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CLEAR CHANNEL REJECTED: DENIAL OF STAY PENDING APPEAL MOOTS CHALLENGE TO "FREE AND CLEAR" PROVISIONS IN SALE ORDER

In *Acorn Capital Group, LLC v. Polaroid Corp. (In re Polaroid Corp.,)*, 611 F.3d 438 (8th Cir. 2010), the Eighth Circuit rejected at least a portion of the Ninth Circuit B.A.P.'s controversial decision in *Clear Channel Outdoor v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (9th Cir. B.A.P. 2008). Following an auction, Judge Kishel issued an order authorizing the sale of Polaroid's assets to the "highest and best" bidder under 11 U.S.C. § 363. Acorn moved for a stay of the sale order pending its appeal which was denied first by the bankruptcy court and later by the district court. While Acorn's appeal was pending, the sale closed and the assets were transferred to the purchaser.

As a result of the denial of the stay, the Eighth Circuit held that Acorn's appeal was moot under 11 U.S.C. § 363(m). This section provides that a reversal or modification of a sale order on appeal does not affect the validity of a sale to a good faith purchaser, whether or not the purchaser knew of the appeal, unless the sale was stayed pending appeal. Acorn, relying on the Ninth Circuit B.A.P.'s *Clear Channel* decision, argued that § 363(m) was inapplicable to its appeal because it only applied to sales authorized under § 363(b) or (c) and not to the avoidance of liens under § 363(f). Like the lien creditor in *Clear Channel*, Acorn argued it was not seeking to avoid that portion of the sale order authorizing the sale under § 363(b), but rather only the "free and clear" language in the sale order authorizing the sale free of Acorn's lien under § 363(f).

Rejecting the Ninth Circuit B.A.P.'s contorted reading of § 363(m) in *Clear Channel*, the Eighth Circuit reasoned that a challenge to an integral provision of the sale, i.e. the "free and clear" of liens provision in the sale order, was tantamount to a challenge of the sale itself. Relying in part on its prior decisions in *In re Farmalnd Indus.*, 408 B.R. 497 (8th Cir. B.A.P. 2009) and *In re Trism, Inc.*, 328 F.2d 1003 (8th Cir. 2003), the court held that an appeal seeking to attack the "integral and essential provisions" of a sale thwarted the purpose of § 363(m) by calling into question the validity of the sale. As noted by Judge Kishel, the purchaser would not have consummated the sale if was not "free and clear" of liens or if the purchaser could be held liable for such liens in the future. Thus, Acorn's appeal was dismissed as moot under § 363(m).

PAST AND FUTURE SOCIAL SECURITY PAYMENTS ARE NOT PROPERTY OF THE ESTATE

In *Carpenter v. Ries (In re Carpenter)*, No. 09-2897 (8th Cir. July 30, 2010), the Eighth Circuit held that pre-petition social security payments are excluded from a debtor's bankruptcy estate. In that case, the debtor received a large lump sum social security payment for retroactive payments that were owing while he applied for social security. Shortly after receiving the lump sum payment, the debtor filed for bankruptcy. The debtor argued that the payment was exempt and should not be included in his bankruptcy estate.

The trustee argued the payment was property of the estate under 11 U.S.C. § 541, which included "all legal or equitable interests of the debtor in property as of the commencement of the case." In addition, the trustee argued that that since the debtor selected the "federal exemptions," he could only exempt post-petition social security payments. Under § 522(d)(10), the federal exemptions exempt, "[t]he debtor's right to receive . . . a social security benefit, unemployment compensation, or a local public assistance benefit."

The debtor argued that the payment was excluded by operation of a provision in the Social Security Act. Section 407 of Title 42 provides, "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." Section 407 also states that, "no other provision of law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."

The Bankruptcy Code does not explicitly exempt or exclude pre-petition social security payments nor acknowledge 42 U.S.C. § 407. To resolve the conflict between the statutes, the court noted that when Congress enacted the Bankruptcy Code in 1978, it listed a number of statutes repealed or modified by its enactment. Congress did not list Section 407 of the Social Security Act as a statute repealed or modified by the Bankruptcy Code. The Sixth Circuit previously relied on that omission to find that a debtor was not required to include social security income in a chapter 13 plan. *Hildebrand v. SSA (In re Buren)*, 725 F.2d 1080 (6th Cir. 1984).

The Eighth Circuit agreed with the Sixth Circuit. Nothing in Section 407 restricts its application, and, as noted in Section 407, if another federal statute sought to restrict Section 407's application, it would have to specifically reference Section 407. As a result, the Eighth Circuit held that social security payments, past or present, are excluded from the estate, regardless of whether the debtor elects federal or state exemptions.

DEBTOR'S RECKLESS DISREGARD FOR THE TRUTH WILL SUPPORT A FINDING OF FRAUDULENT INTENT SUFFICIENT TO DENY DISCHARGE

In the case of *Bank of Bennington v. Thomas (In re Thomas)*, No. 09-6070/6071, 431 B.R. 468 (8th Cir. B.A.P. Jun. 22, 2010), a chapter 7 debtor appealed an order of the Nebraska bankruptcy court denying his discharge under Section 727(a)(4)(A) of the Bankruptcy Code. In an appeal to the Eighth Circuit's B.A.P., the debtor argued that the court's denial of his discharge amounted to the imposition of strict liability with respect to his failure to disclose income in his bankruptcy schedules and statement of financial affairs. The debtor argued that his omissions were honest mistakes, which were corrected as soon as they came to his attention. The B.A.P. concluded the debtor's omissions were sufficiently serious to warrant an inference of fraudulent intent and, thus, held that the bankruptcy court's findings were not clearly erroneous.

The debtor and his wife had filed a chapter 7 petition in November, 2006. In their schedules and statement of financial affairs, they failed to disclose their receipt of several large transfers including: (i) a tax refund in the amount of $397,000; (ii) a loan in the amount of $150,000; (iii) state tax refunds in the aggregate amount of $56,000; (iv) settlement payments in the aggregate amount of $500,000; and (v) business income in the amount of $90,000. Each of these undisclosed transfers was received within two years of the petition date. At the ensuing first meeting of creditors, legal counsel for the debtor's primary creditors, raised questions regarding the first three omitted transfers. A short time later, the debtor amended their statement of financial affairs to disclose these transfers, but they failed to amend their filings to disclose the fourth or fifth omissions.

The creditor filed an adversary proceeding against the debtors seeking to deny their discharges under § 727. The bankruptcy court ultimately denied the husband's discharge concluding that he knowingly chose not to disclose the refunds and payments omitted from his bankruptcy filings. The bankruptcy court did not deny the wife's discharge because the court determined that the creditor did not provide sufficient evidence of her knowledge of the omissions.

In granting a denial of the husband's discharge, the bankruptcy court concluded that he: (i) made statements under oath in his bankruptcy filings and at the first meeting of creditors; (ii) that those statements were false due to his failure to disclose tax refunds, a large settlement, and other income; (iii) that he knew his statements were false; (iv) that he made the statements with a fraudulent intent, *which could be inferred from the recklessness of his omissions*; and (v) that his false statements were material because they concerned the discovery, existence and disposition of estate property.

On appeal, the debtor focused on the court's application of the fourth prong relating to fraudulent intent. He argued that the court's interpretation of that prong would effectively impose a strict liability standard on debtors with respect to the disclosure of pre-petition income. The B.A.P. supported the court's conclusion that a reckless disregard for the truth will support a finding of fraudulent intent for purposes of denying a debtor's discharge under 11 U.S.C. § 727(a)(4)(A). The B.A.P. further noted that the magnitude and seriousness of his omissions justified the bankruptcy court's inference of fraudulent intent.

TRUSTEE CANNOT AVOID UNRECORDED DEED WHERE IT HAS ACTUAL OR CONSTRUCTIVE NOTICE OF CREDITOR'S INTEREST

In the case *In re BowlNebraska L.L.C.*, 10-6016 (8th Cir. B.A.P. July 1, 2010), Omaha State Bank appealed an order of the Nebraska bankruptcy court declaring void certain deeds of trust and related modifications. The court determined that the bank's deeds of trust were void because they were improperly acknowledged and therefore not lawfully recorded. In its appeal, the bank argued that the bankruptcy court's ruling was incorrect as a matter of law. It asserted, among other things, that despite the ineffective recording of its deeds and related modifications, due to its proper recording of default notices, the debtor had either actual or constructive notice of the bank's property interest, and therefore could not avoid its liens as a bona fide purchaser under 11 U.S.C. 544(a)(3). The Eighth Circuit's B.A.P. adopted the bank's arguments and reversed the bankruptcy court's decision.

Prior to filing for chapter 11 bankruptcy, the debtor had consummated a series of lending transactions with the bank. In the course of these transactions, the debtor borrowed in excess of $8 million from the bank and, in exchange, granted liens evidenced by two deeds of trust and several related modifications. Each instrument was recorded in the appropriate county office. In each instance, however, the acknowledging notary was a close relative of the individual who signed the instruments on the debtor's behalf. As a result, each recording was ineffective as a matter of Nebraska law.

A few weeks after filing for bankruptcy, the debtor filed an adversary proceeding against the bank seeking to have its liens declared void or, in the alternative, to avoid the liens under 11 U.S.C. § 544. After filing an answer, the bank moved for judgment on the pleadings. The bankruptcy court denied the bank's motion and instead entered judgment in favor of the debtor. The bankruptcy court held that the deeds of trust were not properly recorded and that, as a result, they were void under Nebraska law.

The bank appealed the bankruptcy court's decision to the Eighth Circuit's B.A.P.. The B.A.P. first rejected the notion that the liens could be considered void *ab initio* because, outside of bankruptcy, the liens would clearly be enforceable between the bank and the debtor (even if they would not be enforceable against third parties). The B.A.P. then considered the bank's argument that, even if its liens were technically unrecorded, the debtor nevertheless received notice of the bank's property interest when the bank recorded notices of default. The B.A.P. determined that, under Nebraska statutes and related case decisions, an improperly recorded instrument is ineffective only as to parties without *any* notice of the property interest at issue. Because the bank had properly recorded notices of default, the B.A.P. concluded that the debtor had received at least constructive notice of the bank's property interest. Accordingly, the B.A.P. held that the debtor could not avoid the bank's liens as a bona fide purchaser under 11 U.S.C. § 544(a)(3).

COURT FINDS NO EVIDENCE OF FRAUDULENT MISREPRESENTATION, THEFT, CONVERSION, OR WILLFUL AND MALICIOUS INJURY AND RULES CONSTRUCTION DEBTS DISCHARGEABLE

In *Laudon v. Yozamp (In re Yozamp)*, Adv. No. 09-6029 (Bankr. D. Minn. Aug. 3, 2010), Judge O'Brien denied a creditor's motion to determine that certain debts arising from a construction project were nondischargeable. Prior to filing chapter 7 with his wife, the debtor entered into a construction and purchase agreement with the creditor. The bankruptcy court found that the debtor acted as an individual, not as a licensed contractor, in making improvements to the residential home covered by the agreement.

After determining that completing the project was not economically feasible, the parties entered into a cancellation and release. Following this cancellation, the creditor claimed the debtor stole certain items of personal property that the creditor had left on the construction site during the pendency of the agreement. The debtor acknowledged possession of some items and offered to give them back. Instead, the creditor commenced three conciliation court actions. The debtor did not appear at the hearings and default judgment was entered against him in all proceedings. These default judgments were boilerplate, containing no findings of fact and conclusions of law.

Judge O'Brien held a lengthy trial and examined the record to determine whether the evidence presented demonstrated the elements of nondischargeability of the debts. The judge relied on three sub-sections of 11 U.S.C. § 523(a). First, § 523(a)(2)(A) provides that a debt for money obtained by fraudulent misrepresentation is nondischargeable. The creditor claimed the debtor represented himself as a licensed contractor and promised to complete the construction by a certain date. The court found the evidence supported neither assertion, and, thus, held § 523(a)(2)(A) did not render the debt nondischargeable.

Second, § 523(a)(4) provides that a debt for money obtained through larceny is nondischargeable. Common law defines larceny as the wrongful taking of property with the fraudulent intent to convert that property to one's own. As the creditor had voluntarily placed the disputed property on the construction site, the court found the debtor had not committed larceny and held § 523(a)(4) did not render the debt nondischargeable.

Third, § 523(a)(6) provides that a debt obtained through "willful and malicious injury" to another entity or the property of another entity is nondischargeable. The court noted that to establish nondischargeability under this section, the movant must prove both willfulness and maliciousness, two distinct elements, on the part of the debtor. Willfulness requires deliberate or intentional injury and maliciousness requires actions that are targeted at a creditor with the intent to cause the creditor almost certain harm. Finding the evidence did not even closely prove either on the part of the debtor, the court held that § 523(a)(6) did not render the debt nondischargeable.

Having exhausted all possible bases of nondischargeability, Judge O'Brien held that the debts established by the state court judgments were dischargeable.

BANKRUPTCY CASE NOT REOPENED BECAUSE ANOTHER COURT HAD CONCURRENT JURISDICTION

In the case of *Mid-City Bank v. Skyline Woods Homeowners Assoc.*, No. 09-6073, 431 B.R. 830 (8th Cir. B.A.P. Jun. 17, 2010), the debtor sold substantially all of its assets (a golf course) to a purchaser in bankruptcy. Mid-City Bank financed the purchase. The debtor's bankruptcy case was subsequently closed.

The purchaser decided not to reopen the golf course, causing a homeowner's association and other interested parties to file suit in

Nebraska state court to enforce restrictive covenants requiring the property to be used as a golf course. Soon after, the purchaser filed a motion in the debtor's bankruptcy case alleging the state court suit violated the bankruptcy court's order approving the sale of the debtor's assets free and clear of liens and interests. Despite learning its motion would not be heard until the purchaser first moved to reopen the debtor's bankruptcy case, the purchaser took no action.

More than two years after the Nevada state court, as affirmed by the Nevada Supreme Court, held that the restrictive covenants were in effect and enforceable, the purchaser and Mid-City Bank moved to reopen the debtor's bankruptcy case in order to initiate an adversary proceeding for an order enjoining the Nevada courts' decision and declaring that the Nevada state court's orders that purported to modify the bankruptcy court's sale order were void for lack of subject matter jurisdiction. The bankruptcy court denied the motion. On appeal, the Eighth Circuit's B.A.P. affirmed.

Section 350(b) provides that "[a] case may be reopened by the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." A bankruptcy court has broad discretion to decide whether to reopen a bankruptcy case and should only do so if the movant demonstrates a compelling reason for the reopening. As outlined by the B.A.P., pertinent considerations include the length of time between the closing of the bankruptcy case and the motion to reopen, the availability of relief in an alternative forum, and whether reopening the case would relieve the moving party of its own neglect or mistake.

Applying these factors, the B.A.P. affirmed the bankruptcy court's determination that the Nevada state court had concurrent jurisdiction to interpret the bankruptcy court's sale order, and, thus, reopening was unnecessary and inappropriate. In particular, the B.A.P. highlighted the fact that the purchaser chose the Nevada state court as an alternative forum for the dispute when they did not initially move to reopen the debtor's bankruptcy case after the Nevada state court suit was filed. The B.A.P. cited 28 U.S.C. § 1334(e) as the source of this concurrent jurisdiction.

In addition, the B.A.P. noted that the bankruptcy court's decision also could be affirmed on the basis that reopening the bankruptcy case would have been futile and a waste of judicial resources because *res judicata* precluded review of the Nebraska Supreme Court judgment, which the adversary proceeding sought to do. Accordingly, the B.A.P. held that the bankruptcy court had properly exercised its discretion when it found that the purchaser and Mid-City Bank had not demonstrated a compelling reason for reopening the debtor's bankruptcy case.

ISSUES ON APPEAL EITHER MOOT OR LACKED STANDING AND B.A.P. ORDERS DENYING MOTIONS AFFIRMED

In the case of *Powers v. Odyssey Capital Group, LLC (In re Mesaba Aviation, Inc.)*, 09-3863 (8th Cir. July 28, 2010), Coleen Powers appealed the B.A.P.'s orders denying her leave to appeal *in forma pauperis* (IFP), denying appointed counsel and oral argument, affirming bankruptcy court orders closing the Mesaba bankruptcy case, and denying her motion to seal her affidavit attached to her IFP request. She also appealed the denial of her various motions for reconsideration of those orders. The Eighth Circuit held most challenges could not be raised and affirmed the BAP's orders on those issues she could properly raise. The court also denied her motion to strike the appellee's brief and appendix.

The court first held that because her sole claim in the bankruptcy case had already been disallowed, she lacked standing to challenge the orders closing the bankruptcy case and lacked standing to challenge the B.A.P.'s disposition of her related appeals. The court did not review the orders denying her IFP status because IFP status was later granted by the B.A.P., rendering that issue moot.

The court affirmed the orders denying her attempts to seal her IFP affidavit because she failed to establish that anything contained therein met the requirements for filing under seal under the Federal Rules of Bankruptcy Procedure. Nor did the court see how failing to seal the affidavit would be a violation of Ms. Powers' constitutional rights or a violation of any other statutes which she listed. Lastly, the court held Ms. Powers did not suffer any due process violations and it affirmed the B.A.P.'s orders denying her counsel and oral argument.

BANKRUPTCY COURT ALLOWED CODEBTOR CLAIM FOR CONTRIBUTION, BUT SUBORDINATED IT TO BANK

In the case of *In re Feneis*, 09-60317, (D. Minn. June 24, 2010), Judge O'Brien found that an individual creditor's claim was allowed, but subordinated it to the claim of Northern National Bank until the bank's claim was paid in full.

The individual creditor claim in the amount of $140,000 was originally objected to by the debtor. The debtor withdrew his objection at the hearing, but requested subordination under 11 U.S.C. § 509(c). The bank had loaned $1.7 million to a company of which the debtor and the individual creditor were both members. The debtor and the individual creditor also personally guaranteed this debt, jointly and severally. The individual creditor then reached a settlement agreement whereby he paid the bank a portion of the guarantor liability. Because the debtor held a 40% membership in the company, the individual creditor made a claim for 40% of the amount which he paid to the bank in settlement of his guarantor liability.

The court held that the individual creditor's claim was allowed under either 11 U.S.C. §§ 502 or 509. Under either section, however, the claim had to be subordinated to the bank's debt until such debt was paid in full. The court recognized § 509, entitled "Claims of Codebtors", required the court to subordinate the claim of a creditor for reimbursement or contribution of an entity that is liable with the debtor until such creditor's claim is paid in full. As such, the court allowed the individual creditor's claim but ordered it subordinated to the bank's claim until the bank's claim was paid in full.

DEBTORS BEWARE: DEFINITION OF "PROPERTY CLAIMED AS EXEMPT" IS A VALUE AND NOT THE PROPERTY ITSELF

In *Schwab v. Reilly*, No. 08-538 (June 17, 2010), the U.S. Supreme Court, in an opinion delivered by Justice Thomas, reversed the Third Circuit's decision regarding the definition of property claimed as exempt resolving a disagreement among the circuits regarding objecting to exemption claims.

The debtor was the sole owner and operator of a small catering business. When she filed for chapter 7 bankruptcy, her "Schedule B–Personal Property" listed her kitchen catering equipment and the market value for each item, for a total of $10,718.

Additionally, her "Schedule C–Property Claimed as Exempt" listed such kitchen equipment and claimed exemptions for trade tools (§ 552(d)(6)) and the "wild-card" exemption (§ 522(d)(5)). The total amount she could have claimed under both categories was $12,075. Neither the trustee nor any other interested party objected to the exemption claims before the deadline even though the trustee had appraisal information showing the equipment was worth as much as $17,200. When the trustee moved for permission to auction the kitchen equipment so the debtor could receive the $10,718 she claimed as exempt and the estate could distribute the remaining equipment proceeds to creditors, the debtor made a conditional motion to dismiss her bankruptcy case so she could keep the equipment essential to her catering business. The bankruptcy court denied the trustee's motion because the trustee failed to timely object to the debtor's claimed exemptions, so her equipment was exempt property under § 522(*l*).

The district court and Third Circuit affirmed the bankruptcy court citing *Taylor v. Freeland & Kranz*, 503 U.S. 638 (1992) finding the debtor's schedules "indicate[d] the intent" to exempt the equipment's full value and finding that if there is no objection to the exemptions within the time allowed, the claimed exemption will exclude the listed property from the debtor's bankruptcy estate even if the exemption's value exceeds what is permitted by the Bankruptcy Code. The Supreme Court reversed the Third Circuit's decision holding that because the debtor's claimed exemptions were dollar amounts within the allowed ranges, the trustee was not required to object to the exemptions in order to preserve the estate's right to retain any excess value in the debtor's kitchen equipment beyond the amount of her claimed exemption.

The Supreme Court held that "property claimed as exempt" is an interest in a particular asset, the value of which may not exceed a certain dollar amount, but does not mean the asset itself. Under this definition, when a debtor lists property as exempt on Schedule C, the debtor is only exempting a monetary value even if the amount claimed as exempt is the market value and less than the statutorily allowed amount for that category of property. The Court's opinion continues to interpret the 30-day objection time frame in Rule 4003(b) as being an objection that is required only if the stated exemption exceeds the amount allowed by the Bankruptcy Code. Under the Court's interpretation, the trustee only needed to verify that the debtor's exemption amounts were at or below the limits for those categories of property, and because both of her exemption claims were within in the limits of the Bankruptcy Code, the trustee did not need to object within the Rule 4003 time frame. In so holding, the Supreme Court refused to expand the definition of "property claimed as exempt" and the "universe of information an interested party must consider in evaluating the validity of a claimed exemption."

The Supreme Court stated that the Third Circuit's reliance on the *Taylor* decision was improper. First, the Court denied that there was an "unstated premise" in *Taylor* that the debtor's stated valuation of her equipment put the Trustee on notice that she intended to exempt her equipment fully. Second, the Court noted the *Taylor* debtor listed the value of the exemption as "$ unknown" and did not list a specific amount like this debtor did. When the amount of the exemption is listed as unknown, the exemption is objectionable on its face because it does not fit within the range of allowable exemption amounts under the Bankruptcy Code and a trustee would have to object as required under Rule 4003 or the exemption could not be challenged later.

Justice Ginsberg authored a dissenting opinion stating that the Court's majority opinion leaves uncertainty for debtors, impedes a "fresh start", and drastically reduces Rule 4003's governance. Ginsberg's dissent points out that the Court's opinion goes against the common definition of what "property," is and was contrary to leading bankruptcy treatises.

The dissent also expressed that the Court's opinion encourages debtors to make their exemptions clear by stating an exemption value as "full fair market value (FMV)" or "100% of FMV" which would encourage a trustee to promptly object to the exemption if there is a wish to preserve some of the value in an asset for the bankruptcy estate in excess of the relevant statutory limits.

UNLIQUIDATED CLAIM SUSTAINED BY FRAUDULENT INDUCEMENT IS NONDISCHARGEABLE

In *West v. Hanson* (*In re Hanson)*, No. 09-6023 (Aug. 3, 2010), Judge O'Brien held that 11 U.S.C. 523(a)(2)(A) did not permit discharge of an investor's unliquidated claim for damages due to fraudulent misrepresentation arising from a partnership dispute. Prior to creating the partnership, the debtor purchased a limousine for $45,000. He financed the entire purchase price and the seller continued to own the limousine until the debtor paid the loan. Thereafter, the debtor and his wife invited West to form a partnership for the purpose of operating a limousine service.

Under the terms of the partnership agreement, the debtor, his wife and West would each contribute $15,000 and the funds would be used to pay off the balance of the loan and take title to the limousine. West made the required $15,000 investment. The debtor and his wife did not contribute any funds and West's contribution was not used to pay down the loan. When the business failed, the debtor sold the limousine to pay off the loan and West lost his entire investment in the partnership.

West filed a non-dischargeability complaint against the debtors, arguing that he was fraudulently induced to enter into the partnership and sustained damages because of their misrepresentations. The bankruptcy court held in West's favor, finding that the debtors materially misrepresented their intentions to make the required capital contributions and pay off the loan, as contemplated by the partnership agreement. The court found that West had justifiably relied to his detriment on the debtors' misrepresentations, and his resulting unliquidated claim would be excepted from discharge under § 523(a)(2)(A).

APPELLANTS BEWARE: BEFORE PURSUING APPEAL OF FORECLOSURE SALE, MOVE TO STAY SALE PENDING APPEAL

In *United States of America v. Asset Based Resource Group, LLC*, 612 F.3d 1017 (8th Cir. 2010), the Eighth Circuit examined whether it had authority to unwind a court-approved foreclosure sale of two airplanes to a bona fide third-party purchaser where the airplanes had already been sold and the appellant failed to move to stay the sale pending appeal. The Eighth Circuit concluded that the appeal is moot.

The debtor, Petters Aircraft Leasing, LLC, had purchased two airplanes from CIT Leasing Corporation by borrowing $21.5 million from Acorn Capital Group, LLC. The following year, a receiver was appointed to manage the assets of the debtor. The receiver entered into a foreclosure agreement with CIT, which was approved by the district court. The parties complied with the terms of the foreclosure agreement and CIT leased the airplanes to third parties. In its appeal, Acorn alleged the district court abused its discretion by approving the foreclosure agreement and sought either an unwinding of the foreclosure sale and subsequent leases of the airplanes or entry of a $13 million judgment against CIT.

The court recited a common principle applied in numerous Eighth Circuit cases, which provides that "once foreclosed property is sold to a bona fide third-party purchaser, a court generally lacks the power to craft an adequate remedy for the debtor." Therefore, absent a stay, the completed sale to a good-faith purchaser cannot be overturned. Acorn argued that only appeals challenging transfers of title, and not appeals challenging other characteristics of court-approved sales under 11 U.S.C. § 363, are moot absent a stay pending appeal. The court rejected Acorn's argument as unpersuasive. Although Acorn agreed the airplanes were sold at fair market value, Acorn alleged CIT was not a good-faith purchaser because the receiver and CIT colluded during the negotiations of the foreclosure agreement. The district court found the complete opposite to be true about the negotiations between the receiver and CIT. As a result, the court concluded that it lacked the authority to unwind the sale. Acorn next argued the district court could craft an adequate remedy by either entering a $13 million judgment against CIT for the value of CIT's alleged unlawful windfall or remanding to the district court with instructions to order the receiver to seek disgorgement and restitution from CIT. Because CIT was not a party to the case, the court concludes that it had no authority to grant such relief. Therefore, the court dismissed the appeal as moot.

EMPLOYMENT OF PROFESSIONALS UNDER 11 U.S.C. § 327: THE DIFFERENCE BETWEEN ORDINARY COURSE PROFESSIONALS AND SPECIAL COUNSEL CAN IMPACT APPROVAL OF YOUR FEES

In the case of *In re Genmar Holdings, Inc.*, Case No. 09-43537 (June 30, 2010) (unpublished), Judge O'Brien was asked to approve a fee application and examined whether certain services rendered by Briggs and Morgan were special counsel services under 11 U.S.C. § 327(e) or ordinary course services under 11 U.S.C. § 327(a), for which approval had not been given by the Court. Briggs filed a motion for allowance of fees and expenses incurred pursuant to an order approving employment in the amount of $225,240. The U.S. Trustee objected to $96,000 of the fees arguing such fees were for services under 11 U.S.C. § 327(a), which was outside of the scope of Briggs' approved employment. Following an evidentiary hearing, the court concluded that Briggs presented persuasive testimony that explained the services were provided as ordinary course professionals, which did not include services such as counseling regarding chapter 11 issues, and were required irrespective of the bankruptcy case. Based upon this testimony, the court found the services were within the scope of the approved employment and overruled the Trustee's objection.

Section 327 of the Bankruptcy Code sets forth the requirements for employment of professionals in a bankruptcy case. Section 327(a) provides the trustee or debtor-in-possession the ability to employ, with the court's approval, "…one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11

U.S.C. § 327(a). Section 327(e) provides that the trustee or debtor-in-possession may employ, with the court's approval, "…for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e). At the outset of the jointly administered cases, the debtors filed a motion seeking approval of the employment of a number of professionals to provide services to the debtor in the ordinary course of business, which included Briggs. Specifically, the motion sought the employment of professionals who advised and assisted the debtors in the past and would continue to do so regarding issues related to the debtors' ongoing operations, but not regarding bankruptcy reorganization. In the debtors' motion, the description for legal matters that Briggs would advise the debtors on included "…dealer/distributor, securities, creditors' rights, commercial litigation, noncompete litigation…". No party filed an objection to the motion and the court granted it and approved the employment of Briggs as an ordinary course professional.

A few months after the approval order was entered, the debtors filed a motion seeking to expand the ordinary course employment of Briggs. At the hearing, both the debtors and Briggs took the position that under the terms of the original order, Briggs was not a professional pursuant to Section 327(e), but rather was a professional pursuant to Section 327(a) and now sought to expand its scope to a professional under Section 327(e), or as special counsel. Specifically, the debtors sought to employ Briggs as special counsel to advise a special committee of the debtors' board of directors on bankruptcy matters. The court questioned whether Briggs, as special counsel in this position, would be providing legal representation that was already being performed by the debtors' counsel. Because the court believed that the requested expansion of legal services by Briggs would implicate Section 327(a), the court denied the debtors' motion and Briggs continued its legal representation of the debtors as defined under the original approval order.

Several months later, Briggs filed the fee application at issue and the Trustee objected arguing Briggs did not qualify for employment under Section 327(e) due to conflicts of interest. The bankruptcy court overruled this objection because the Trustee had never objected to the original employment order and had agreed at the hearing that entry of that order and approval of Briggs' employment under Section 327(e) was appropriate. Thus, the court approved Briggs' fee application in the full amount.

MINNESOTA SUPREME COURT SIDES WITH MN BANKERS ASSOCIATION AND OVERTURNS DECISION AFFECTING TORRENS PROPERTY INTERESTS

In *Imperial Developers, Inc. v. Calhoun Dev., LLC*, A08-1883 (Minn. Oct. 28, 2010), the Minnesota Supreme Court reversed a decision that had created a lot of stir in the world of Torrens property interests. In the earlier ruling, the Minnesota Court of Appeals had ruled that certain mechanics' liens had priority over an earlier filed mortgage because the mortgage was not "of record" (due to an apparent mistake in the registrar's office) at the time the mechanics' liens attached. The Minnesota Supreme Court reversed finding that the priority of the mortgage related back to the date and time it was *filed* with the registrar's office – not when it was memorialized on the certificate of title.

The dispute involved Lot 4 of a residential subdivision in Eden Prairie. On June 27, 2005, Lot 4 and two other lots were conveyed by warranty deed to Lind Homes. Lind Homes granted a mortgage on the lots to BankFirst on June 27, 2005, and this mortgage was filed with the office of the Hennepin County Registrar of Titles on June 28, 2005. Due to a mistake, the registrar did not memorialize BankFirst's mortgage on the certificate of title for Lot 4, nor did it issue a new Torrens certificate that reflected Lind Homes' ownership interest.

Lind Homes acted as general contractor in the construction of a home on Lot 4 and hired a number of subcontractors, each of which perfected mechanic's liens on the property. When these liens first attached, the certificate of title for Lot 4 contained no memorialization of BankFirst's mortgage. After issuing and canceling several erroneous certificates, over a year later, on September 20, 2006, the registrar's office issued a correct Torrens certificate for Lot 4. This certificate memorialized BankFirst's mortgage as having a "Date of Registration" of June 28, 2005, the date BankFirst had filed its mortgage with the registrar.

Following Lind Homes' default on the BankFirst mortgage and its failure to pay several subcontractors, a priority dispute developed between BankFirst and the mechanics' lien holders. The district court ruled in BankFirst's favor, but the Minnesota Court of Appeals reversed finding that "of record" must be interpreted within the context of the registration requirements for Torrens property interests. Because the the only issue involved interpretation of the Torrens statute, the Minnesota Supreme Court reviewed the Court of Appeals' decision *de novo*.

Significantly, BankFirst conceded that none of the mechanics' lien holders had actual knowledge of its mortgage interest at the time their liens attached. Indeed, a review of the certificate of title for Lot 4 would not have revealed BankFirst's mortgage interest. BankFirst had initially argued the mechanics' lien holders had "inquiry notice" because the certificate of title on file was not in the name of the current owner, Lind Homes, but this issue was not addressed on appeal. Instead, the court held that in the Torrens property context, "of record" and "registered" were not synonymous, and that the plain language of Minn. Stat. § 514.05 supported BankFirst's argument that "of record" meant the time it was "filed with the registrar, date and time stamped, and issued a document number." The court relied on "plain language" principles of statutory construction and Black's Law Dictionary which defines the verb "record" as to "deposit (an original or authentic official copy of a document) with an authority . . .". The court noted that the definition of "record" in Black's Law mirrored the reality of what takes place when a mortgage interest in Torrens property is presented to the registrar for filing and memorialization on the Torrens certificate.

The court rejected respondent's arguments that the definition of "registered" in the Torrens property context (and the very foundation of the entire Torrens system) requires memorialization on the certificate of title, and thus the statutory term "of record" must also demand memorialization on the Torrens certificate. Instead, the Minnesota Supreme Court noted that sound public policy strongly favored its decision. Citing the *Amicus Curiae* brief filed by the MN Bankers Association, the court agreed that banks would be reluctant to issue construction loans if they could not rely on the fact that their mortgages duly filed with the office of the registrar of titles would be superior to later perfected mechanic's liens.