# Orange County Bankruptcy Forum

# No Whining – Lessons from the Premier Cru Liquidation

Panelists:

- The Hon. William J. Lafferty, III, United States Bankruptcy Court, Northern District of California
- J. Michael Issa, Glass Ratner
- Mark Chavez, Esq., Chavez & Gertler, LLP

Moderator:
Kyra Andrassy, Esq.,
Smiley Wang-Ekvall, LLP

## September 27, 2018 4:45-7:00 pm

Orange Coast Winery
869 W 16th Street, Newport Beach

*The above activity has been approved for Minimum Continuing Legal Education by the State Bar of California in the amount of 0.75 hour. The OCBF certifies that this activity conforms to the standards for the approved education activities prescribed by the rules and regulations of the State Bar of California governing MCLE.*

**ORANGE COUNTY BANKRUPTCY FORUM**
6789 Quail Hill Parkway #204 | Irvine, CA 92603
(949) 681-8676 | info@ocbf.org | www.ocbf.org

BIOGRAPHY
William J. Lafferty, III
Bankruptcy Judge, Northern District of California

William J. Lafferty, III, is a United States Bankruptcy Judge in the Northern District of California. He was appointed to the Bankruptcy Court in April 2011 and also serves on the United States Bankruptcy Appellate Panel for the Ninth Circuit. He received his J.D. from the University of California Hastings College of the Law and earned his undergraduate degree at the University of California Berkeley.

Prior to his appointment to the Bankruptcy Court, Judge Lafferty was a Director with Howard Rice Nemerovski Canady Falk & Rabkin from 1993 to 2011, joining the firm in 1987. His affiliations include: Vice President, California Bankruptcy Forum; Past President, Bay Area Bankruptcy Forum; Past President, Bar Association of San Francisco, Commercial Law and Bankruptcy Section; and Bankruptcy & Reorganization Practice Group.

# J. MICHAEL ISSA

**GlassRatner Advisory & Capital Group LLC**
19800 MacArthur Suite 820
Irvine, CA 92612
949 862-1595

***EXPERIENCE***

**GlassRatner Advisory & Capital Group LLC**

***California Managing Principal***

GlassRatner is a national advisory firm with offices in a number of major cities. The firm received the award for Middle Market Turnaround Firm of the Year in 2013. Mr. Issa is the principal in charge of the firm's California practice. The firm and its principals have provided significant benefits to clients in many industries including automotive, manufacturing, distribution, healthcare, retailing, restaurants, professional practices, services, real estate, oil and gas, and construction. The firm has an extensive real estate consulting and capital raising operation as part of its practice. The firm's services to its clients have been diverse, and have included the following:

- Mr. Issa and his team have raised various types of equity financing and joint venture participations on behalf of their clients. One of Mr. Issa's 2012 transactions received a major category award in 2013 at the Atlas Turnaround Event. Mr. Issa also won the M&A Advisors Award for Middle Market Retailing Deal of the Year in 2005.
- Mr. Issa has advised a number of investors on acquisitions of assets including portfolios of distressed assets from banks.
- As a part of crisis management for their clients, the firm frequently engages in debt restructuring. Mr. Issa has personally managed several billion dollars of debt restructuring on behalf of his clients and has been Chief Restructuring Officer for many of California's residential, office and retail developers, including some of the largest restructurings and bankruptcies in the last two real estate cycles. He has served as a Chapter 11 Bankruptcy Trustee in the Central District of California as well as in other Court appointed fiduciary capacities.
- Mr. Issa is a well-known authority on corporate operations, including working in interim management capacities. Services provided to his clients have included debt restructuring including CRO, bankruptcy advisory, capital raising, M&A and financial and operational turnaround.
- Mr. Issa has also been a court-appointed liquidating trustee of portfolios of real property and of operating companies, including a Registered Investment Adviser. He chaired the strategic disposition committee of a public hotel company when the company's assets were sold off in a nine-digit transaction to another public hotel company.
- Mr. Issa and other GlassRatner professionals frequently appear as expert witnesses in litigation matters. These matters frequently involve testimony in the context of corporate, partnership, or individual bankruptcies. Examples of such testimonies include Plan Feasibility at Bankruptcy Confirmation Hearings, testimony in Use of Cash Collateral Hearings, company and asset liquidation analysis, adequacy of New Value, and a variety

of financing and recapitalization issues. Mr. Issa has testified on interest matters in bankruptcy court a number of times. Mr. Issa and the firm also appear as expert witnesses in a variety of other non-bankruptcy litigation matters.

**Ballenger Cleveland & Issa, LLC** with offices in Los Angeles and Irvine
***Executive Managing Director and Cofounder***
Mr. Issa's Orange County practice of Ballenger Cleveland & Issa, LLC merged with GlassRatner in November 2010. The array of services outlined above was substantially the same at both BCI and GlassRatner.

**KIBEL GREEN ISSA, Inc**. with offices in Santa Monica and Irvine, Ca
***Vice Chairman, Managing Director of Orange County Practice***
Mr. Issa was the principal in charge of the firm's Orange County practice since the office opened in 1993. KGI was named one of the "12 Outstanding Turnaround Firms Nationally" by a nationwide industry publication during Mr. Issa's tenure.

***PREVIOUS WORK EXPERIENCE***
Prior to his employment with KGI, Mr. Issa was the head of a group of companies, which were privately owned by several high net-worth, individual investors whose primary business was to acquire and turnaround problem assets including both operating companies and real property. After completing graduate school, Mr. Issa worked as a commercial banker with a regional bank and a money center bank for a total of five years. Subsequent to his banking career, Mr. Issa was the chief financial officer for a privately held company with diverse investments in operating companies, oil and gas assets and real estate.

***OTHER QUALIFICATIONS***
**Education:**
Mr. Issa is a Beta Gamma Sigma Master of Business Administration from the University of Texas at Austin. He also received a Bachelor of Business Administration from the same institution. Mr. Issa has also taught in the business schools at three different four-year universities.

**Boards:**
Mr. Issa has served on the boards of both public and private companies as well as various non-profit organizations. He has also served on or chaired a number of strategic, financial and operating committees for these companies.

**Licenses and Professional Designations:**
Mr. Issa is a Certified Public Accountant. He also holds various FINRA licenses including the Series 79; Series 63; and Series 65. He is a frequent court-appointed fiduciary including roles as receiver, CRO and Bankruptcy Trustee in the Central District of California; and is a member of the following professional organizations: Orange County Bankruptcy Forum, Turnaround Management Association, and Urban Land Institute. He has also been included in the Nationwide Register's Who's Who in Executives and Businesses and speaks frequently at industry conferences on a variety of topics.

**Mark A. Chavez**
Chavez & Gertler LLP
42 Miller Avenue
Mill Valley, Ca 94941
(415) 381-5599
mark@chavezgertler.com

Mr. Chavez received his Juris Doctorate degree from Stanford Law School where he served as a Judicial Extern for the Honorable Mathew O. Tobriner of the California Supreme Court, was a co-founder and the first Managing Editor of the Stanford Environmental Law Journal and was a founding member of the Stanford Public Interest Law Foundation. He was selected through the Attorney General's Honors Program and joined the Civil Division of the United States Department of Justice in Washington, D.C. after graduating from law school. Mr. Chavez entered private practice working first at Pillsbury Winthrop Shaw Pittman LLP and subsequently at Farrow, Bramson, Chavez & Baskin before founding the law firm of Chavez & Gertler LLP with Jonathan E. Gertler.

In the course of his career, Mr. Chavez has represented plaintiffs in a wide variety of consumer class actions and other complex civil litigation matters. His significant class action experience includes arguing Olszeweski v. ScrippsHealth, 30 Cal.4th 798 (2003) and Linder v. Thrifty Oil, 23 Cal.4th 429 (2000) before the California Supreme Court and acting as co-counsel for the plaintiffs in In re Tobacco Cases II, (2007) 41 Cal.4th 1257 and Briseno v. Washington Mutual, 24 Cal.4th 906 (2001). He has served or is currently serving as lead or co-lead counsel in over 120 class actions filed in federal and state courts in Alabama, Arizona, California, Colorado, Florida, Idaho, Massachusetts, Missouri, Nevada, New Jersey, Ohio, Pennsylvania, Tennessee and Washington. These cases have resulted in some of the largest recoveries ever achieved in consumer class actions. See, e.g., Richardson v. Wells Fargo, Case No., CGC-08-481662 (San Francisco Superior Court) ($232 million); Smith v. General Motors Acceptance Corporation, Case No. 776152 (Santa Clara County Superior Court) ($105 million); In Re Transouth Cases, (Santa Clara County Superior Court) ($76 million).

Mr. Chavez is A-V rated by Martindale-Hubbell and has been selected as a Northern California Super Lawyer ten times. He was one of the founders of the National Association of Consumer Advocates and is its former Co-Chair. Mr. Chavez currently serves as the chair of the board of Public Citizen Foundation. He previously served on the boards of the National Consumer Law Center, Disability Rights Advocates, Consumer Attorneys of California, Stanford Public Interest Law Foundation, Legal Services for Children, San Francisco Trial Lawyers Association, and Public Justice Foundation.

Mr. Chavez and his firm have received the Champion of Justice Award from the Bar Association of San Francisco, the Equal Justice Award from the Law Foundation of the Silicon Valley and the Guardian of Justice Award from Bay Area Legal Aid. In 2012, he was named the Consumer Attorney of the Year by the National Association of Consumer Advocates. In 2016, the National Consumer Law Center bestowed the Countryman Award on Mr. Chavez in recognition of his lifetime of achievements in the field of consumer law.

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Insolvency. Real Estate. Business Litigation.

**Kyra E. Andrassy**
Partner

Main 714-445-1000
Direct 714-445-1017
Email kandrassy@swelawfirm.com
V-Card Download

PRACTICE AREAS

Insolvency and Business Litigation

AWARDS/RECOGNITION

- Best Lawyers in America, Bankruptcy and Creditors' Rights
  2018
- Southern California Super Lawyers
  2012-2018
- Top Bankruptcy Lawyers, OC Metro Magazine
  2015
- Southern California Rising Star
  2005-2008 and 2010-2011

EDUCATION

- Loyola Law School, Juris Doctor
  1998
- University of California, San Diego, B.A. Political Science
  1995

JUDICIAL CLERKSHIPS

- Hon. John E. Ryan - United States Bankruptcy Court, Central District of California, Santa Ana Division
  1998-2000

ADMISSIONS

- California State Bar
- United States Court of Appeals for the Ninth Circuit
- U.S. District Courts for the Central, Eastern, Northern, and Southern Districts of California

MEMBERSHIPS/ASSOCIATIONS

- American Bankruptcy Institute
- Orange County Bankruptcy Forum
- Los Angeles Bankruptcy Forum
- International Women's Insolvency and Restructuring Confederation
- Orange County Bar Association
- Federal Bar Association
- Orange County Women Lawyer's Association
- Director, American Youth Soccer Organization Region 159 (2014 to 2016)

KYRA E. ANDRASSY is a partner of Smiley Wang-Ekvall, LLP. She concentrates her practice on bankruptcy and insolvency matters and business litigation. Her insolvency-related work includes representing chapter 11 debtors, chapter 7 and chapter 11 trustees, secured and unsecured creditors, creditors' committees, purchasers of assets from bankruptcy estates, assignees in assignments for the benefit of creditors, and borrowers in out-of-court workouts. Ms. Andrassy's business litigation practice includes a broad range of disputes in state and federal court, including breach of contract and fraud.

She received her undergraduate degree in political science from the University of California at San Diego in 1995, and her law degree from Loyola Law School in Los Angeles in 1998. She was an editor of the Loyola Law Review and the recipient of the American Jurisprudence Book Award in Legal Writing. She served a judicial externship to the Honorable Barry Russell, United States Bankruptcy Judge for the Central District of California, in Spring 1998. From September 1998 until September 2000, Ms. Andrassy served a judicial clerkship to the Honorable John E. Ryan, United States Bankruptcy Judge for the Central District of California and a member of the Ninth Circuit Bankruptcy Appellate Panel.

## PROFESSIONAL ACTIVITIES

- Conference Co-Chair, California Bankruptcy Forum Conference, 2019
- Co-Vice Chair of the Insolvency Law Committee of the Business Law Section of the California Lawyers Association, 2018-2019
- Director, Southern California Chapter of the International Women's Insolvency & Restructuring Confederation, 2016-2019
- Secretary of the Insolvency Law Committee of the Business Law Section of the California Lawyers Association, 2017-2018
- Co-Education Chair, California Bankruptcy Forum Conference, 2018
- Co-Editor in Chief of eBulletins for the Insolvency Law Committee of the Business Law Section of the State Bar of California, 2016-2017
- Member of the Advisory Board for the American Bankruptcy Institute's Bankruptcy Battleground West, 2017-2019
- Member of the Bar Advisory Board for the U.S. Bankruptcy Court, Central District of California, 2016-2017
- Member, Insolvency Law Committee of the Business Law Section of the State Bar of California, 2015-2018
- Sole attorney member of the committee to revise the Local Rules Governing Bankruptcy Appeals, Cases, and Proceedings of the U.S. District Court, Central District of California, 2011
- President, Orange County Bankruptcy Forum, 2008-2009
- Director, California Bankruptcy Forum, 2008-2010
- Member, U.S. Bankruptcy Court, Central District Task Force for Amendments to Local Rules, 2007-2008
- Director, Orange County Bankruptcy Forum, 2006-2009




- Program Chair for the Bankruptcy Ethics Symposium for the Federal Bar Association, Los Angeles Chapter, 2006
- Member of the Advisory Board for the Bankruptcy Ethics Symposium for the Federal Bar Association, Los Angeles Chapter, 2004-2005
- Section Chair, Orange County Bar Association Commercial Law & Bankruptcy Section, 2004
- Program Chair, Orange County Bar Association Commercial Law & Bankruptcy Section, 2003

## SPEAKING ENGAGEMENTS

- Panelist and Moderator, *The Intersection of Pension and Retirement Plans and Bankruptcy*
  American Bankruptcy Institute
  2017
- Panelist, *Federal Practice/Bankruptcy*
  Orange County Bar Association's Bridging the Gap Program
  2016
- Producer and Moderator, *Identifying Estate Assets in Atypical Property*
  California Bankruptcy Forum
  2013
- Panelist, *Business Bankruptcy Issues*
  Orange County Bar Association and Orange County Bankruptcy Forum
  2011
- Moderator, *Judgment Enforcement in Federal Court*
  Orange County Bankruptcy Forum
  2006

# OCBF PRESENTATION RE FOX ORTEGA CASE

DEBTOR'S BUSINESS INVOLVED SALES OF (FREQUENTLY QUITE HIGH-END) WINE. MANY OF THE SALES WERE CONDUCTED OVER THE INTERNET, AND MANY OF THE INTERNET SALES WERE FOR "PRE-ARRIVAL" WINES, I.E., WINES NOT YET PRODUCED OR BOTTLED.

MODEL WAS "PAY [A RELATIVELY SMALL AMOUNT] NOW FOR THESE WINES, AND WHEN THEY ARE READY, IN A FEW YEARS, WE CAN SHIP THEM TO YOU, OR YOU CAN PICK THEM UP."

PROBLEM: WHEN CASE FILED, THERE WERE APPROXIMATELY 9600 CUSTOMERS WHO HAD "ORDERED" WINE, AND HAD NOT RECEIVED IT. THESE CUSTOMERS' "CLAIMS" TOTALED APPROXIMATELY $74M. UNFORTUNATELY, THERE WERE ONLY 75,000 BOTTLES OF WINE ON HAND, WITH A VALUE OF APPROXIMATELY $7.4M, AND NO MEANINGFUL RIGHTS TO FUTURE DELIVERIES.

TRUSTEE WANTS TO SELL THE WINE, SEES THE CUSTOMERS AS CREDITORS. OBJECTORS' (I.E., CUSTOMERS') RESPONSE, "WAIT A MINUTE, THAT'S OUR WINE! WE AREN'T CLAIMANTS, WE'RE OWNERS, AND YOU CAN'T SELL OUR WINE!"

SOME OBJECTORS HAD INVOICES SHOWING THEY HAD PURCHASED WINE;

SOME OBJECTORS ALSO HAD CORRESPONDENCE WITH MORE DETAILS RE THEIR PURCHASE AND WINES ON HAND;

SOME OBJECTORS HAD "THEIR WINE" ON PALLETS, WITH SHRINK-WRAPPED PLASTIC AROUND THE ORDER, READY FOR PICK-UP—AND THE PETITION WAS FILED AN HOUR BEFORE THE OBJECTORS CAME TO CLAIM THE WINE.

SO, WHO OWNS THE WINE????

FOUR BIG CATEGORIES OF QUESTIONS:

I. BURDEN OF PROOF RE TITLE TO ASSETS IN A BK CASE

GENERAL PRESUMPTIONS?

CAL EVIDENCE CODE 662—BK SCHEDULES, AND DEBTOR'S BOOKS, TEND TO SHOW DEBTOR "OWNS" THE WINE. HELPFUL?

BOP IN A BANKRUPTCY DISPUTE?

DOES TRUSTEE HAVE TO DEMONSTRATE "OWNERSHIP" PRIOR TO SELLING THE ASSETS?
WHO HAS TO "PROVE" WHAT? DO BURDENS SHIFT? ULTIMATE BURDEN?
RODEO CANYON

II. TITLE ISSUES:

SOURCE OF LAW FOR TITLE QUESTIONS?

DIVISION 2 OF THE CAL UCC APPEARS TO GOVERN

SUBJECT TO GENERAL PROVISIONS AS SET FORTH IN "1".

III. SPECIAL RIGHTS OR INTERESTS IN GOODS

DIVISION 2—UCC

RIGHTS OF POSSESSION, OR RIGHT TO REPLEVIN

IV. EQUITABLE REMEDIES

CONSTRUCTIVE TRUSTS

EQUITABLE LIENS

I. FUNDAMENTAL QUESTION: HOW TO ALLOCATE BURDEN OF PROOF RE THEORIES OF RECOVERY ASSERTED.

TRUSTEE: RELIED ON CAL EVIDENCE CODE SECTION 662, PRESUMPTIONS RE OWNERSHIP, AND PRESUMPTION FROM THE SCHEDULES FILED IN THE BK.

OBJECTORS: NO PRESUMPTION APPROPRIATE FROM SCHEDULES, AND CASES IN THE 9TH CIRCUIT MAKE CLEAR THAT THE TRUSTEE MUST ESTABLISH THAT AN ASSET IS PPT OF THE ESTATE BEFORE IT CAN BE SOLD BY THE TRUSTEE. RODEO CANYON, CLARK

> THE FACT THAT THE TRUSTEE MUST MAKE A SHOWING OF HOLDING A REQUISITE INTEREST IN PROPERTY DOES NOT NECESSARILY MEAN THAT HE HAS THE BURDEN, OR CAN'T MAKE USE OF A PRESUMPTION.

BREAKDOWN INTO CONSIDERATION OF THE THEORIES PRESENTED:

A. BUYERS' RIGHT TO EQUITABLE REMEDY: BURDEN CLEARLY ON THE CLAIMANTS TO SHOW AN INTEREST THAT WOULD DEFEAT OR BE SUPERIOR TO TRUSTEE'S LEGAL OWNERSHIP—AS TO ALL ELEMENTS OF THE CLAIM.

> I.E., NOT ENOUGH TO SAY, I WANT A TRUST ON THAT WINE, AND I'LL TELL YOU WHO BENEFITS LATER, IF AT ALL—TRACING RULES SIMPLY DON'T WORK THAT EASILY, AND THIS CAN'T BE JUST A REMEDY IN SEARCH OF A RATIONALE.

B. SPECIAL INTERESTS—NO CLEAR "RULE" IN THE UCC, BUT IT SEEMS OBVIOUS THAT TO PREVAIL RE ENTITLEMENT TO SPECIAL INTERESTS, AND TO BE ABLE TO ENFORCE RIGHTS OF POSSESSION, BURDEN MUST BE ON THE BUYERS—THESE ARE UCC, STATUTORY REMEDIES THAT DISPLACE, IN LIMITED CIRCUMSTANCES, TITLE DETERMINATIONS, AND PROVIDE EXTRAORDINARY REMEDIES; INCONCEIVABLE THE BURDEN ISN'T ON THE PARTY SEEKING THE BENEFIT OF THESE SPECIAL INTERESTS.

C. TITLE—TRICKIEST—BUT, NO QUESTION THAT TITLE AT LEAST WAS IN THE DEBTOR/TRUSTEE AS OF THE COMMENCEMENT OF THE CASE—I.E., NO ONE GAVE DEBTOR $1000 "IN TRUST TO GO BUY WINE, AND BRING ME THE CHANGE." DEBTOR BOUGHT WINE FROM WINERIES, OBTAINED OWNERSHIP—WHOLE QUESTION WAS DID TITLE PASS TO BUYERS AND IF SO WHEN? AGAIN, UCC DOES NOT APPEAR TO STATE A RULE ABOUT BURDEN OF PROOF, BUT THE STATUS QUO ANTE WAS, SELLER OWNED IT.

> RELIANCE ON RODEO CANYON OR CLARK FOR THE PROPOSITION THAT THE BURDEN OF PROOF IS ENTIRELY ON THE TRUSTEE MISSES THE POINT.

II. TITLE

A. SECTION 2-401 PROVIDES THAT TITLE FOR GOODS PASSES AFTER IDENTIFICATION, 2-501, AND SETS RULES AND PRESUMPTIONS BASED ON DELIVERY OR SHIPMENT TERMS. TRUSTEE ASSERTED THAT THESE WERE "SHIPPING CONTRACTS" SUCH THAT TITLE COULD NOT PASS UNTIL SHIPMENT, SO WHATEVER WAS AT THE DEBTOR'S PREMISES MUST HAVE BEEN OWNED BY THE DEBTOR AND HENCE THE ESTATE. I DID NOT ACCEPT THIS ARGUMENT—AMONG OTHER REASONS, THE FORM OF THE TERMS AND CONDITIONS THEMSELVES SET FORTH ADDITIONAL POSSIBILITIES RE DISPOSITION AND DELIVERY OF THE WINE.

B. I SUGGESTED A THEORY ONE LEVEL OF GENERALITY DOWN, THAT, AS A MATTER OF LAW, SELLER'S PERFORMANCE RE DELIVERY WAS NOT COMPLETE TILL WINE SHIPPED OR PICKED UP—BASED ON FOUR POSSIBLE OUTCOMES FROM TERMS AND CONDITIONS, AND FACT THAT INDEFINITE STORAGE, AT NO COST, WITH RISK OF LOSS ON SELLER, AND RIGHT OF REFUND AND RETURN IN BUYER, ESTABLISHED THE "DEAL" IN COMPREHENSIVE TERMS THAT WENT BEYOND "THE WINE IS HERE."

1. AT LEAST TWO PROBLEMS WITH THIS:

a. LINE OF CASES SUGGESTING THAT DELIVERY PERFORMANCE IS SEPARATE FROM STORAGE PERFORMANCE—NOT SURE THEY SHOULD DICTATE RESULT ON THESE UNUSUAL FACTS

b. LIKELY TO BE DISPUTED ISSUES OF MATERIAL FACT

2. SOME BUYERS ARGUED FOR "TWO SEPARATE CONTRACTS—ONE FOR DELIVERY AND ONE FOR STORAGE"—BUT NOTE HOW INSPECIFIC AND CURSORY WOULD BE THE "STORAGE CONTRACT" IN THE TERMS AND CONDITIONS

C. OTHER ISSUES:

WHAT WAS THE CONTRACT? 2-204 SAYS A CONTRACT FOR SALE OF GOODS MAY BE MADE IN ANY WAY SUFFICIENT TO SHOW AGREEMENT, INCLUDING BY CONDUCT WHICH RECOGNIZES AN AGREEMENT. OK, BUT THAT JUST MEANS A CONTRACT MIGHT HAVE BEEN FORMED, DOESN'T TELL YOU WHAT THE TERMS WERE.

2-401 REQUIRES AN EXPLICIT AGREEMENT RE DELIVERY/PERFORMANCE, SO QUERY WHAT ROLE 2-204 HAS HERE

ALSO, QUERY WHAT ROLE EMAIL MESSAGE EXCHANGES BETWEEN BUYER AND SELLER SHOULD PLAY HERE—WERE THEY EXPLICIT AGREEMENTS RE TITLE PASSAGE? PROBABLY NOT. WERE THEY INTENDED TO OR SHOULD THEY BE DEEMED TO HAVE A LEGAL CONSEQUENCE? NOT SURE, BUT NOT NECESSARILY.

D. WERE CUSTOMERS "BUYERS IN ORDINARY COURSE," SUCH THAT THEY WOULD HAVE HAD SPECIAL RIGHTS IN THE GOODS?

1. RAISED AT HEARING, NOT IN THE BRIEFING

2. LOOK AT DEFINITION OF BIOC—WHAT WAS ORDINARY COURSE ABOUT THESE TRANSACTIONS?

E. PROBLEMS WITH IDENTIFICATION

1. A PRE-REQUISITE TO BOTH TITLE PASSAGE AND SPECIAL INTERESTS

a. TRUSTEE ARGUES THAT IDENTIFICATION REQUIRES SOME FORM OF MARKING OR SEGREGATION OF GOODS.

b. BUYERS ASSERT IDENTIFICATION MAY HAVE OCCURRED SIMPLY VIA EMAIL CONFIRMATION OF ORDERS.

2. TWO SETS OF ISSUES UNDER 2-501:

a. FOR EXISTING GOODS—ID OCCURS WHEN CONTRACT IS MADE IF MADE FOR GOODS ALREADY EXISTING AND IDENTIFIED—DOES THIS SUGGEST THAT SOMETHING MORE NEED OCCUR THAN "WE HAVE THE GOODS"? NOT CLEAR

b. FOR FUTURE GOODS—ID OCCURS WHEN GOODS ARE SHIPPED, MARKED OR OTHERWISE DESIGNATED BY SELLER AS GOODS TO WHICH THE CONTRACT REFERS.

3. PARTIES PRESENTED DIFFERENT CASE AUTHORITY RE DETERMINING IDENTIFICATION

a. TRUSTEE'S CASES WERE GENERALLY OLDER AND DESCRIBED SITUATIONS IN WHICH SEGREGATION OCCURRED—DON'T NECESSARILY STAND FOR PROPOSITION THAT SEGREGATION MUST OCCUR.

b. THESE CASES ARE CONTRA THE MORE MODERN MOVEMENT AWAY FROM STRICT FORMALISM, AND MORE LENIENT CONTRACT INTERPRETATION—AND DIMINISHING ROLE OF "TITLE" IN DISPUTE RESOLUTION.

c. CLEARLY, GENERAL POLICY IS TO RESOLVE DOUBTS IN FAVOR OF IDENTIFICATION.

d. "RULE" FOR FUNGIBLE GOODS—NEED NOT SEPARATELY DESIGNATE THEM, IF ALL OF THE SAME TYPE, AND THERE WERE, AT TIME OF IDENTIFICATION, AND ALL TIMES THEREAFTER, SUFFICIENT GOODS TO COVER THE REQUIREMENTS FOR ID.

e. A PROBLEM HERE, SINCE WE DON'T NECESSARILY HAVE RELIABLE CONTEMPORANEOUS RECORDS TRACKING THE SALES/CONFIRMATION/RECEIPT OF FUTURE GOODS/IDENTIFICATION PROBLEM.

f. NEITHER UCC NOR CASES SUGGEST A CONVENTION FOR DEALING WITH SITUATIONS OUTSIDE OF THAT DESCRIBED IN "e", I.E., WHERE NO CORRESPONDING GOODS AT THE TIME (OR LATER), OR WHERE GOODS RECEIVED AFTER ALLEGED IDENTIFICATION, OR OVERSUBSCRIPTION—DO "FIRST" BUYERS HAVE GOODS IDENTIFIED TO THE CONTRACT? SOME BUYERS SUGGEST THAT "FIRST IN TIME" RULE FOR OVERSUBSCRIPTIONS; SOME SUGGEST THAT THE EVENTUAL RECEIPT OF ENOUGH GOODS CURES THE PROBLEM—NOT SURE OF EITHER.

g. SIGNIFICANCE—2-402—RIGHTS OF SELLER'S CREDITORS ARE SUBJECT TO SPECIAL INTERESTS IN BUYERS OF IDENTIFIED GOODS—BUT NO IMPAIRMENT OF DIVISION 9 RIGHTS. SO, MUST IDENTIFICATION BE CONTEMPORANEOUS, OR BE A PREFERENCE OR A FRAUDULENT TRANSFER? NOT SURE, BUT A PROBLEM.

4. BETTER TO SAY THAT SEGREGATION MAY NOT BE NECESSARY, BUT AT LEAST LEDGER ENTRY (EVEN IF ELECTRONIC)?

III. SPECIAL INTERESTS—2-502 AND 2-716

THRESHOLD QUESTION: CAN UCC DIVISION 2 SPECIAL INTERESTS APPLY IN A BK? PAOLETTI CASE SEEMS TO SAY "NO": IF NOT EXERCISED PRE-BK, THEY ARE JUST CLAIMS (EQUITABLE RIGHTS)—THEY ARE JUST INCONSISTENT WITH THE BK SYSTEM, AND NOT REALLY LIEN-LIKE, SINCE THEY DON'T PREVENT THE SALE OF THE GOODS, BUT JUST GIVE RISE TO A CLAIM THEN AS WELL.

NOT SURE I AGREE WITH THIS:

> WHAT IS THE DIFFERENCE BETWEEN ESTABLISHING TITLE AND ESTABLISHING RIGHTS TO OTHER INTERESTS?
>
> THESE ARE TWO DIFFERENT SETS OF TERMINOLOGIES, BUT MAYBE NOT RADICALLY DIFFERENT CONCEPTS
>
> REMEMBER RODEO CANYON WAS NOT AN "OWNERSHIP/TITLE" CASE IN ITS SIMPLEST FORM, BUT A CASE IN WHICH A PARTNER IN A PARTNERSHIP ARGUED THAT PARTNERSHIP FUNDS HAD BEEN EXPENDED ON A PIECE OF REAL PROPERTY IN HANDS OF A THIRD PARTY, SO PARTNERSHIP SHOULD OWN HALF OF THE IMPROVED ASSET.
>
> > POINT IS THAT SECTION 541 ISSUES ENCOMPASS NOT JUST "TITLE TO PROPERTY" BUT MUCH MORE SUBTLE QUESTIONS RE WHAT IS THE EXTENT OF THE TRUSTEE'S RIGHTS IN AN ASSET, AND THE RIGHTS OF OTHERS, SOMETIMES EXPRESSED AS TITLE, SOMETIMES NOT.
> >
> > AND THE "FONT" OF ALL OF THIS IS STATE LAW.
> >
> > AND SECTIONS 2-502(1) AND (2) (RIGHT TO RECOVER POSSESSION) AND 2-716 (REPLEVIN) INDICATE CLEARLY A BUYER'S RIGHT TO RECOVER POSSESSION OF GOODS VIS. THE SELLER, AND 2-402 INCLUDES THE RIGHT TO DO SO IN DEROGATION OF, OR IN A MANNER SUPERIOR TO, THE UNSECURED CREDITORS OF THE SELLER, AND IF THAT ISN'T ESSENTIALLY THE SAME THING AS "RIGHTS IN THE PROPERTY" AND "TITLE", I DON'T KNOW WHAT WOULD BE.
> >
> > AND, 2-402 AND SECTIONS OF DIVISION 9 CLEARLY DESCRIBE PRIORITY RULES AMONG BUYERS WITH SPECIAL INTERESTS AND CONSENSUAL SECURED CREDITORS, AND MAYBE BY DEFAULT LIEN CREDITORS, IN A WAY THAT SUGGESTS THE IMPORTANCE OF THESE RIGHTS AND THE COMPREHENSIVE NATURE OF THE STATE LAW SYSTEM THAT ESTABLISHED THESE RIGHTS—NO REASON FOR BK TO OBLITERATE THEM.

BUT—TWO BIG ISSUES:

EFFECT OF TRUSTEE'S AVOIDING POWERS?

PRE-CONDITIONS FOR EXERCISE OF RIGHTS UNDER SPECIAL INTERESTS?

PER EARLIER DISCUSSION GOODS MUST HAVE BEEN IDENTIFIED, AND CONTINUOUSLY SUBJECT TO THOSE REQUIREMENTS, AND

SPECIAL CONDITIONS:

2-502(2)—SELLER MUST HAVE FIRST BECOME INSOLVENT WITHIN 10 DAYS OF RECEIPT OF FIRST INSTALLMENT ON THE PRICE—TOUGH TO PROVE THIS ON OUR FACTS.

2-502(1)—APPLIES WHERE GOODS BOUGHT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES, AND SELLER REPUDIATES OR FAILS TO DELIVER AS REQUIRED BY THE CONTRACT.

WAS THIS WINE BOUGHT FOR PERSONAL USE? MANY HAVE ADMITTED THAT THE WINE WAS BOUGHT FOR INVESTMENT. ADD FACTORS OF QUANTITY AND PRICE OF WINE BOUGHT, STORAGE HISTORY, APPRECIATION IN FAVOR OF THE BUYER, AND IT LOOKS HARDER TO PROVE THAT WINE BOUGHT FOR PERSONAL USE IN MANY IF NOT MOST OF THESE CASES.

DID SELLER REPUDIATE OR FAIL TO DELIVER PER THE REQUIREMENTS OF THE CONTRACT? REPUDIATION OR FAILURE TO DELIVER NOT MERELY A CONSEQUENCE OF BK—AUTO STAY—PROVES TOO MUCH; OR CURRENT DISORGANIZED STATE OF AFFAIRS—UCC REMEDIES NEED TO BE TRIGGERED, SO THERE HAD TO BE AN ACTUAL REPUDIATION OR FAILURE TO DELIVER AS REQUIRED BY THE CONTRACT, AND NOT A "DEEMED FAILURE"; ALSO, THE CONTRACT, IN MANY CASES, DIDN'T "REQUIRE" ANYTHING RE DELIVERY—MAY BE VERY HARD FOR THE HOLDERS OF CLAIMS AGAINST THE NON-SEGREGATED 45,000 BOTTLES OF "SUBSCRIBED" WINE TO PREVAIL ON THIS BASIS.

2-716—SPECIFIC PERFORMANCE/RIGHT OF REPLEVIN:

SPECIFIC PERFORMANCE IS DISCRETIONARY—DOES THAT MEAN RIGHT OF REPLEVIN IS AS WELL?

MUST STILL DEMONSTRATE IDENTIFICATION.

RIGHT OF REPLEVIN IF AFTER REASONABLE EFFORTS, BUYER UNABLE TO EFFECT COVER—MANY ISSUES HERE—ARE THE WINES TRULY UNIQUE? WHAT WOULD PREVENT COVER? NOT JUST PAYING HIGHER PRICE. COULD ONE COVER WITH A SIMILAR, BUT NOT EXACTLY THE SAME WINE?

IV. EQUITABLE REMEDIES

CONSTRUCTIVE TRUSTS

EQUITABLE LIENS

GENERAL PUBLIC POLICY: DISFAVORED IN BK

TRACING ISSUES?

STILL DON'T HAVE ADEQUATE ASSETS TO SATISFY THE CLAIMS OF OWNERSHIP—WHY PREFER SOME CUSTOMERS???

TRUSTEE ARGUED THAT THESE SORTS OF INTERESTS DO NOT ARISE FROM A DEBTOR/CREDITOR RELATIONSHIP. HAS SOME APPEAL—OTHERWISE, ALL CREDITORS WOULD CLAIM A RIGHT OF OWNERSHIP.

West's Ann.Cal.Evid.Code § 662

§ 662. Owner of legal title to property is owner of beneficial title

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

**Credits**

(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

West's Ann. Cal. Evid. Code § 662, CA EVID § 662
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess

**End of Document**



362 F.3d 603
United States Court of Appeals,
Ninth Circuit.

In re RODEO CANON DEVELOPMENT CORPORATION, Debtor.
William Warnick; Ann Warnick, individually and as Trustees of the William and Ann Warnick Family Living Trust; Alan Warnick; Jill Warnick, Appellants–Cross–Appellees,
v.
Fred Yassian; Beverly Rodeo Development Corporation, Appellees–Cross–Appellants.

Nos. 02–56999, 02–57203.
|
Argued and Submitted Dec. 2, 2003.
|
Filed March 30, 2004.

**Synopsis**
**Background:** Order was entered by the Bankruptcy Court authorizing sale of certain property legally titled in Chapter 7 debtor-partner's name free and clear of all liens, and other partner appealed. The Bankruptcy Appellate Panel affirmed in part and reversed in part and remanded with instructions, and appeal was taken.

**Holdings:** The Court of Appeals, Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation, held that:

[1] Court of Appeals could not consider real-party-in-interest objection that debtor-partner sought to assert for first time on appeal;

[2] bankruptcy court should not have authorized sale of certain property which, although legally titled in Chapter 7 debtor-partner's name, was allegedly owned by partnership, without first adjudicating ownership dispute; and

[3] proceeds from sale conducted pursuant to sales order prematurely entered by bankruptcy court had to be disgorged.

Affirmed with instructions.

**Attorneys and Law Firms**

***605** Louis J. Khoury, Law Offices of Louis J. Khoury, Los Angeles, CA, for the appellants/cross-appellees.

David R. Weinstein, Weinstein, Eisen, Weiss & Rothschild LLP, Los Angeles, CA, for the appellees/cross-appellants.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel Marlar, Montali and Perris, Judges, Presiding. BAP No. CC–01–01428 MaMoP.

Before: KOZINSKI and NOONAN, Circuit Judges, and SCHWARZER,* Senior District Judge.

**Opinion**

SCHWARZER, Senior District Judge:

This case concerns the proper disposition in bankruptcy court of proceeds from the sale of property, the ownership of which was subject to dispute and in litigation in a pending adversary proceeding. While the debtor held legal title to the property, its partner claimed that the property was owned by the partnership and hence not the estate. The outcome of the ownership dispute, yet unresolved, would determine whether the indebtedness secured by liens on the property would be satisfied out of the proceeds from the sale or out of the debtor's assets.

The Bankruptcy Appellate Panel ("BAP") held that, since the sale had been consummated and was not subject to attack, the nonbankrupt partner was entitled to disgorgement of the sale proceeds sufficient to protect the partnership's claimed ownership interest in the property and his potential interest in the partnership. We have jurisdiction pursuant to 28 U.S.C. § 158(d). We affirm, but for reasons other than those of the BAP.

## FACTUAL AND PROCEDURAL BACKGROUND

The debtor is Rodeo Canon Development Corporation ("Rodeo"), which holds record title to a commercial property at 9615 Brighton Way in Beverly Hills, California ("the Property"). In 1990, it formed the 9615 Brighton Way Partnership ("Brighton") with Beverly Rodeo Development Corporation, whose president is Fred Yassian (together "Beverly"). Each partner held a 50% interest. While Rodeo held legal title to the Property, Beverly claimed that, because partnership funds were used to purchase it, the Brighton ***606** partnership is the equitable owner of the Property and Beverly has a 50% interest. Adversary proceedings remain pending in the bankruptcy court to resolve this ownership dispute.

Beginning in 1993, members of the Warnick family and a family trust (together "the Warnicks") extended a series of loans aggregating $3,200,000 to Rodeo; the loans were secured by deeds of trust on the Property. In July 1999, the Warnicks sought to foreclose their trust deeds, prompting Rodeo's bankruptcy filing. Beverly and the Chapter 7 Trustee disputed the validity of two of the trust deeds and a portion of a third. Beverly contended that these obligations were incurred without the consent of the partnership and hence could not be enforced against the Property. That issue also remains pending in the adversary proceeding.

In December 2000, after conversion of the bankruptcy to Chapter 7, the Trustee moved pursuant to 11 U.S.C. § 363(b) and (f) for authorization to sell the Property free and clear of liens, agreeing that the Warnicks' lien interests as well as Beverly's interest in the property would attach to the sale proceeds pending resolution of the disputes. Beverly objected on the ground that the Property was not "property of the estate" as required by 11 U.S.C. § 363(b)(1).

To settle the dispute over the enforceability of the trust deeds and clear the way for a sale, the Trustee and the Warnicks entered into a settlement agreement on January 25, 2001. Under the agreement, the Property would be sold for $10,500,000, the Warnicks would accept $3,200,000 in settlement of their secured claims and convert a portion of their secured claim to unsecured, and other creditors' secured liens totaling $4,302,000 would be paid; the disbursements would leave the estate with $2,998,000 in sale proceeds. Following a hearing, the bankruptcy court approved the settlement agreement and entered its order for the sale "free and clear" of liens and claims.

Beverly moved for reconsideration, representing that it did not object to the sale "free and clear" of liens and claims to the extent that it authorized payments of costs and liens not in dispute, so long as the payments would not implicitly resolve or render moot the litigation in which it claimed that the partnership owned the Property and that the challenged liens could not be enforced against the Property. It sought an order directing the Trustee to withhold payments to the Warnicks in excess of $1,050,000 pending resolution of the adversary proceedings over ownership and the enforceability of the liens. The court denied the motion and the appeal to the BAP followed.

The BAP affirmed the order insofar as it approved the

  

settlement. It reversed the sale order insofar as it provided for the disbursement of more than $1,050,000 of the sale proceeds to the Warnicks, holding that it was error to permit the Trustee to sell "free and clear" of any other entity's interest so long as such interest remained in dispute without prohibiting or conditioning such sale "as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). The Warnicks argued that the settlement agreement provided adequate protection because as a 50% partner Beverly was, at most, entitled to half of the $5,148,000 available for distribution to the partners after payment of other creditors' secured liens, and the $2,998,000 in net proceeds remaining in the estate would suffice to satisfy that entitlement. The BAP disagreed, however, pointing out that because partnership property rights and interpartner adjustments remained unresolved, "there was no guarantee that Beverly's interest would be only 50% of ***607** the sale proceeds." The bankruptcy court had therefore erred in authorizing the Trustee to distribute the entire amount of $3,200,000 before the ownership issue had been resolved. The BAP instructed the bankruptcy court to order the Warnicks to disgorge $2,150,000—the disputed amount of sale proceeds—to the Trustee pending conclusion of the adversary proceedings.

## DISCUSSION

### I. STANDARD OF REVIEW

[1] [2] [3] We review an order of the BAP de novo. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir.2002). "We independently review a bankruptcy court's ruling on appeal from the BAP," reviewing the bankruptcy court's "conclusions of law de novo and its factual findings for clear error." *Id.* We review the bankruptcy court's approval of a proposed compromise for an abuse of discretion. *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.)*, 255 F.3d 1061, 1065 (9th Cir.2001).

### II. BEVERLY'S RIGHT TO MAINTAIN CLAIMS ON BEHALF OF THE PARTNERSHIP

[4] The Warnicks contend that Beverly (and Yassian) are not entitled to maintain this action because they are not real parties in interest. The pivotal issue in the litigation is whether the Property was property of the bankruptcy estate. The Warnicks argue that because the dispute is over the partnership's claim to ownership of the Property, only the partnership is the proper party to assert it.

We do not need to resolve this issue because the Warnicks, having failed to raise the real party in interest objection in the bankruptcy court, have waived it. Federal Rule of Bankruptcy Procedure 7017 incorporates Federal Rule of Civil Procedure 17(a), which mandates that "[e]very action shall be prosecuted in the name of the real party in interest." We have held that an objection to a party on real party in interest grounds is waived if not raised in a timely manner. *See United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1183 n. 4 (9th Cir.1989) (refusing to address a real party in interest defense raised for the first time on appeal). Other circuits have taken the same position. *See Ensley v. Cody Res., Inc.*, 171 F.3d 315, 319–20 (5th Cir.1999) (Rule 17(a) objection waived when not raised until case reached court of appeals); *Richardson v. Edwards*, 127 F.3d 97, 99 (D.C.Cir.1997) (objection waived when not raised until trial underway); *Gogolin & Stelter v. Karn's Auto Imps., Inc.*, 886 F.2d 100, 102–03 (5th Cir.1989) (defense waived when made at the close of the plaintiff's evidence); *Hefley v. Jones*, 687 F.2d 1383, 1386–88 (10th Cir.1982) (defense waived when made sixteen days before trial); *Chicago & Northwestern Transp. Co. v. Negus–Sweenie, Inc.*, 549 F.2d 47, 50 (8th Cir.1977) (defense waived when not raised during trial court proceedings).

[5] The real party in interest objection is not founded on Article III standing principles, but is a prudential rule intended to ensure that the party bringing the action is the party entitled to make the claim. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C.Cir.1992) ("Conceptually ... the problem [of stockholders' rights to bring an action alleging breach of a fiduciary duty owed to the corporation] is not an Article III one."); *see also Ensley*, 171 F.3d at 319 (holding that so long as the plaintiff satisfies constitutional standing requirements, the Rule 17(a) limitation is prudential rather than constitutional).

Rule 17(a) makes clear that the objection must be timely raised:

> ***608** Rule 17(a) ... provides that "no action shall be dismissed on [real-party-in-interest grounds] until a reasonable time has been allowed after objection for ratification of commencement of the action by ... the real party in interest...." This implies that the defense may *not* be raised at any time, for the real party must have the opportunity to step into the "unreal" party's shoes and should not be prejudiced by undue delay.

*Whelan*, 953 F.2d at 672 (citation omitted); *see also Richardson v. Edwards*, 127 F.3d 97, 99 (D.C.Cir.1997) (stating that the court "will not entertain [an objection under Rule 17(a) ] because Richardson failed to raise it in the bankruptcy court. ... To wait until the case reaches the court of appeals is to waive the objection."). Accordingly, we reject the Warnicks' contention.

## III. THE DISTRIBUTION OF THE SALE PROCEEDS

The BAP held that while the sale, having been consummated, was not subject to attack, Beverly's claim to an ownership interest in the Property was entitled to protection. It looked to 11 U.S.C. § 363, which authorizes the trustee to sell "property of the estate." 11 U.S.C. § 363(b)(1). Section 363(f) permits the trustee to sell such property "free and clear of any interest in such property of an entity other than the estate" if certain conditions are met. The BAP, however, invoked § 363(e), which provides that "on request of an entity that has an interest in property ... sold ... by the trustee, the court ... shall prohibit or condition such ... sale ... as is necessary to provide adequate protection of such interest." It then concluded that the amount of the proceeds remaining in the estate after the disbursement of $3,200,000 to the Warnicks did not constitute adequate protection under the circumstances of the case.

We disagree with the BAP's analysis although we agree with its result. Section 363 authorizes the trustee to sell only property of the estate. *Connolly v. Nuthatch Hill Assocs. (In re Manning)*, 831 F.2d 205, 207 (10th Cir.1987). Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property." Although Rodeo was the record titleholder of the Property, Beverly claimed a beneficial interest in it. Beverly's claim relied on the contention that the Property was purchased with partnership funds, and that the partnership was therefore the equitable owner of the Property. If the partnership did own the Property, Beverly would have a partner's stake in it.

The bankruptcy court allowed the sale free and clear even though it declined to adjudicate the equitable ownership of the Property until after the sale. The court did state that Beverly failed to rebut California's presumption that the owner of legal title to property also owns the full beneficial title. *See* CAL. EVID. CODE § 662. And it purported to find the Property to be "property of [Rodeo's] estate." But that finding is irreconcilable with its decision to leave the ownership question open "for another day." A final decision that Beverly failed to overcome § 662's presumption would have settled the very question the court professed to leave open. Thus, we cannot find that the court finally resolved the ownership question in the face of its express decision to leave it unresolved.

[6] [7] A bankruptcy court may not allow the sale of property as "property of the estate" without first determining whether the debtor in fact owned the property. *See Moldo v. Clark (In re Clark)*, 266 B.R. 163, 172 (9th Cir. BAP 2001) (holding that "[t]he threshold question, is ***609** [the property] still property of the estate, must ... be decided" before it can be sold free and clear under § 363(f)); *Anderson v. Conine (In re Robertson)*, 203 F.3d 855, 863 (5th Cir.2000) ("Because the separate property home of [a nondebtor] was not included or owned in indivision with the property of the Debtor's bankruptcy estate, the Trustee lacked authority to sell her home ... as property of the estate in which there is an interest of 'an entity other than the estate' under section 363(f)...."); *In re Coburn*, 250 B.R. 401, 403 (Bankr.M.D.Fla.1999) (finding it necessary to determine whether an asset is property of the estate in order to decide whether the trustee is entitled to sell the asset pursuant to § 363(f)). Thus, the bankruptcy court had no sound basis for holding that the Property was property of the estate.

The Property would not be property of the estate if, as Beverly claims, it was partnership property. That Rodeo, as a partner, had at least a 50% interest in the Property does not alter that conclusion. California state law determines whether a property constitutes property of the estate. *See Dumas v. Mantle (In re Mantle)*, 153 F.3d 1082, 1084 (9th Cir.1998) (citing *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). Under California's former Uniform Partnership Act, which governs because the partnership was formed before January 1, 1997, *see* CAL. CORP. CODE § 16111, "[a] partner is co–owner with the other partners of specific partnership property holding as a tenant in partnership." CAL. CORP. CODE § 15025(1). Although the language of the statute would seem to give Rodeo an interest in the property even if the partnership owned the property, California courts have ruled otherwise. In *Munkdale v. Giannini*, 35 Cal.App.4th 1104, 41 Cal.Rptr.2d 805 (Ct.App.1995), the court explained:

> In all material respects, California Corporations Code section 15025 is identical to section 25 of the Uniform Partnership Act, a provision which has been described as follows: "Although stating that each partner is a co-owner of the partnership property, [§ 25 of the Uniform Partnership] Act systematically destroys the

  

> usual attributes of ownership.... Functionally, despite the literal language, the partnership owns its property and the partners do not. The Act would be better if it conceded this rather than accomplishing it by indirection." [*Employers Cas. Co. v. Employers Commercial Union* 632 F.2d 1215, 1219–20 (5th Cir.1980).] This description of ownership of partnership property was adopted by Division One of this court in *Bartlome v. State Farm Fire & Casualty Co.*, [256 Cal.Rptr. 719, 722–23 (Ct.App.1989) ].

41 Cal.Rptr.2d at 809 n. 6; *see also Mayer v. Driver*, 98 Cal.App.4th 48, 120 Cal.Rptr.2d 535, 542–43 (Ct.App.2002). Thus, if the partnership owned the Property, Rodeo did not own it under California law.

**[8]** Nor was the Property part of the estate simply because Rodeo undisputedly held legal title to it. Where a debtor holds only legal title to property and no equitable ownership interest, "the sole permissible administrative act of the trustee or debtor-in-possession is to pay over or endorse over the property to the beneficiary." *In re Signal Hill–Liberia Ave. Ltd. P'ship,* 189 B.R. 648, 651 (Bankr.E.D.Va.1995) (quoting *Mid–Atlantic Supply, Inc. v. Three Rivers Aluminum Co. (In re Mid–Atlantic Supply Co.),* 790 F.2d 1121, 1126 (4th Cir.1986)); *see also* 11 U.S.C. § 541(d) ( "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest ... becomes property of the estate ... only to the extent of the debtor's legal title ***610** to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.").

The question whether the Property was property of the estate unavoidably rested on the question of equitable ownership. The bankruptcy court prematurely concluded that the Property was property of the estate without deciding the ownership question. The sale was therefore not authorized by law.

**[9]** Because the sale, having been consummated, is no longer subject to collateral attack, our concern is with the disposition of the proceeds into which the Property has now been converted. Contrary to the BAP's reasoning, § 363 does not apply because the sale was not of property of the estate. *See In re Manning,* 831 F.2d at 207 ("[Section 363] does not authorize sale of the real property owned by the partnership [rather than the debtor partner], since it is not property of the estate."). Nevertheless, under equitable principles, if it is ultimately determined that the partnership owned the Property, the partnership would be entitled to the proceeds in excess of secured liens and other priority obligations and Rodeo's claim would be limited to the rights of a 50% partner.

The Warnicks contend that the sale and distribution were carried out pursuant to the Settlement Agreement which had been approved by the bankruptcy court and the approval affirmed by the BAP. Thus, they argue that Beverly's attack is on a compromise subject to review only for abuse of discretion. The argument misconceives the issue. As the BAP pointed out, "We do not affirm the approval of any provisions of the Settlement Agreement which purported to immediately distribute the disputed sale proceeds." Moreover, the settlement was premised on a sale pursuant to court approval and, as we have shown, the bankruptcy court's approval of the sale was error.

**[10]** **[11]** The question remains whether the BAP's disgorgement order should be affirmed. Although we disagree with the BAP's reasoning, we agree with its result. "[A] bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code." *Beaty v. Selinger (In re Beaty),* 306 F.3d 914, 922 (9th Cir.2002) (internal quotation marks omitted). A court may order parties to a bankruptcy appeal to disgorge improperly-distributed assets. *See Spirtos v. Moreno (In re Spirtos),* 992 F.2d 1004, 1006–07 (9th Cir.1993).

The Warnicks' attack on the disgorgement order is unavailing. They assert that Beverly ratified the Warnicks' trust deeds and agreed to pay $2,850,000 of the principal due. The ownership dispute is therefore unimportant, they say, because Beverly will owe the funds to the Warnicks if Rodeo's estate does not pay. This contention is premature. The bankruptcy court has not ruled on Beverly's liability to the Warnicks, and this issue is not properly before us.

The Warnicks also contend that the amount left in the estate—$2,998,000—is sufficient to protect Beverly's claimed 50% interest. They reason that $5,148,000 is the maximum amount from the sale proceeds available for distribution to the partners after payment of secured liens, and half of that amount (Beverly's 50% share) is $2,574,000, considerably less than the amount left in the estate. Beverly, they insist, is therefore adequately protected.

The BAP properly rejected this contention. It pointed out, first, that the Warnicks' argument ignores the fact that it was Brighton's interest that was in dispute, ***611** not merely one partner's interest, and the partnership would be entitled to the entire net proceeds from the sale of its property, $5,148,000. Second, partnership property rights and interparty issues yet unresolved may lead to other than a 50–50 division of the proceeds. We find no error in

  

the BAP's disgorgement order.

In its cross-appeal, Beverly challenges the compromise between the Warnicks and the Trustee on the further ground that it was tainted by fraud. Because we affirm the BAP's order, we do not need to reach this issue.

## CONCLUSION

We affirm the order of the BAP remanding the case to the bankruptcy court with instructions to order the Warnicks to disgorge $2,150,000, plus interest, to the Trustee to be held until the conclusion of the pending adversary proceeding resolving Beverly's claims.

**AFFIRMED,** with instructions.

### All Citations

362 F.3d 603, 51 Collier Bankr.Cas.2d 1605, 42 Bankr.Ct.Dec. 223, Bankr. L. Rep. P 80,073, 04 Cal. Daily Op. Serv. 2680, 2004 Daily Journal D.A.R. 3891

Footnotes

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.



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Distinguished by In re Gould, Bankr.N.D.Cal., June 12, 2008

266 B.R. 163
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Robert L. CLARK, Debtor.
Byron Z. Moldo, Chapter 7 Trustee, Appellant,
v.
Robert L. Clark; United States Trustee; Appellees.

BAP No. CC–00–1690–MOPB.
|
Bankruptcy No. SV 96–17254–KL.
|
Argued and Submitted June 22, 2001.
|
Filed Aug. 6, 2001.

**Synopsis**
In case converted from Chapter 13 to Chapter 7, Chapter 7 trustee filed motion to sell real property free and clear of debtor's claim of exemption. The United States Bankruptcy Court for the Central District of California, Kathleen T. Lax, J., denied motion, and trustee appealed. The Bankruptcy Appellate Panel, Montali, J., held that: (1) by describing the property claimed as exempt as "five lots listed in qualified retirement plan" when there was no such plan and the property actually was owned by an entity other than debtor or a retirement plan, debtor's exemption claim was ambiguous and did not render the subject property automatically exempt under the Supreme Court's *Taylor* decision when no timely objection to it was filed, and (2) section of the Bankruptcy Code permitting estate property to be sold free and clear of disputed liens and other interests does not permit sale of property free and clear of exemption claims.

Reversed and remanded.

### Attorneys and Law Firms

***164** Peter A. Davidson, Kenneth Miller, Rein, Evans & Sestanovich, Los Angeles, CA, for Byron Z. Moldo,

trustee.

Sue Ann Howard, Law Offices of Sue Ann Howard, Lancaster, CA, for Robert L. Clark.

Before: MONTALI, PERRIS and BRANDT, Bankruptcy Judges.

***165 *OPINION***

MONTALI, Bankruptcy Judge.

In this case the debtor filed inaccurate schedules showing ownership of non-existent assets and claiming them as exempt. When the trustee attempted to sell unscheduled assets, the debtor convinced the bankruptcy court that those assets were the same as those he had claimed exempt.

**[1]** Byron Z. Moldo, chapter 7[1] trustee (the "Trustee"), appeals from the Bankruptcy Court's order denying the Trustee's motion to sell real property free and clear of the claim of exemption of debtor Robert L. Clark ("Debtor"). The Trustee did not object to Debtor's claim of exemption within the time allowed by Rule 4003(b),[2] but argues that he was not required to object because Debtor's Schedules B and C did not adequately describe Debtor's interest in the subject property. We agree with the Trustee and REVERSE and REMAND.

## I. FACTS

Debtor filed a chapter 13 petition on August 5, 1996. The case was converted to chapter 7 on June 17, 1998, upon motion by Debtor, and the Trustee was appointed.

Debtor did not file new schedules in the chapter 7 case, so the pertinent information is found in the schedules that were filed in the chapter 13 case. In the Schedule B list of personal property assets, under Item 11 (entitled "Interests in IRA, ERISA, Keogh, or other pension or profit-sharing plans"), Debtor listed "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN," and the value of such property at $100,000;[3] at Item 19 (entitled "Contingent and non-contingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust"), Debtor listed nothing. In the Schedule C list of property claimed exempt, Debtor listed, *inter alia*, "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN," citing "704.115"[4] as the source of the exemption, valuing the property at $100,000, and claiming that amount exempt.

The chapter 7 meeting of creditors provided for by section 341 was commenced on July 24, 1998. The record on appeal does not include a transcript of that meeting, but the Trustee's brief on appeal states without contradiction that he asked Debtor during the meeting to provide information "on the 'five lots listed in qualified retirement plan' listed on Debtor's Schedule 'B' and claimed exempt on Debtor's Schedule 'C' and a trust agreement mentioned by the Debtor." The meeting was continued to August 28, 1998, pending the Trustee's receipt of the requested information, and was concluded on that date. The Trustee filed a form entitled "TRUSTEE'S WORKSHEET ON 341 MEETING" on September 8, 1998. The form was annotated to state "no need to appear—info ***166** received" and "checking assets,"[5] and showed the meeting to be concluded.[6]

Neither the Trustee nor any other creditor filed an objection to the exemption claim stated in Debtor's Schedule C as "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN." An order granting Debtor's discharge pursuant to section 727(b) was entered on March 22, 1999.[7]

On July 14, 1999, the Trustee applied for an order authorizing him to employ a real estate broker to list and sell four of the lots in which the Trustee contended that Debtor held an interest, although title to the lots was vested in a trust.[8] That application was granted by an order issued on July 23, 1999. Debtor filed a motion to reconsider that order on the basis that the lots in question had been claimed exempt without timely objection and were therefore not part of the bankruptcy estate and could not be sold by the Trustee.

On August 24, 1999, the Trustee filed a response to Debtor's motion for reconsideration, opposing it on the merits and also because the motion did not comply with the local rules and provide a declaration of facts. The Trustee's opposition to Debtor's reconsideration motion stated, *inter alia*, that:

> Upon review of the Debtor's Schedule B, the Trustee noted that among the Debtor's assets were "five lots listed in qualified retirement plan" ("Five Lots") which

  

> were valued at $100,000. The Trustee also noted that the Debtor marked "X" for none to item # 19 on Schedule B which asked about any interest in a trust.... Additionally, the Trustee noted that the Debtor claimed an exemption for the Five Lots on his Schedule C in the amount of $100,000.

The Trustee's Opposition further stated that the Trustee asked Debtor at the initial section 341 meeting to provide a copy of the " 'qualified retirement plan' within which the Debtor purported to hold the five lots," and received a copy of a document with a cover page entitled "California Pension Administrators & Consultants, Inc. Trust Agreement (Self Trustee)," followed by a page stating "Amendment No. 2," which was an incomplete form with blanks that had not been filled in; the signature lines on "Amendment No. 2" show Debtor as both "Trustee" and "Firm."

The Trustee's opposition also contended that the Trustee asked Debtor's attorney for "a listing of properties held in the Trust," and Trustee then ordered preliminary ***167** title reports for four of the lots; those reports showed title to be held by Robert L. Clark, Trustee of the Robert L. Clark Trust dated December 5, 1988. The Trustee argued that the four lots had not been properly claimed exempt and therefore remained part of the bankruptcy estate and subject to sale by the Trustee. The Bankruptcy Court denied Debtor's reconsideration motion without reaching the merits because it was not supported by a declaration of facts as required by the local rules.

Debtor did nothing further and the Trustee proceeded to market the four lots. On August 15, 2000, the Trustee filed a motion for authorization to accept the best offer received ($75,000 total for three of the lots), saying that he was entitled to sell property of Debtor's trust for the benefit of the estate.[9] The Trustee's motion sought to sell free and clear of a disputed lien and alluded to a past dispute about Debtor's exemption claim, but did not pray for authorization to sell free and clear of the exemption claim. The hearing was continued twice at the request of Debtor, and Debtor then filed an opposition to the sale.[10] In his opposition, Debtor raised the same argument that he had made in his reconsideration motion, *viz.*, that the property had been claimed exempt without objection and was therefore no longer part of the bankruptcy estate and could not be sold by the Trustee. The Trustee responded with the same argument that he had made in opposing Debtor's reconsideration motion, *viz.*, that the property had not been properly exempted from the estate and therefore remained available to be sold.

After a hearing, the Bankruptcy Court issued an order denying the Trustee's motion to sell the three lots on the basis that such property was exempt because the Trustee did not file a timely objection to Debtor's Schedule C exemption claim, citing *Taylor v. Freeland & Kronz,* 503 U.S. 638, 641–45, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992).

The Trustee timely appealed, contending: first, that the subject lots were not "validly exempt" and their sale by the Trustee therefore should have been approved; and, second, that sale free and clear of any exemption claim should have been authorized pursuant to section 363(f)(4) on the basis of a *bona fide* dispute concerning the property's exempt status, pending litigation of such dispute.

## II. ISSUES

A. Whether the Bankruptcy Court erred in denying the Trustee's motion to sell the subject property because it had been claimed exempt without timely objection and was therefore no longer estate property subject to sale by the Trustee.

***168** B. Whether the Bankruptcy Court erred in failing to authorize sale of the subject property free and clear of any exemption claim pending litigation of a *bona fide* dispute regarding the property's exempt character, pursuant to section 363(f)(4).

## III. STANDARD OF REVIEW

**[2] [3]** Rulings on motions to sell property of the estate other than in the ordinary course of business pursuant to section 363 are reviewed for abuse of discretion. *See Rosenberg Real Estate Equity Fund III v. Air Beds, Inc.* (*In re Air Beds, Inc.*), 92 B.R. 419, 422 (9th Cir. BAP 1988); *Committee of Equity Security Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, 1071 (2d Cir.1983). A court abuses its discretion when it bases its ruling on an erroneous view of the law. *See Predovich v. Staffer* (*In re Staffer*), 262 B.R. 80, 82 (9th Cir. BAP 2001).

**[4]** Whether property is included in a bankruptcy estate is a question of law, subject to *de novo* review. *See Cisneros v. Kim* (*In re Kim*), 257 B.R. 680, 684 (9th Cir. BAP

  

2000).

## IV. DISCUSSION

*A. Denial of sale due to exemption claim.*

**[5]** The Trustee argues that Debtor's exemption claim of "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN" did not identify the property being claimed exempt sufficiently to effect exemption at all; as a result, there was no exemption claim to object to, and the time within which objections must be made therefore never commenced to run. The Trustee correctly points out that a debtor controls the schedules and bears the burden of enabling trustees and creditors "to determine precisely whether a listed asset is validly exempt simply by reading a debtor's schedules," so that any ambiguity is construed against the debtor, citing *Hyman v. Plotkin* (*In re Hyman*), 967 F.2d 1316, 1319 n. 6 (9th Cir.1992) ("*Hyman*") and *Seror v. Kahan* (*In re Kahan*), 28 F.3d 79, 82 (9th Cir.1994) ("*Kahan*"). The Trustee also cites *Andermahr v. Barrus* (*In re Andermahr*), 30 B.R. 532, 533 (9th Cir. BAP 1983) ("*Andermahr*"), which holds that a "non-specific" exemption claim stated as "other assets of the petitioner" has no legal effect. The Trustee's position is that, while *Taylor* states the rule of automatic exemption by default in the absence of a timely objection, there are circumstances under which that rule does not apply and this is one of them.

One such circumstance occurred in *Hyman*, where the debtors' exemption claim stated that it pertained to their "homestead," cited CCP § 704.720,[11] and set forth the value of the exemption as $45,000. The trustee never objected to that claim, but did seek to sell the property. The debtors argued that they had claimed the entire property exempt and that it was set aside as exempt pursuant to section 522(1) when no timely objection was made to their claim. The Ninth Circuit held that:

> the [debtors] did not sufficiently notify others that they were claiming their entire homestead as exempt property; their schedule only gave notice that they claimed $45,000 as exempt, which is the proper amount of their homestead allowance under [CCP § 704.720 and ***169** § 704.730] [citation omitted]. Thus, the trustee had no basis for objecting, and could well have suffered the bankruptcy judge's ire had he objected to the $45,000 exemption to which the [debtors] were clearly entitled.

*Hyman*, 967 F.2d at 1319. The *Hyman* Court noted that, under *Taylor*, property claimed exempt is "automatically exempt" in the absence of a timely objection (regardless of whether the exemption claimed is a valid one), but that result did not follow where the exemption claim was so ambiguous that potential objectors were not put on notice of what property was being claimed exempt. *Id.* at 1319 n. 6.[12]

The court made a comparable analysis of an ambiguous claim of exemption in *Kahan*, where the debtor first claimed his home exempt under CCP § 704.740[13] to the extent of $45,000; four years later, he amended his schedule and claimed the property exempt to the extent of his entire joint tenancy interest (which was worth $187,500). No objection was made to the initial claim, but the trustee did object to the amended claim within the time provided by Rule 4003(b). The debtor argued that the amended claim did not operate to commence a new objection period because it was merely a "clarification" of the original claim, which had become final and binding when no timely objection was made to it. The Ninth Circuit held that the second claim did not just clarify the first because the two claims differed "significantly," inasmuch as the original claim exempted only $45,000 worth of the debtor's interest in the property, whereas the amended claim exempted all of his interest in the property. The Court pointed out that the debtor's arguments were identical to those made and rejected in *Hyman*, and held that the original claim did not impart notice that the debtor claimed an exemption exceeding $45,000.

**[6]** In *Andermahr*, decided nine years prior to *Taylor*, the debtor claimed the grubstake, or wildcard, exemption of $7,900 that was then provided by section 522(d)(5) and applied $4,650 of it to various specific assets. He then applied the $3,250 balance of the available exemption to what was described only as "other assets of the petitioner." The trustee did not object to the exemption claim, but did collect a $2,202 tax refund issued months later. The debtor argued that the refund was exempt because it was encompassed by the "other assets of the petitioner" that had been claimed exempt without timely objection. We held that:

> The non-specific claim of exemption gives the debtor no rights, legally or practically. It is mandatory under the language of the statute that the debtor file a list of the property he claims exempt. 11 U.S.C. § 522(1). A list of property connotes a selection of specific properties. The claim to "other assets of the petitioner" does not comply with the statute.

  

> ***170** Even without the statutory mandate, the practicalities of bankruptcy administration require that the trustee be advised of the precise items of property in the estate, 11 U.S.C. § 541(a), that the debtor elects to withdraw from the estate. The trustee needs this information in order to judge the validity of the exemption claim and to know what property remains in the estate for purposes of liquidation.

*Andermahr,* 30 B.R. at 533. Although *Andermahr* was decided prior to *Taylor,* its rationale is consistent with that of *Hyman* and *Kahan,* which were both decided after *Taylor.* All three cases hold that an ambiguous exemption claim that does not clearly specify the property being claimed exempt invokes no duty to object, and failure to object to such a claim does not render the claimed exemption effective.

Another example of an ambiguous exemption claim was at issue in *Alderman v. Martinson* (*In re Alderman*), 195 B.R. 106, 111 (9th Cir. BAP 1996). In that case, the debtor claimed property exempt as a homestead under Montana law and stated the value of the exemption claim as "maximum allowed;" the property was owned by a partnership in which the debtor held an undetermined percentage interest of less than 100%, and the available exemption was limited to $40,000 for the entire property. The trustee did not object to the exemption claim but, after the objection period expired, moved to have the court determine the value of the debtor's exemption, and sought turnover of sale proceeds that exceeded such amount. The debtor argued that, under *Taylor,* he was entitled to exempt the maximum of $40,000 allowed by Montana law, since there had been no timely objection to his exemption claim. We considered, *inter alia, Hyman* and *Kahan,* and concluded that:

> The foregoing cases suggest that a motion to value an exemption is not bound by the 30 day bar of Rule 4003. The bankruptcy court in this proceeding believed similarly, specifically stating that *Taylor* did not control in this instance. "The Trustee does not object to the Debtor's allowable Montana homestead exemption. Rather, the Trustee seeks a determination as to the allowable dollar value of such exemption. *Taylor* is therefore not dispositive of the issue of the allowable amount of the exemption." ORDER, June 19, 1995.
>
> Regardless, the manner in which the exemption was valued is inherently ambiguous and calls for valuation at some point in the proceeding. When debtors claim an exemption at the "maximum allowed," that can only mean the maximum allowed by law. Montana law clearly provides that a claimant's homestead exemption is limited to an amount proportional to his ownership interest in the property. Mont.Code Ann. § 70–32–104(2) (1994).

*Alderman,* 195 B.R. at 111.

**[7]** In this case, Debtor's exemption claim is just as ambiguous and imprecise as the claims that were found defective in the foregoing cases. The exemption claim states "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN," values them at $100,000, and cites the source of the exemption as CCP § 704.115 (which pertains to exempting private retirement plans). Yet the documents that Debtor provided to the Trustee did not demonstrate that a qualified retirement plan had been established, and the Trustee's own efforts revealed title records showing that four of the lots in question were owned by a trust rather than by Debtor (although Debtor stated in his schedules that he held no interests in any trusts).[14]

***171** By describing the property claimed exempt as "FIVE LOTS LISTED IN QUALIFIED RETIREMENT PLAN" when there is no such plan and the property is actually owned by an entity other than Debtor or a retirement plan, the exemption claim refers to property that does not exist, and fails to refer to the property that does exist (*i.e.,* four lots with their titles held by a trust, in which trust Debtor may have an interest). Such a claim of exemption is not effective to render exempt any direct interest that Debtor may have in the trust that holds title to the subject lots, much less any indirect interest that Debtor may have in the lots themselves as property of the trust. Since the exemption claim does not, by its terms, pertain to either the lots or Debtor's interest in the trust that owns the lots, it cannot cause such property to become automatically exempt under *Taylor* when no timely objection is made to the claim. Accordingly, the Bankruptcy Court erred in denying the Trustee's motion to sell, based on Debtor's exemption claim.

**[8]** The result we reach here, fully supported by the foregoing authorities, could have been achieved early in the case if the Trustee had sought and obtained an extension of the objection period as permitted by Rule 4003(b) until he had an opportunity to investigate fully the nature of Debtor's interest in the lots, the *bona fides* of the alleged retirement plan, and any other pertinent issues. Alternatively, he could have filed a timely objection to the exemption claim, briefly stating grounds such as the claim's failure to establish Debtor's entitlement to the exemption sought, or the claim's failure to identify the property claimed. As this case illustrates, trustees risk costly delays and the uncertainty of litigation and appeals when they assume that failure to object to an imprecise and unsupported exemption claim will not result in

  

automatic exemption under *Taylor*. By far the safer approach would be for trustees to take a conservative and skeptical view of exemption claims, and refuse to accept any claim of exemption that is not clearly legitimate on its face.

*B. Refusal to authorize sale free and clear under section 363(f)(4).*

We are reversing the order denying the Trustee's sale because the Debtor did not unambiguously claim an exemption in property of the estate. In doing so, however, we reject the Trustee's argument that the sale should have been authorized free and clear of Debtor's exemption claim because a *bona fide* dispute existed as to whether the property was exempt, which is a ground under section 363(f)(4) for sale free and clear of liens and interests pending resolution of the dispute. This argument is flawed.

**[9] [10]** The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated. *See, generally*, 3 Lawrence P. King, *Collier on Bankruptcy* ¶ 363.06 (15th ed. rev.1998). Typically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute; such procedure preserves all parties' rights by simply transferring interests from property to dollars that represent its value. In this case, Debtor presumably believed the lots were his exempt property ***172** and did not want them sold at all. His right to continue to own the lots would not have been preserved had they been sold, with his interest in them transferred to proceeds.

**[11] [12] [13]** The Trustee cites no authority for the proposition that section 363(f) permits sale of property free and clear of exemption claims. Pursuant to section 363(f), "property under subsection (b) or (c) of this section" may be sold free and clear of "any interest in such property of an entity other than the estate"—the property that can be sold free and clear under section 363(f) is defined by subsections (b) and (c) of section 363 as "property of the estate." *Id.* Pursuant to section 541(a), "property of the estate" consists generally of all property in which the debtor had an interest on the date of bankruptcy, but section 522(b) provides that a debtor may exempt property from the estate. *See Robertson v. Alsberg* (*In re Alsberg*), 161 B.R. 680 (9th Cir. BAP 1993), *aff'd,* 68 F.3d 312 (9th Cir.1995), *cert. denied, Alsberg v. Robertson*, 517 U.S. 1168, 116 S.Ct. 1568, 134 L.Ed.2d 667 (1996). In other words, if the property is exempt it may not be sold by the Trustee; if it is not exempt, it may be sold. The threshold question, is it still property of the estate, must first be decided.

## V. CONCLUSION

The Bankruptcy Court erred in denying the Trustee's motion to sell the subject property, inasmuch as Debtor's exemption claim was not sufficiently clear and precise, and therefore too ambiguous, to render the subject property automatically exempt under *Taylor* when no timely objection to it was filed.

The order of the Bankruptcy Court is REVERSED and the matter REMANDED for the court to determine whether to authorize the sale.[15]

### All Citations

266 B.R. 163, 38 Bankr.Ct.Dec. 84, Bankr. L. Rep. P 78,516, 01 Cal. Daily Op. Serv. 7225, 2001 Daily Journal D.A.R. 8933

Footnotes

1 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036.

2 The rule provides that objections must be filed within 30 days after the later of conclusion of the section 341 meeting or the filing of an amendment to the list of property claimed exempt or supplemental schedules, unless the time is extended for cause upon request made during the objection period.

3 Debtor did not include the lots in the Schedule A list of real property assets.

  

4 This is apparently a citation to California Code of Civil Procedure ("CCP") § 704.115, entitled "Private retirement plans; exemption; periodic payments."

5 Debtor's brief on appeal states that the Trustee eventually filed a report of no assets in the estate, but the Trustee denies having done so and the bankruptcy case docket shows that no such report has ever been filed. In any event, it is irrelevant to the issues on appeal whether a no asset report was filed, since such a filing would not have effected an abandonment of estate property pursuant to section 554.

6 Conclusion of the section 341 meeting started the time for objections running pursuant to Rule 4003(b). *See Smith v. Kennedy* (*In re Smith*), 235 F.3d 472 (9th Cir.2000); *Moldo v. Blethen* (*In re Blethen*), 259 B.R. 153 (9th Cir. BAP 2001); *Chubb & Son, Inc. v. Clark* (*In re Clark*), 262 B.R. 508 (9th Cir. BAP 2001).

7 Debtor argued in the Bankruptcy Court and on appeal (citing no apposite authority) that issuance of the discharge somehow should have prevented the Trustee from asserting an interest in property. That is not the law. Pursuant to section 524, a discharge provided by section 727(b) merely protects debtors from personal liability for certain debts. The discharge has no effect upon an estate's interest in property or a trustee's administration of estate property.

8 The record on appeal does not indicate that the Trustee took any action concerning the fifth lot referred to in Schedules B and C.

9 Curiously, Trustee bypassed what appears to be at least a preliminary obstacle to his ability to sell property in a trust. He acknowledged that the property was held in a trust, then stated: "[T]rustee is entitled to act as trustee of the Clark Trust. Acting as trustee of the Clark Trust, [Trustee] is entitled to sell the Properties for the benefit of the Estate."
It is not clear to us how Trustee can make the leap from the Clark Trust, apparently ignoring its beneficiaries, and sell for the bankruptcy estate without first dissolving the Clark Trust, obtaining the consent of its beneficiaries, or doing something else. Perhaps the Bankruptcy Court can sort out this confusion on remand; we offer no opinion just what should be done.

10 Debtor's opposition was late under the local rules, but the Bankruptcy Court ruled in its order of November 9, 2000, that, notwithstanding Debtor's untimely filing, it was appropriate to address the grounds stated in the opposition because they went "to the heart of" the Trustee's *prima facie* case.

11 That statute is entitled "Extent of homestead exemption; exemption for proceeds of sale, insurance, indemnification or compensation; separate homesteads of debtor and spouse" and provides, *inter alia,* that "A homestead is exempt from sale under this division to the extent provided in Section 704.800."

12 Shortly prior to oral argument, the Trustee filed a Notice of Recent Decision, citing *Soost v. NAH, Inc.* (*In re Soost*), 262 B.R. 68 (8th Cir. BAP 2001). That case holds (in the context of avoiding a judicial lien under section 522(f) as an impairment of exemption) that an exemption claim stating the value of the exemption to be $1.00 does not operate to exempt the entire property, but renders exempt only $1.00 worth of the property's value, with the rest of the property remaining in the estate and subject to administration by the trustee. *Soost* cites *Hyman* and employs the same rationale.

13 That section is entitled "Sale of dwelling to enforce money judgment" and provides, *inter alia* that "the interest of a natural person in a dwelling" is exempt as provided by CCP Article 4; Article 4 sets forth, at section 704.730, several alternative amounts of exemption.

14 Debtor's counsel conceded at oral argument that no qualified retirement plan existed; she also admitted that the exemption claim was not scheduled accurately, that applicable law would not prevent creditors from reaching the lots in question, and that title to the lots is held by a trust.

15 On remand the court should decide whether the Trustee is entitled to sell property owned by a trust rather than by Debtor. Should Debtor attempt to amend his schedules to claim the property as exempt, the court may also need to decide whether Debtor is entitled to exempt property he does not own, and if so, whether he is now precluded from amending his claim of exemption. *See Arnold v. Gill* (*In re Arnold*), 252 B.R. 778 (9th Cir. BAP 2000). We express no opinion on any of these issues.

  

West's Ann.Cal.Com.Code § 2401

§ 2401. Passing of title; reservation for security; limited application of this section

Effective: January 1, 2007

Each provision of this division with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this division and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the division on secured transactions (Division 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) If the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) If the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

**Credits**

(Stats.1963, c. 819, § 2401. Amended by Stats.1965, c. 1379, p. 3286, § 2; Stats.2006, c. 254 (S.B.1481), § 37.)

West's Ann. Cal. Com. Code § 2401, CA COML § 2401
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess

**End of Document**



West's Ann.Cal.Com.Code § 2501

§ 2501. Insurable interest in goods; manner of identification of goods

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) When the contract is made if it is for the sale of goods already existing and identified;

(b) If the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) If the contract is for the sale of unborn young or future crops, when the crops are planted or otherwise become growing crops or the young are conceived.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the

identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

**Credits**

(Stats.1963, c. 819, § 2501.)

West's Ann. Cal. Com. Code § 2501, CA COML § 2501
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess



West's Ann.Cal.Com.Code § 2204

§ 2204. Formation in general

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

**Credits**

(Stats.1963, c. 819, § 2204.)

West's Ann. Cal. Com. Code § 2204, CA COML § 2204
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess



West's Ann.Cal.Com.Code § 2402

§ 2402. Rights of seller's creditors against sold goods

(1) Except as provided in subdivisions (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this division (Sections 2502 and 2716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him or her a retention of possession by the seller is fraudulent or void under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent or void.

(3) Nothing in this division shall be deemed to impair the rights of creditors of the seller:

(a) Under the provisions of the division on secured transactions (Division 9); or

(b) Where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this division constitute the transaction a fraudulent transfer or voidable preference.

**Credits**

(Stats.1963, c. 819, § 2402. Amended by Stats.1988, c. 1368, § 9, operative Jan. 1, 1990.)

West's Ann. Cal. Com. Code § 2402, CA COML § 2402
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess



West's Ann.Cal.Com.Code § 2502

§ 2502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency

Effective: July 1, 2001

(1) Subject to subdivisions (2) and (3), and even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he or she has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if either:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract.

(b) In all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under paragraph (a) of subdivision (1) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his or her special property has been made by the buyer, he or she acquires the right to recover the goods only if they conform to the contract for sale.

**Credits**

(Stats.1963, c. 819, § 2502. Amended by Stats.1999, c. 991 (S.B.45), § 28.3, operative July 1, 2001; Stats.2000, c. 135 (A.B.2539), § 19; Stats.2000, c. 1003 (S.B.2002), § 5, operative July 1, 2001.)

West's Ann. Cal. Com. Code § 2502, CA COML § 2502
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess



West's Ann.Cal.Com.Code § 2716

§ 2716. Buyer's right to specific performance or replevin

Effective: July 1, 2001

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he or she is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

**Credits**

(Stats.1963, c. 819, § 2716. Amended by Stats.1999, c. 991 (S.B.45), § 28.4, operative July 1, 2001.)

West's Ann. Cal. Com. Code § 2716, CA COML § 2716
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess



205 B.R. 251
United States Bankruptcy Court,
N.D. California.

In re G. PAOLETTI, INC., Debtor.
DIESEL PERFORMANCE, INC., etc., et al.,
Plaintiffs,
v.
G. PAOLETTI CO., INC., etc., et al., Defendants.
And Related Counter– And Cross–Claims.

Bankruptcy No. 95–46785 TS.
|
Adversary No. 95–4883 AT.
|
Jan. 9, 1997.

**Synopsis**
Chapter 7 trustee sought authority to sell two partially completed fire trucks free and clear of all liens and interests, and summary adjudication that city that had contracted with debtor to purchase trucks prior to commencement of bankruptcy did not own trucks and had waived any right to possession of trucks. The Bankruptcy Court, Leslie Tchaikovsky, J., held that: (1) city had adequate notice that prior motions in adversary proceeding were intended to affect its interests in trucks; (2) prior motions in adversary proceeding were not res judicata as to city's ownership claim; (3) law of case did not bar city's ownership claim; (4) bankruptcy estate owned trucks; and (5) city waived right to possession of trucks as holder of special property interest by failing to tender balance due.

Trustee's motions granted.

**Attorneys and Law Firms**

***254** Charles E. Vose, Deputy City Attorney, for the City of Oakland.

Joseph K. Falzon, Goldberg, Stinnett, Meyers & Davis, San Francisco, CA, for Trustee, Richard Spear.

**MEMORANDUM OF DECISION**

**(Oakland Summary Judgment Motion)**

LESLIE TCHAIKOVSKY, Bankruptcy Judge.

Richard Spear (the "Trustee"), the chapter 7 trustee of the above-captioned bankruptcy estate, seeks authority to sell two partially completed fire trucks (the "Oakland Trucks") to Opperman and Sons ("Opperman") for $125,000 free and clear of all liens and interests. He also seeks a summary adjudication that the City of Oakland ("Oakland"), the party that contracted with the Debtor to purchase the Oakland Trucks prior to the commencement of bankruptcy, does not own the Oakland Trucks and has waived any right to possession of the Oakland Trucks. For the reasons set forth below, the Court grants both motions.[1]

**SUMMARY OF FACTS**

To grant a motion for summary judgment, the Court must find that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). All evidence presented, as well as all inferences that can be drawn from the evidence, must be construed in favor of the ***255** nonmoving party. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir.1988). In accordance with these standards, for purposes of these motions, the Court assumes the following facts to be true:

The above-captioned chapter 7 bankruptcy case was commenced on October 5, 1995. Prior to that date, G. Paoletti Co., Inc. (the "Debtor") was in the business of retrofitting truck chassis into special use vehicles: e.g., fire trucks. The Debtor resold these special use vehicles to end users, who were generally public entities like Oakland.

On or about June 21, 1994, Oakland agreed to purchase two fire trucks from the Debtor for $359,706.09. The agreement is evidenced by a purchase order, signed by Oakland, accepting a bid signed by the Debtor on a form supplied by Oakland (collectively the "Contract"). The purchase price includes $27,414.09 in sales tax. The Contract provides that Oakland will be entitled to a discount on the purchase price as follows:

> Discount for partial payment: City is entitled to a total discount of $6,134.00 ($3,067 each) if payment of chassis is made when G. Paoletti Company invoice the City for the Chassis and provides an insurance certificate covering loss of the chassis.

The Contract also provides that the Debtor must register the Oakland Trucks with the State of California for exempt license plates, listing Oakland as the registered legal owner. However, the Contract does not specify when the Debtor must register the Oakland Trucks.

The Debtor provided Oakland with invoices (the "Invoices") for the chassis for the Oakland Trucks on or about March 14, 1995 and May 8, 1995, respectively. Each Invoice is in the total amount of $83,830.69. This amount is calculated as follows: $80,508.75 less $3,067 discount for pre-payment plus $6,388.94 in sales tax. The Debtor also provided Oakland with an insurance certificate for at least one of the chassis—i.e., the chassis invoiced in March 1995 (the "March 1995 Insurance Certificate"). The March 1995 Insurance Certificate describes the Debtor as the insured and Oakland as the certificate holder. In addition, the March 1995 Insurance Certificate contains the following notation:

> Certificate holder is named as an additional insured as respect to work insured is doing on: 1995 International chassis VIN # 1HTHCAHT35H674598 *which is owned by the City of Oakland.* [Emphasis added.]

Oakland has been unable to locate an insurance certificate for the other chassis.

Oakland paid the amounts of the Invoices—a total of $167,661.38 (the "Partial Payment") sometime shortly after it received them. The original Contract price for the two units was $359,706.09. By paying the amounts of the Invoices, Oakland received the discount provided for in the Contract. As a result, the Contract price was reduced to $353,572.09 ($359,706.09 less $6,134). Thus, the balance due from Oakland to the Debtor under the Contract at present is $186,090.71 (the "Balance Due").

As noted above, the Debtor filed a bankruptcy petition on October 5, 1995. At that time, the Debtor had not completed the retrofit work on the Oakland Trucks. Bruce Jaussaud, a Fleet Specialist for Oakland, inspected the Oakland Trucks in September 1995 and determined that they were each approximately 75% complete. Jaussaud estimates their value at approximately $310,000 (the "Present Value"). He estimates the cost to complete their retrofit at approximately $140,000. The difference between the Present Value of the Oakland Trucks and the Partial Payment is $142,338.62.

Shortly after the bankruptcy case was filed, several of the suppliers of the truck chassis, including the suppliers of the Oakland Trucks, asserted claims that they had retained title to the truck chassis after delivering them to the Debtor. This adversary proceeding was commenced, and two motions for partial summary judgment were filed with respect to this issue. One of the motions was filed by Wells Fargo Bank, N.A. ("Wells Fargo"), the Debtor's principal secured creditor. The other was filed by the Trustee. The motions were consolidated for decision. The Court ultimately ruled against the suppliers, summarily determining that the suppliers had not retained title to the ***256** truck chassis, including the Oakland Trucks (the "Prior Decision").

  

## DISCUSSION

### A. SUMMARY OF ISSUES

The Trustee contends that, at best, when the bankruptcy petition was filed, Oakland had a "special property interest" in the Oakland Trucks pursuant to section 2501 of the California Commercial Code (the "Commercial Code"). A buyer with a special property interest in undelivered goods has a right to possession of the goods under certain circumstances. The Trustee contends that Oakland has waived any such right by failing to tender the Balance Due.[2]

Oakland does not address this contention. Instead, it relies solely on its theory that it owns the Oakland Trucks. Oakland contends that title to the Oakland Trucks passed to Oakland when it made the Partial Payment. At a minimum, Oakland contends, there is a triable issue of fact with respect to this issue. The Trustee disagrees. First, he contends that Oakland's claims are barred by the Prior Decision under either res judicata or law of the case principles. Second, he contends that, even if the merits of Oakland's claims are considered, based on the evidence, he is entitled to a summary adjudication that the bankruptcy estate owns the Oakland Trucks.

### B. DOES OAKLAND OWN THE OAKLAND TRUCKS?

#### (1) Due Process Argument

[1] As noted above, the Trustee contends that Oakland's claim of ownership is barred by the Prior Decision. Oakland opposes this contention on the ground that it did not have adequate notice that the prior motions for summary adjudication were intended to affect its interests. The Court views this argument as a due process argument. Having reviewed the relevant documents in the adversary proceeding file, the Court concludes that Oakland did receive adequate notice that the prior motions were intended to bind Oakland to satisfy due process concerns.

The notice of the Wells Fargo motion clearly directs the motion to all parties to the adversary proceeding. Oakland does not dispute that, at all relevant times, it was a party to the adversary proceeding. Additionally, the proofs of service reflect service on Oakland of each document filed in connection with the prior motions. Oakland does not contend that it did not receive these documents.

The notice of the Trustee's motion is not ideal. No separate document was filed entitled "Notice of Motion." Instead, the Trustee filed a document entitled "Opening Brief." The "Notice of Motion" is included as a section of the Opening Brief, immediately following the table of contents and authorities. Like the Wells Fargo motion, the heading of this section indicates that the motion is directed to all parties to the adversary proceeding. However, the text of the notice section directs the motion only to certain named parties, not including Oakland.

However, the Wells Fargo motion and the Trustee's prior motion were consolidated for decision. As discussed above, Oakland was clearly on notice that it would be bound by the Wells Fargo motion. Had Oakland been acting diligently to protect its interests, it should have objected to the consolidation if it did not wish to be bound by any decision directed to claims raised in the Trustee's motion as opposed to those raised in the Wells Fargo motion. Thus, the Court concludes that Oakland is bound by the Prior Decision. The question remains whether the Prior Decision bars Oakland's present contention that it owns the Oakland Trucks under either res judicata or law of the case principles.

#### (2) Res Judicata Argument

[2] [3] The doctrine of res judicata bars relitigation of an issue that was or could have ***257** been raised in a prior action.[3] In the prior motions for summary judgment, the chassis dealer that supplied the truck chassis for the Oakland Trucks contended that it owned the Oakland Trucks. Oakland clearly could have raised the contention that Oakland owned the Oakland Trucks in connection with those motions.

However, for res judicata to apply, four elements must be satisfied:

> ... (1) a final judgment on the merits; (2) the judgment was rendered by a court of competent jurisdiction; (3) a second action involving the same parties; and (4) the same cause of action involved in both cases.

*In re Heritage Hotel Partnership I,* 160 B.R. 374, 376–77 (9th Cir. BAP 1993), *aff'd,* 59 F.3d 175 (9th Cir.1995).

  

The first, second, and fourth elements are satisfied in the instant case but not the third.

[4] As required by the first element, there is a final judgment on the merits of the prior motions. Although normally a final judgment is not entered until all claims have been resolved, in this proceeding, the Trustee sought and obtained permission to enter a final partial judgment pursuant to the Prior Decision. *See* Fed.R.Civ.Proc. 54(b), made applicable to this proceeding by Fed.R.Bankr.Proc. 7054(a). There is no dispute concerning whether the Court had the jurisdiction to enter that judgment—the second element cited above.

[5] [6] In addition, the fourth element is satisfied: the same cause of action is involved. The contemporary approach is to use a transactional approach to define a claim or cause of action. Thus, as defined by the Restatement Second of Judgments, for res judicata purposes, a claim or cause of action "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the actions arose." Restatement Second of Judgments, 1981, § 24, quoted in 18 Charles Alan Wright—Arthur R. Miller—Edward H. Cooper, *supra*, § 4407, p. 55. Oakland's claims in connection with this motion arise out of its agreement to purchase the Oakland Trucks from the Debtor. The prior motions concerned the agreement by the supplier of the truck chassis for the Oakland Trucks to sell the truck chassis to the Debtor. The two agreements are either part of the same transaction or constitute a series of connected transactions.

[7] However, the third element cited above is not satisfied. The parties to this motion are the same as the parties to the prior motions. However, this motion cannot be fairly characterized as a second action. The term "action" is commonly understood to refer to the entire legal proceeding: i.e., this adversary proceeding. Thus, Oakland is asserting a claim in the same action in which the Prior Decision was made, not a second action. As a result, the doctrine of res judicata does not apply.

**(3) Law of the Case Argument**

[8] [9] The Trustee contends that, even if res judicata does not apply under these circumstances, Oakland's contention is barred by the Prior Decision under the related doctrine of "law of case."

> Under that doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher case in the identical action.... For the doctrine to apply, the issue in question must have been " 'decided either expressly or by necessary implication in [the] previous disposition.' "

*Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.1993), quoting *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir.1990), in turn quoting *Liberty Mut. Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir.1982).[4] Thus, the doctrine of law of the ***258** case will bar Oakland's contention that it owns the Oakland Trucks if that issue was decided, either expressly or by necessary implication, in the Prior Decision. The Court concludes that it was not.

Some of the language in the Prior Decision and the judgment entered pursuant to the Prior Decision, read out of context, supports the Trustee's position. It suggests that the Court made a broad determination that the truck chassis, including the Oakland Trucks, were the property of the above-captioned bankruptcy estate. However, the Prior Decision, read as a whole, clearly indicates the determination of narrower issues.

In the prior motions, the suppliers raised three arguments. First, they contended that they had effectively retained title to the truck chassis after they were delivered to the Debtor by retaining certain documents of title. Second, they contended that, by retaining these documents of title, at least, they perfected security interests in the truck chassis. Third, they contended that they had delivered the truck chassis to the Debtor as their bailee and had never intended to sell them to the Debtor. The Court ruled against the suppliers on all three issues. This was the context in which the Court stated that the bankruptcy estate owned the truck chassis. The Court was never asked to decide whether, after receiving title, the Debtor passed that title on to the end user—e.g., Oakland.

Moreover, the Prior Decision does not necessarily imply a determination that the Debtor did not pass title to the Oakland Trucks on to Oakland prior to filing its bankruptcy petition. The Prior Decision *would have* implied such a determination if the Court had found *in favor* of the suppliers. If the Court had concluded that the suppliers still held title to the truck chassis at the time the bankruptcy petition was filed, the Court could not now decide that the Debtor had passed title to the Oakland Trucks on to Oakland prior to bankruptcy. However, the reverse is not true.

[10] Oakland could have raised its contention that it owns the Oakland Trucks in connection with the prior motions. However, the doctrine of law of the case does not bar the

  

litigation of issues that could have been decided in proceedings previously conducted in the same case, only those that were.

**(4) Trustee's Right to Summary Adjudication on Ownership Issue**

[11] The Trustee also contends that, based on the evidence presented in connection with this motion for partial summary judgment, he is entitled to a summary adjudication, rejecting Oakland's claim of ownership and declaring that the bankruptcy estate owns the Oakland Trucks. The Court agrees.

[12] [13] The Contract is governed by Division 2 of the California Commercial Code (the "Commercial Code"). *See* Cal.Comm.Code §§ 2102, 2105. Section 2401(2) of the Commercial Code establishes the point in time at which title passes from a seller to a buyer. Section 2401(2) provides that "[u]nless otherwise explicitly agreed title passes to the buyer [when the seller completes physical delivery of the goods]...." It is undisputed that the Debtor never physically delivered the Oakland Trucks to Oakland. As a result, in order to establish that it owns the Oakland Trucks, Oakland must establish that it explicitly agreed with the Debtor that title would pass from the Debtor to Oakland prior to delivery.[5]

***259** Section 2201(1) of the Commercial Code provides that, to be enforceable, any agreement for the sale of goods for a price of $500 or more must be in writing, and the writing must be signed by the party against whom enforcement is sought. The price of the Oakland Trucks was in excess of $500. Thus, any explicit agreement between the Debtor and Oakland that title to the Oakland Trucks would pass prior to physical delivery must have been in writing.

Oakland cites a number of factors that it contends support its contention that it became the owner of the Oakland Trucks when it made the Partial Payment. First, Oakland contends that it would not have required the Debtor to provide a certificate of insurance for the Oakland Trucks naming Oakland as a beneficiary as a condition of its making the Partial Payment if the parties had not agreed that it would become the owner of the Oakland Trucks from that point on. Second, Oakland notes that, in addition to reimbursing the Debtor for its out of pocket costs for the truck chassis, it also paid the Debtor sales tax on the amount of the costs. Third, Oakland notes that the Debtor was required to register the Oakland Trucks in Oakland's name.

[14] None of these factors is sufficient to establish as a matter of law either an explicit or implied agreement that title to the Oakland Trucks would pass to Oakland when Oakland made the Partial Payment. Section 2501(1) of the Commercial Code states that a buyer has an insurable interest in goods once they become identified to the contract. As noted above, the Oakland Trucks became identified to the Contract at least by the time that Oakland made the Partial Payment. Thus, Oakland's special property interest in the Oakland Trucks gave it the right to be named as the beneficiary on an insurance policy covering the Oakland Trucks. Its designation as beneficiary did not necessarily indicate that Oakland was the owner of the Oakland Trucks from that time forward.

[15] Similarly, it is not particularly significant that Oakland was invoiced for sales tax in connection with the Partial Payment. As the retail purchaser, Oakland was clearly required to pay the Debtor sales tax with respect to the transaction at some point. The Partial Payment only included a portion of the sales tax. It is difficult to see how Oakland's payment of a portion of the sales tax would necessarily trigger the passage of title to Oakland to the Oakland Trucks as a whole.

[16] The third factor—that the Debtor was required to register the Oakland Trucks in Oakland's name—has no relevance to the issue presented here whatsoever. As noted above, there was no specification as to when Debtor was required to register the Oakland Trucks. Unlike the requirement that the Debtor obtain insurance for the Oakland Trucks, the registration requirement was not a condition of Oakland's making the Partial Payment.

Oakland overlooks the strongest evidence in its favor: the March 1995 Insurance Certificate. As noted in the summary of facts, the March 1995 Insurance Certificate states that the chassis covered by the insurance policy is owned by Oakland. The policy was presumably procured by the Debtor. Thus, the March 1995 Insurance Certificate is evidence that the Debtor told the insurer issuing the policy that Oakland was the owner of the Oakland Trucks.

This evidence would support a finding that there was either an implied agreement or an explicit oral agreement that title to the Oakland Trucks would pass to Oakland when Oakland made the Partial Payment. If either an implied agreement or an explicit oral agreement were sufficient to cause title to pass under the Commercial Code, the Court would deny the Trustee's motion for summary adjudication. However, as discussed above, title to the Oakland Trucks could pass prior to their physical

  

delivery only if there were an explicit agreement in writing signed by the Debtor. No such writing has been supplied to the Court. For that reason, the ***260** Court finds in favor of the Trustee on the issue of ownership.

## C. OAKLAND'S RIGHTS AS HOLDER OF SPECIAL PROPERTY INTEREST

**[17]** The Court must now address the issue originally raised by the Trustee's motion: i.e., whether Oakland has waived any right to possession of the Oakland Trucks under Division 2 of the Commercial Code as the holder of a special property interest by failing to tender the Balance Due. Two sections of the Commercial Code arguably apply: sections 2502 and 2716.[6] Both sections give a buyer with a special property interest the right to possession of goods under certain circumstances.

Section 2502 requires the buyer to have made partial payment for the goods; the seller must have become insolvent within ten days after receiving the first installment of the purchase price; and the buyer must tender any unpaid balance of the purchase price. Section 2716 requires the buyer to establish that it is unable to "cover": i.e., obtain substitute goods; it makes no reference to the financial condition of the seller; the buyer need not have paid any portion of the purchase price; and there is no express requirement that the buyer tender any unpaid balance of the purchase price.

The Trustee contends that sections 2502 and 2716 both require the buyer to pay the balance of the purchase price to recover the goods. Alternatively, the Trustee contends that only section 2502 applies when the seller is insolvent. Oakland does not address these contentions; it relies exclusively on its claim that it owns the Oakland Trucks.

The Trustee has cited and the Court has found no case precisely on point as to either issue. Some courts appear to assume, without discussion, that sections 2502 and 2716 both apply in a bankruptcy context. *See Abbott v. Blackwelder Furniture Company of Statesville, Inc.*, 33 B.R. 399, 403 (W.D.N.C.1983); *In re Surplus Furniture Liquidators, Inc. of High Point*, 199 B.R. 136, 140–42 (M.D.N.C.1995). Other courts only address a buyer's rights under section 2716, with no mention of section 2502, even though the seller is insolvent. *In re Bullet Jet Charter, Inc.*, 177 B.R. 593 (Bankr.N.D.Ill.1995); *Proyectos Electronicos, S.A. v. Alper*, 37 B.R. 931, 933–34 (E.D.Pa.1983). With the exception of *Carey*, none of the courts appears to have been asked to permit the buyer to deduct its damages from the purchase price.

For the reasons stated below, the Court concludes that section 2716 does not necessarily require the buyer to tender any unpaid balance of the purchase price. The Court further concludes that only section 2502 applies when a seller is insolvent. Finally, the Court concludes that section 2502 is not enforceable in a bankruptcy case.

### (1) *Do Sections 2502 and 2716 Both Require the Buyer To Tender Any Unpaid Balance of the Purchase Price?*

**[18]** The Trustee acknowledges that section 2716 does not expressly require the buyer to tender any unpaid balance of the ***261** purchase price as a condition of obtaining possession of the goods. However, he contends that this requirement should be implied. He acknowledges that there is one reported case in which a buyer was granted possession of the goods and permitted to deduct its damages from the purchase price—*Carey Aviation v. Giles World Marketing, Inc.*, 46 B.R. 458, 464 (D.Mass.1985). However, he notes that *Carey* contains no analysis of the issue and involves a dispute between a buyer and a secured creditor pursuant to section 9307, not a dispute between a buyer and a seller pursuant to either section 2502 or 2716.[7]

The Trustee's contention that section 2716 requires a buyer to tender any unpaid balance of the purchase price without any deduction for nonconformity fails to account for section 2717. Section 2717 provides as follows:

> **§ 2717 Deduction of Damages From the Price**
>
> The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

While section 2717 does not expressly state that it is intended to apply to a buyer seeking possession of goods under section 2716, its proximity to section 2716 suggests that it does apply. There is nothing awkward about such an application. Since section 2716 does not expressly require the buyer to tender any unpaid balance of the purchase price, there is no inconsistency between the two. Thus, the Court rejects the Trustee's contention that a buyer must necessarily tender any unpaid balance of the purchase price to obtain possession of goods under section 2716.

**[19]** However, the Court agrees with the Trustee that a

  

buyer seeking possession under section 2502 must tender any unpaid balance of the purchase price without reduction for nonconformity. The Court does not believe that section 2717 was intended to apply under those circumstances. Section 2717 does not expressly state that it applies to a buyer seeking possession under section 2502; it does not proximately follow section 2502; and its provisions are inconsistent with those of section 2502. Additionally, when a buyer's remedies under Division 2 in general are considered, it becomes clear that such an application would be anomalous.

Under Division 2 of the Commercial Code, a buyer is rarely permitted to retain nonconforming goods and also recover damages from the seller for nonconformity. A buyer is generally required to choose between acceptance or rejection of the goods. Cal.Comm.Code § 2601. If goods are rejected, they must be returned to the seller. Cal.Comm.Code §§ 2601, 2602. Under certain circumstances, a buyer may revoke acceptance; however, again, if acceptance is revoked, the buyer must return the goods to the seller. Cal.Comm.Code § 2608(3).

Section 2607(2) of the Commercial Code states that acceptance of goods does not "of itself" impair any other remedy for nonconformity provided by Division 2. However, the remedies section of Division 2—chapter 7—permits a buyer to retain goods and also recover damages for their nonconformity only in one instance. Section 2607(3) provides that, when a buyer has accepted goods without knowledge that they are nonconforming, the buyer must give notice of the nonconformity to the seller within a reasonable time after the nonconformity is or ***262** should have been discovered. Otherwise, the buyer will be barred from any remedy.

Section 2714(1) provides that, if this notice has been given, the buyer may recover damages due to the nonconformity. The buyer is not required to revoke its acceptance of the goods and thus is not required to return them to the seller. The rarity of this dual remedy in the general scheme of Division 2—i.e., retention of goods and recovery of damages for nonconformity—supports the narrow application of section 2717: i.e., only to a buyer seeking possession under section 2716 and not to a buyer seeking possession under section 2502.

**(2) *Does Section 2502 Alone Apply When the Seller is Insolvent?***

[20] The Court agrees with the Trustee's alternative contention—i.e., that, when a seller becomes insolvent before goods are delivered, a buyer's right to possession of the goods must stand or fall on the basis of section 2502. First, the heading of section 2502 suggests that it is the only statute intended to apply when the seller is insolvent. Second, the Official Comment to the Commercial Code contains a statement that supports this conclusion.

As noted above, one of the requirements of section 2502 is that the seller become insolvent within ten days after receiving the first installment of the purchase price. The Official Comment to the Commercial Code contains the following statement concerning the effect of section 2502:

> The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place *after* the ten-day period provided in this section depends upon compliance with the provisions of the Article (Chapter) on Secured Transactions (Article (Chapter) 9). [Emphasis added.]

*See In re Tennecomp Systems, Inc.*, 12 B.R. 729, 737 (Bankr.E.D.Tenn.1981) (citing Official Comment). Thus, a buyer whose seller becomes insolvent more than ten days after receipt of the first installment may not seek possession of the goods under section 2716.

The deficiency at issue here is Oakland's failure to tender the balance of the purchase price, not the seller's having become insolvent more than ten days after receiving the first installment of the purchase price.[8] However, the underlying principle is the same: if the buyer is unable to satisfy the conditions of section 2502, the buyer may not resort to section 2716 for assistance.

**(3) *Is Section 2502 Enforceable in a Bankruptcy Case?***

[21] [22] [23] Oakland's claim for possession of the Oakland Trucks pursuant to section 2502 must fail for another reason. The Court concludes that section 2502 gives a buyer nothing more than an unsecured claim in a bankruptcy case. Generally, federal bankruptcy law looks to state law to determine a party's property rights. However, a buyer's "special property interest" in goods identified to the contract is a property interest in name only. The only right this "property interest" gives a buyer is the right to possession of the goods under certain

  

circumstances. If the buyer does not exercise this right and the goods are sold, the buyer has no right to any portion of the sale proceeds.

Thus, a buyer's special property interest is more accurately described as an equitable remedy than a property interest. The Bankruptcy Code defines "claim" as including:

> ... [a] right to an equitable remedy for breach or performance if such breach gives rise to a right to payment....

11 U.S.C. § 101(5). A seller's failure to deliver goods to a buyer is a breach of performance that gives the buyer a right to money damages from the seller. Cal.Comm.Code § 2711(1). As a result, in a bankruptcy case, a buyer's rights under section 2502 of the Commercial Code give the buyer nothing ***263** more than a claim against the bankruptcy estate. As discussed above, this claim is unsecured unless the buyer has perfected a security interest in the goods under Division 9 of the Commercial Code as section 1201(37)(a) permits it to do.

On the other hand, if a buyer's right to possession of goods identified to the contract pursuant to section 2502 of the Commercial Code is characterized as a lien, it is clearly avoidable as a statutory lien pursuant to section 545 of the Bankruptcy Code. Section 545(1)(D) provides that the trustee may avoid a statutory lien that becomes effective only when the debtor becomes insolvent. Although a buyer acquires a special property interest when the goods are identified to the contract, not when the debtor becomes insolvent, the buyer's special property interest does not, by itself, entitle the buyer to possession of the goods. The buyer's right to possession only arises under certain conditions, among them, the seller's becoming insolvent within ten days after receiving the first installment on the purchase price.

In reaching this determination, the Court has duly considered *Matter of Telemart*, 524 F.2d 761 (9th Cir.1975).[9] In *Telemart*, a case decided under the Bankruptcy Act, the Ninth Circuit rejected the contention that section 2702 of the Commercial Code created a statutory lien that was avoidable in a bankruptcy case. Section 2702 provides that a seller who sells goods on credit to a buyer that is insolvent may reclaim the goods as long as the seller makes demand for the goods within ten days of their receipt by the buyer.

The rationale for the *Telemart* decision highlights the fundamental differences between sections 2502 and 2702. The *Telemart* court held that, when a seller delivers goods to an insolvent buyer, the sale is fraudulent and subject to rescission. Although title passes to the buyer on delivery, the title is voidable from its inception. Because full title never passed to the debtor, permitting the seller to rescind the transaction does not give the seller preferential treatment vis-a-vis other creditors of the bankruptcy estate. *Telemart*, 524 F.2d at 764.

By contrast, section 2502 gives a buyer the right to possession of goods even though the seller was solvent when it received the first installment of the purchase price. The seller need only become insolvent within ten days *after* receipt. Such a transaction cannot be fairly characterized as fraudulent. Moreover, for the remedy provided by section 2502 to be comparable to that provided by section 2702, the buyer would be entitled to recover its partial payment, not to obtain possession of the goods.

There is further reason to distinguish *Telemart.* When the Bankruptcy Code replaced the Bankruptcy Act in 1979, a new provision was enacted addressing the enforceability of a seller's rights under section 2702 of the Commercial Code—i.e., 11 U.S.C. § 546(c). Section 546(c) preserves the state law rights of a seller of goods to an insolvent debtor with certain limitations. The drafters of the Bankruptcy Code must have been aware of section 2502 of the Commercial Code. If they had wanted to preserve a buyer's rights under section 2502, surely, they would have enacted a comparable provision to that effect.

**[24]** Section 2502 is also inconsistent with section 365 of the Bankruptcy Code and is therefore preempted by that section pursuant to the Supremacy Clause—Article VI of the United States Constitution. *See Abbott v. Blackwelder Furniture Co.*, 33 B.R. 399, 404–05 (W.D.N.C.1983). ***264** Section 365 of the Bankruptcy Code gives the trustee the right to decide whether it is in the best interests of the bankruptcy estate to assume or reject an executory contract. If the contract is assumed, the trustee must perform the debtor's obligations under the contract and is entitled to all consideration due to the debtor. If the trustee rejects the contract, the trustee need not perform the contract, and the other contracting party may assert a general, unsecured claim for damages against the bankruptcy estate.

**[25]** The term "executory contract" is not defined by the Bankruptcy Code. However, case law has construed it to mean a contract on which material obligations remain to be performed by both parties. *In re Bullet Jet Charter, Inc.*, 177 B.R. 593 (Bankr.N.D.Ill.1995). The Contract fits within the definition of an executory contract cited above.

  

If section 2502 were enforceable in a bankruptcy case, the buyer, rather than the trustee, would have the right to make the decision whether the sale contract should be assumed or rejected. When state law conflicts with federal law, the Supremacy Clause requires that federal law prevail.

## CONCLUSION

The Court finds in favor of the Trustee on both motions. The sale of the Oakland Trucks to Opperman is approved. It is summarily adjudicated that Oakland does not own the Oakland Trucks and has waived any right to possession of the Oakland Trucks under Division 2 of the Commercial Code by failing to tender the Balance Due to the Trustee. Moreover, section 2502 of the Commercial Code, the sole provision that applies when a seller is insolvent, is unenforceable when the seller files a bankruptcy petition. The buyer has only an unsecured claim against the bankruptcy estate. Counsel for the Trustee is directed to submit two proposed forms of order in accordance with this decision, one with the main case caption authorizing the sale, the other with the adversary proceeding caption granting summary adjudication.

**All Citations**

205 B.R. 251, 34 UCC Rep.Serv.2d 987

Footnotes

1 Section 363(f) of the Bankruptcy Code permits a trustee to sell property of the bankruptcy estate free and clear of liens if the lienholder consents or if the lien or interest is subject to a bona fide dispute. The parties that assert an interest in the Oakland Trucks have either consented to the sale or their interests are subject to a bona fide dispute. However, Oakland objects to the sale motion on the ground that Oakland owns the Oakland Trucks. This contention is addressed in connection with the Trustee's motion for partial summary judgment.

2 To date, Oakland has not offered to pay the Trustee any additional amount for the Oakland Trucks. Opperman has agreed to pay $125,000 for the Oakland Trucks. Oakland concedes that, "as is," the Oakland Trucks are worth approximately $142,000 more than it has paid for them. If Oakland had merely offered to pay the Trustee the Unpaid Value, the Trustee would presumably have agreed to sell the Oakland Trucks to Oakland rather than to Opperman.

3 By contrast, collateral estoppel only bars the relitigation of an issue that was actually determined. The modern trend is to refer to the broader effect of res judicata as claim preclusion and to refer to the narrower effect of collateral estoppel as issue preclusion. In this context, the term "claim" is intended to correspond to the term "cause of action." 18 Wright—Miller—Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters, § 4402 (1981).

4 The doctrine of law of the case is less rigidly applied than res judicata. A court has some discretion to reopen a previously resolved question. Courts have identified various factors that justify declining to apply the doctrine. *Thomas v. Bible,* 983 F.2d at 155. The Court finds none of these factors present here.

5 The parties' ability to agree that title to goods will pass to the buyer prior to delivery is limited by the rule that title may not pass before the goods are identified to the contract. Cal.Comm.Code § 2401(1). Section 2501(1) specifies when goods become identified to the contract. If the parties have an explicit agreement, that agreement will control. Since there is no evidence of such an agreement here, when the Oakland Trucks became identified to the Contract depends on whether the Oakland Trucks were existing or "future goods" when the Contract was made. Cal.Comm.Code § 2501(1)(a), (b). There is insufficient evidence in the record to permit the Court to make this determination. However, the determination is unnecessary since, under either provision, the Court concludes that the Oakland Trucks were identified to the Contract at least by the time the Partial Payment was made. *But see In re Tacoma Boatbuilding Co.,* 158 B.R. 19 (S.D.N.Y.1993) (incomplete object does not qualify as good and thus may not be identified to contract).

6 Section 2502 of the Commercial Code provides as follows:

> **§ 2502 Buyer's Right to Goods on Seller's Insolvency**
> (1) ... even though the goods have not been shipped a buyer who has paid a part ... of the price of goods in which he has a special property under ... [section 2501] may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within 10 days after receipt of the first installment on their price.
> (2) If the identification creating his special property interest has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

  

Section 2716 provides as follows:

> **§ 2716 A Buyer's Right to Specific Performance or Replevin**
>
> (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
>
> (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
>
> (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

7 Section 2402(3) states that the rights of a buyer with a special property interest in goods may not impair the rights of a secured creditor pursuant to Division 9 of the Commercial Code. However, section 9307 states that a buyer in the ordinary course of business takes goods free of any claim by the seller's secured creditors. The majority of courts have held that a buyer with a special property interest may qualify as a buyer in the ordinary course and that it is not necessary for title to have passed for the buyer to prevail over the secured creditor. *Matter of Darling's Homes, Inc.,* 46 B.R. 370, 377–79 (Bankr.Del.1985); *Carey Aviation v. Giles World Marketing, Inc.,* 46 B.R. 458, 460–61 (D.Mass.1985); *contra Kinetics Technology International Corp. v. Fourth National Bank of Tulsa,* 705 F.2d 396, 400–02 (10th Cir.1983) (buyer only prevails if title has passed); *see also In re Tacoma Boatbuilding Co.,* 158 B.R. 19, 23 (S.D.N.Y.1993) (buyer need not even have acquired special property interest in goods to have buyer in ordinary course status; execution of contract is sufficient).

8 The Trustee does not concede that the Debtor became insolvent within ten days after receiving the first installment of the Partial Payment in March 1994. Given the fact that the Debtor did not file its bankruptcy petition until October 1995, this might well provide another reason for denying Oakland the right to possession of the Oakland Trucks pursuant to section 2502. However, the Trustee has presented no evidence on this issue and does not ask the Court to grant its motion on the basis of this deficiency at this time.

9 The Court has also considered *Matter of Daylin, Inc.,* 596 F.2d 853, 854–55 (9th Cir.1979) which was decided shortly after *Telemart.* In *Daylin,* the Ninth Circuit held that a trustee could not use the trustee's right as a hypothetical lien creditor under bankruptcy law to avoid a seller's rights under section 2702 of the Commercial Code. Section 2702 makes a seller's reclamation rights subject to the rights of a buyer in the ordinary course or other good faith purchaser or "lien creditor." However, the Ninth Circuit concluded that, under applicable state law, a lien creditor would not prevail against a seller with a right to reclaim goods pursuant to section 2702. *Matter of Daylin,* 596 F.2d at 856; *see also In re Bullet Jet Charter, Inc.,* 177 B.R. 593, 605–06 (Bankr.N.D.Ill.1995) (holding that trustee's rights as a hypothetical lien creditor did not prevail over buyer's equitable title to goods where buyer had fully paid for goods and seller had deposited bill of sale into escrow prior to bankruptcy). The Court does not address this issue here: i.e., whether a buyer's rights under section 2502 of the Commercial Code are avoidable by a bankruptcy trustee pursuant to section 544(a)(1) of the Bankruptcy Code.







323 B.R. 260
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Ronald Frederick POPP, Debtor.
Rodney F. Darby, Appellant,

v.

P.J. Zimmerman, Chapter 7 Trustee, Appellee.

BAP No. CC–04–1071–MkMaMo.
|
Bankruptcy No. RS 01–27670 DN.
|
Argued and Submitted on Nov. 18, 2004 at Pasadena, California.
|

Filed—Feb. 24, 2005.

**Synopsis**

**Background:** Order was entered by the United States Bankruptcy Court for the Central District of California, David N. Naugle, J., authorizing sale, free and clear, of real property on which creditor had deed of trust lien. Creditor appealed.

**Holdings:** The Bankruptcy Appellate Panel, Markell, Bankruptcy Judge for the District of Nevada, sitting by designation, held that:

[1] undersecured creditor with deed of trust lien on real property that was subject of bankruptcy court order authorizing a sale thereof free and clear of all liens qualified as "person aggrieved," with standing to appeal sales order;

[2] bankruptcy court should not have authorized sale of real property free and clear of all liens, without first resolving disputed question of whether debtor, and Chapter 7 estate, had any interest therein; and

[3] appeal was rendered neither "moot" nor "equitably moot" as result of appellant's failure to obtain stay pending appeal and of consummation of sale to third party purchaser acting in good faith.

Reversed and remanded.

Marlar, J., dissented and filed opinion.

**Attorneys and Law Firms**

***262** Elizabeth A. LaRocque, Goe & Forsythe, LLP, Newport Beach, CA, for Rodney Darby.

Wayne E. Johnson, Redlands, CA, for P.J. Zimmerman, Ch. 7 Trustee.

Before: MARKELL[1], MARLAR and MONTALI, Bankruptcy Judges.

**OPINION**

MARKELL, Bankruptcy Judge.

**INTRODUCTION**

Appellant Rodney Darby ("Darby") appeals from two bankruptcy court orders authorizing the sale of a 4.88 acre parcel of unimproved real property in Riverside County, California (the "Property"). The first order granted the Trustee's "Motion to Sell Real Property Under Section 363(f)" (the "Sale Motion"). The second denied Darby's "Motion for Reconsideration of the Sale Order" (the "Motion for Reconsideration").

Darby argues that both orders were error under *Warnick v. Yassian (In re Rodeo Canon Dev. Corp.),* 362 F.3d 603 (9th Cir.2004), because the trial court did not make sufficient findings that the estate had an interest in the Property that could be sold under Section 363.[2] Appellee P.J. Zimmerman, the chapter 7 trustee ("Trustee"), contends that the sale was proper under *Rodeo.* She also maintains that this Court does not have jurisdiction over Darby's appeal because Darby lacks standing, and that since the sale has already been consummated, the matter is moot.

We reverse.

**FACTS**

Darby holds a deed of trust on the Property recorded on October 4, 1995 (the "Deed of Trust"). The original debt secured by the Deed of Trust was stated as $20,000, which, with interest, had grown to $37,592.65 by the time the Trustee filed the Sale Motion.

The parties dispute title to the Property. Before the 1990s, the debtor in this case, Ronald Popp ("Popp"), had a 50% interest in the Property. From that point of seeming clarity, however, a chain of events and ***263** transactions began that has all the hallmarks of a crude, yet complex, shell game.[3]

The first relevant transfer occurred in May of 1995, when

Popp and the other co-owners of the Property conveyed it to Investors Co–Op, a general partnership ("IC"). The partners in IC were Popp's father, Fred Popp (who died in February 1999), and Popp's girlfriend of 15 to 20 years, Deborah Turner ("Turner").

The next transfer occurred five months later, on October 2, 1995, when IC entered into a contract for deed to sell the Property to Darby[4] for $40,000. Of this amount, Darby was to pay half at the time of contracting, with the remainder due "on or before" October 2, 1997. Darby's deposit was refundable if Darby did not complete the sale. To secure IC's contingent obligation to pay Darby an amount equal to the deposit, IC gave Darby a promissory note for $20,000, and secured it with the Deed of Trust.

Finally, on February 3, 1997, Darby signed yet another contract conveying his interest in the Property back to IC. This transfer was accomplished by quit claim deed subject to the Deed of Trust. The terms of this contract provided that interest would accrue on the amount secured by the Deed of Trust at an annual rate of 10%.[5]

Although Popp is not listed as a partner in IC's partnership agreement, that agreement gave him authority to sign binding contracts for IC. Indeed, Popp's signature purports to bind IC in all of the above transactions, except for the October, 1995 promissory note to Darby, which was executed by Turner on IC's behalf.[6]

In late 2001, Popp filed bankruptcy. On May 28, 2002, the Trustee filed an adversary proceeding seeking, among other remedies, a declaratory judgment that IC was an alter ego of Popp ("Alter Ego Adversary"). Popp, Turner, the estate of Popp's father, Popp's mother and IC were all named defendants.

The third cause of action in the Alter Ego Adversary sought a declaration that the Property was property of Popp's bankruptcy ***264** estate. It also sought an injunction against IC's further transfer of the Property. After a hearing, the court granted this request and entered a preliminary injunction against all defendants—including the record title holder, IC—prohibiting them from any sale or transfer of the Property.

In October 2003, before the Alter Ego Adversary was concluded, the Trustee filed the Sale Motion, which requested authority to sell the Property for $22,500. Essential to that motion was a finding that the Property belonged to Popp's bankruptcy estate. The Sale Motion thus constituted a proceeding parallel to, and in many respects duplicative of, the Alter Ego Adversary.

Darby, Popp, and Turner each opposed the Sale Motion. In particular, Darby objected on the grounds that the estate lacked title to the Property, and that the Property could not be sold free of his interest without paying him in full. The court overruled all objections and granted the Sale Motion on December 3, 2003 (the "Sale Order"). Although the court had before it the convoluted evidence sketched above, the full extent of the court's findings on ownership was that Popp's estate had "some interest in the property."[7]

Darby did not seek a stay of the Sale Order. The sale to the purchaser, Nancy R. Redding ("Redding"), was consummated, and the grant deed was recorded on December 23, 2003.[8]

On December 15, 2003, Darby filed the Motion for Reconsideration. The court heard this motion after recordation of the deed, and on January 26, 2004, the bankruptcy court denied it ("Reconsideration Order"). At that time, the bankruptcy court took evidence of Redding's good faith, and found that she was a good faith purchaser within the meaning of Section 363(m). Darby filed a Notice of Appeal from the Reconsideration Order on February 5, 2004.[9] Redding is not a party to this appeal.

At oral argument, the parties informed the Panel that the Alter Ego Adversary was still pending, and that after the sale order was entered the trustee had added Darby to the list of defendants who she alleged were alter egos of Popp.

## ISSUES

1. Does Darby lack standing to object to the sale because he is a lien holder and not an owner of the Property?

2. Was the maintenance of parallel proceedings, each seeking a determination that the estate had an interest in the Property, impermissible under *Rodeo?*

3. If the bankruptcy court improperly countenanced parallel proceedings, what, if any, remedy is appropriate and within this court's jurisdiction to grant?

  

***265 STANDARD OF REVIEW**

[1] [2] [3] This court reviews "appeals from orders to sell property of the estate other than in the ordinary course of business pursuant to 11 U.S.C. § 363(b) for abuse of discretion." *Rosenberg Real Estate Equity Fund III v. Air Beds, Inc. (In re Air Beds, Inc.)*, 92 B.R. 419, 422 (9th Cir.BAP1988) (citing *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir.1983); *Big Shanty Land Corp. v. Comer Props., Inc.*, 61 B.R. 272, 277 (N.D.Ga.1985)). A court abuses its discretion if " 'it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact.' " *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir.1998) (citation omitted). The reversal of an order for abuse of discretion requires "a definite and firm conviction that the court below committed clear error of judgment in the conclusion it reached upon weighing the relevant factors." *Stine v. Flynn (In re Stine)*, 254 B.R. 244, 248 (9th Cir. BAP 2000) (citing *In re Cortez*, 191 B.R. 174, 177 (9th Cir. BAP 1995)). Similarly, this court will not reverse a finding of fact unless it is clearly erroneous. *Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 277 (9th Cir. BAP 1989).

**DISCUSSION**

***Standing***

The Trustee claims that Darby, as a lien holder, does not have standing to appeal the Sale Order. Darby responds that the Sale Order had the type of direct and adverse pecuniary effect on him that is sufficient to give him standing. We agree with Darby.

[4] [5] "To have standing to appeal a decision of the bankruptcy court, an appellant must show that it is a 'person aggrieved' who was 'directly and adversely affected pecuniarily by an order of the bankruptcy court.' " *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 670 (9th Cir.1998) (citing *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442–43 (9th Cir.1983); *Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675 (9th Cir.1996)). A "person aggrieved" is someone whose interest is directly affected by the bankruptcy court's order, either by a diminution in property, an increase in the burdens on the property, or some other detrimental effect on the rights of ownership inherent in the property. *In re Fondiller*, 707 F.2d at 442–43.

[6] Darby does not claim a fee interest or any residual ownership in the Property. Instead, he has a lien on the Property in the form of the Deed of Trust. The Trustee believes that this lesser property interest is insufficient to allow Darby to challenge the Trustee's proposed sale. We disagree.

It is instructive to examine the circumstances in which the Code and case law permit creditors and lien holders to object to a sale under Section 363 of the Code. With respect to creditors, case law permits any creditor to challenge transfers because of the estate's lack of the power to sell. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 778 (9th Cir.1999). With respect to lien holders, the Code supplements the list of challenges by allowing a secured creditor to object to a sale free and clear unless that secured creditor's claim is paid in full. 11 U.S.C. § 363(f)(3).

Darby's objection in the trial court included an objection that the Trustee did not own the Property, and that Darby's claim was not proposed to be paid in full. On appeal, however, Darby has not renewed his objection under ***266** Section 363(f)(3). Seizing on this omission, the Trustee essentially argues that Section 363(f) constitutes an exclusive list of possible objections to a sale under Section 363.

We do not agree. Initially, we note that Section 363(f) does not provide an exclusive set of objections. Indeed, even before one gets to Section 363(f), Section 363(b), as interpreted by *Rodeo*, requires that the estate demonstrate that the property it proposes to sell is "property of the estate." Darby's objection thus rests at this fundamental level, and we read Ninth Circuit law to permit even unsecured creditors to challenge proposed sales on this ground.

*P.R.T.C.* demonstrates this point. There, a chapter 7 trustee had sold avoiding-powers actions to a trust, with the understanding that the trust, and not the trustee, would pursue the litigation. When sued by that trust, a defendant raised the issue that, unlike chapter 11, nothing in chapter 7 authorized such a sale. The trustee countered that the litigation defendant did not have standing to raise that issue.

The Ninth Circuit rejected the challenge. After discussing *Fondiller*, which we cite above, the court noted that "[a] creditor does ... have a direct pecuniary interest in a bankruptcy court's order transferring assets of the estate."

177 F.3d at 778. The creditor's pecuniary interest arises from the fact that, by the sale, the mix of assets held by the estate from which to pay creditors is irrevocably altered. In this sense, *P.R.T.C.* presents a weaker standing claim than that present here: *P.R.T.C.* recognized standing to challenge a sale based on the expectations of an *unsecured* creditor. In the current case, Darby's status is stronger. As an undersecured creditor, he possesses both secured and unsecured claims. 11 U.S.C. § 506(a).

Given this discussion, there are two consequences that flow from the sale proposed here that cement Darby's standing. First, the sales price established that Darby has an unsecured deficiency claim along with his secured claim. *See* 11 U.S.C. § 506(a). Under *P.R.T.C.*, that unsecured claim gives him standing to challenge the sale.

If Darby's unsecured claim bestows standing, it would be odd if the Trustee's attempt to strip Darby's lien from the Property did not achieve the same result. Seeking to avoid inconsistency, we hold that the sale and lien stripping in this case also confers standing. Section 363(f)(3) recognizes that a lien holder has an interest in a sale of its collateral, and can successfully oppose the sale if the proceeds do not pay the full amount of debt secured by the property being sold. While Darby did not specifically cite Section 363(f)(3) on appeal, the same interest is encompassed and inherent in the argument he does make: that the estate does not own his collateral. Indeed, *Rodeo* requires that the Trustee establish that the property to be sold is "property of the estate" before invoking Section 363(f)'s extraordinary power to strip liens. As a result, the necessary pecuniary interest for standing is present when a proposed Section 363 lien stripping diminishes, burdens, or otherwise alters a lien holder's state law property rights. *In re Fondiller*, 707 F.2d at 442–43.

The sale and lien stripping here certainly affected Darby's state law property rights in a way contemplated by *Fondiller's* standing analysis.[10] This is best seen from the perspective of the sale as one ***267** "free and clear" of Darby's lien. Such a sale necessarily resulted in a change in Darby's collateral. Before the sale, his security was real estate. After the sale, it was cash, and less cash than Darby's debt. Among the consequences of this change was Darby's loss of his nonbankruptcy right to delay foreclosure until real property prices rose. This transformation of collateral and change in foreclosure rights establish Darby's status as a "person aggrieved" under *Fondiller* and similar cases, especially since he was undersecured at the time the court ordered his lien stripped. *Cf.* 11 U.S.C. § 1111(b) (preserving nonrecourse creditor's right to look to property appreciation for repayment).[11]

The Trustee responds by noting that the Property had been on the market for eighteen months and that the sale price was the best possible result for all concerned. Therefore, the Trustee argues, land values and Darby's failure to ask for loan payments, not the Sale Order, caused any loss. This practical argument succeeds only if the value of the Property is static, and if the Trustee had used available legal theories under Section 502(d) and Rule 3012 to value Darby's interest in the Property, thus quantifying the extent of Darby's secured claim. *See In re Canonigo,* 276 B.R. 257 (Bankr.N.D.Cal.2002). Darby could prefer an investment in real estate to a cash investment, and the Sale Order affected his interest in the Property by involuntarily depriving him of that choice.

Darby also successfully distinguishes the only two cases cited by the Trustee for the proposition that lien holders do not have standing to dispute ownership. The first, *Cassirer v. Sterling Nat'l Bank & Trust (In re Schick),* 246 B.R. 41, 46 (Bankr.S.D.N.Y.2000), holds that strangers who will not benefit from a constructive trust do not have standing to sue to impose one. The second, *Tilley v. Vucurevich (In re Pecan Groves),* 951 F.2d 242, 245 (9th Cir.1991), rules that creditors have no standing to object to a violation of an automatic stay, because the automatic stay "is intended solely to benefit the debtor estate." As Darby points out, neither case is directly applicable to the question of whether a lien holder has standing to object to an unauthorized sale of the property that serves as collateral for his lien.

Darby has thus established that he is an "aggrieved party" under *Fondiller* and *P.R.T.C.* and therefore has standing.[12]

***268** ***Is the Property Part of Popp's Estate?***

**[7]** Darby argues that both the Sale Order and the Reconsideration Order were an abuse of discretion under *Rodeo* because the Property had not been finally determined to be the property of Popp's bankruptcy estate. In response, the Trustee maintains that the orders were not abuses of discretion because the bankruptcy court found that Popp had "some interest in the property," and that finding was supported by sufficient evidence. We disagree with the Trustee.

In *Rodeo*, the Ninth Circuit considered the sale of real property that was the subject of an ownership dispute. *Warnick v. Yassian (In re Rodeo Canon Dev. Corp.),* 362 F.3d 603, 605–06 (9th Cir.2004). The debtor there had record title to the property being sold, which under

  

California law created a rebuttable presumption that it held at least equitable ownership. *Rodeo,* 362 F.3d at 608 (citing Cal. Evid.Code § 662). The appellant, however, claimed that the equitable owner of the property was a partnership in which the appellant and the debtors were the two general partners because the property had been acquired using that partnership's funds. *Id.* at 605–06.

To resolve the ownership issue, an adversary proceeding had started before the sale. But before issuing a dispositive motion or holding trial in the adversary proceeding, the bankruptcy court allowed the sale of the property under Section 363. The appellant moved for reconsideration, contending that while it did not object to the sale generally, it did object to any distribution of the sale proceeds to satisfy interests or liens that were already in dispute in the pending adversary proceeding. The trial court overruled the objection and ordered a distribution based on an assumed minimum ownership interest by the debtor. It did this, however, without entering any order in the pending adversary proceeding.

Adopting a rule designed to discourage piecemeal litigation, the Ninth Circuit ruled that "[a] bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the debtor in fact owned the property" and found that the trial court had not done so. *Id.* at 608–09. The court first noted the bankruptcy court's order "purported to find the [p]roperty to be 'property of [Rodeo's] estate.' " But the court found this "irreconcilable with [the bankruptcy court's] decision to leave the ownership question open 'for another day,' " because "a final decision ... would have settled the very question the court professed to leave open. Thus we cannot find that the court finally resolved the ownership question in the face of its express decision to leave it unresolved." *Id.* The court also stated that the bankruptcy court's finding of ownership was in conflict with its subsequent failure to resolve an adversary proceeding in which the identical issue was presented. *Id.*

Although it concluded that "the sale was ... not authorized by law," and that Section "363 does not apply because the sale was not of property of the estate," the Ninth Circuit did not invalidate the sale. *Id.* at 610. Instead the court concerned itself with "the disposition of the proceeds into which the Property has now been converted," remanding the case to the bankruptcy court to resolve the ownership dispute and order the disgorgement of improperly distributed assets. *Id.* at 610–11.

Were the trial court's actions in this case consistent with *Rodeo? Rodeo* is silent on how a court must determine whether property ***269** is estate property. The facts in *Rodeo* led the Ninth Circuit to conclude that the bankruptcy court's finding of ownership with respect to the motion was "irreconcilable" with the bankruptcy court's failure to dismiss the adversary proceeding. It is unclear, however, if *Rodeo* forbids a bankruptcy court from ever making such a finding in a contested matter (as opposed to an adversary proceeding)[13] or whether *Rodeo* employs prudential principles of efficient dispute resolution to channel disputes over issues such as ownership into a single, appropriate forum.

We interpret *Rodeo* as standing for principles of efficient judicial administration. Such principles, as applied here, lead to reversal since the court's determination of disputed ownership was duplicative and parallel to the essential subject of a pending adversary proceeding.[14]

In *Rodeo,* reversal occurred because the bankruptcy court's actions were inconsistent. The court made a finding of ownership in the contested matter without carrying the consequences of that finding through to the pending adversary proceeding. Here, granting the Sale Motion—which necessarily involved a finding of ownership—without applying that finding in the Alter Ego Adversary presents the same incongruity: The trial court permitted parallel and piecemeal proceedings to continue without regard to the initial finding of ownership. This was duplicative and could promote inconsistent and ultimately inconclusive litigation as to the true ownership of the Property. As a result, it did not provide a "sound basis for holding that the Property was property of the estate." *Id.* at 609.

Courts have long condemned duplicative and wasteful litigation. *Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 96 L.Ed. 200 (1952). *See also* James P. George, *Parallel Litigation,* 51 BAYLOR L. REV. 769, 785–89 (1999). Other than *Rodeo,* we have not found a case in which one court entertained the same substantive issue involving the same parties in two separate proceedings pending before it. In the analogous situation of two separate actions pending involving the same issue before two *different* courts, the Ninth Circuit has adopted a rule of comity in which the second court presented with the issue defers to the first court. *Barapind v. Reno,* 225 F.3d 1100, 1109 (9th Cir.2000); *Pacesetter Sys., Inc. v. Medtronic, Inc.,* 678 F.2d 93, 95 (9th Cir.1982); *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 749 (9th Cir.1980).

The policies behind the comity rule—promotion of efficient judicial administration and avoidance of the risk of inconsistent results, *Pacesetter,* 678 F.2d at 96—apply with even more force when only one court is involved,

  

and when consolidation of the actions is expressly permitted. *See* BANKR. RULE 7042 (permitting a court to consolidate different actions if they present common questions of law or fact); 9014 (making, among other things, Rule 7042 applicable to contested matters).

Although *Rodeo* does not refer to the rule of comity, it does effectively extend the rule's sound policies. In observing ***270** that the trial court divided the task of determining ownership into two proceedings without giving finality to either, *Rodeo* highlighted the same concerns expressed in the cases cited above regarding parallel and piecemeal litigation. It then applied those policies by reversing based on the lower court's lack of a "sound basis" for proceeding in parallel on the ownership issue.

**[8]** Against this background, *Rodeo* stands for the proposition that courts must seek to promote consistent and unfragmented decisionmaking when faced with the need to determine predicate issues such as property ownership in the Section 363 context. The trial court here did not adhere to this principle when it split the litigation over the ownership of the Property, and then purported to make a finding about ownership in one piece of the litigation that was not binding in any way in the Alter Ego Adversary. As a result, the bankruptcy court's factual determination in this case that Popp had "some interest in the property" effectively resolved nothing. Therefore, it cannot be given any dispositive force.

*Rodeo* thus mandates reversal. In addition, reversal is consistent with the equities of the underlying litigation. The Trustee, for example, has argued that the $22,500 offer she received was the highest and best price for the Property, and buttressed that assertion with evidence that she had marketed the Property for more than eighteen months. This admission indicates that, as estate representative, she had intended to sell property titled in another for more than a year and a half. Nonetheless, she declined or neglected to bring the issue of ownership to a head in the pending Alter Ego Adversary. If the facts were so clear that they could be decided in a separate contested matter, the Trustee could have sought a similar determination by way of summary judgment in the adversary proceeding or could have requested an expedited trial on the issue.

Moreover, the contract between the buyer and the Trustee indicates that each knew of the disputed ownership claims, and they jointly allocated to Redding the risk that the estate would not ultimately be found to own the Property. In Sections 7 and 8 of the purchase agreement, the Trustee disclaimed all warranties of title, so Redding knowingly took the entire risk that the estate did not have good title—or, for that matter, *any* title.[15]

To avoid pernicious piecemeal litigation, the bankruptcy court should have insisted that the Trustee finish determining ownership before stepping outside the Alter Ego Adversary to sell the Property. Because the trial court did not, we must reverse the determination that the estate had "some ownership" in the Property, and thus reverse the order authorizing the Property's sale under Section 363.

***Appropriate Remedy***

Despite the invalidity of the Sale Order, the Trustee asserts that Darby's appeal is moot, either under the general mootness rule, the doctrine of equitable mootness, or under Section 363(m), because Darby did not request a stay and the sale had already been consummated to a good faith purchaser.

**[9]** The Constitution limits the power of the federal courts to "the adjudication of actual cases and live controversies." ***271** *Luckie v. EPA*, 752 F.2d 454, 457 (9th Cir.1985); U.S. Const. art. III, § 2, cl. 1. The mootness doctrine, derived from this rule, prohibits a court from hearing an appeal "when ... an event occurs which renders it impossible for [the] court ... to grant [the plaintiff] any effectual relief whatsoever." *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797 (9th Cir.1981) (quoting *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895)).

**[10]** Our determination that Section 363 does not apply here, however, does not permit us to simply reverse. We must consider equitable mootness generally.[16] In bankruptcy, courts apply several variations of the equitable mootness rule. The first applies when "events ... occur that make it impossible for the appellate court to fashion effective relief." *Focus Media, Inc. v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.)*, 378 F.3d 916, 922 (9th Cir.2004) (citing *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 187 (9th Cir.1977)). Generally, a consummated sale to a third party who is not a party to the appeal falls within this category. *Focus Media*, 378 F.3d at 922. This is not, however, an ironclad rule. *Id.* at 923 ("However, '[t]he party asserting mootness has a heavy burden to establish that there is no effective relief remaining for the court to provide.' ").

**[11] [12]** A second, related variation of the mootness rule, the equitable mootness doctrine, applies when appellants

  

" 'have failed and neglected diligently to pursue their available remedies to obtain a stay' " and circumstances have changed so as to " 'render it inequitable to consider the merits of the appeal.' " *Focus Media*, 378 F.3d at 923 (citation omitted). Courts have applied the doctrine of equitable mootness when the appellant has failed to obtain a stay and the ensuing transactions are too "complex and difficult to unwind." *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 933 (9th Cir.1999) (comparing *In re Spirtos*, 992 F.2d 1004, 1007 (9th Cir.1993) with *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981) and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977)).

**[13] [14]** The Ninth Circuit has acknowledged that tension has developed within mootness jurisprudence between these two "alternative rationales." *See, e.g., Onouli–Kona Land Co. v. Estate of Richards (In re Onouli–Kona Land Co.)*, 846 F.2d 1170, 1172 (9th Cir.1988). Under the first rationale, courts look solely at their ability to fashion an effective remedy. *Id.* Under the second, courts go beyond remedial considerations and consider the consequences of the remedy and the number of third parties who have changed their position in reliance on the order that is being appealed. Courts have described this rationale as the need to assure "finality," and under this rationale the failure of an appellant to obtain a stay receives great weight. *Id.*

**[15]** Here, although Redding is not a party to this appeal, this Court is still able ***272** to afford Darby effective relief. One consequence of this Court's finding that the Sale Order was not authorized by Section 363 is that Section 363(f) is not available to permit the sale of the Property free of Darby's lien. Thus, while the sale itself may not be rescinded, the Court may vacate the transfer of Darby's lien to the sale proceeds, and hold that it remains attached to the Property. *See Beneficial California, Inc. v. Villar (In re Villar)*, 317 B.R. 88 (9th Cir. BAP 2004) (lien reinstated on property that may have been sold even though purchaser was not a party to the appeal).

As a result, although Darby failed to request a stay of the sale, we conclude that the equitable mootness doctrine does not apply. The transaction is not "complex" or "difficult to unwind." *Lowenschuss*, 170 F.3d at 933. There is only one third party who may have relied on the Sale Order, rather than a large number as in a reorganization. *See, e.g., Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797–98 (9th Cir.1981) Additionally, the third party buyer signed a sale agreement in which she explicitly assumed the risk that the estate would have nothing to sell.

To be candid, many, many cases from this circuit could be read to require a stay pending appeal as a condition of avoiding the consequences of equitable mootness. *See, e.g., Ewell v. Diebert (In re Ewell)*, 958 F.2d 276 (9th Cir.1992) (appeal held moot because transfer of property had already occurred as of time appellant sought stay pending appeal); *Mann v. Alexander Dawson, Inc. (In re Mann)*, 907 F.2d 923, 925 (9th Cir.1990) (appeal of order lifting automatic stay held moot for failure to seek stay pending appeal; secured creditor purchased property by credit bid); *Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi Ohana, Ltd.)*, 873 F.2d 1302, 1306 (9th Cir.1989) (appeal of District Court order affirming Bankruptcy Court order ruling that contract for sale of land was executory and could be rejected by corporate debtor held moot in absence of stay pending appeal, where debtor completed sale to third party prior to disposition by Court of Appeals); *BC Brickyard Assocs., Ltd. v. Ernst Home Ctr., Inc. (In re Ernst Home Ctr., Inc.)*, 221 B.R. 243, 247 (9th Cir. BAP 1998) (transfer of real property after denial of Landlord's Committee's motion for a stay pending appeal).

Such a result, however, is not yet a rule. The relatively simple transaction present here, in which a buyer expressly took the risk of receiving less than marketable title, coupled with the issues raised—the sale of property and the stripping of a creditor's lien from that property without a proper determination of its ownership—compel reversal notwithstanding arguments of mootness.

We therefore REVERSE the decision below, and REMAND to the bankruptcy court for proceedings not inconsistent with this opinion.

MARLAR, Bankruptcy Judge, dissenting.

I respectfully disagree with my colleagues, and would DISMISS either for lack of standing to appeal or for mootness. Although the majority opinion is well-written and scholarly, I believe that it is distracted by a tangential issue, that of who owns the property. The crux of this appeal, in my view, is whether Darby has standing to appeal the validity of the sale on the grounds that the property was not property of the estate, which is the only issue he has raised.

Darby's interest in the property sold by the trustee is that of a lienholder. The outcome of an ownership controversy is of no import to a lienholder; its interest is ***273** secured

  

by the value of its collateral regardless of who owns the property. In this case, the value of Darby's lien was only as great as the value of his collateral which was administered by the chapter 7 trustee. *See* 11 U.S.C. § 506(a).

Therefore, a lienholder has no basis to challenge a sale on grounds that someone other than the debtor's estate owns it. Because Darby has no pecuniary stake in any dispute as to who the true owner of his collateral may be, his appeal on that ground fails for lack of standing. *See In re P.R.T.C., Inc.*, 177 F.3d 774, 777 (9th Cir.1999) (appellant's interests must be directly affected by a bankruptcy court order).

The majority relies on *P.R.T.C.* to support its conclusion that a creditor has a pecuniary interest in a bankruptcy court's order transferring assets of the estate. *See id.* at 778. This broad statement is a true one, as a chapter 7 estate's ultimate beneficiaries are a debtor's creditors. But that fact does not confer standing on all estate issues. *See* 11 U.S.C. § 323 (trustee is the estate's representative).

Indeed, in *P.R.T.C.*, the Ninth Circuit in making that statement cited a case involving competing creditor claims to a limited fund. *See In re Int'l Envtl. Dynamics, Inc.*, 718 F.2d 322, 326 (9th Cir.1983). Such facts, and those of *P.R.T.C.* are distinguishable.

In *P.R.T.C.*, there was no bankruptcy sale, no lienholder, and no lien attached to the sale proceeds. There, the estate lacked sufficient funds to pursue various avoidance actions and other lawsuits, which were the estate's only assets. Therefore, the litigation rights were assigned to the largest creditor, and another creditor, who was a potential defendant, objected. The Ninth Circuit held that the objecting creditor had standing to object to the transfer because such transfer left the bankruptcy estate without any other significant assets. *P.R.T.C.*, 177 F.3d at 778.

In contrast, here, the real property asset has simply been transformed into cash proceeds, to which Darby's lien attached. Furthermore, in this case, the parties who are debating ownership are not parties to this appeal. Thus, they have waived any *Rodeo Canon* arguments, and § 363 applies.

It is precisely because Darby, as a lienholder, is only entitled to challenge the sale on one of the specific grounds of § 363(f) that his arguments surrounding ownership ring hollow. Even though, in bankruptcy court, Darby objected that the sale price was inadequate to fully pay his lien (§ 363(f)(3)), he has not raised any § 363(f)(1)-(f)(5) challenges to the sale in this appeal. If he had done so, he might have fair game for an appellate argument. Instead, he has waived any § 363(f) challenges. *See Laboa v. Calderon*, 224 F.3d 972, 981 n. 6 (9th Cir.2000) (appellate court ordinarily will not consider arguments not raised in appellant's opening brief). Instead, his only appellate issue concerns who owns the property, and his interest is not claimed to be that of an owner.

Turning to the value side of the coin, a secured creditor's lien attaches to collateral only to the extent of the collateral's value. Any debt in excess of the collateral's value is unsecured. *See* 11 U.S.C. § 506(a). Thus, by waiving the § 363(f)(3) argument that the property was being undersold, Darby cannot complain that his lien on land was transformed into a lien on cash. A lienholder has no pecuniary interest in its collateral except as may be necessary to pay the debt which is secured by it. When collateral is *sold*, and a creditor's lien is transferred to cash, the creditor is one step closer to what it bargained for— ***274** repayment—and has no complaint that it was deprived of its right to foreclose. *Cf. Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (refusing chapter 7 debtor's attempt, prior to foreclosure, to strip down a lien on real property to the value of the collateral, pursuant to § 502(d), because a chapter 7 creditor's lien "stays with the real property until the foreclosure").

Eventually, the validity, priority and extent of the Darby lien, if the trustee disputes it, will be tested in the crucible of an adversary proceeding. *See* Fed. R. Bankr.P. 7001(2). If Darby wins, he will presumably be paid the sale proceeds.

Finally, a word addressed to the majority's analogy to § 1111(b), as a method to protect lienholders. This section is simply not applicable to chapter 7, by analogy or otherwise. *See* § 103(g) (making subchapter I of chapter 11 applicable only in a chapter 11 case, with the exception of § 901(a)).

Section 1111(b) has a sound policy reason for appearing in the reorganization chapter that does not apply at all to liquidations. Section 1111(b) applies where a debtor seeks to *retain* secured real property, and at the same time prevents that debtor from valuing the collateral for a sum less than the secured debt without giving the creditor a unilateral option to elect to be treated as if it were fully secured. The purpose is to preserve the "upside" appreciation for a creditor who is deprived of its immediate right to foreclose while the debtor continues to use the property. Section 1111(b) thus shifts future appreciation to the creditor's side of the equation. *See In*

  

*re Tuma*, 916 F.2d 488, 491 (9th Cir.1990). Those policy reasons are simply inapplicable when the goal is liquidation in a chapter 7 proceeding. *See, e.g.*, § 704(1) (trustee shall collect and reduce the property of the estate to money as quickly as possible).

In addition, the § 1111(b) election option explicitly excepts any nonrecourse holder whose secured property is sold pursuant to § 363 or in a reorganization plan. *See* 11 U.S.C. § 1111(b)(1)(A)(ii). The reason for this is that the secured party has a right to bid the full amount of its secured claim at any bankruptcy sale of its collateral. *See In re Tampa Bay Assocs., Ltd.*, 864 F.2d 47, 50 (5th Cir.1989) (citing 124 Cong. Rec. H11103–04 (daily ed. Sept. 28, 1978, at 32407)); 11 U.S.C. § 363(k).

In summation, Darby has no standing to appeal the sale order on the basis of ownership. He has no dog in that fight.

Alternatively, I conclude that this appeal is moot. Section 363(m) speaks to this subject loud and clear, and the majority's efforts to slip-slide around its mandate is, in my opinion, tortured. What § 363(m) means to Darby (assuming that he had standing) is this: had he wished to stop the sale, he could have applied for a stay pending appeal, and if the court required it, posted a bond equal to the sale price, and could then have had his appeal heard on the merits. But he never asked for a stay. Therefore, § 363(m) describes the unequivocal consequence:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

Because the sale has now closed, Darby's appeal is moot and should be dismissed.

***275** For these reasons, I respectfully dissent, and would DISMISS.

**All Citations**

323 B.R. 260, 05 Cal. Daily Op. Serv. 3323, 2005 Daily Journal D.A.R. 4313

Footnotes

1 Honorable Bruce A. Markell, Bankruptcy Judge for the District of Nevada, sitting by designation.

2 Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036.

3 Popp supplied a narrative of the changes in ownership of the Property. It states:

> 50% of this land was purchased by me, somewhere maybe in the 1970's. [¶] In 1995 both the other 50% owners and myself transferred the property to Investors Co–Op a general Partnership. [¶] At this time we were not paid for the purchase. The property was then sold by a contract for deed sale. A trust deed was recorded for $20,000 against the property. [¶] The Partnership Deborah Turner and Fred Popp. [*sic*] The sales contract was to Rodney F. Darby. [¶] The Partnerships [*sic*] interest in the sales contract was assigned to Worthmore in 1997.[¶] In 1998 the other 50% original owners were paid off by Worthmore. [¶] Leaving a contract to sell still in effect and a $20,000.00 trust Deed [*sic*] recorded against the property. [¶] When the contract is completed the deed will have to be recorded to the new owner or Worthmore if the sale is not completed.

Given the confusing nature of this explanation, we attempt in the body of the Opinion to sort out the transfers with more precision.

4 Popp and his family have known Darby since Popp was a child.

5 In addition to the above convoluted facts, at least two entities involved in these transactions have registered the name "Investors Co–Op" as a fictitious business name. On May 12, 1995, Fred Popp and Deborah Turner registered the name for IC, and on October 3, 1995, Popp registered the name for himself. Both registrations contain the same address.

  

6 There is also some evidence that during all of these transactions little or no money changed hands. Since 1997, when Darby executed the quit claim deed conveying his interest in the Property back to IC, Darby has received neither interest nor principal payments, nor has he taken action to enforce his right to receive them.

7 At best, the evidence submitted to the bankruptcy court regarding ownership was equivocal.

8 In light of the Trustee's disclaimers as to the warranty of title explored *infra,* we think the grant deed was more akin to a quit claim deed.

9 Darby's Notice of Appeal refers only to the Motion for Reconsideration; however, the Appellant's Opening Brief makes it clear that Darby's appeal encompasses the bankruptcy court's Sale Order as well. In similar situations, the Ninth Circuit has held that "[u]nless the opposing party can show prejudice, courts of appeal may treat an appeal from a postjudgment order as an appeal from the final judgment." *Ward v. San Diego County,* 791 F.2d 1329, 1331 (9th Cir.1986) (citing *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). This line of cases negates the Trustee's argument regarding Darby's failure to appeal directly from the Sale Order.

10 We do not address the issue of Darby's standing had the sale been subject to Darby's lien.

11 The dissent questions the use of Section 1111(b) in this chapter 7 liquidation case. Indeed, given that Popp's obligations secured by the Deed of Trust are recourse obligations, Section 1111(b) would be of little use even if Popp's case were filed under chapter 11. As the "*cf.*" signal indicates, however, we cite Section 1111(b) only to show that the interest of a lien holder in any future appreciation of its collateral is an interest recognized elsewhere in the Code. *See, e.g., Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),* 177 F.3d 774 (9th Cir.1999) (finding that, notwithstanding absence of statutory authority, court had power to authorize chapter 7 trustee to transfer avoiding-powers actions to litigation trust; creditor sued by trust had standing to challenge transfer of estate assets, and thus had standing to challenge transfer of estate's causes of action).

12 The dissent's position that Darby lacks standing has odd consequences. Consider, for example, a hypothetical chapter 7 filing by a business which stores towed and seized cars. Assume that the trustee takes the position that possession of the stowed cars gives her the ability to sell the cars free and clear of any liens. She then notices a sale of all such cars, and for whatever reason, the cars' owners do not object (they could have abandoned them because they believe the liens against them left no equity). It would blink reality to say that the banks and credit unions who lent money on the cars would lack standing to object to the sale on the basis of a lack of ownership, yet that is the result the dissent would have us adopt.

13 *See* BANKR. R. 7001(2) (providing that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" is an adversary proceeding).

14 Because both this case and *Rodeo* involve sale motions under Section 363 made during the pendency of an adversary proceeding contesting ownership, we do not decide whether a contested matter brought in the absence of such an adversary proceeding can provide a "sound basis for holding that the [property sought to be sold is] property of the estate." *Rodeo,* 362 F.3d at 609.

15 The clearest example of this risk shifting is found in Section 8.02 of the Addendum to the Purchase Agreement, which states that "[t]itle to the Property shall be transferred to the Buyer by a bankruptcy trustee's deed without warranties, representations or recourse of any kind."

16 Section 363(m) codifies the mootness doctrine as it applies to property sales governed by that section. In *Rodeo,* however, the Ninth Circuit ruled that none of the salutary and protective provisions of Section 363(m) apply without a dispositive and final finding that the estate owned what it purported to sell. Because the purported consummation of the sale here was also without authority under Section 363, Section 363(m) is also not available.

> We agree with the dissent that, if Section 363 applied, the case would likely be moot for failure to obtain a stay pending appeal. But that consequence shows the need to distinguish cases such as this—where the predicate showings for application of Section 363 have not been made—and those cases in which the estate acts properly and does not attempt to expropriate nonestate property.

  

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