

DEC 9 2013

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. ID-13-1107-JuKiKu
7)
8 BRUCE LEE ALLEN, dba Bruce) Bk. No. ID-09-41567-JDP
9 Allen Construction,)
10 Debtor.)
11)
12 BRUCE LEE ALLEN,)
13)
14 Appellant,)
15)
16 v.) M E M O R A N D U M *
17)
18 GARY L. RAINSDON, Chapter 7)
19 Trustee; ZIONS FIRST NATIONAL)
20 BANK,)
21)
22 Appellees.)
23)
24)
25)

Argued and Submitted on November 22, 2013
at Pasadena, California

Filed - December 9, 2013

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

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Appearances: Appellant Bruce Lee Allen argued pro se;
Daniel C. Green, Esq., of Racine, Olson, Nye,
Budge & Baily, Chartered, argued for appellee
Gary L. Rainsdon.

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

* 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 Chapter 7¹ debtor Bruce Lee Allen appeals from the
2 bankruptcy court's order approving a settlement agreement
3 pursuant to Rule 9019 between appellee-trustee, Gary L.
4 Rainsdon, and Zions First National Bank (Zions). We AFFIRM.

5 **I. FACTS²**

6 **A. Prepetition Events**

7 Debtor owned and operated Bruce Allen Construction, Inc., a
8 construction and land development business located in Hailey,
9 Idaho. In connection with his business, debtor purchased
10 commercial real property in Hailey known as the Davis Business
11 Park that he wanted to develop into three commercial lots.

12 In April 2007, debtor borrowed \$1,170,000 from Zions to
13 refinance³ and develop the property. The loan was secured by a
14 deed of trust against the property. After the loan closed,
15 debtor used some of the proceeds to make infrastructure
16 improvements to the property.

17 A dispute later arose between the parties over Zions'
18 alleged agreement with debtor to purchase one of the lots and
19 have debtor construct a Zions branch on it. Debtor asserted
20 that: Zions agreed to purchase one of the three lots for
21

22 ¹ Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

25 ² Most of the undisputed facts are contained in the
26 Settlement Agreement and the first amended complaint.

27 ³ Debtor used approximately \$750,000 of the loan proceeds to
28 discharge an existing debt with U.S. Bank which had been
previously secured by the property.

1 \$1,499,000; Zions hired debtor to construct a Zions branch
2 office on the lot; Zions agreed that debtor should build the
3 bank branch on a cost plus ten percent (10%) basis; and, in
4 September 2007, Zions informed debtor that it wished to
5 construct a kiosk/ATM on debtor's property prior to constructing
6 a full bank branch. Debtor further alleged that Becky Kearns
7 (Kearns), an employee of Zions, assured him on several occasions
8 that Zions' Board of Directors approved the purchase of the lot
9 and debtor's construction of the Hailey branch. However, in
10 November 2008, Zions informed debtor that it could not complete
11 the purchase of the lot for financial reasons.⁴

12 Zions acknowledged that it investigated the possibility of
13 using one of debtor's lots for a branch office in Hailey or to
14 construct a kiosk on the site. Zions also admitted that it had
15 discussions with debtor, but contended that a contract was never
16 reached. Zions denied debtor's other allegations.

17 On October 1, 2008, debtor became obligated to repay
18 Zions' loan in full. Zions and debtor agreed to extend the
19 maturity date for three months by way of a written loan
20 extension agreement. Debtor failed to timely pay the loan when
21 the extension expired and Zions commenced foreclosure
22 proceedings.

23 **B. Bankruptcy Events**

24 To stop the foreclosure, debtor filed for relief under
25

26 ⁴ Around this same time, Zions had ordered an appraisal of
27 the property through Mountain States Appraisal and Consulting,
28 Inc., which was certified as completed on November 7, 2008,
showing the fair market value of the three lots as \$3.42 million.

1 chapter 11 on October 6, 2009. On June 3, 2010, the
2 U.S. Trustee moved to have the case dismissed or converted to
3 chapter 7 due to debtor's failure to file monthly operating
4 reports and pay quarterly trustee fees. Debtor agreed to the
5 conversion of the case. By order, the case converted to
6 chapter 7 on July 20, 2010.

7 Shortly after the conversion of the case, debtor entered
8 into an agreement for representation with the law firm of
9 Johnson and Montelone, LLP (J&M), to pursue a lawsuit against
10 Zions on a contingency basis. This agreement was not binding,
11 since trustee had control of the claim. Thereafter, the
12 bankruptcy court entered an order authorizing trustee to employ
13 J&M as special counsel to pursue the estate's claims against
14 Zions in the state court. During the pendency of the case,
15 Zions was granted relief from stay so that it could foreclose
16 upon the property, but the order authorizing the stay relief was
17 subject to a stipulation that the order was without prejudice to
18 the estate's claims against Zions.

19 In March 2011, J&M filed suit in the District Court of the
20 Fifth Judicial District for the State of Idaho, County of
21 Blaine, Case No. CV-2011-204, on behalf of trustee against Zions
22 and Kearns. On June 28, 2011, J&M filed a first amended
23 complaint alleging eleven counts, including counts for breach of
24 contract and misrepresentation, among others. In lieu of an
25 answer Zions moved to compel arbitration, which was granted.
26 The parties agreed on an arbitrator with the American Arbitration
27 Association (AAA).

28 As part of the arbitration process, Zions moved for summary

1 judgment, arguing that debtor had released Zions from all claims
2 by executing the loan extension agreement. J&M filed a motion
3 for partial summary judgment on count five for misrepresentation
4 based on the deposition testimony of Kearns and other evidence.
5 The arbitrator denied both motions finding that there were
6 disputed issues of material fact.⁵ Neither trustee nor his
7 general counsel participated personally in this proceeding.

8 Thereafter, the parties participated in a mediation that
9 resulted in the settlement between Zions and trustee. Zions
10 agreed to pay trustee \$550,000, to withdraw its proofs of claim
11 against the estate which totaled approximately \$1.28 million,
12 and to waive any other claims against the bankruptcy estate.
13 Trustee agreed to waive all claims that the estate had against
14 Zions. In due course, trustee filed a notice of intent to
15 settle the potential claims against Zions. Debtor objected to
16 the proposed settlement based upon the dollar amount.⁶ Trustee
17 contended that debtor had no standing to object to the
18 settlement.

19 In response to the objection, the bankruptcy court held an
20 evidentiary hearing at which Mr. Johnson of J&M and trustee
21 testified in support of the settlement and debtor testified
22 against. Besides hearing the testimony, the bankruptcy court
23

24 ⁵ The arbitrator's findings for the rulings were not
25 included in the record.

26 ⁶ Debtor had calculated his damages in excess of six
27 million, including three million in punitive damages. At the
28 evidentiary hearing, debtor's counsel stated that debtor's range
of reasonableness was approximately half that amount, or three
million.

1 frequently questioned the witnesses or their counsel about the
2 underlying merits of the state court case and the calculation of
3 damages. The bankruptcy court closed the evidence and continued
4 the matter to February 15, 2013, so that it could review the
5 record in detail.

6 After hearing final arguments, the court orally stated its
7 findings of fact and conclusions of law approving the settlement
8 on the record. The bankruptcy court also overruled trustee's
9 objection to debtor's standing to contest the settlement. The
10 court found that debtor had standing to object to the settlement
11 because he had put on the kind of evidence to suggest that there
12 was at least some prospect that if the litigation were to turn
13 out favorable that there may be a surplus.⁷ The court entered
14 the order approving the settlement on February 27, 2013. Debtor
15 timely appealed.

16 II. JURISDICTION

17 The bankruptcy court had jurisdiction over this proceeding
18 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
19 under 28 U.S.C. § 158.

20 III. ISSUE

21 Did the bankruptcy court abuse its discretion in approving
22 the settlement?

23 IV. STANDARD OF REVIEW

24 We review the bankruptcy court's decision to approve a
25 settlement for an abuse of discretion. Martin v. Kane
26 (In re A & C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986). The

27
28 ⁷ No one has challenged debtor's standing on appeal.

1 court abuses its discretion if it applied the wrong legal
2 standard or its findings were illogical, implausible or without
3 support in the record. TrafficSchool.com, Inc. v. Edriver Inc.,
4 653 F.3d 820, 832 (9th Cir. 2011). Because the bankruptcy court
5 identified and applied the correct legal standard, the only
6 question on appeal is whether its determinations that the
7 settlement was fair and equitable and in the best interest of
8 the estate were clearly erroneous.

9 V. DISCUSSION

10 Rule 9019(a) authorizes the bankruptcy court to approve a
11 settlement on motion by the trustee and after notice and a
12 hearing. As the party proposing the compromise, the trustee
13 bears the burden of proving that the settlement is fair and
14 equitable and should be approved. In re A & C Props., 784 F.2d
15 at 1382.

16 The bankruptcy court must conduct an inquiry into all
17 "factors relevant to a full and fair assessment of the wisdom of
18 the proposed compromise." Protective Comm. for Indep.
19 Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S.
20 414, 424 (1968). In conducting this inquiry, the bankruptcy
21 court must consider: (a) the probability of success in the
22 litigation; (b) the difficulties, if any, to be encountered in
23 the matter of collection; (c) the complexity of the litigation
24 involved, and the expense, inconvenience and delay necessarily
25 attending it; and (d) the paramount interest of the creditors
26 and a proper deference to their reasonable views in the
27 premises. In re A & C Props., 784 F.2d at 1381.

28 The bankruptcy court has considerable discretion in

1 evaluating a proposed settlement because it "is uniquely
2 situated to consider the equities and reasonableness [of
3 it]. . . ." United States v. Alaska Nat'l Bank (In re Walsh
4 Constr., Inc.), 669 F.2d 1325, 1328 (9th Cir. 1982). "[A]s long
5 as the bankruptcy court amply considered the various factors
6 that determined the reasonableness of the compromise, the
7 court's decision must be affirmed." In re A & C Props.,
8 784 F.2d at 1381.

9 In this case, the bankruptcy court explicitly addressed
10 each of the A & C Props. factors in its February 15, 2013, oral
11 ruling. Point by point, the bankruptcy court extracted from the
12 record facts addressing each of the factors necessary to a
13 determination that the compromise was fair and equitable.

14 In addressing the probability of success factor, the
15 bankruptcy court examined the strengths and weaknesses of both
16 debtor's and Zions' cases. The court noted there were legal
17 issues on both sides in contract and tort including (1) whether
18 the statute of frauds precluded enforcement of an oral contract,
19 (2) whether there was part performance of an oral agreement;
20 (3) whether debtor's release of his claims against Zions in the
21 loan extension agreement was enforceable; and (4) whether debtor
22 could satisfy the elements for his claim of misrepresentation
23 under the clear and convincing burden of proof under Idaho law.
24 On the misrepresentation claim, the court noted that the
25 heightened burden of proof could be a "substantial burden,
26 especially in any close case. This appears to be a case that
27 might be described as a close case." The court also observed
28 that the case involved factual issues which ultimately could be

1 decided in either side's favor. Finally, the bankruptcy court
2 considered the difficulty of calculating damages in light of the
3 economic downturn which may have caused debtor's loss as opposed
4 to any wrongdoing by Zions. Based upon the evidence, the
5 bankruptcy court indicated that "the possibilities of success
6 for Trustee and [debtor] in this action against the bank are, at
7 best, uncertain, and the prospects for success are challenging
8" Consequently, in the bankruptcy court's view, it was
9 unclear which party would be successful.

10 In considering the second factor - the difficulties, if
11 any, to be encountered in the matter of collection - the
12 bankruptcy court attributed no weight to this factor because
13 trustee conceded that collection of a judgment against Zions
14 would probably not be an issue.

15 In addressing the third factor, the complexity of the
16 litigation and the expense, inconvenience and delay in pursuing
17 it, the bankruptcy court found that the litigation was "complex"
18 and that it would take the parties considerable time to prepare
19 for and complete the arbitration. The court also noted the
20 possibility that any decision by the arbitrator could be
21 appealed and that there would be additional costs beyond the
22 special counsel's contingent fees. Finally, the court observed
23 that the delay factor in light of time value of money weighed in
24 favor of settlement.

25 When considering the interests of creditors, the bankruptcy
26 court found that this factor weighed in favor of settlement
27 because the settlement would provide a significant distribution
28

1 to unsecured creditors.⁸ The court observed that if trustee
2 pursued the lawsuit there was no guarantee that there would be a
3 distribution, but, then again, there may be a large
4 distribution. After taking into account the time value of
5 money, and acknowledging that this factor was not "crystal
6 clear," the bankruptcy court concluded that the scales tipped
7 slightly in favor of the settlement because it was significant
8 in amount.

9 On appeal, debtor does not tell us which of the bankruptcy
10 court's factual findings were clearly erroneous nor does he
11 point out why. Instead, debtor spends significant time
12 responding to trustee's challenge to debtor's standing to object
13 to the settlement. However, debtor's standing is not relevant
14 to our review in this appeal because the bankruptcy court
15 overruled trustee's objection and found debtor had standing.
16 Trustee did not cross appeal on this issue. Further, debtor
17 raises many issues which were not raised in the trial court and,
18 therefore, not considered. We do not address these arguments
19 for the first time on appeal. Cold Mountain v. Garber, 375 F.3d
20 884, 891 (9th Cir. 2004). Any remaining issues raised are
21 without merit.

22 In sum, in approving the settlement, the bankruptcy court
23 applied the correct legal rule, measuring the reasonableness of
24 the compromise under the factors articulated in A & C Props.
25 The bankruptcy court's findings and conclusions were supported

26
27 ⁸ At the evidentiary hearing, trustee stated that unsecured
28 creditors would receive a dividend of approximately thirty-three percent.

1 by competent evidence in the record and were not illogical,
2 implausible, or without support in inferences that may be drawn
3 from the record. Accordingly, the court did not abuse its
4 discretion in approving the settlement.

5 **VI. CONCLUSION**

6 For these reasons, we AFFIRM.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28