

DEC 23 2005

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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NOT FOR PUBLICATION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-05-1240-KPaB |
| |) | | |
| KERNOL F. GANT and |) | Bk. No. | SB 96-20842-DN |
| ROBERTA A. GANT, |) | | |
| |) | Adv. No. | RS 04-02119-DN |
| Debtors. |) | | |
| _____ |) | | |
| |) | | |
| 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.

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

5
6 FACTS

7 On May 13, 1996, debtors, Kernol and Roberta Gant, filed a
8 chapter 11 case that was converted to a chapter 7 case on October
9 25, 1996. The bankruptcy court entered a judgment denying
10 debtors' discharge on September 16, 1997.

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

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

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

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

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

8 The stipulation also established that partitioning the two
9 parcels of co-owned property would cost approximately \$15,000 per
10 parcel, totaling \$30,000. The fair market value of the smaller
11 parcel, sold as a whole, was stipulated to be approximately
12 \$80,000, and the value of the larger parcel, sold as a whole, was
13 approximately \$280,000.

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

24 The stipulation made clear that the conditions of
25 §§ 363(h) (2) and (4) were satisfied:

26
27 ¹Although the exhibit memorialized a transfer of the Gants'
28 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.

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

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

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

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

20 The court ruled that the partition of the property was
21 "impracticable" within the meaning of § 363(h), noting that
22 impracticability was not synonymous with impossibility and that
23 two factors warranted the conclusion that partitioning the
24 property was "impracticable": (1) the cost of approximately
25 \$30,000; and (2) the time needed to partition the property under
26 nonbankruptcy law would consume eighteen months. The temporal
27 issue was important to the court because partition would delay
28 the closing of the case. The court also reasoned that the
29 favorable state of the real estate market weighed in favor of a
30 current sale, as opposed to a partition and later sale.

31 Moreover, the court found it persuasive that a motivating

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

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

14 On May 27, 2005, the court entered a judgment authorizing
15 the sale of the property. This appeal ensued.

16 17 JURISDICTION

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

20 21 ISSUE

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

25 26 STANDARD OF REVIEW

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

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

8
9 DISCUSSION

10 The trustee may be permitted to sell both the estate's
11 interest and the interest of a co-owner in property in which the
12 debtor had, at the time of the commencement of the case, an
13 undivided interest as tenant in common, joint tenant, or tenant by
14 the entirety, so long as four conditions specified at
15 §§ 363(h)(1)-(4) are satisfied. 11 U.S.C. § 363(h).

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

26 //

27 //

28 //

2 Section 363(h) provides as follows:

3 (h) Notwithstanding subsection (f) of this section, the
4 trustee may sell both the estate's interest, under
5 subsection (b) or (c) of this section, and the interest
6 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--

7 (1) partition in kind of such property among the
estate and such co-owners is impracticable;

8 (2) sale of the estate's undivided interest in such
9 property would realize significantly less for the estate
than sale of such property free of the interests of such
co-owners;

10 (3) the benefit to the estate of a sale of such
11 property free of the interests of co-owners
outweighs the detriment, if any, to such co-owners;
and

12 (4) such property is not used in the production,
13 transmission, or distribution, for sale, of electric
energy or of natural or synthetic gas for heat, light,
14 or power.

15 11 U.S.C. § 363(h).

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

1 McCoy), 111 B.R. 276, 281-82 (9th Cir. BAP 1990). An argument
2 need not be considered on appeal unless it is "raised sufficiently
3 for the trial court to rule on it." Rains v. Flinn (In re Rains),
4 428 F.3d 893, 902 (9th Cir. 2005); Broad v. Sealaska Corp., 85
5 F.3d 422, 430 (9th Cir. 1996).

6
7 A. § 363(h)(1) - Impracticability

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

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

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

25 _____
26 ²Appellant incorrectly cites In re Van Der Heide with the
27 following citation: "219 B.R. 83 (8 Cir BAP 1998)." The correct
28 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.

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

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

15 As the parties point out, the "impracticable" prong of 363(h)
16 is usually discussed in cases where property, by its physical
17 nature or legal condition, cannot be partitioned. See Reed v.
18 Reed (In re Reed), 940 F.2d 1317, 1321 (9th Cir. 1991) ("[s]ince
19 this was a residence, partition in kind was obviously not
20 possible"); Griffin v. Griffin (In re Griffin), 123 B.R. 933, 935
21 (1991) ("Where property is a single family residence, there is no
22 practicable manner of partition other than a sale and division of
23 the proceeds."), citing In re Ivey, 10 B.R. 230 (Bankr. N.D. Ga.
24 1981).

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

1 case-by-case basis. Block v. Cambio (In re Block), 259 B.R. 498,
2 507 (Bankr. D.R.I. 2001); In re Batten, 141 B.R. 899, 905 (Bankr.
3 W.D. La. 1992).

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

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

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

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

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

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

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

20 We are also mindful that pursuing partition could ultimately
21 result in sale anyway because sale is a permissible remedy in a
22 California partition action. Stine v. Diamond (In re Flynn), 297
23 B.R. 599, 604 (9th Cir. BAP 2003) (citing HARRY D. MILLER, ET AL.,
24 CALIFORNIA REAL ESTATE § 12:19 (3d ed. 2001)), rev'd on other grounds,
25 418 F.3d 1005 (9th Cir. 2005).

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

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

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

8
9 B. § 363(h)(3) - Balancing Test

10 The next issue relates to the § 363(h)(3) balancing test. A
11 trustee may sell both the estate's interest and the interest of
12 any co-owner in property only if the benefit to the estate of a
13 sale of such property free of the interest of the co-owner
14 outweighs the detriment, if any, to such co-owner. 11 U.S.C.
15 § 363(h)(3).

16 Trudgeon's argument focuses on the detriment to the estate
17 versus the detriment to appellant³ concluding that the only
18 detriment to the estate is cost and time. As to time, he contends
19 that the estate has already been open for eight years, so keeping
20 it open an additional eighteen months would not be detrimental.

21 Trudgeon weighs the costs to the estate against the capital
22 gains he would incur if the whole property were sold, concluding
23

24 ³Although appellant contends that nothing in the stipulated
25 facts indicates that the partition of the property and the sale
26 of the estate's interest thereafter will yield any less funds to
27 the estate than its one-half of the proceeds from the sale of the
28 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.

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

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

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

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

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

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

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

12 In sum, determining whether a sale is authorized under
13 § 363(h) entails a measure of judgment and discretion. We cannot
14 say that the court's judgment in authorizing the sale was
15 illogical or otherwise an abuse of discretion. Rabkin v. Oregon
16 Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

18 CONCLUSION

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