

MAY 10 2011

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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NOT FOR PUBLICATION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

1 In re:) BAP No. WW-10-1142-MkHJu
2)
3 MICHAEL R. MASTRO,) Bk. No. 09-16841-SJS
4)
5 Debtors.)
6)
7)
8)
9 JAMES F. RIGBY, JR., Chapter 7)
10 Trustee,)
11)
12 Appellant,)
13)
14 v.) **MEMORANDUM***
15)
16 ITALIAN COMMUNITY HALL, INC.,)
17)
18 Appellee.)
19)
20)

Submitted Without Oral Argument
on January 21, 2011**

Filed - May 10, 2011

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

21 *This disposition is not appropriate for publication.
22 Although it may be cited for whatever persuasive value it may
23 have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

24 **This matter was set for oral argument on the Panel's
25 January 21, 2011, calendar in Seattle, Washington. Although he
26 had previously indicated he would appear and argue, Jerome
27 Shulkin of Shulkin Hutton, Inc., P.S., counsel for Appellee
28 Italian Community Hall, did not appear at the time set for
argument. Christine Tobin of Bush, Strout & Kornfeld, counsel
for Appellant James Rigby, chapter 7 trustee, appeared but
consented to submission of the matter without argument.

1 Appearances: Christine M. Tobin-Presser of Bush, Strout &
2 Kornfeld on brief for Appellant James F. Rigby,
3 Chapter 7 Trustee
Jerome Shulkin of Shulkin Hutton, Inc., P.S. on
brief for Appellee Italian Community Hall, Inc.

4 Before: MARKELL, HOLLOWELL and JURY, Bankruptcy Judges.

5 **INTRODUCTION**

6 James F. Rigby, Jr., chapter 7¹ trustee ("Trustee"), appeals
7 the bankruptcy court's order granting the motion of Italian
8 Community Hall, Inc. ("ICH") for relief from the automatic stay
9 and also denying the Trustee's motion for authority to sell
10 certain real property (the "Property") that had been owned by
11 debtor Michael R. Mastro ("Mastro"). We REVERSE the order
12 granting relief from stay, and we VACATE the order denying the
13 Trustee's sale motion. We thus REMAND for further proceedings.

14 **FACTS**

15 On July 10, 2009, three of Mastro's secured creditors filed
16 an involuntary chapter 7 petition against him. Mastro consented
17 to the petition on August 20, 2009. The court entered an "Order
18 for Relief and Judgment Granting Petition for Involuntary Chapter
19 7" on August 21, 2009, and the Trustee was appointed that same
20 day.

21 On December 31, 2009, ICH filed its motion for relief from
22 stay ("ICH Motion"). ICH sought relief from the automatic stay
23 so that it could pursue its rights against the Property. Those
24 rights derived from a deed of trust dated February 8, 2006.

25
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 ICH's Motion was skeletal and was not accompanied by any
2 declarations or documentary evidence. Rather, the ICH Motion
3 referred to a proof of claim that ICH filed on October 8, 2009,
4 asserting a secured claim in the amount of \$647,467.91. Attached
5 to the proof of claim was a copy of the February 8, 2006 deed of
6 trust, and a one-page document entitled "Exhibit A to Promissory
7 Note." The proof of claim stated that the basis of the claim was
8 a "Promissory Note," but no note was attached to the proof of
9 claim.

10 In subsequent papers filed in support of its motion, ICH
11 provided a copy of a note dated May 9, 2003, in the original
12 principal amount of \$400,000, made by Mastro and payable to ICH.
13 ICH contended that the 2006 deed of trust secured the 2003 note.

14 On January 22, 2010, the Trustee filed an objection to the
15 ICH Motion. In essence, the Trustee argued that ICH's 2006 deed
16 of trust did not validly encumber the Property because it lacked
17 an essential element of any security device: it did not contain a
18 statement of an intention to secure a debt capable of
19 enforcement.

20 The Trustee's argument is based upon the following language
21 in the 2006 deed of trust:

22 This deed is for the purpose of securing performance of
23 each agreement of grantor [identified therein as
24 Mastro] herein contained, and payment of the sum of
25 (\$400,000) FOUR HUNDRED THOUSAND DOLLARS and NO/CENTS
26 with interest, in accordance with the terms of a
27 promissory note of even date herewith, payable to
28 Beneficiary [identified therein as ICH] or order, and
made by Grantor, and all renewals, modifications and
extensions thereof, and also such further sums as may
be advanced or loaned by Beneficiary to Grantor, or any
of their successors or assigns, together with interest
thereon at such rate as shall be agreed upon[.]

1 2006 Deed of Trust at p. 1 (emphasis supplied).

2 As the Trustee explained in its subsequent filings in
3 support of its opposition, the words in the 2006 deed of trust
4 unambiguously expressed an intent that the 2006 deed of trust
5 secured a debt evidenced by a note "of even date" with the deed
6 of trust - that is, February 8, 2006 - and ICH produced no
7 evidence that such an indebtedness existed.² Further, the
8 Trustee asserted that parol evidence was not admissible to
9 rewrite the unambiguous terms of the deed of trust, as it would
10 constitute an impermissible attempt by ICH to reform the 2006
11 deed of trust, an action that would require a separate adversary
12 proceeding. The Trustee reiterated its assertion that an
13 adversary proceeding was necessary at the final hearing on the
14 ICH Motion.³

15 Both sides offered extrinsic evidence in support of their
16 positions. ICH offered the declaration testimony of William
17 Buchholz and Anthony Petrarca, two gentlemen affiliated with ICH.
18 They generally testified that, to their knowledge, the 2003 note
19 evidenced the only debt that Mastro owed to ICH, that it was
20 originally secured, and that the parties would from time to time
21 substitute collateral that secured this debt. According to
22 Buchholz and Petrarca, the last collateral that Mastro provided
23 to secure the debt was the Property. The Buchholz and Petrarca
24

25 ²Indeed, ICH stated that there was no note other than the
26 2003 note.

27 ³The Trustee also argued, both in the bankruptcy court and
28 on appeal, that the evidence presented was insufficient to
support a claim for reformation.

1 declarations were accompanied by a handful of documents, which
2 ICH claimed corroborated their account of the parties' mutual
3 intent. In part, these documents included correspondence between
4 Mastro's office and ICH generally concerning the substitution of
5 collateral and an appraisal report for the Property.

6 Meanwhile, the Trustee offered transcript excerpts from a
7 Rule 2004 examination of Mastro. Mastro testified that he had
8 signed the 2003 note. He also testified that the parties
9 generally had a practice of substituting collateral with respect
10 to existing notes, and that when collateral was substituted he
11 typically "issued a new note and voided the old one." 2004 Exam
12 Transcript (Feb. 18, 2010) at 70:18-71:19. Mastro further
13 testified that he signed the 2006 deed of trust, and that the
14 parties several times substituted the collateral securing the
15 2003 Note. Finally, Mastro testified that he did not know
16 whether he ever signed a note dated February 8, 2006, as
17 referenced in the 2006 deed of trust, and that he was unaware of
18 any mistakes in the 2006 deed of trust.

19 On January 27, 2010, the Trustee file a motion for authority
20 to sell the Property free and clear of liens, claims and
21 encumbrances pursuant to § 363(f) (the "Sale Motion"). The
22 proposed sale price was \$160,000. The Trustee acknowledged that
23 the title report for the Property reflected a lien in favor of
24 ICH, but the Trustee asserted his belief that the ICH lien was
25 void, referring to his objection to the ICH Motion and related
26 papers.

27 ICH objected to the Trustee's Sale Motion, and both parties
28 filed additional papers in support of their respective positions.

1 Their assertions regarding the Sale Motion largely mirror their
2 assertions regarding the ICH Motion.

3 The bankruptcy court held a preliminary hearing on the ICH
4 Motion on January 29, 2010. The court continued the matter in
5 order to give the parties the opportunity to marshal their
6 evidence and provide further briefing. According to the court,
7 the principal issue was "whether or not [the 2006] deed of trust
8 was intended to secure the 2003 note." Transcript (Jan. 29,
9 2010) at 38:13-14.

10 The bankruptcy court held a joint final hearing on the ICH
11 Motion and the Sale Motion. The final hearing consisted solely
12 of the oral argument of the Trustee's counsel, and the court's
13 comments and ruling on the two motions. No live testimony was
14 taken, no formal evidentiary objections were made to any of the
15 evidence that the parties submitted in their papers, and the
16 court did not formally admit into evidence any of the parties'
17 written submissions.

18 At the conclusion of the hearing, the court granted the ICH
19 Motion and denied the Sale Motion. At the time of its ruling,
20 the court made the following findings: (1) that Mastro was
21 indebted to ICH; (2) that this debt was a liquidated debt and not
22 subject to any dispute; and (3) the 2006 deed of trust was
23 intended to secure this debt, even though there was no note of
24 even date as referenced in the 2006 deed of trust.

25 Reading the hearing transcript as a whole, the court's
26 ruling primarily hinged on its legal determination that a debt
27 may be secured by an encumbrance on real property even if the
28 debt is not evidenced by a note. It is unclear whether the court

1 relied on extrinsic evidence in support of its ruling. The court
2 might have credited the extrinsic evidence tending to show that,
3 from time to time, the parties would substitute the collateral
4 securing the debt evidenced by the 2003 note.

5 The court acknowledged the Trustee's argument that the 2006
6 deed of trust expressed an intent for the Property to secure a
7 debt evidenced by a note of even date, but the court apparently
8 rejected this argument. A fair reading of the entire transcript
9 suggests three possible grounds behind the court's ruling:

10 (1) the extrinsic evidence regarding substitution of collateral
11 reflected a different intent, (2) the reference to a note of even
12 date was merely "boilerplate language you find in every form deed
13 of trust" and (3) ICH, a private charitable organization, could
14 not be held to the same degree of skill as a bank in documenting
15 its loan transactions.

16 On April 14, 2010, the court entered its order granting the
17 ICH Motion and denying the Sale Motion. The Trustee timely
18 appealed.

19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
22 § 158(a)(1).

23 ISSUE

24 Did the bankruptcy court abuse its discretion in granting
25 the ICH Motion and denying the Sale Motion?

26 STANDARDS OF REVIEW

27 We review orders granting relief from the automatic stay
28 for abuse of discretion. Kronemyer v. American Contractors

1 Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP
2 2009). We also review orders on motions to sell pursuant to
3 § 363 for abuse of discretion. Clear Channel Outdoor, Inc. v.
4 Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008).

5 Under the abuse of discretion standard of review, we first
6 "determine de novo whether the [bankruptcy] court identified the
7 correct legal rule to apply to the relief requested." United
8 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
9 And if the bankruptcy court identified the correct legal rule, we
10 then determine under the clearly erroneous standard whether its
11 factual findings and its application of the facts to the relevant
12 law were: "(1) illogical, (2) implausible, or (3) without support
13 in inferences that may be drawn from the facts in the record."
14 Id. (internal quotation marks omitted).

15 We generally review de novo the bankruptcy court's
16 interpretation of contract terms. See United States v. 1,377
17 Acres of Land, 352 F.3d 1259, 1264 (9th Cir. 2003); Kittitas
18 Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d
19 95, 98 (9th Cir. 1980). In interpreting contracts, findings
20 regarding surrounding circumstances are reviewed under the
21 clearly erroneous standard, but the application of rules of
22 contract construction is a matter of law subject to de novo
23 review. Id.

24 DISCUSSION

25 1. Validity and Interpretation of 2006 Deed of Trust

26 Under Washington law, encumbrances of real property must be
27 created by deed, and deeds must be in writing. Revised Code of
28 Washington ("RCW") §§ 64.04.010, 64.04.020. An essential term of

1 any encumbrance is a reference to the obligation secured. In
2 other words, to create a valid encumbrance, the parties must have
3 intended to secure a debt that is capable of enforcement. See
4 Tesdahl v. Collins, 97 P.2d 649, 652 (Wash. 1939); John R.
5 O'Reilly, Inc. v. Tillman, 191 P. 866, 868 (Wash. 1920); Reed v.
6 Parker, 74 P. 61, 64 (Wash. 1903); Parker v. Speedy Re-Finance,
7 Ltd., 596 P.2d 1061, 1067 (Wash. Ct. App. 1979).

8 Here, the 2006 deed of trust expressly and explicitly
9 identifies the obligation secured as a debt evidenced by a note
10 "of even date," but it is undisputed that no such note exists, or
11 at least that no such note was produced or proved. Consequently,
12 given that the 2006 deed of trust does not refer to an
13 enforceable obligation, the deed of trust appears to be invalid
14 on its face.

15 ICH argues, however, that the 2006 deed of trust was meant
16 to secure the debt evidenced by the 2003 note. ICH points to
17 documents and statements of parties to demonstrate that there was
18 an intent for the 2006 deed of trust to secure the 2003 note. We
19 look to Washington law to determine whether this extrinsic
20 material may be considered.

21 As a general rule, Washington law provides that when a
22 writing is required, "parol evidence is not admissible or
23 permissible to establish an essential provision of the alleged
24 agreement nor to supply deficiencies in the writing." Smith v.
25 Twohy, 425 P.2d 12, 15 (Wash. 1967). As applied here, Smith
26 suggests that, given the explicit description contained in the
27 2006 deed of trust, ICH cannot look to extrinsic evidence in an
28 attempt to vary the 2006 deed of trust's description of what it

1 was meant to secure. Recent Washington case law emphasizes that
2 Washington follows the "objective manifestation theory" of
3 contract interpretation. See Hearst Commc'ns, Inc. v. Seattle
4 Times Co., 115 P.3d 262, 267 (Wash. 2005) (citing cases). In
5 other words, Washington courts "[focus] on the objective
6 manifestations of the agreement, rather than on the unexpressed
7 subjective intent of the parties." Id. Washington courts thus
8 "impute an intention corresponding to the reasonable meaning of
9 the words used." Id. They "do not interpret what was intended to
10 be written but what was written." Id.

11 This objective manifestation rule coexists with
12 Washington's "context rule," which allows extrinsic evidence to
13 help determine the meaning of specific words and terms used. See
14 Berg v. Hudesman, 801 P.2d 222, 229 (1990). But no context can
15 show that words having only one reasonable meaning - here, a
16 specific date - can mean something completely different - here, a
17 totally different date. The context rule simply does not allow a
18 party to offer extrinsic evidence to demonstrate that party's
19 unilateral or subjective intent, or to show an intention separate
20 and apart from the written instrument. In short, the context
21 rule cannot be used to "vary, contradict or modify the written
22 word." Hollis v. Garwall, Inc., 974 P.2d 836, 843 (Wash. 1999);
23 see also Hearst Commc'ns, 115 P.3d at 267.

24 Most importantly, as set forth above, the context rule is
25 not so broad as to allow the admission of extrinsic evidence to
26 interpret the meaning of a contract term when the plain language
27 of that term is "subject to only one reasonable interpretation."
28 Hearst Commc'ns, 115 P.3d at 270 & n.14. In Hearst Commc'ns, the

1 court rejected the extrinsic evidence offered by Hearst because
2 the contract language in question was not reasonably susceptible
3 to the meaning that Hearst was attempting to attribute to it.

4 Id.⁴

5 ICH here sought to offer extrinsic evidence to contradict
6 the plain meaning of the 2006 deed of trust, which stated on its
7 face that it secured a debt evidenced by a "note of even date."
8 It might have been ICH's subjective, unilateral intent to secure
9 the 2003 note, but that intent is not expressed in the writing,
10 nor is the writing reasonably subject to that interpretation. It
11 also is conceivable that the parties mistakenly referenced "a
12 note of even date" rather than referencing the 2003 note, but
13 proving that the parties' writing does not accurately reflect the
14 parties' intent is not a matter of contract interpretation, but
15 rather must be addressed, if at all, as a matter of reformation.⁵

16 In sum, Hearst Commc'ns and Hollis require us to hold that
17 the 2006 deed of trust on its face secures an obligation that ICH
18 could not establish. Perhaps it exists, but it does not on this
19 record. Consequently, the 2006 deed of trust, for purposes of
20

21 ⁴The court rejected the contentions that the parties had
22 intended that costs associated with a labor strike were costs to
23 be allocated under either a five-page definition of costs or were
24 to be treated under a general force majeure clause. As the court
25 stated, the parties had "failed to reduce such an intention to
26 writing. Instead, they defined the specific elements of
27 calculating gains and losses once, in lengthy detail, and
28 embedded these terms without qualification in the loss operations
clause. Hearst essentially asks us to rewrite the JOA by revising
the loss operations clause, something we are not at liberty to
do".

⁵We discuss contract reformation immediately below.

1 the matters on appeal, is invalid unless reformation is
2 available.⁶

3 **2. Availability of Reformation**

4 Reformation is an equitable remedy that conforms a writing
5 to the parties' identical mutual intent when the writing
6 materially differs from that intent. See St. Regis Paper Co. v.
7 Wicklund, 610 P.2d 903, 905 (Wash. 1980); Akers v. Sinclair,

8
9 ⁶A bankruptcy court generally may not finally adjudicate the
10 validity of a lien in either a relief from stay proceeding under
11 § 362(d) or in a motion to sell under § 363(f). Both of those
12 types of proceedings are contested matters, adjudicated by
13 motion, Rule 9014, whereas lien validity determinations require
14 an adversary proceeding. See Rules 4001(a)(1), 6004(c), 7001(2).
15 However, when exercising its discretion to grant or deny relief
16 under sections 362(d) or 363(f), a bankruptcy court should take
17 into account an apparent issue that calls into question the
18 validity of the creditor's interest. The prospective invalidity
19 of that interest may justify denying relief from stay and/or
20 granting the sale motion. See First Fed. Bank of Cal. v. Robbins
21 (In re Robbins), 310 B.R. 626, 630 (9th Cir. BAP 2004); see
22 generally Moldo v. Clark (In re Clark), 266 B.R. 163, 171-72
23 (9th Cir. BAP 2001) (explaining when relief under § 363(f) is
24 appropriate). In short, even though the bankruptcy court may not
25 finally determine the validity of the creditor's interest in
26 estate property in these types of proceedings, the validity issue
27 nonetheless can be relevant and should be considered before
28 granting or denying relief.

21 Because of the relevance of the note validity and
22 reformation issues here, we must address them both. Furthermore,
23 the procedural limitations on bankruptcy courts in resolving
24 contested matters do not apply to us when we are duly presented
25 on appeal with the issue of the underlying merits of the
26 creditor's substantive rights and interests. See, e.g., Biggs v.
27 Stoven (In re Luz Int'l, LTD.), 219 B.R. 837, 843-48 (9th Cir.
28 BAP 1998). Our examination of the validity and reformation
issues also is consistent with the well-established rule that we
may consider for the first time on appeal issues of law when the
relevant facts are undisputed and/or the factual record has been
fully developed. See Vasquez v. Holder, 602 F.3d 1003, 1010 n.6
(9th Cir. 2010) (quoting United States v. Berger, 473 F.3d 1080,
1100 n.5 (9th Cir. 2007)).

1 226 P.2d 225, 230 (Wash. 1950); Restatement (Second) of Contracts
2 § 155, cmt. a (1981).

3 In Washington, "reformation is justified only if the
4 parties' intentions were identical at the time of the
5 transaction." Seattle Prof'l Eng'g Employees Ass'n v. Boeing
6 Co., 991 P.2d 1126, 1130-1131 (Wash. 2000). The party seeking
7 reformation must prove the facts supporting it by clear, cogent
8 and convincing evidence, Akers, 226 P.2d at 231, and must
9 establish: (1) that the parties made a mutual mistake, or
10 (2) that one of them made a mistake and the other engaged in
11 inequitable conduct. Wash. Mut. Sav. Bank v. Hedreen,
12 886 P.2d 1121, 1123 (Wash. 1994). Furthermore, reformation is
13 not available if the intervening rights of third parties would be
14 unduly affected. Id. at 230 (citing Restatement (First) of
15 Contracts § 504).

16 In this case, the Trustee argued both before the bankruptcy
17 court and on appeal that ICH was not entitled to reformation.
18 We agree. The bankruptcy court never expressly invoked the
19 remedy of reformation, but in light of our holding that ICH
20 failed to establish that the 2006 deed of trust secured the debt
21 evidenced by the 2003 note, the bankruptcy court could only have
22 reached the opposite conclusion by reforming the contract.

23 Reformation of the 2006 deed of trust, however, would have
24 been improper for three separate and independent reasons. First,
25 because reformation is an equitable remedy, the court could not
26 properly grant such relief outside of an adversary proceeding.
27 See Rule 7001(7). Neither relief from stay proceedings nor
28 bankruptcy sale proceedings are appropriate substitutes when an

1 adversary proceeding is required. See In re Robbins, 310 B.R. at
2 630-31; GMAC Mortgage Corp. Salisbury (In re Loloee), 241 B.R.
3 655, 661-62 (9th Cir. BAP 1999).

4 Second, even if it had been procedurally appropriate for the
5 bankruptcy court to reform the 2006 deed of trust in the context
6 of a relief from stay motion or a sale motion, the evidence in
7 the record was insufficient to establish the grounds necessary
8 for such relief. We have found no evidence in the record of
9 mutual mistake on the parts of both Mastro and ICH - especially
10 given Mastro's testimony at his 2004 examination - nor was there
11 any evidence of inequitable conduct by either one of the parties.

12 Third and finally, the Trustee holds title to the Property
13 as if he were a bona fide purchaser as of the commencement of
14 Mastro's bankruptcy case for value and without notice of
15 unrecorded competing claims or interests. See 11 U.S.C.
16 § 544(a)(3). The Trustee's assertion of his intervening bona
17 fide purchaser status under § 544(a)(3) would have precluded the
18 bankruptcy court from reforming the 2006 deed of trust in any
19 event. See Wolters v. Flagstar Bank, 429 B.R. 587, 597-98 (W.D.
20 Mich. 2010).

21 Accordingly, reformation was not available to correct any
22 alleged mistake in the 2006 deed of trust. We next examine the
23 impact of our validity and reformation holdings on the bankruptcy
24 court's rulings.

25 **3. Abuse of Discretion in Granting the ICH Motion for Relief** 26 **From Stay**

27 Relief from stay motions are summary proceedings. They are,
28 for example, meant to focus on limited issues like adequate

1 protection of the moving creditor, whether debtor has any equity
2 in the property, and whether debtor needs the property to
3 effectuate a plan of reorganization. So long as the moving
4 creditor has submitted evidence sufficient to support a colorable
5 claim of entitlement to estate property, the relief from stay
6 proceeding should not be used to fully adjudicate the merits of
7 the parties' underlying rights. See In re Robbins, 310 B.R. at
8 630-31 (citing Johnson v. Righetti (In re Johnson), 756 F.2d 738,
9 740 (9th Cir. 1985)), partially overruled on other grounds,
10 Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443
11 (2007); In re Luz Int'l, 219 B.R. at 841-43 (9th Cir. BAP 1998)
12 (also citing Johnson).

13 However, when the parties' submissions in a relief from stay
14 proceeding demonstrate that the movant has not established a
15 colorable claim to holding an interest in property of the estate,
16 the court should deny the relief from stay motion. See, e.g.,
17 In re Hubbel, 427 B.R. 789, 796-98 (N.D. Cal. 2010) (holding that
18 bankruptcy court did not abuse its discretion in denying stay
19 relief because debtor's TILA rescission argument cast serious
20 doubt on the validity of creditor's security interest); Luz,
21 219 B.R. at 848 (holding that bankruptcy court abused its
22 discretion in granting relief from stay in part because the
23 record established that creditor did not have a valid setoff
24 entitlement).

25 Here, the bankruptcy court granted ICH's relief from stay
26 motion because it construed the 2006 deed of trust as securing
27 the debt evidenced by the 2003 note. As we explained above,
28 however, the plain language of the 2006 deed of trust is not

1 reasonably susceptible to this construction. ICH thus did not
2 establish that the 2006 deed of trust secured any obligation in
3 the record, and therefore for purposes of the relief from stay
4 motion it held no security interest in estate property. Under
5 these circumstances, ICH did not establish that it had a
6 colorable interest in the Property, and accordingly the court
7 abused its discretion in granting ICH relief from the stay.

8 **4. Abuse of Discretion in Denying the Trustee's Sale Motion**

9 Under the Bankruptcy Code, a trustee who seeks to sell
10 estate property free and clear of the interests of others in such
11 property must establish one of the following grounds:

12 (1) applicable nonbankruptcy law permits sale of such
13 property free and clear of such interest;

14 (2) such entity consents;

15 (3) such interest is a lien and the price at which such
16 property is to be sold is greater than the aggregate
value of all liens on such property;

17 (4) such interest is in bona fide dispute; or

18 (5) such entity could be compelled, in a legal or
19 equitable proceeding, to accept a money satisfaction of
such interest.

20 11 U.S.C. § 363(f).

21 While the Trustee primarily relied on § 363(f)(5) in support
22 of the Sale Motion, we note that § 363(f)(4) expressly permits a
23 sale free and clear of an interest in estate property when "such
24 interest is in bona fide dispute." See Moldo v. Clark (In re
25 Clark), 266 B.R. 163, 171 (9th Cir. BAP 2001). Here, the
26 undisputed facts in the record and our holding that the 2006 deed
27 of trust secures an obligation that ICH could not establish would
28 support a determination that § 363(f)(4) applies. However, we

1 decline to determine whether this clause applies or whether any
2 of the four other clauses under § 363(f) apply. It suffices for
3 us to say that, in the process of denying the sale motion based
4 on its erroneous construction of the 2006 deed of trust, the
5 bankruptcy court neglected to determine whether authority to sell
6 existed or could have been granted under § 363(b)(1) and
7 § 363(f). Under Hinkson, 585 F.3d at 1262, this constituted an
8 abuse of the court's discretion.

9 **CONCLUSION**

10 Based on the analysis set forth above, the bankruptcy
11 court's order granting the ICH Motion is REVERSED, its order
12 denying the Sale Motion is VACATED, and this matter shall be
13 REMANDED for further proceedings.