) to this situation.

28 AFFIRMED.