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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NOT FOR PUBLICATION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

6	In re:)	BAP No.	NV-09-1049
7	SILVER BEACH, LLC,)	Bk. No.	08-13995-MKN
8	Debtor.)		
9	_____)		
10	ROBERT HEY; CHERYL LABOSCO;)		
11	MICHAEL PANAGGIO; AL SCHMIDT,)		
12	Appellants,)		
13	v.)		
14	SILVER BEACH, LLC; UNITED)	M E M O R A N D U M ¹	
15	STATES TRUSTEE; ATLANTIC)		
16	NORTHSTAR, LLC,)		
17	Appellees.)		
18	_____)		

Argued and Submitted on September 24, 2009
at Las Vegas, Nevada

Filed - November 3, 2009

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

Honorable Mike K. Nakagawa, Chief Bankruptcy Judge, Presiding

Before: Kurtz², Montali and Dunn, Bankruptcy Judges.

¹This 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.

²Hon. Frank L. Kurtz, Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 The subject of this appeal is an order authorizing the
2 auction sale of approximately 2 acres of vacant Florida
3 beachfront property free and clear of timeshare interests. On
4 appeal, four owners of timeshares challenge the auction order,
5 arguing that their timeshare interests are not property of the
6 debtor's estate and not subject to sale by the bankruptcy court.
7 In response, the debtor argues the issue is being raised for the
8 first time on appeal and further argues that timeshare interests
9 are property of the estate and can be sold by authority of
10 11 U.S.C. §§ 363(b) and (f)³.

11 Our motions panel initially denied the timeshare owners'
12 request for a stay pending appeal, reasoning that they had failed
13 to show that they would succeed on appeal due to their failure to
14 raise their appellate issue before the trial court. Thereafter
15 the timeshare owners' renewed request for stay was granted. In
16 granting the stay, the motions panel questioned whether the
17 interests of the timeshare owners should have been determined by
18 the bankruptcy court before authorizing the sale, citing Popp v.
19 Zimmerman (In re Popp), 323 B.R. 260, 272 (9th Cir. BAP 2005) and
20 whether the appropriate procedure for the auction order was an
21 adversary proceeding as opposed to a motion, citing Rule 7001(3).
22 We conclude the bankruptcy court should have determined the
23
24

25 ³Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
28 enacted and promulgated after the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23.

1 interests of the timeshare owners before authorizing the sale
2 and, for that reason, reverse the auction order and remand.

3
4 **STATEMENT OF FACTS**

5 Parties

6 Silver Beach, LLC ("Silver Beach"), is a limited liability
7 company, organized under the laws of the state of Nevada, and the
8 debtor in a chapter 11 case filed on April 24, 2008.

9 Robert Hey, Cheryl Labosco, Michael Panaggio, and Al Schmidt
10 ("timeshare owners") are the owners of timeshare units created by
11 virtue of a declaration of timeshare plan affecting Florida
12 beachfront property, the principal asset of Silver Beach.

13 Property

14 Silver Beach owns 2.06 acres of vacant land ("Property"),
15 abutting the Atlantic Ocean and currently zoned for tourism-
16 related uses. Title to the Property is clouded by the interests
17 of timeshare owners, a Declaration of Timeshare Plan, a
18 Declaration of Condominium, a Recreational Facilities Agreement,
19 and miscellaneous covenants, conditions and restrictions.

20 In 1997, Silver Beach Villas, Inc. ("SB Villas"), a
21 corporation formed by Robert Hey, purchased the Property. At the
22 time, there was a two story motel on the Property. SB Villas
23 intended to develop the Property for timeshare and condominium
24 use. After acquiring the Property, SB Villas filed the necessary
25 documents, including condominium and timeshare plan declarations,
26 and began selling timeshare units. The corporation also started
27 construction and placed a steel frame over the motel so that
28 third and fourth floors could be added. Before framing started,

1 in February of 2003, SB Villas filed a petition for chapter 11
2 relief. Tammac Financial Corporation ("Tammac"), SB Villas' real
3 estate lender, successfully moved the court for dismissal of the
4 case. In October of 2003, SB Villas refiled chapter 11 but the
5 case eventually was converted to chapter 7 and closed as a no
6 asset case. During the pendency of the second case, Tammac
7 obtained relief from the automatic stay, foreclosed upon the
8 Property, and purchased the Property at the foreclosure sale.

9 In January of 2005, Silver Beach purchased the Property from
10 Tammac, with the intention of developing the Property into
11 condominium units. Silver Beach's project likewise was
12 unsuccessful. The contractor retained for the project gutted the
13 interior of the motel but failed to advance the project beyond
14 that stage. Eventually the condition of the project deteriorated
15 and the City of Daytona Beach ordered Silver Beach to demolish
16 its improvements, reducing the Property to vacant land.

17 After its condominium project failed, Silver Beach attempted
18 to sell the Property to prospective developers, including
19 Mr. Hey, the owner of an adjacent timeshare resort. These
20 efforts were unsuccessful, largely due to the cloud upon the
21 title created by the interests of the timeshare owners and other
22 encumbrances related to SB Villas' aborted timeshare project.
23 Silver Beach also blames current market conditions for its
24 inability to sell the Property. Eventually Silver Beach filed a
25 petition for relief under chapter 11.

26 The Motion for Approval of Sale and Auction Procedure

27 Some seven months after the debtor filed its petition for
28 relief, it sought approval of sale and auction procedures for the

1 sale of the Property. The sales motion was carefully planned and
2 supported by several declarations that provided the court with
3 relevant information regarding the Property. The requested order
4 would have authorized a sale of the Property, free and clear of
5 all interests, including the interests of timeshare owners. The
6 Property was to be sold to the highest bidder at an auction
7 conducted in open court. The debtor cited sections 363(b) and
8 (f) as authority for the sale. The auction order provided
9 creditors with liens secured by the Property could credit bid up
10 to the amount of the secured debt. The order established
11 \$6,800,000.00 as the minimum opening bid and further stated that
12 Atlantic Northstar, LLC ("Atlantic Northstar"), the debtor's
13 secured real estate lender, had agreed to accept \$6,507,575.00 in
14 satisfaction of its debt, if no bid exceeded the amount of the
15 minimum bid. The order further provided for the distribution of
16 proceeds to pay priority tax claims, administrative claims, trade
17 debt claims, and a carve out of \$100,000.00 for the holders of
18 timeshare units. In the event that the successful bid exceeded
19 the minimum bid, the holders of timeshare units would receive an
20 additional payment, calculated at 5% of the amount exceeding the
21 minimum bid.

22 The Timeshare Owners' Response

23 In response to the motion, four of the approximately 150
24 scheduled timeshare owners and an entity identified as the Silver
25 Beach Club Association, Inc. ("objecting parties"), objected.
26 Their objection to the sale was "an analysis of admitted facts
27 which raise legitimate concerns about the good faith of the
28 debtor in its bankruptcy filing and proposed property sale, and a

1 suggestion of other unknown facts, not revealed in the debtor's
2 motion" The objection was not supported by affidavit or
3 declaration. Essentially the objection was based upon an
4 admitted fact: Silver Beach and Atlantic Northstar are affiliates
5 of Bridge Capital USVI ("Bridge Capital"), a Virgin Islands
6 Limited Liability Company; and a representation: Silver Beach
7 Club Association, Inc., had been negotiating to purchase the
8 Property and was offering an amount in excess of the minimum bid
9 price. In their view, the sole purpose of the bankruptcy was to
10 enable the debtor to sell the Property free and clear of the
11 interests of the timeshare owners, providing additional leverage
12 to the debtor in its negotiations with Silver Beach Club
13 Association, Inc. Additionally the objecting parties questioned
14 the amount of the debt claimed by Atlantic Northstar. They
15 asserted the Property was purchased from Tammac for cash and any
16 secured real estate debt likely related to the debtor's aborted
17 condominium project. In their view, \$8,146,283.00 seemed
18 excessive for a construction project that resulted in vacant
19 ground.

20 Also, they questioned the need for the bankruptcy because
21 there was no foreclosure. Any foreclosure would have involved
22 the unlikely scenario of one Bridge Capital affiliate foreclosing
23 upon the property of another Bridge Capital affiliate. Moreover,
24 because the legal description associated with the mortgage
25 excepted the timeshare units, the foreclosure would not have
26 dealt with the troublesome timeshare interests. Therefore, the
27 timeshare owners submit, motivation for filing bankruptcy was to
28 eliminate the objecting parties' interest.

1 The Hearing

2 After hearing and considering the objecting parties'
3 presentation to the court, the bankruptcy judge concluded that
4 some of the objecting parties' objections were not supported by
5 competent evidence and some objections, such as the amount of the
6 debt owed to Atlantic Northstar, could be resolved at a later
7 time. The court granted the debtor's motion and entered a number
8 of findings of fact, based upon the declarations submitted in
9 support of the order.

10 Bankruptcy Court's Findings of Fact

11 In addition to granting the debtor's motion, the court
12 entered a number of findings of fact, based upon the declarations
13 submitted in support of the order. These findings included
14 findings that: the notice of the sale and all supporting
15 documents were properly served upon all interested parties; the
16 sale represents a reasonable exercise of the debtor's business
17 judgment; the debtor is authorized to terminate the condominium,
18 timeshare and master declarations by voting its interest in favor
19 of termination; under applicable nonbankruptcy law, the timeshare
20 owners could be compelled to accept a monetary satisfaction
21 pursuant to a partition action, under Florida law; and the
22 interests of the timeshare owners are in bona fide dispute. On
23 appeal, the timeshare owners do not specifically assign error to
24 any of these findings of fact but in the body of their appellate
25 brief, they implicitly challenge some of the findings of fact.

26 Issues Raised by the Objecting Parties

27 The objecting parties' written objection and oral
28 presentation to the trial court did touch upon a number of issues

1 subsequently raised on appeal. For example, in their written
2 objection, they stated:

3 It should be noted that the debtor (on behalf of
4 Bridge) simply acquired the interest in the property
5 which Tammac acquired through its foreclosure. This
6 interest apparently does not include the title
7 interests owned by numerous timeshare interest holders.
8 ER Exh. "E" ¶5 pg. 5.

9 Here, the objecting parties are asserting that the timeshare
10 owners are fee owners of their interests in the Property and
11 objecting to the proposed sale of their fee interests. The
12 objection also challenges the disposition of the sale's proceeds
13 based upon the fee interests of the timeshare owners. They
14 stated:

15 ...in a proper sale of the property, the timeshare
16 owners would receive a pro rata share of the gross sale
17 price, before payment of the purported mortgage to
18 Atlantic Northstar, LLC, which would have to be paid
19 only from the share of the gross sale price allocated
20 to the debtor. ER Exh. "E" ¶6 pg. 5.

21 And the objection asserts the timeshare owners would be treated
22 differently under state law:

23 ...if the property was sold under state partition laws
24 or other applicable timeshare/condominium dissolution
25 procedures, the timeshare interest holders would
26 receive a pro-rata share of the sale proceeds before
27 (emphasis in original) payment of the mortgage to
28 Atlantic Northstar, LLC, ER Exh. "E" ¶7 pg. 6.

29 In summary, the objecting parties raised the issues of the nature
30 of their interests in the Property, and how they should be
31 compensated as owners.

32 At the hearing, counsel for Mr. Hey stated that he wanted to
33 emphasize two matters. The first was the amount of the debt owed
34 to Atlantic Northstar, LLC, and the second was:

35 There's also a question about what the percentage of
36 the apportionment of the ownership of this property

1 should be to those fee title holders. Those who had a
2 warranty deed filed on this property are owners of the
3 property. And I understand that through the bankruptcy
4 action their interest can't be taken away
5 ER Exh. "G" pg. 17.

6 Later, he stated:

7 We would ask your Honor to hold off on an approval of
8 any sale at this point until those issues are
9 addressed. And once those are addressed, at this time,
10 I think it would be better suited to hold an auction
11 for this property if that's the appropriate way. ER
12 Exh. "G" pgs. 17-18.

13 In effect, Mr. Hey's attorney asked the court to determine the
14 interests of the timeshare owners before authorizing an auction
15 sale of the property.

16 **ISSUES ON APPEAL**

- 17 1. What is the interest of a timeshare owner?
- 18 2. Should the interests of the timeshare owners have been
19 determined by the bankruptcy court before authorizing the
20 sale?
- 21 3. Does section 363(f) authorize sales that extinguish
22 timeshare estates?
- 23 4. Was the appropriate procedure for the auction order an
24 adversary proceeding as opposed to a motion?

25 **STANDARD OF REVIEW**

26 This court reviews appeals from orders to sell property of
27 the estate other than in the ordinary course of business pursuant
28 to section 363(b) for abuse of discretion. In re Popp, 323 B.R.
at 265. On appeal, bankruptcy courts' findings of fact are
reviewed for clear error and conclusions of law are reviewed de

1 novo. Rule 8013. A court abuses its discretion if the court
2 does not apply the correct law or if the court rests its decision
3 on a clearly erroneous finding of material fact. United States
4 v. Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998). The reversal of
5 an order for abuse of discretion requires "a definite and firm
6 conviction that the court committed clear error of judgment in
7 the conclusion it reached upon weighing the relevant factors."
8 Stine v. Flynn (In re Stine), 254 B.R. 244, 248 (9th Cir. BAP
9 2000) (citing In re Cortez, 191 B.R. 174, 177 (9th Cir. BAP
10 1995)). "Review under the 'clearly erroneous standard' is
11 significantly deferential; to reverse, the appellate court must
12 have a 'definite and firm conviction that a mistake has been
13 committed.'" In re Bigelow, 271 B.R. 178, 183 (9th Cir. BAP
14 2001). "[A]n appellate court will not consider issues not
15 properly raised before the [trial] court. Furthermore on appeal,
16 arguments not raised by a party in its opening brief are deemed
17 waived." Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410
18 (9th Cir. BAP 2005), aff'd, 564 F.3d 1052 (9th Cir. 2009)
19 (quoting Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)).

20 21 **DISCUSSION**

22 I. What is the interest of a timeshare owner?

23 This is, of course, a question of Florida state law. Butner
24 v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed. 136
25 (1979); In re Harrell, 73 F.3d 218 (9th Cir. 1996). In Florida,
26 the creation and sale of timeshares is regulated by The Florida
27 Vacation Plan and Timesharing Act, which covers sales of
28 timeshare interests and authorizes the creation of either

1 "timeshare estates" or "timeshare licenses." Fla. Stat. § 721.02
2 (2005). The term "timeshare estates" is defined in Fla. Stat.
3 § 721.02 (34) as "a right to occupy a timeshare unit, coupled
4 with a freehold estate or an estate for years with a future
5 interest in a timeshare property or a specified portion thereof."
6 Significantly, a timeshare estate creates a fee interest in real
7 property. This form of ownership is contrasted with a "timeshare
8 license," which is essentially the owners' permission to use the
9 property. Fla. Stat. § 721.05 (37).

10 Here, SB Villas filed a Declaration of Condominium that
11 provided that the condominiums could be subject to the creation
12 of timeshare estates. Then SB Villas filed a Declaration of
13 Timeshare Plan, which dedicated four condominiums to a timeshare
14 plan that provided for the subdivision of the subject
15 condominiums into unit weeks. In other words, the condominium
16 plan provided for a fixed week timeshare allowing the owner to
17 use the unit for a specified week during the year. In this case,
18 the timeshare owners each purchased a timeshare estate, which is
19 a fee interest in the timeshare property. This is why the
20 Property purchased by the debtor from Tammac did not include the
21 time unit weeks sold by SB Villas to the timeshare owners and why
22 the legal description of the Property attached to the debtor's
23 motion states a legal description of the 2.06 acres of property
24 **less** and **except** certain specified time unit weeks.

25 II. Should the interests of the timeshare owners have been
26 determined by the bankruptcy court before authorizing the sale?

27 The timeshare owners' contentions, made both to the
28 bankruptcy court and to this Panel, are: the debtor does not own

1 our timeshares; because the debtor does not own our timeshares,
2 the timeshares are not property of the bankruptcy estate; and
3 because the timeshares are not property of the bankruptcy estate,
4 the timeshares cannot be sold under authority of section 363(b).
5 The timeshare owners emphasize section 363(b) authorizes the sale
6 of only "property of the estate." According to the debtor, the
7 timeshare owners' contention that the bankruptcy court lacked
8 authority to sell their fee interests contains a faulty premise.
9 The auction order does not authorize the sale of timeshare
10 interests. Rather the auction order authorizes the sale of the
11 Property free and clear of the interests of the timeshare owners.

12 Only Property of the Estate May Be Sold

13 Section 363(b)(1) provides that "[t]he trustee, after notice
14 and a hearing, may use, sell, or lease, other than in the
15 ordinary course of business, property of the estate...."
16 11 U.S.C. § 363(b)(1). Implicit within the statutory grant of
17 authority to sell property under section 363(b), is the
18 requirement that the estate actually have an interest in the
19 property to be sold. For that reason, a bankruptcy court may not
20 allow the sale of property as "property of the estate" without
21 first determining whether the debtor in fact owns the property.
22 Moldo v. Clark (In re Clark), 266 B.R. 163, 172 (9th Cir. BAP
23 2001). In Clark, the debtor filed bankruptcy schedules claiming
24 ownership of assets actually owned by the debtor's trust. The
25 debtor also claimed these assets as exempt property. The trustee
26 disputed the claim of exemption and moved to sell the property
27 free and clear of exemption. The Bankruptcy Appellate Panel
28 reversed the order authorizing the sale and remanded for

1 determination of "the threshold question" regarding whether the
2 property to be sold was property of the estate.

3 Similarly, the issue before the bankruptcy court in In re
4 Anderson, 377 B.R. 865 (6th Cir. BAP 2007) was the approval of
5 the trustee's settlement of an adversary proceeding. In that
6 lawsuit, the trustee sought to compel the sale of hunting land
7 free and clear of certain nondebtor co-owners' interests. The
8 bankruptcy court refused to approve the settlement because the
9 debtors had exempted their interest in the property. The
10 bankruptcy court considering the motion sua sponte raised the
11 issue of whether the bankruptcy estate had an interest in the
12 property. The court concluded that it did not because the
13 debtor's interest in the property had been properly exempted, and
14 the court declined to approve the settlement. Id. at 868-870.
15 On appeal, the Bankruptcy Appellate Panel reversed the bankruptcy
16 court, ruling that the bankruptcy court erred by refusing to
17 approve the settlement, but recognizing that the bankruptcy court
18 correctly determined that the hunting land was not property of
19 the estate and not subject to disposition under section 363(b).
20 Id. at 877.

21 In Popp, the trustee sought to sell property "free and
22 clear" of a claim asserted by a secured creditor that disputed
23 the trustee's title to the property. After the bankruptcy court
24 approved the sale, the secured creditor appealed to the
25 Bankruptcy Appellate Panel, arguing that the sale violated the
26 holding in Warnick v. Yassian (In re Rodeo Canon Dev. Corp.),
27 362 F.3d 603 (9th Cir. 2004) withdrawn and modified by 126 Fed.
28 Appx. 353, 2005 WL 663421 (9th Cir. 2005). In Rodeo Canon, the

1 Ninth Circuit considered a challenge to a sale of real property
2 "free and clear" of an ownership claim that was the subject of a
3 pending adversary proceeding. Reversing the order authorizing
4 the sale, the Ninth Circuit stated section 363(b) does not permit
5 the sale of property that is not "property of the estate" and
6 held the bankruptcy court should not have authorized a sale
7 without first adjudicating the ownership dispute in the pending
8 adversary. Popp, 323 B.R. at 268. After carefully analyzing the
9 Rodeo Canon decision, the Popp court concluded that Rodeo Canon
10 merely established principles of efficient judicial
11 administration. Following the principle established by Rodeo
12 Canon, the Popp court reversed because the bankruptcy court
13 decided that the estate had some ownership interest in the
14 property and authorized the sale, despite the pendency of an
15 adversary proceeding addressing the ownership dispute. Id. at
16 269-70.

17 Section 363(b) states the general rule that only "property
18 of the estate" may be sold pursuant to its authority. The single
19 statutory exception to the rule is section 363(h), which
20 authorizes the sale of specified co-owned property. A section
21 363(f) sale cannot be used to transform property of others into
22 property of the estate. For example, in Nickless v. Aaronson
23 (In re Katz), 341 B.R. 123, 126 (Bankr. D. Mass. 2006), the
24 debtor owned an interest in a non-debtor partnership. The
25 chapter 7 trustee commenced an adversary proceeding seeking,
26 among other things, authority to sell the partnership's assets.
27 The court observed "it is axiomatic that the mere bankruptcy of a
28 partner does not bring the partnership assets within the

1 jurisdiction of the bankruptcy court. A debtor's interest in a
2 partnership is an asset of the debtor's estate under 11 U.S.C.
3 § 541; the assets of the partnership are not." Katz, 341 B.R. at
4 128. Observing that the trustee was "seeking to accomplish
5 indirectly what he cannot do directly[,]" the court denied the
6 trustee request for authority to sell the partnership property
7 under authority of section 105(a). Id. at 133-34.

8 Before the bankruptcy court may authorize a sale under
9 authority of section 363(b)(1), the court must determine whether
10 the estate actually has an interest in the property to be sold.
11 While there is no question that the Property is property of the
12 estate, there are unresolved questions regarding whether the
13 Silver Beach bankruptcy estate includes the timeshare owners'
14 deeded fee interests and whether a section 363(f) sale is being
15 used to sell non-estate property. In this case, the bankruptcy
16 court approved the sale of the Property free and clear of the
17 timeshare owners' interests, without first addressing their
18 contention that the effect of the auction order was to sell non-
19 estate property. Significantly the bankruptcy court's findings
20 of fact and conclusions of law do not address this issue.

21 In view of our holding that the interests of the timeshare
22 owners should have been determined by the bankruptcy court before
23 authorizing the sale, we do not reach the remaining issues on
24 appeal. The order authorizing the auction sale of the debtor's
25 Florida beachfront property free and clear of timeshare interests
26 is REVERSED and the matter is REMANDED to the bankruptcy court
27 for further proceedings consistent with this opinion.