NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1240-KPaB
KERNOL F. GANT and ROBERTA A. GANT,	Bk. No. SB 96-20842-DN
Debtors.	Adv. No. RS 04-02119-DN
JEFFREY C. TRUDGEON,	
Appellant,	
v.	**MEMORANDUM**[*]
R. TODD NIELSON, Trustee,	
Appellee.	

Argued and Submitted on November 17, 2005
at Los Angeles, California

Filed – December 23, 2005

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

Honorable David N. Naugle, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS, and BRANDT, Bankruptcy Judges.

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

This is an appeal from a bankruptcy court order authorizing the trustee to sell the estate's interest and the appellant co-owner's interest in real property pursuant to 11 U.S.C. § 363(h). We AFFIRM.

FACTS

On May 13, 1996, debtors, Kernol and Roberta Gant, filed a chapter 11 case that was converted to a chapter 7 case on October 25, 1996. The bankruptcy court entered a judgment denying debtors' discharge on September 16, 1997.

At the time of the Gants' bankruptcy filing, they co-owned real property with appellant Jeffrey C. Trudgeon, which consisted of two parcels totaling 25 acres of undeveloped land in San Bernardino County, California.

The appellee chapter 7 trustee reported in 2000 his view that the co-owned property had no value to the estate and announced his expectation that the co-owned property would be abandoned pursuant to 11 U.S.C. § 554(c) when the case closed. The case, however, has remained open through the present, and the trustee has changed his mind about the value of the property.

On December 6, 2004, the trustee commenced an adversary proceeding, seeking authorization to sell both the interest of the estate and Trudgeon's interest in the co-owned property pursuant to § 363(h).

On May 9, 2005, the parties filed a "Joint Stipulation As To Admitted Facts For Use At Trial" that contained fourteen stipulated facts. The court accepted the stipulation.

The parties stipulated that upon the commencement of the Gants' bankruptcy case, their ownership interest in the property became property of the bankruptcy estate. Thus, Trudgeon was party to a stipulation that the Gants' co-owned the property with him and that: "The legal descriptions of the Property are set forth on the Grant Deeds transferring title of the Property to Debtors, copies of which are attached as Exhibit 'A'... ."[1]

The stipulation also established that partitioning the two parcels of co-owned property would cost approximately $15,000 per parcel, totaling $30,000. The fair market value of the smaller parcel, sold as a whole, was stipulated to be approximately $80,000, and the value of the larger parcel, sold as a whole, was approximately $280,000.

In addition, the stipulation established that the Gants' estate was ready to be closed within short order once the sale of the property was completed. It was also stipulated that the requirement that the trustee partition the two parcels of property would effectively delay the final closing of the estate by approximately eighteen months, plus some additional time to market the properties and obtain court approval of a sale offer, "assuming no additional delay [was] required by reason of any legal dispute or proceedings as to the propriety or fairness of the partition proposed by the civil engineer."

The stipulation made clear that the conditions of §§ 363(h)(2) and (4) were satisfied:

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[1]Although the exhibit memorialized a transfer of the Gants' one-half interest in the property to Westshore Enterprises, Inc., a Nevada Corporation, nobody argued in the trial court that the estate did not own an interest in the property. In any event, the stipulation regarding ownership trumps.

> A sale of the estate's undivided interest in the Property would realize significantly less for the Estate than the sale of the Property free of the interest of defendant. The Property is not used in the production, transmission or distribution, for sale, of electric energy or natural or synthetic gas for heat, light or power.

The parties further stipulated that appellant had owned his undivided interest in the property since 1985. He acquired his interest in the property for a long-term investment and had a tax basis of $15,000. If he sold his interest, as the trustee requested, he would incur capital gains tax liability.

On May 12, 2005, a trial was held in the adversary proceeding. The evidence consisted of the Joint Stipulation and the record of the case.

After closing argument, the court made findings of fact and conclusions of law orally on the record, authorizing the trustee to sell both the interest of the estate and appellant in the property.

The court ruled that the partition of the property was "impracticable" within the meaning of § 363(h), noting that impracticability was not synonymous with impossibility and that two factors warranted the conclusion that partitioning the property was "impracticable": (1) the cost of approximately $30,000; and (2) the time needed to partition the property under nonbankruptcy law would consume eighteen months. The temporal issue was important to the court because partition would delay the closing of the case. The court also reasoned that the favorable state of the real estate market weighed in favor of a current sale, as opposed to a partition and later sale.

Moreover, the court found it persuasive that a motivating

factor in the sale was the need for the estate to conclude its relationship with tax creditors.

Addressing Trudgeon's personal tax concerns, which were raised at oral argument, the court responded that it was impressed by the fact that Trudgeon seemed to be in a tax bracket in which the amount of capital gains posed a real financial threat to him. However, the court pointed out that capital gains tax treatment is more favorable now than it has been in the past. Moreover, there was no suggestion that Trudgeon's tax liability would exceed the net sale proceeds. The court also noted that Trudgeon had the alternative of purchasing the estate's interest from the trustee under favorable circumstances (in addition to the statutory rights of refusal afforded by 11 U.S.C. § 363(i)).

On May 27, 2005, the court entered a judgment authorizing the sale of the property. This 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).

ISSUE

Whether the bankruptcy court abused its discretion by authorizing the trustee to sell both the estate's and co-owner's interest in the property.

STANDARD OF REVIEW

The bankruptcy court's decision to authorize the sale of property pursuant to § 363(h) is reviewed for an abuse of

discretion. Probasco v. Eads (In re Probasco), 839 F.2d 1352, 1357 (9th Cir. 1987). An abuse of discretion may be based on an incorrect legal standard, or a clearly erroneous view of the facts, or a ruling that leaves the reviewing court with a definite and firm conviction that there has been a clear error of judgment. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Ho v. Dowell (In re Ho), 274 B.R. 867, 871 (9th Cir. BAP 2002).

DISCUSSION

The trustee may be permitted to sell both the estate's interest and the interest of a co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as tenant in common, joint tenant, or tenant by the entirety, so long as four conditions specified at §§ 363(h)(1)-(4) are satisfied. 11 U.S.C. § 363(h).

In this appeal, only the questions of whether the bankruptcy court abused its discretion in determining that the trustee met the requirements of § 363(h)(1) and § 363(h)(3) are in issue: specifically, whether partition is "impracticable" and whether the benefit to the estate outweighs the detriment to co-owners. The Joint Stipulation eliminated the other § 363(h) issues, including the proposition that sale of the estate's undivided interest in the property would realize significantly less for the estate than the sale under § 363(h) of such property free of the co-owner's interest.

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Section 363(h) provides as follows:

> (h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--
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> (1) partition in kind of such property among the estate and such co-owners is impracticable;
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h).

Trudgeon argues for the first time on appeal that the record at the bankruptcy court is devoid of any evidence that the property was held by the Gants as either a "tenant in common, joint tenant or tenant by the entirety" as required by the statute. In doing so, he implicitly and without explanation renounces his stipulation to the contrary. Regardless of the stipulation, however, the omission to have presented the issue to the trial court leads us to decline to address on appeal his argument that it was not demonstrated that the Gants owned the requisite interest in the property. Leibowitz v. County of Orange (In re Leibowitz), 230 B.R. 392, 399 (9th Cir. BAP 1999); Concrete Equip. Co. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996); McCoy v. Bank of Am. (In re

McCoy), 111 B.R. 276, 281-82 (9th Cir. BAP 1990). An argument need not be considered on appeal unless it is "raised sufficiently for the trial court to rule on it." Rains v. Flinn (In re Rains), 428 F.3d 893, 902 (9th Cir. 2005); Broad v. Sealaska Corp., 85 F.3d 422, 430 (9th Cir. 1996).

A. § 363(h)(1) – Impracticability

In order to sell property free and clear of the interest of a co-owner, the trustee must demonstrate that partitioning the property is "impracticable." 11 U.S.C. § 363(h)(1).

Appellant argues that the trustee has not met his burden and that partitioning the property is not impracticable. First, he relies on policy grounds. Citing a divided Eighth Circuit BAP decision that was later reversed on appeal, In re Van Der Heide,[2] and a bankruptcy court decision from another circuit, In re Belyea, 253 B.R. 312 (Bankr D. N.H. 1999), Trudgeon argues that the requirement in § 363(h) that partition be "impracticable" operates as an independent threshold barrier that requires a showing of "impossibility" that can never be surmounted based merely on time and expense.

In reply, the trustee, noting that the Bankruptcy Code does not explain the "impracticability" standard of § 363(h)(1), contends that "impracticability" is not an independent threshold barrier that entails a showing that partition is impossible, but

[2]Appellant incorrectly cites In re Van Der Heide with the following citation: "219 B.R. 83 (8 Cir BAP 1998)." The correct citation is Van Der Heide v. LaBarge (In re Van Der Heide), 219 B.R. 830 (8th Cir. BAP 1998), rev'd, 164 F.3d 1183 (8th Cir. 1999). He does not attempt to address the implications of the subsequent reversal by the Eighth Circuit.

rather that the standard should be less than impossibility. In support, the trustee points out that, in Belyea, a bankruptcy court in New Hampshire ruled that § 363(h)(1) required the plaintiff to meet a burden "similar" to that prevailing under New Hampshire law, which entails showing "great prejudice or inconvenience" but not impossibility. Belyea, 253 B.R. at 318.

The Belyea decision, however, recognizes that "impracticability" is a federal standard. If Congress had intended that state law controlled, then it would have used the standard phrase "applicable nonbankruptcy law" in § 363(h). Moreover, if state law controlled there would be little need for the "impracticability" standard at § 363(h) because a trustee could always rely on state law. It follows that impracticability is less than impossibility.

As the parties point out, the "impracticable" prong of 363(h) is usually discussed in cases where property, by its physical nature or legal condition, cannot be partitioned. See Reed v. Reed (In re Reed), 940 F.2d 1317, 1321 (9th Cir. 1991)("[s]ince this was a residence, partition in kind was obviously not possible"); Griffin v. Griffin (In re Griffin), 123 B.R. 933, 935 (1991) ("Where property is a single family residence, there is no practicable manner of partition other than a sale and division of the proceeds."), citing In re Ivey, 10 B.R. 230 (Bankr. N.D. Ga. 1981).

The few reported cases that have dealt with undeveloped, nonresidential property present idiosyncratic facts that do not provide much guidance with respect to the meaning of "impracticable," other than to suggest that the analysis is on a

case-by-case basis. Block v. Cambio (In re Block), 259 B.R. 498, 507 (Bankr. D.R.I. 2001); In re Batten, 141 B.R. 899, 905 (Bankr. W.D. La. 1992).

It is apparent from such cases that each partition situation must be assessed on its own unique constellation of facts.

Appellant's assertion that Congress "preferred" that the property be partitioned under § 363(h) leads to little more than the unexceptional proposition that, all other things being equal, the nonbankruptcy remedy of partition is preferred, if available.

The test created by Congress that focuses upon "impracticability" of partition, a "significant" difference in the proceeds to the estate, and a balance of benefits against detriments, operates to fix the analysis of what is to be done when all other things are not equal.

Although Congress was silent as to the bounds of the concept, the choice of the word "impracticable" instead of "impossible" connotes a barrier lower than that for which Trudgeon argues. The term "impracticable" logically brings within its reach a range of situations in which it is not impossible to partition the property, but in which a sale of the co-owner's interest in the property is more than merely inconvenient.

This analysis is further informed by other contexts in which the term "impracticable" equates with prejudice and expense. Under contract law, performance may be impracticable due to excessive and unreasonable difficulty, expense, or loss to a party. 30 WILLISTON ON CONTRACTS § 77:1 (4th ed. 1990); 1 WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 842 (10th ed. 2005). Such usages all connote the exercise of judgment by the trial court.

In this instance, the bankruptcy court concluded that partitioning the property was impracticable primarily because of the associated costs and time. As the trustee points out, $30,000 represents one-sixth of the gross value of the estate's interest in the parcels. After such costs, coupled with brokers' commissions and costs of sale, as well as capital gains tax liability, these costs would exceed more than twenty percent of the anticipated net recovery of the estate. Trudgeon has essentially conceded that point as a consequence of conceding that the sale would produce "significantly" more for the estate than partition.

Second, the bankruptcy court found that partitioning of the property was impracticable because the closing of the estate would be delayed by a significant amount of time. Here, partitioning the property would take at least eighteen months. If the partition in kind took only three months, appellant would have a better argument. The temporal issue is important because the parties stipulated that the estate is ready to close, but for the matters related to this property.

We are also mindful that pursuing partition could ultimately result in sale anyway because sale is a permissible remedy in a California partition action. Stine v. Diamond (In re Flynn), 297 B.R. 599, 604 (9th Cir. BAP 2003)(citing HARRY D. MILLER, ET AL., CALIFORNIA REAL ESTATE § 12:19 (3d ed. 2001)), rev'd on other grounds, 418 F.3d 1005 (9th Cir. 2005).

The trial court was faced with a decision that required it to exercise its judgment about how to deal with co-owned property in a manner that would allow an estate that has already been open for

eight years to move towards a conclusion. In that context, keeping an estate open for at least another eighteen months, and potentially longer if further litigation were to ensue, is a temporal factor that the court could properly consider.

We cannot say that the bankruptcy court's decision regarding impracticability under § 363(h)(1) represents an abuse of discretion.

B. § 363(h)(3) – Balancing Test

The next issue relates to the § 363(h)(3) balancing test. A trustee may sell both the estate's interest and the interest of any co-owner in property only if the benefit to the estate of a sale of such property free of the interest of the co-owner outweighs the detriment, if any, to such co-owner. 11 U.S.C. § 363(h)(3).

Trudgeon's argument focuses on the detriment to the estate versus the detriment to appellant[3] concluding that the only detriment to the estate is cost and time. As to time, he contends that the estate has already been open for eight years, so keeping it open an additional eighteen months would not be detrimental.

Trudgeon weighs the costs to the estate against the capital gains he would incur if the whole property were sold, concluding

[3]Although appellant contends that nothing in the stipulated facts indicates that the partition of the property and the sale of the estate's interest thereafter will yield any less funds to the estate than its one-half of the proceeds from the sale of the whole property, the Joint Stipulation established that a sale of the estate's undivided interest in the property would realize "significantly" less for the estate than sale of the property free of his interest. Formal stipulations made and accepted in judicial proceedings are not to be taken lightly.

that the "financial impact is 'a draw.'" Although the record does not contain evidence regarding his capital gains liability, Trudgeon argued orally to the trial court that his low tax basis in the property would lead to substantial capital gains tax liability.

He further contends that the sale of the whole property will prejudice him because he will be forced to sell an asset that he purchased as a long-term investment. Without the sale, he would retain ownership of the property until after his death, with a view to bequeathing it to his heirs.

The trustee counters that the same considerations that establish impracticability – delay, cost and risk of substantial additional litigation delay – also demonstrate that the benefit to the estate outweighs the detriment, if any, to appellant.

The statute is worded in terms of the benefit to the estate and the detriment to the co-owner. Here, the estate will benefit by the sale of the property free and clear of appellant's interest because it will not incur partitioning costs and the property can be sold in a favorable market. As the bankruptcy court noted, the change of interest rates in the last year tend to indicate the estate may not benefit as much if the property were sold eighteen months down the line. Moreover, the estate would benefit from the sale because the trustee would finally be in a position where he can close the estate. Also, the sale is beneficial to the estate because it allows the trustee to make a more rapid payment to the taxing authorities.

These benefits to the estate must outweigh the detriment to appellant. 11 U.S.C. § 363(h)(3). The putative detriment to

appellant is two-fold: the capital gains liability and the stripping away of his long-term investment. As to the first, the detriment is not great because the co-owner will have ample sale proceeds to pay capital gains taxes that are taxed at a rate that usually is less than ordinary income.

As to the second, the Code offers appellant an opportunity to preserve his ownership. Pursuant to § 363(i), a co-owner may purchase the estate's half-interest in the property at the price at which a sale would be consummated. 11 U.S.C. § 363(i). Moreover, it is also pertinent that there was no effort made to have the property abandoned pursuant to 11 U.S.C. § 554.

In sum, determining whether a sale is authorized under § 363(h) entails a measure of judgment and discretion. We cannot say that the court's judgment in authorizing the sale was illogical or otherwise an abuse of discretion. Rabkin v. Oregon Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

CONCLUSION

The trial court applied correct legal standards. There was no clearly erroneous assessment of facts. Regardless of what individual members of this panel might have ruled if presented with an identical situation in their capacity as bankruptcy trial judges, we collectively are not left with a definite and firm conviction that there has been a clear error of judgment. Hence, the trial court did not abuse its discretion. We AFFIRM.