NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-06-1032-KPaJ
TEDDI OF CALIFORNIA,	)	Bk. No. LA 03-40849-ES
Debtor.	)	
STEPHEN MEADOW; WALFORD INVESTMENTS, INC.,	)	
Appellants,	)	
v.	)	**MEMORANDUM**[*]
DAVID K. GOTTLIEB, Chapter 7 Trustee; SUNTRUST BANK,	)	
Appellees.	)	

Argued and Submitted on January 17, 2007
at Pasadena, California

Filed – March 26, 2007

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: KLEIN, PAPPAS and JAROSLOVSKY,[**] Bankruptcy Judges.

[*]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.

[**]Hon. Alan Jaroslovsky, U.S. Bankruptcy Judge for the Northern District of California, sitting by designation.

This is an appeal from a $500,000 compromise of the trustee's avoiding action against a secured creditor. Although appellants, who are noncreditor insiders, withdrew their $550,000 offer to trump the compromise by purchasing the trustee's avoiding action, they contend that the $500,000 compromise was nevertheless inadequate. We AFFIRM the order approving the compromise as fair and equitable.

FACTS

Appellee David K. Gottlieb is the chapter 7 trustee in this involuntary case that was commenced in December 2003.

Appellant Walford Investments, Inc., ("Walford") is the 100 percent shareholder of the debtor corporation.

Appellant Stephen Meadow is the president of Walford and is a trustor and trustee of the Stephen H. Meadow and Mary E. Meadow 1981 Trust, which owns 100 percent of the shares of Walford (collectively, "Meadow-Walford").

Appellee SunTrust Bank ("SunTrust") was the debtor's primary lender and is the defendant in the trustee's avoiding action that is the subject of the presently contested compromise.

Three lawsuits pertain to this appeal, two of which are bankruptcy court adversary proceedings (including the action being compromised); the third is a district court civil action presently on appeal to the court of appeals.

First, as a matter of background, the trustee sued Meadow-Walford in adversary proceeding no. AD 04-02110-ES to avoid and recover transfers alleged to exceed $9,000,000. The court approved the compromise of that action on the same day as the compromise that Meadow-Walford is presently appealing.

Second, also as a matter of background, Meadow-Walford sued SunTrust in the United States District Court for the Central District of California, (Meadow v. SunTrust Bank, Case No. CV-02439), asserting claims in the nature of lender liability to which SunTrust counterclaimed for breach of contract. The District Court granted summary judgment in favor of SunTrust on the premise that Walford and Meadow lacked standing to assert a cause of action that the district court deemed to be property of the chapter 7 estate unless and until the chapter 7 trustee abandons the cause of action. The termination of that civil action is now before the Ninth Circuit as appeal no. 05-55631.

Third, the trustee sued SunTrust in adversary proceeding no. AD 05-02129-ES seeking to avoid and recover allegedly fraudulent and preferential transfers of $1,745,000, as well as damages based on allegations similar to those made by Meadow-Walford. Before the action was filed, Meadow-Walford rebuffed the trustee's attempt to amend the complaint in no. AD 04-02110-ES so as to join SunTrust as a party to that action.

The trustee agreed to compromise with SunTrust under terms providing that SunTrust would pay the trustee $500,000 in exchange for a mutual release of claims, SunTrust's filed proof of claim for $1,256,641.72 would be allowed subject to reconciliation for payments received, and SunTrust would withdraw its objection to the employment of the trustee's litigation counsel.[1]

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[1]Such an objection by a defendant can be of dubious merit. A defendant ordinarily is not a "person aggrieved" and, hence, lacks standing to object to the trustee's employment of counsel (continued...)

Consistent with the rule that compromises affecting the estate be reviewed on notice to the entire creditor body with a view to whether they are "fair and equitable," the trustee then filed a motion in the parent bankruptcy case to approve the compromise. In the motion, consistent with decisional law requiring a simultaneous opportunity for a competitive sale when a cause of action capable of being transferred is being compromised, the trustee included a proposed bidding procedure so that parties in interest could purchase the estate's claims against SunTrust. The bidding procedures required a prospective bidder to:

> (a) deposit with the trustee $75,000 at least five days prior to the hearing;
> (b) put forth an initial minimum bid of no less than $550,000;
> (c) subsequent overbids to be in increments of $25,000;
> (d) "hold the trustee and estate harmless and indemnify the trustee and estate for any and all losses, liabilities and expenses arising from the prosecution of the litigation against SunTrust, as well as any and all losses, liabilities and expenses arising out of any claim made by SunTrust against the trustee which would have otherwise been released if SunTrust was the highest bidder" ("Indemnity Provision");
> (e) acknowledge that the trustee has no obligation to participate in continuing litigation arising out of the purchase of the claims in the complaint.

Motion For Order Approving Compromise of Controversy Between David K. Gottlieb, Chapter 7 Trustee and Sun Trust Bank Which is Subject to Overbid, page 3.

Appellants filed an opposition to the compromise motion, deposited $75,000 with the trustee and indicated their desire to submit an overbid.

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[1](...continued)
to prosecute that defendant. Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983). To be sure, SunTrust is simultaneously a defendant and a creditor.

At the hearing held on December 6, 2005, Meadow-Walford submitted an overbid of $550,000, subject to two conditions: (1) that the trustee be required to negotiate a mutually acceptable agreement regarding the assignment of the estate's claims against SunTrust (specifically, the Indemnity Provision), and (2) that their bid be made subject to their right to appeal the court's ruling on the compromise motion.

The trustee declined to accept the appellants' bid with the two conditions. The court clarified that any sale would be a sale of the causes of action (rather than the compromise agreement), that its order would be the definitive document transferring the causes of action, and that there would be no separate assignment agreement.

The appellants then elected to withdraw their $550,000 overbid and not to participate further in the bidding.

As there were no overbids, the court proceeded to consider the $500,000 compromise under the long-settled "fair and equitable" standards applicable to review of compromises.

Meadow-Walford continued to oppose the compromise, contending that it was not fair and equitable. Taking aim at the hold harmless provision, they argued that "the proposed bidding procedures are vague, ambiguous, and designed to chill, rather than encourage, competitive bidding."

The court announced its ruling and thereafter rendered written findings of fact and conclusions of law and entered its order approving the compromise. This timely appeal ensued.

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 the appellants have standing.

(2) Whether the bankruptcy court abused its discretion when it found that the compromise between the trustee and SunTrust was "fair and equitable" and that the bidding procedures contained in the compromise motion were appropriate.

STANDARD OF REVIEW

The bankruptcy court's decision to approve a compromise is reviewed for an abuse of discretion. Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1380 (9th Cir. 1986); Goodwin v. Mickey Thompson Entm't Grp., Inc. (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003). It is an abuse of discretion to apply an incorrect legal rule. Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 287 (9th Cir. BAP 2005). Otherwise, we do not reverse unless we have a definite and firm conviction that the court's findings are a result of a clear error of judgment. Mickey Thompson, 292 B.R. at 420.

DISCUSSION

Before addressing the merits, we note that there is a question regarding standing.

I

The appellees argue that the appellants lack standing to appeal the compromise order because they are not creditors of the debtor. Rather, Walford is an equity holder of the debtor, and Meadow is in control of Walford. The appellees contend that equity holders have no expectation of a distribution because the claims of creditors exceed the probable availability of funds of the estate; in other words, it is not a "surplus" estate. The appellants contend that they nevertheless have standing because they are challenging the inherent fairness of the "failed auction," separate and apart from Walford's equity holder status.

The factual scenario implicates both a sale and a compromise, which are separate concepts that require separate analysis. The appellants, as equity holders in a case in which there will be no surplus, ordinarily lack standing to appeal a compromise of a dispute affecting the estate. Since there is no likely return for equity holders, they are not "injured in fact" and, accordingly, normally lack standing. E.g., Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777-79 (9th Cir. 1999); Fondiller, 707 F.2d at 442; Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R. 448, 454 (9th Cir. BAP 2004), aff'd mem., 160 F. App'x 644 (9th Cir. 2005).

While we have recognized the appellate standing of unsuccessful bidders at auction sales in the contexts presented by Mickey Thompson and Lahijani, this appeal presents a different situation. In those cases, the court either rejected or declined to entertain a bid. Here, in contrast, the appellants elected to withdraw their bid, which makes their case for standing weaker.

The appellants, however, explain the withdrawal of their bid as a response to the unsatisfactory "intrinsic structure" of the bidding procedures associated with the sale. They contend that the trustee's proposed bidding procedures were vague, ambiguous and designed to chill competitive bidding.

While the case for standing is thin, the critique of the "intrinsic structure of the sale" brings the appellants sufficiently "within the zone of interests" to be protected by the Bankruptcy Code that we will treat them as if they have standing to bring this appeal. In view of the overlap between concepts of compromise and sale, we will address both.

II

The standard for assessing a compromise is whether the compromise is "fair and equitable," taking into account probability of success in the litigation, and any difficulties in collection, and the expense, inconvenience, and delay of litigation, as well as the view of creditors. A&C Props., 874 F.2d at 1381.

The appellants raise only one question: whether the release of the trustee by SunTrust was appropriate.

The compromise provided for a payment of $500,000 with SunTrust's proof of claim being allowed, plus a Release of the Trustee by SunTrust:

> Except for: (a) a breach of this Agreement, and claims arising by reason of such breach; (b) enforcement of rights, obligations and duties arising under this Agreement; and (c) satisfaction of the executory provisions of this Agreement (collectively, the "Preserved Claims"), and (d) SunTrust's Proof of Claim filed in the bankruptcy case on February 2, 2005 (the

> "SunTrust Proof of Claim") in consideration of the provisions of this Agreement, and provided that SunTrust is the successful bidder at the hearing on the Approval Motion, SunTrust does hereby fully and finally compromise and settle with, and forever releases, remises, relieves, waives, relinquishes and discharges the Trustee and the Debtor's bankruptcy estate from any and all claims, complaints, rights, manner of action or actions, cause or causes of action, suits, debts, dues, demands, obligations, charges, costs, expenses (including but not limited to attorney's fees) sums of money, controversies, damages, accounts, agreements, covenants, contracts, judgments, reckonings, liens and liabilities of every kind and nature whatsoever, whether at law or in equity, whether based upon statute, common law or otherwise, whether matured, contingent or non-contingent, whether direct or indirect, whether known or unknown, whether suspected or unsuspected, whether or not hidden and without regard to the subsequent discovery or existence of different or additional facts, which SunTrust ever had, now have, or may claim to have against the Trustee, or the bankruptcy estate (the "SunTrust Claims.")

Motion for Order Approving Compromise of Controversy Between David K. Gottlieb, Chapter 7 Trustee and Sun Trust Bank Which is Subject to Overbid, exhibit 1.

SunTrust and the trustee also agreed to waive the application of California Civil Code § 1542,[2] which operates to limit the terms of a general release. Essentially, the release acted to absolve the trustee from all future liability.

While the trustee was adamant about requiring this provision, the trustee also contended that he knew of nothing that might lead to liability to SunTrust and hence that the "value" of the compromise was impossible to evaluate. From his

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[2]California Civil Code § 1542 provides,

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

standpoint, the value of the release (upon which the trustee nevertheless insisted) was nil.

The appellants attempt to make much of this and, in particular, emphasize that the trustee ought not to be able to obtain protection from his own misconduct. While that position would have theoretical appeal in a situation in which the trustee's conduct was questionable, it turns out to be much ado about nothing in this instance because nobody has articulated any actual claims that might be encompassed by the release. In other words, the trustee's seemingly paradoxical insistence on something he contended lacked value was merely the usual reciprocal release upon which prudent parties insist as a precaution even when there is no trouble on the horizon – this is not, in context, overreaching.

Moreover, the release would have dropped out of the picture if the appellants had outbid SunTrust. The above-quoted terms of the compromise provided that there would be no release if SunTrust was not the successful bidder at the sale facet of the hearing on the motion to approve the compromise.

An acid test of a compromise of a cause of action that is capable of being sold is whether there is anyone who is willing to pay the trustee more than the compromise amount in order to acquire and prosecute the cause of action. The appellants elected not to outbid SunTrust when they chose to withdraw their $550,000 bid. Hence, one must view their predicament as largely self-inflicted: by withdrawing their bid, they caused the $500,000 SunTrust bid to pass the acid test.

In short, the appellants have not carried their appellate burden to demonstrate that the court's assessment of the compromise as fair and equitable was error.

III

The focus now shifts to the sale aspect of the compromise proceeding. First, for the sake of clarity, the basics. What was being compromised was a cause of action (i.e., a "chose in action") by the trustee against SunTrust. Such actions are transferrable by a bankruptcy trustee in this circuit. P.R.T.C., 177 F.3d at 781. SunTrust was willing to pay $500,000 to acquire and extinguish the chose in action. The sale aspect of the situation was whether there was anyone willing to pay more than $500,000 to acquire the chose in action.

The nub of the issue on appeal is whether the bidding procedures were appropriate under the circumstances.

The appellants' challenge to the bidding procedures boils down to two main points of contention: (1) the unknown value of the release given to SunTrust, and (2) the putative overbreadth of the indemnity provision.

The appellants argue that the trustee's refusal to disclose to potential bidders and to the court the nature or value of any claims that SunTrust may have against the trustee or the estate made it impossible for the court to determine if the compromise with SunTrust was "fair and equitable."

Part of the deal with SunTrust was a mutual release of claims between the trustee and SunTrust, together with an indemnification provision. The appellants argue that because of

the lack of disclosure, the indemnification provision was too broad. Not only does it cover claims that SunTrust may bring against the estate, but it also encompasses any claims relating to the trustee's own misconduct.

The trustee asserts that he did not value the release and accompanying indemnification provision in the SunTrust compromise because "placing a value on claims that are unknown would be an arbitrary and fruitless exercise." The trustee argues that the inability to value the prospective counterclaims was not due to a lack of due diligence, but rather because "any claims would be specious."

Although the appellants argue that absent such valuation of the release, the court was in no position to determine whether their bid of $550,000 without the release was superior to SunTrust's offer of $500,000 with the release, we are not persuaded. In the absence of any hint in the record that the trustee has done something to expose the estate to liability to SunTrust (which did not assert a counterclaim addressed to the trustee's conduct), the release and indemnification provisions appear to be routine provisions that are, in context, more form than substance.

In any event, the scope of the Indemnity Provision was no broader than the scope of the release agreed to by SunTrust. Both had the same value. If the release had no value because SunTrust had no valid claims against the trustee and the estate, then the appellants would be giving no value in agreeing to the Indemnity Provision. Similarly, if the release had value because counterclaims did arise, then the appellants would be giving an

equivalent value by having given the indemnity against the same claims as to which the release would apply. Thus, the value of the indemnity equaled the value of the release.

The appellants rely on our decisions in Mickey Thompson and Lahijani to support their contention that the trustee did not meet his burden to demonstrate that the court-approved compromise was fair and equitable.

In Mickey Thompson, 292 B.R. 415, there was a settlement that included mutual releases between the estate and a third party purchaser that the trustee did not value. The record was such that, given the nature of that complex litigation, there was a substantial possibility that something of value was involved. Due to the lack of evidence in the record regarding the value of the release, we reversed the court-approved settlement. The distinction here is that the trustee in the present appeal has consistently contended there is nothing of value (other than the trustee's lawsuit) pertinent to the release and there is nothing of record to suggest otherwise.

The appellants also argue that our decision in Lahijani, 325 B.R. at 282, requires the court to consider an offer to share in the proceeds of any prospective recovery. In that instance, the bidder unambiguously offered a combination of cash and a percentage of the net recovery and then was outbid because the court declined to give any value to the proposed share of the potential recovery. In contrast, in this instance, the withdrawn bid was all cash, and the record does not establish that the appellants unambiguously made an offer to share a recovery with the estate as a component of their bid. The vague,

unsubstantiated assertion that appellants informed the trustee that they would be willing to include a judgment sharing provision as part of their offer does not equate with the Lahijani situation.

As noted, the disposition of intangible estate property, such as a chose in action, may be sold by the trustee. P.R.T.C., 177 F.3d at 781; Lahijani, 325 B.R. at 288. Disposition of that chose in action by way of compromise is the equivalent of a sale of that property that simultaneously invokes the sale provisions of 11 U.S.C. § 363, and the compromise procedure of Federal Rule of Bankruptcy Procedure 9019(a). Mickey Thompson, 292 B.R. at 421.

> When confronted with a motion to approve a settlement under Rule 9019(a), a bankruptcy court is obliged to consider, as part of the 'fair and equitable' analysis, whether any property of the estate that would be disposed of in connection with the settlement might draw a higher price through a competitive process and be the proper subject of a section 363 sale. Whether to impose formal sale procedures is ultimately a matter of discretion that depends upon the dynamics of the particular situation.

Id. at 421-22 (footnote omitted).

When viewed as a sale, the issue is whether the terms of the sale to SunTrust created a greater benefit to the estate than the offer with the two conditions given by the appellants. See Lahijani, 325 B.R. at 288. Thus, if the appellants had not withdrawn their bid, the court would have been required to compare the competing bids. When the appellants withdrew the bid, they prevented the court from making the necessary comparison and now are not in a position to complain.

We also note that the appellants' withdrawn "bid" was more in the nature of a proposal to acquire an option to negotiate than a bid to acquire an item of property. It consisted of a cash offer of $550,000, together with a request that the indemnification provision be renegotiated to limit its scope, and that the appellant's bid be subject to their right to appeal. A requirement of further negotiation is not consistent with a purchase.

The court clarified that what it was selling was a cause of action without further features. In other words, no contingent negotiation requirement would apply, which would have transformed the transaction into something more in the nature of an option. The court's restriction of the transaction to the simple sale of the chose in action was appropriate and consistent with the sale as noticed. We perceive no error.

CONCLUSION

The bankruptcy court did not err when it approved the compromise between the trustee and SunTrust over the appellants' objection. AFFIRMED.

JAROSLOVSKY, Bankruptcy Judge, concurring:

I concur with my brethren that the compromise is fair and equitable. I write separately only to express a deeper reservation about appellants' standing.

Giving ear to appellants' arguments creates a disconnect between the proper concerns of the bankruptcy court below and the

factors being urged upon us now on appeal. The bankruptcy court had only one legitimate concern, which was the best interests of the bankruptcy estate. Goodwin v. Mickey Thompson Entm't Grp., Inc. (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003).[1] Appellants have made it clear, both in their brief and at oral argument, that they care nothing about the bankruptcy estate. They just want to get their hands on estate property.[2]

Just because technical standing has been established does not mean that either the bankruptcy court was or we are compelled to consider every argument raised by a frustrated buyer. Standing does not confer upon a frustrated buyer the right to assert that it has been harmed. It only confers the right to assert that the bankruptcy estate has been harmed.

In egregious cases, the argument of a frustrated buyer that it has been harmed may also establish that the estate has been harmed. For instance, corruption or fraud in the marketing of estate property necessarily harms an estate and a frustrated buyer may be allowed to demonstrate such facts. However, the focus must remain the best interests of the estate, not the would-be buyer.

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[1]The court must of course find that a compromise is fair and reasonable. However, this means fair and reasonable *to the creditors*, whose interests are paramount, not frustrated buyers. See Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 290 (9th Cir. BAP 2005); Mickey Thompson, 292 B.R. at 420.

[2]When asked at oral argument how his clients were harmed by the bankruptcy court's decision, counsel for appellants responded that "We were precluded from having a fair opportunity to bid . . . . We spent time, energy and effort . . . wanting to acquire this interest."

In this case, there is no indication of any wrongdoing. All we have is a trustee trying diligently to liquidate an estate and a bankruptcy court properly trying to ensure that the trustee's actions are in the best interests of the estate. Appellants simply have no standing to argue that the bankruptcy court should be reversed because under a different scenario they end up being successful purchasers. Lahijani, 325 B.R. at 290 n.13.