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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NOT FOR PUBLICATION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

5	In re:)	BAP No.	AZ-09-1322-KiJuMk
)		
6	JAMES C. SNODGRASS and)	Bk. No.	09-01148-JMM
	MARIA J. SERINO,)		
7)		
	Debtors.)		
8	_____)		
)		
9	JAMES C. SNODGRASS;)		
	MARIA J. SERINO,)		
10)		
	Appellants,)		
11)		
	v.)	M E M O R A N D U M ¹	
12)		
	BETH LANG, Chapter 7)		
13	Trustee,)		
)		
14	Appellee.)		
15	_____)		

Argued and Submitted on June 18, 2010
at Phoenix, Arizona

Filed - July 12, 2010

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

Hon. James M. Marlar, Chief Bankruptcy Judge, Presiding

Before: KIRSCHER, JURY, and MARKELL, Bankruptcy Judges.

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

1 Appellants-Debtors, James C. Snodgrass ("Snodgrass") and
2 Maria J. Serino (collectively "Debtors"), appeal from the
3 bankruptcy court's order determining that certain real estate
4 commissions were earned by Snodgrass prepetition and were
5 property of the estate subject to turnover to Appellee-Chapter 7²
6 trustee, Beth Lang ("Trustee"). Because the bankruptcy court did
7 not err in concluding that the commissions were property of the
8 estate and subject to turnover, we AFFIRM.

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 The facts in this case are not in dispute. Debtors filed a
11 chapter 7 petition on January 23, 2009 ("Petition Date"). Prior
12 to the Petition Date, Snodgrass was a licensed Arizona real
13 estate agent, employed by Tierra Antigua Realty.

14 On July 27, 2009, Trustee filed an Amended Motion to Compel
15 Turnover by Debtors in which she sought turnover of 25% of real
16 estate commissions earned by Snodgrass prepetition and paid to
17 him postpetition.³ Snodgrass had acted as real estate agent for
18 the "short sale" of two real properties for which purchase
19 contracts were executed prior to the Petition Date, but lender
20 approvals, closings, and payment of commissions occurred
21 postpetition.

22 One purchase contract was executed by the buyer and seller
23 on October 4, 2008, for real property located on North Steamboat

24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 ³ The parties agree that 75% of Snodgrass's commissions are
28 exempt under Arizona law.

1 Drive ("Steamboat Contract"). In conjunction with the Steamboat
2 Contract, the seller executed a "Short Sale Addendum to Listing
3 Contract." The Steamboat Contract contained contingencies for
4 lender approval of the short sale, financing, appraisal, and
5 other contingencies. In the "Additional Terms And Conditions"
6 portion of the Steamboat Contract it states:

7 "Buyer shall have first right of refusal for the
8 purchase of this home. All subsequent offers will be
9 in a back-up position until buyer short sale is
10 negotiated with buyers [sic] lender."

11 "Buyer is aware property is a short sale and agrees to
12 [illegible] the terms and conditions of this offer
13 until the sellers [sic] lender approves the offer."

14 Postpetition, on March 25, 2009, the buyer and seller
15 executed "Addendum #1" to the Steamboat Contract. It states that
16 the lender approved the short sale with the condition that the
17 price be changed to \$156,500.00, up from the accepted offer of
18 \$155,000.00. Buyers agreed to this price increase. The sale
19 closed on March 31, 2009. The buyer and seller did not change.
20 Snodgrass's commission on the Steamboat Contract was \$6,881.00.

21 The other purchase contract was executed by the buyer and
22 seller on November 25, 2008, for real property located on North
23 Regulation Drive ("Regulation Contract"). A few weeks prior to
24 execution of the Regulation Contract, on November 3, 2008, the
25 seller executed a "Short Sale Addendum to Listing Contract." The
26 Regulation Contract contained contingencies for lender approval
27 of the short sale, among others. In the "Additional Terms And
28 Conditions" portion of the Regulation Contract it states:

"Buyer to have first right of refusal upon lender
approval."

1 Postpetition, on February 18, 2009, the buyer and seller
2 executed "Addendum #1" to the Regulation Contract. It states
3 that the lender approved the short sale with the condition that
4 the price be changed to \$330,000.00, up from the accepted offer
5 of \$325,000.00, and noted various other conditions. Buyers
6 agreed to the price increase. The sale closed on March 2, 2009.
7 The buyer and seller did not change. Snodgrass's commission on
8 the Regulation Contract was \$13,200.00.

9
10 In response to Trustee's turnover motion, Debtors agreed
11 that under Arizona law a real estate commission is earned when
12 the agent produces a ready, willing, and able buyer and a binding
13 contract is signed. However, Debtors argued that neither
14 contract was binding due to their "short sale" nature and,
15 therefore, no commissions were earned until after the Petition
16 Date. As a result, they contended the short sale commissions
17 were not estate property subject to turnover. Debtors and
18 Trustee agreed that if the \$20,081.00 in commissions were
19 considered property of the estate, then Trustee is entitled to
20 the non-exempt 25% portion, which is \$5,020.25.

21 The bankruptcy court held a hearing on the matter and took
22 it under advisement. On September 28, 2009, it entered an order
23 determining that the real estate commissions were property of the
24 estate. The court reasoned that despite the lender approval
25 contingency, Snodgrass held a contingent interest in the
26 commissions on the Petition Date, and therefore they were
27 sufficiently rooted in his pre-bankruptcy past to render them

1 property of the estate. Segal v. Rochelle, 382 U.S. 375, 380
2 (1966). Debtors appealed.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 §§ 157(b)(2)(E) and 1334. We have jurisdiction under 28 U.S.C.
6 § 158.⁴

7 **III. ISSUE**

8 Did the bankruptcy court err when it determined that the
9 "short sale" real estate commissions were earned prepetition and
10 thus constituted property of the estate subject to turnover?

11 **IV. STANDARD OF REVIEW**

12 Whether a particular asset is estate property is a
13 conclusion of law reviewed de novo. Groshong v. Sapp (In re
14 MILA, Inc.), 423 B.R. 537, 542 (9th Cir. BAP 2010).

17
18 ⁴ On December 9, 2009, we issued an order informing
19 Appellants of two potential issues that precluded jurisdiction
20 over their appeal. First, the order on appeal did not appear to
21 address all issues needing determination. Specifically, while it
22 disposed of the property of the estate issue, it did not dispose
23 of Trustee's objection to Debtors' exemption claim. Second, the
24 order on appeal contained findings and conclusions and did not
25 comply with the separate judgment requirement of Rule 9021.
26 Thus, the order appeared to be interlocutory. Appellants were
27 ordered to file and serve a response explaining why the order was
28 final and immediately reviewable on appeal.

29 Upon considering Appellants' response, on January 27, 2010,
30 we issued an order determining that Trustee's subsequent
31 withdrawal of her objection to Debtors' exemption claim resolved
32 the remaining issues in the dispute. In light of no objections
33 filed, we also granted Appellants' request to waive the separate
34 judgment requirement of Rule 9021. Bankers Trust Co. v. Mallis,
35 435 U.S. 381, 384 (1978). Thus, the order was final and
36 immediately reviewable on appeal.

1 V. DISCUSSION

2 A. Applicable Law.

3 Section 541(a) provides that "all legal or equitable
4 interests of the debtor in property as of the commencement of the
5 case" are property of the estate. The scope is broad, and the
6 estate includes all attributes of the Debtor's interest, whether
7 contingent or not. In re Ruetz, 317 B.R. 549, 551 (Bankr. D.
8 Colo. 2004), citing In re Yonikus, 996 F.2d 866, 869 (7th Cir.
9 1993), citing Segal, 382 U.S. at 379.

10 "Property interests are created and defined by state law."
11 Butner v. United States, 440 U.S. 48, 55 (1979). Under Arizona
12 law, a real estate broker is entitled to a commission when he or
13 she produces a ready, willing, and able buyer and a binding
14 contract is signed. Manning v. Blackwelder, 146 Ariz. 411, 412
15 (Ct. App. 1985).

16 "[W]here the debtor receives a commission post-petition but
17 essentially fulfilled all of his obligations for that commission
18 pre-petition, the commission will be deemed property of the
19 estate." Tully v. Taxel (In re Tully), 202 B.R. 481, 483
20 (9th Cir. BAP 1996). "The debtor's commission is property of the
21 estate "if all the acts of the debtor necessary to earn it are
22 rooted in the pre-bankruptcy past.'" Id., citing Segal, 382 U.S.
23 at 380.

24 Therefore, the question here is did Snodgrass perform the
25 acts necessary to entitle him to a real estate commission under
26 Arizona law prior to the Petition Date. We believe he did.

1 **B. The Bankruptcy Court Did Not Err When It Determined That**
2 **The "Short Sale" Commissions Were Earned Prepetition And**
3 **Thus Constituted Property Of The Estate Subject To Turnover.**

4 **1. Debtors' Contentions.**

5 Debtors contend that the bankruptcy court erred when it
6 determined that Snodgrass's real estate commissions were property
7 of the estate and subject to turnover. They argue that Snodgrass
8 did not earn his commissions until there was a binding contract,
9 which occurred postpetition.

10 Debtors assert several reasons why the Steamboat Contract
11 and the Regulation Contract were not binding. First, Debtors
12 claim that in both contracts the sellers executed a "Short Sale
13 Addendum" in which the seller reserved the right to not go
14 forward with the sale, but rather pursue other options.
15 Additionally, in both contracts, the sellers had the right to
16 accept other offers and the buyers were granted a right of first
17 refusal at such time the lender approved the short sale.

18 Moreover, Debtors assert, that due to the unique nature of
19 short sales, the exact price at which the sale is consummated is
20 not determined until after lender approval. Therefore, they
21 contend that without a definite price on the Petition Date, the
22 contracts were nothing more than "agreements to agree."

23 Finally, Debtors contend that neither contract was binding
24 until the contingency of lender approval was fulfilled and the
25 parties executed further documents agreeing to the lender's terms
26 which, in both cases, occurred postpetition and only because of
27 Snodgrass's postpetition efforts.

1 **2. Analysis.**

2 Debtors assert that in the "Short Sale Addendum" each seller
3 specifically reserved the right to not go forward with the sale
4 but rather pursue other options. We disagree. The addendums
5 signed by the sellers do not say that seller can walk away from a
6 signed contract with a buyer. In fact, each Short Sale Addendum
7 signed in this case does not appear to be the document Debtors
8 assert it to be. Sellers only, not buyers, signed an addendum to
9 a "listing agreement," not a purchase contract, and it merely
10 informs sellers that they have other options than to pursue short
11 sales, such as loan modifications and the like, and provides
12 general information about short sales. Moreover, the Regulation
13 Contract Short Sale Addendum was signed by seller three weeks
14 prior to the purchase contract. At best, the Short Sale
15 Addendums only allow a seller the right to terminate the listing
16 agreement with the broker/agent. They have no bearing on whether
17 the purchase contracts were binding on the buyers and the
18 sellers.

19 As for Debtors' argument that the purchase contracts were
20 not binding because sellers had the right to accept other offers
21 and buyers were granted a right of first refusal upon lender
22 approval of the short sale, nothing in the Regulation Contract
23 states that seller can accept other offers, and the faulty
24 addendum Debtors rely upon does not help them. The Steamboat
25 Contract provides that subsequent offers will be in a back-up
26 position, but this does not mean that seller did not have a
27

1 binding contract with this buyer. Again, the faulty addendum
2 does not help Debtors.

3 Debtors' argument that an indefinite price made the
4 contracts merely "agreements to agree" has some appeal. However,
5 we are not persuaded. For example, most real estate purchase
6 contracts contain appraisal contingencies. Buyer and seller
7 agree on a price, but due to a later appraisal the parties may
8 opt to negotiate a new price. This does not mean that the
9 original contract was not binding when signed by buyer and
10 seller. The new price was simply a modification to the original,
11 binding contract in light of the appraisal contingency. Here,
12 the postpetition addendums executed by the lenders with price
13 changes were merely modifications to the original purchase
14 contracts.

15 We also reject Debtors' argument that neither purchase
16 contract was binding until the lender approved the short sale and
17 the parties executed further documents agreeing to the lender's
18 terms. Unfortunately no published decisions exist on this issue.
19 Nonetheless, we believe that lender approval of the short sale
20 was merely one of many contingencies in both the Steamboat
21 Contract and the Regulation Contract, and a short sale
22 contingency, like any other contingency, does not alter the
23 binding nature of executed purchase contracts or negate a
24 broker's or agent's contingent interest in a commission.
25 See Ruetz, 317 B.R. at 551-53 (rejecting debtor's argument that
26 unfulfilled financing and insurance contingencies made her
27 entitlement to commission uncertain and not property of the

1 estate, and holding, "[t]he contingent or inchoate nature of [a
2 right to a commission] certainly does not negate the broker or
3 agent's right to receive a commission if the contingencies are
4 satisfied;" contingent right to commission was property of the
5 estate). The lender in a short sale is simply approving the
6 "short" payoff, not approving the purchase contract, as the
7 lender does not own the property and is not a party to the
8 contract.

9 Finally, we reject Debtors' contention that without
10 Snodgrass's postpetition efforts of corresponding with the
11 lenders he would not have earned his commissions. Snodgrass's
12 postpetition act of corresponding with lenders is not an act that
13 entitles a broker or agent to a real estate commission under
14 Arizona law. Obtaining a ready, willing, and able buyer, and a
15 signed, binding contract earns the commission. In addition, no
16 provision in either the purchase contracts or the addendums
17 required Snodgrass to perform those postpetition acts in order to
18 earn the commissions. Tully, 202 B.R. at 484. Other courts have
19 rejected Debtors' argument for the same reasons. See Parsons v.
20 Union Planters Bank (In re Parsons), 280 F.3d 1185, 1187-88
21 (8th Cir. BAP 2001), aff'd 280 F.3d 1185 (8th Cir. 2002)
22 (commissions earned prepetition despite fact that agent scheduled
23 inspections, worked on title issues, and negotiated contract
24 changes between buyers and sellers); Smith v. Hanrahan (In re
25 Smith), 402 B.R. 887, 890 (8th Cir. BAP 2009)(commission earned
26 even though agent negotiated amendments to a contract and
27 assisted buyer with obtaining desired zoning); In re Snowcrest

1 Dev. Group, 200 B.R. 473, 477-78 (Bankr. D. Mass. 1996)(whether
2 broker performs some postpetition services to finalize the
3 closing or financing is not relevant to the inquiry).

4 Here, the prepetition acts of producing a ready, willing,
5 and able buyer and obtaining a binding contract were all that was
6 necessary for Snodgrass to earn the commissions or, as the
7 bankruptcy court observed, entitle him to a contingent interest
8 in the commissions. These acts were fulfilled prepetition when
9 the binding contracts were signed by the buyer and seller in the
10 Steamboat Contract on October 4, 2008, and in the Regulation
11 Contract on November 25, 2008. Accordingly, Snodgrass earned the
12 commissions prepetition. These commissions are sufficiently
13 rooted in his pre-bankruptcy past and are property of the estate,
14 subject to turnover. We see no error here.

15 **VI. CONCLUSION**

16 For the foregoing reasons, we AFFIRM.