

September 12, 2007

Barbara A. Schermerhorn
ClerkNOT FOR PUBLICATIONUNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUITIN RE RAFTER SEVEN RANCHES
LP,

Debtor.

BAP No. KS-06-137

RAFTER SEVEN RANCHES LP,

Appellant,

Bankr. No. 05-40483-12
Chapter 12

v.

ORDER AND JUDGMENT*

WNL INVESTMENTS, L.L.C. and
DUANE KOSTER,

Appellees.

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

Before BOHANON, BROWN, and THURMAN, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Debtor Rafter Seven Ranches L.P. appeals the bankruptcy court's denial of its "Motion to Interpret" an agreement between itself and its creditor, Appellee WNL Investment, L.L.C. ("WNL"), and its related "Motion to Reconsider." This appeal involves the proper interpretation of a phrase contained in a settlement,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

between the Debtor and WNL, resolving a motion for relief from stay.¹ We reverse.

I. Background

In October, 2002, WNL purchased three one-quarter section tracts of real property. It acquired one-quarter section from the Debtor and the other two from trusts (the “Trusts”) controlled by the Debtor’s general partner, Michael Friesen. According to the parties’ original agreement, WNL was required to lease back all three tracts to the Debtor and the Trusts (collectively, the “Sellers”). WNL also granted the Sellers an option to repurchase.

Sellers failed to make the required payments. After receiving WNL’s notice of default, they filed Declarations of Equitable Interest with the Finney County, Kansas, recorder in March 2004. WNL then brought suit to quiet title and for ejectment and monetary damages. In response, the Trusts abandoned their claim of interest in the properties, but the Debtor filed a Chapter 12 petition in bankruptcy. WNL moved for relief from the automatic stay to proceed against the properties.

At the beginning of the hearing on WNL’s motion, counsel for both WNL and the Debtor announced that they had reached an agreement. In general terms, their agreement provided that WNL would be deemed the “absolute owner” of all three tracts, and the Debtor would pay WNL \$240,000 on or before July 15, 2006. If WNL received timely payment in full, it would deed all three tracts back to the Debtor, free and clear of any claims. If WNL did not receive timely payment in full, it was authorized to sell as much of the property as necessary to recoup full

¹ We recognize that motions to enforce stipulations on stay relief motions are typically resolved in the main bankruptcy case, without the need for filing an adversary proceeding. But as described *infra*, the Debtor’s motion could be interpreted as seeking to invoke the bankruptcy court’s declaratory judgment powers or as seeking injunctive relief. To the extent it seeks either, such relief should have been sought in an adversary proceeding. Fed. R. Bankr. P. 7001. Any such procedural deficiency, however, has been waived.

payment. The agreement is now embodied in a Stipulated and Agreed Order Approving Settlement Agreement [] (“Stipulated Order”), and a separate settlement agreement (collectively referred to as the “Agreement”). The parties noticed the terms of their Agreement to interested parties and the court approved it in due course.

The terms of sale in the Agreement provided in pertinent part that “WNL shall sell *one quarter section of the Real Estate at a time*, in the following order: SE/4 36-22-25, then NE/4 25-22-25, then SE/4 25-22-25.”² The three tracts were commonly referred to by the parties and the bankruptcy court as “Tracts 1, 2, and 3,” based upon the agreed order of sale. When the Debtor failed to meet its payment obligation by July 15, 2006, WNL proceeded to advertise Tract 1 for sale. In September 2006, Mr. Duane Koster purchased Tract 1 at auction for \$113,600. WNL then placed advertisements announcing the auction of the other two tracts, to be held on October 31, 2006 at 10:00 a.m. The ads separately described Tracts 2 and 3 and stated that “[e]ach quarter will sell separately.”³

When Mr. Friesen, the Debtor’s principal, learned of the intended auction on October 19, 2006, he began negotiating a sale or trade of various properties with Mr. Koster that would allow the Debtor and/or the Trusts to repay WNL and avoid the auction of Tract 3. At the subsequent hearing, Mr. Friesen explained that, while Tract 3 might be less desirable to others, it was the most desirable to him, because it had been his grandfather’s homestead.⁴ The Debtor also intended

² Stipulated Order at 6, ¶ 5(c)(1), *in* Appellant’s Appendix (“App.”) at 92 (emphasis added).

³ App. at 132. The ad listed WNL as the owner of the properties, and specified that “announcements made at the auction shall take precedence over any prior advertising.”

⁴ *October 25, 2006, Tr. of Oral Proceedings* (“Tr.”) at 5, *ll.* 15-17, *in* Supplemental Appendix of Appellee WNL (“WNL App.”) at 89.

to farm Tract 3 as part of its plan of reorganization.⁵ The Debtor claims that it reached a deal with Mr. Koster that would allow it to retain Tract 3, but WNL would not join in the agreement.

On October 23, 2006, in a routine status conference in his personal bankruptcy, Mr. Friesen advised the court that the Debtor was aware of, and objected to, WNL's proposed auction of Tracts 2 and 3. According to Mr. Friesen, the court advised him that the only available hearing date prior to the auction date was either October 24 or 25. The Debtor then filed a "Motion to Interpret the Agreement" on October 23, 2006, along with a motion for emergency hearing. WNL filed its objection to the Debtor's motion on October 24, and the court conducted a hearing on October 25. At the conclusion of the hearing, the court denied the Debtor's motion on the record.

The auction proceeded as advertised on October 31, and Mr. Koster was the successful bidder on both Tracts 2 and 3. Although the record is somewhat unclear on sale prices, it appears that WNL sold Tract 2 for the gross sales price of \$94,400 and Tract 3 for approximately \$74,740.⁶ Based on these figures, WNL grossed approximately \$282,740 from the sales of all three tracts.

The written order, denying the Debtor's motion, entered on November 14, 2006 (the "November 14 Order"). The Debtor timely filed a motion to reconsider, which both WNL and Mr. Koster opposed. The court denied the Debtor's reconsideration motion as well, and this timely appeal followed. Although the Debtor did not seek a stay of the sale from either the bankruptcy court or this

⁵ Debtor's *Motion to Reconsider the Court's Order Entered Herein on November 14, 2006 and to Declare the Sale of the SE/4 of 25-22-31 Completed on October 31, 2006 to be Ineffective Because it Violated the Agreement Between the Parties* ("Motion to Reconsider") at 9, in App. at 111.

⁶ *Declaration of Michael J. Friesen and Settlement Statement*, in App. at 136 and 200.

Court, WNL and Mr. Koster have not yet closed on the sale.⁷

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.⁸ The Debtor’s notice of appeal in this case was timely.⁹ Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.

A decision is considered final “if ‘it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”¹⁰ In this case, the orders of the bankruptcy court denied the Debtor’s Motion to Interpret and reconsideration motion, effectively allowing the auction to proceed. Nothing remained for the bankruptcy court’s consideration. Thus, the decision of the bankruptcy court is final for purposes of review.¹¹

III. Standard of Review

The pertinent facts in this case are undisputed. The issue is one of contract interpretation, which is a legal issue that is reviewed *de novo* on appeal. *In re*

⁷ Duane Koster Statement of Closing, filed August 1, 2007.

⁸ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a) & (d). Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

⁹ Pursuant to Federal Rule of Bankruptcy Procedure 8002(b), the Debtor’s reconsideration motion, which was filed within ten days of the entry of judgment, extended the deadline for filing a notice of appeal. *See Lopez v. Long (In re Long)*, 255 B.R. 241, 244 (10th Cir. BAP 2000). The notice of appeal, which was filed within ten days of entry of the Reconsideration Order, was also timely, pursuant to Rule 8002(a).

¹⁰ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

¹¹ *In re Geneva Steel Co.*, 260 B.R. 517, 520 (10th Cir. BAP 2001) (“An order on an objection to a claim is a final order for purposes of 28 U.S.C. § 158(a)(1).”)

Amarex, Inc., 853 F.2d 1526, 1529 (10th Cir. 1988). A court’s determination of a contract’s ambiguity is also a legal issue that is reviewed *de novo*. *Id.* at 1530.

IV. Discussion

The bankruptcy court held that the phrase “one at a time” is unambiguous and meant only that the three pieces of real estate would be sold in parcels one at a time and not as a unit.¹² The court further concluded that nothing in the Agreement required sales on different dates and, thus, WNL’s auction of Tracts 2 and 3 on one day was proper. On appeal, the Debtor contends that the phrase “one at a time” in this context is ambiguous and that extrinsic evidence establishes that the parties intended that each tract would be sold separately on different dates and not “stacked” on the same day.

A. Applicable Law

Neither the Agreement nor the November 14 Order incorporating it specifies which jurisdiction’s law is applicable. Since the Agreement was executed in Kansas, involves Kansas real property, and the parties are located in Kansas, Kansas law governs its interpretation. *See* Restatement (Second) of Conflict of Laws § 188 (1971) (law of state with most significant relationship to the transaction and the parties is applicable); *Foundation Prop. Invs., LLC v. CTP, LLC*, 159 P.3d 1042, 1046 (Kan. App. 2007) (Kansas follows Restatement of Conflicts).

B. Ambiguity of the Agreement

An unambiguous contract must be interpreted “solely within its four corners, and extrinsic evidence is inadmissible.” *Youell v. Grimes*, 217 F. Supp. 2d 1167, 1173 (D. Kan. 2002) (*quoting Clark v. Wallace County Coop. Equity Exch.*, 986 P.2d 391, 393 (Kan. Ct. App. 1999)). A contract term is ambiguous only where “the application of pertinent rules of interpretation to the face of the

¹² *Tr.* at 70, *ll.* 14-18, *in* WNL App. at 154.

instrument leaves it generally uncertain which one of two or more possible meanings is the proper meaning.” *McGinley v. Franklin Sports, Inc.*, 75 F. Supp. 2d 1218, 1234 (D. Kan. 1999), *aff’d*, 262 F.3d 1339 (Fed. Cir. 2001) (citing *Marquis v. State Farm Fire and Cas. Co.*, 961 P.2d 1213, 1219 (Kan. 1998)). In determining if ambiguity exists, “[t]he court must not consider the disputed provision in isolation, but must instead construe the term in light of the contract as a whole, such that if construction of the contract in its entirety removes any perceived ambiguity, no ambiguity exists.” *McGinley*, 75 F. Supp. 2d at 1234.

This rule of construction correlates with the so called “cardinal rule” of contract interpretation that a court must “ascertain the parties’ intention and give effect to that intention when legal principles so allow.” *Williamson v. Kay (In re Villa West Assocs.)*, 146 F.3d 798, 803 (10th Cir. 1998) (citing *Ryco Packaging Corp. v. Chapelle Int’l, Ltd.*, 926 P.2d 669, 674 (Kan. Ct. App. 1996)).

“Reasonable rather than unreasonable interpretations of contracts are favored, and accordingly, interpretations which lead to absurdity or negate the purpose of the contract should be avoided.” *Time Warner Entm’t Co., LP v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1044-45 (10th Cir. 2004) (internal quotation marks omitted). All terms of a contract should be read together in harmony. *Id.* at 1045 (internal quotation marks omitted). Where faced with a choice of finding a contract term meaningless or meaningful, a court will opt for the latter. *Stark v. Resolution Trust Corp.*, 856 F. Supp. 1509, 1513 (D. Kan. 1994).

In this case, we agree with the bankruptcy court that the term “one at a time,” was not ambiguous. Construing the term in light of the contract as a whole, however, we believe the term required WNL to initiate and complete the sale process for each tract of land separately, before initiating the process for the next tract. To allow a “stacked sale” of the tracts renders the term “one at a time” meaningless, when considered in context of the entire Agreement.

The parties’ settlement Agreement provided the Debtor a certain period of

time to pay WNL \$240,000, in which case WNL would deed all three tracts of land to the Debtor. If it failed to make payment by the required deadline, WNL could “proceed to sell so much of the Real Estate as is necessary in WNL’s sole discretion to generate the total amount of \$240,000”¹³ All three sales were to be by public auction, with WNL again having “sole discretion” as to the choice of auctioneer, the terms and conditions of sale, and sale price.¹⁴ All costs of sale were to be paid from sale proceeds.

The Agreement limited WNL’s discretion with regard to sale of the tracts of land in one important respect: it stated that “WNL shall sell one quarter section of the Real Estate at a time, in the following order: SE/4 36-22-25, then NE/4 25-22-25, then SE/4 25-22-25[.]”¹⁵ If WNL made its \$240,000 from the sale of less than all of the tracts, the remaining net proceeds or remaining real estate would be property of the Debtor. The Agreement also specifically recognized the right of the Debtor, the trusts, and Mr Friesen to participate in the auctions.

Read in this context, the term “one at a time” means more than merely sold separately, as indicated by the bankruptcy court. Rather, the term describes a staged sequence of individual sales of three tracts of land. The next sale of the sequence could only be initiated after completion of the previous sale and after the net sale proceeds had been applied to the settlement amount owed by the Debtor. While nothing in the Agreement requires a set amount of time to pass between sales, a certain amount of time – be it one day or three weeks – is inherent in the sale process. The property must be advertised, the auction held, net proceeds collected and then applied to the \$240,000 settlement amount. WNL short circuited this process by beginning the sale process for Tract 3 by

¹³ *Stipulated Order* at 6, ¶ 5(c), *in App.* at 92.

¹⁴ *Id.* at 6, ¶ 5(c)(2), *in App.* at 92.

¹⁵ *Id.* at 6, ¶ 5(c)(1), *in App.* at 92.

advertising it for sale well before the sale of Tract 2 had completed and before the net proceeds had been applied. This violated the terms of the Agreement.

WNL notes that, after Tract 1 sold for only \$113,600 in September 2006, it should have been clear to the Debtor that both tracts 2 and 3 would have to be sold to meet the \$240,000 settlement number, given that Debtor deemed Tract 1 most valuable.¹⁶ Thus, under WNL's reasoning, Debtor had no practical need for, and no right to, additional time in between the sales of Tract 2 and Tract 3. From WNL's perspective, the sale of Tract 3 no doubt seemed inevitable and thus WNL had every incentive to hold the sale of Tract 3 as soon as possible in order to realize its \$240,000 payment. WNL's desire for quick sales of tracts 2 and 3, however, cannot alter the Agreement's requirement for one sale at a time.

WNL makes much of the fact that it believes the Debtor's true motive in attempting to stop the October 31 auction was to force WNL to accept a different deal for purchase of tracts 2 and 3. We agree that nothing in the parties' Agreement obligates WNL to accept another offer for purchase. Even if the "stacked sale" had not occurred, there is no guaranty that the Debtor's proposed deal would have been accepted. Nevertheless, correctly sequenced sales may have allowed the Debtor a better opportunity to participate in the auction of Tract 3. The Debtor's motion for reconsideration states that on November 3, 2006, the trusts sold a separate piece of property referred to as "Tract 4" for \$88,000.¹⁷ Assuming the trusts were willing to use these funds to purchase Tract 3 or to loan the funds to the Debtor to do so, the Debtor at least had the potential of beating the highest bid price for Tract 3.¹⁸ Again, there is no guarantee that such a

¹⁶ WNL Br. at 19.

¹⁷ *Motion to Reconsider* at 8, ¶ 10, and *Exh. G* thereto, in App. at 110 and 138.

¹⁸ *Debtor's Reply to the Response to Motion to Reconsider* at ¶ 20, in App. at

scenario would have played out. The possibility of such a result, however, means the bankruptcy court's decision was not harmless error.

C. The Motion to Reconsider and Standing

The Debtor also asserts that its motion for reconsideration should have been granted on the basis of "newly discovered evidence," and that Duane Koster's participation in the rehearing proceedings should have been precluded by Federal Rule of Bankruptcy Procedure 9014. Given our reversal on the bankruptcy court's initial ruling on the motion to interpret, the Debtor's other issues are moot and we decline to address them. *Kaw Nation v. Springer*, 341 F.3d 1186, 1187 (10th Cir. 2003) (court will not undertake to decide issues that do not affect the outcome of a dispute).

V. Conclusion

For the reasons stated above, the bankruptcy court's ruling on the Debtor's motion to interpret is reversed and this case is remanded for further proceedings in accordance with this Order and Judgment.

¹⁸ (...continued)
191.

THURMAN, Bankruptcy Judge, dissenting.

The majority makes a strong and persuasive argument for its position. However, this dissent concludes that the phrase “one at a time” does not go as far as the majority allows. While agreeing that the phrase is not ambiguous, the majority interprets the provision to require that WNL “initiate and complete the sale process for each tract of land separately.” I respectfully disagree. Nothing in the written Agreement precludes “stacked sales,” nor does the allowance of such sales “negate the purpose of the contract.” On the contrary, the parties’ Agreement expressly grants WNL absolute ownership of all three tracts, and allows it to sell them in the event Debtor failed to make full payment by July 15. It also provides that time is of the essence and that “WNL is not required to and will not agree to” extension of the payment deadline. As such, once the payment deadline passed without full payment, WNL had the right to sell as many tracts as were necessary for it to recover its entire \$240,000 so long as it sold the properties “one at a time,” in a specified order, at auction, and for cash. Thus, Debtor’s principal, Mr. Friesen, acknowledged in his testimony that Debtor’s payment right expired on July 15 and that Debtor’s only contractual recourse after that time would be to purchase property at the auction.¹ Significantly, nothing about holding the sales of Tracts 2 and 3 on the same day prevented Debtor from bidding at the auction. In fact, it is only from Debtor’s proffered extrinsic evidence that we learn that additional time *might* have allowed Debtor to obtain adequate funding to purchase Tract 3 at the auction, and even that assumes that Debtor could have either outbid Mr. Koster or worked out a separate deal with him. What Debtor’s extrinsic evidence also shows is that the real problem with the timing of the sales was that Debtor did not really even attempt to obtain funding for the purchase of Tract 3 until it learned that WNL intended to sell both

¹ Tr. at 64, ll. 11-20, in WNL App. at 148.

tracts on October 31. However, Debtor's insufficient funding to purchase Tract 3 on October 31 was not because both tracts were sold on that day, but simply because it had failed to obtain funding sooner. In any event, WNL could have sold each of the tracts on separate days long before October 31, and Debtor would have had neither sufficient funds nor any contractual objection to the sales.

The parties' Agreement also contains a "merger clause," which specifically provides that the written document constitutes the "entire expression of the agreement of the parties," and may not be varied or contradicted by extrinsic evidence. Absent consideration of Debtor's extrinsic evidence, the two final property sales fully complied with the facially unambiguous terms of the Agreement. Extrinsic evidence is not properly used to create ambiguity in a document that is clear on its face, nor may new rights be created by "interpretation" of an unambiguous provision. The policy of enforcing agreements as written is particularly applicable to those that are executed in the course of a bankruptcy proceeding, which are both noticed out to creditors and approved by the bankruptcy court. Such agreements, upon which creditors are expected to and do rely, should only be altered by the courts in exceptional circumstances. I do not believe that such circumstances exist in this case.

The majority is persuaded that the disputed contract term prevents "stacked sales" which, though separate, take place one immediately after the other on the same day. The only suggestion that such sales were not allowed is contained in a cryptic and itself ambiguous discussion of the basic terms of the parties' Agreement *before* it was put into writing and approved by the court. After the fact use of evidence to alter the terms of the parties' Agreement is precisely the result that a merger clause seeks to avoid. Debtor and its counsel participated in the drafting of the Agreement and had ample opportunity to negotiate specific terms such as time between sales, but failed to do so. In fact, Mr. Friesen even acknowledged that the Agreement's failure to specify a reason for, or an amount

of time between, sales resulted from his own carelessness. Thus, as I see it, an argument could be made that it is the merger clause that is rendered meaningless, not “one at a time.”

The majority’s interpretation of an unambiguous contract term requiring “one at a time” sales as requiring not only separate sales, but separate sales on separate days, and separate and non-overlapping *advertising* of such sales suggests to me that “one at a time” should not be extended past what is written. Because I agree with the bankruptcy court that WNL’s one at a time sales on the same day fully complied with the unambiguous requirement of the parties’ Agreement that sales be “one at a time,” I would affirm.