FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 7, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ROY A. LOTSPEICH, also known as R. A. Lotspeich, Debtor.	BAP No. WO-08-016
FIRST STATE OPERATING COMPANY, Appellant, v. L. WIN HOLBROOK, Trustee, ROY A. LOTSPEICH, FARM SERVICE AGENCY, BANK OF LAVERNE, and WOLF CREEK ENTERPRISES, INC., Appellees.	Bankr. No. 02-22227 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before NUGENT, McNIFF, and THURMAN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Appellant First State Operating Company ("FSOC") appeals the bankruptcy court's September 28, 2006 Order ("Good Faith Order"), challenging the determination that Wolf Creek Enterprises, Inc. ("Wolf Creek"), was a good faith

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

purchaser under 11 U.S.C. § 363(m).[1] For the following reasons, we AFFIRM.

I. Background

This appeal is the second appellate challenge by FSOC to a § 363(b) sale of real property to Wolf Creek, a third party. Detailed facts regarding Debtor, his bankruptcy case, and the subject sale were set forth in *In re Lotspeich*,[2] and will not be repeated here except as relevant to our analysis.

Debtor filed for Chapter 11 relief on December 5, 2002. Approximately one year later, the bankruptcy court appointed the Appellee L. Win Holbrook Chapter 11 Trustee. Incident to his proposed plan of reorganization, on August 25, 2004, the Trustee filed a motion to sell certain agricultural real estate to Wolf Creek. The Farm Service Agency ("FSA") held a secured claim in the bankruptcy case in the amount of $926,205.65 that was secured by a mortgage lien on some of the property. The sale as noticed was subject to the following terms: (1) the property was to be sold to Wolf Creek for $738,761.61, with the sales proceeds paid to FSA; (2) Lotspeich Group, LLC, a third party, was to contribute $70,000 toward the purchase of the FSA collateral, (3) $50,000 of $70,000 would be paid to FSA, and (4) the remaining $20,000 was to be retained by the Trustee to pay for administrative costs.[3] The sale notice did not contain any disclosure or description of these additional terms or understandings between and among FSA, Lotspeich, and the Trustee: (1) Lotspeich would be permitted to remain on the property as a caretaker for Wolf Creek while Wolf Creek marketed the property; and (2) Wolf Creek would be permitted to use water from a source on adjacent

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[1] Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

[2] *In re Lotspeich*, 328 B.R. 209 (10th Cir. BAP 2005) ("*Lotspeich I*").

[3] *See* Trustee's Chapter 11 Plan of Reorganization, Docket No. 165, and Trustee's Motion to Sell Real Estate Listed on Exhibit A Free and Clear of Liens, Docket No. 170, *In re Lotspeich*, Bankr. No. 02-22227 (W.D. Okla.).

ground owned by Lotspeich. The Trustee and Wolf Creek did not conclude a written contract of sale, relying instead on the terms of the sale notice and the plan.

FSOC objected to the proposed sale and confirmation of the Trustee's plan. On September 22, 2004, the bankruptcy court held an evidentiary hearing on confirmation of the Trustee's plan and the motion to sell. On September 28, 2004, the bankruptcy court entered a written order memorializing his bench order granting the motion to sell ("Sale Order") and confirming the Trustee's plan ("Confirmation Order").

FSOC appealed both orders to the bankruptcy appellate panel ("BAP") and sought a stay from the bankruptcy court pending appeal. On October 26, 2004, the bankruptcy court denied FSOC's request for stay, and the sale was closed during the pendency of the first appeal. It does not appear that FSOC sought a stay from the BAP. On July 25, 2005, the BAP reversed both the Sale Order and the Confirmation Order and remanded the matter for further proceedings.[4] The panel reversed the Confirmation Order, holding that because the plan allowed Debtor to retain equitable ownership interests in certain real estate and minerals without paying the unsecured creditors in full, it violated the "absolute priority rule" of § 1129(b)(2)(B)(ii) and confirmation should have been denied. The panel reversed and remanded the Sale Order on the procedural ground that the bankruptcy court had failed to make findings of fact as to whether Wolf Creek was a good faith purchaser under § 363(m). The *Lotspeich I* panel concluded its opinion as follows:

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[4] *Lotspeich I*, 328 B.R. 209.

> We REVERSE and REMAND with respect to the Sale Order for the limited purpose of determining whether the purchaser of the Harper Property was a good faith purchaser within the provisions of § 363(m) as defined herein. With respect to the Confirmation Order we REVERSE and REMAND for proceedings consistent with this opinion.[5]

The BAP issued its mandate on August 5, 2006. Both Debtor and the Trustee appealed *Lotspeich I* to the Tenth Circuit Court of Appeals, which dismissed their appeals on February 13, 2006, on the ground that the BAP's decision was not a final order and therefore not appealable.[6]

On remand, the Trustee filed a motion for additional findings concerning the sale and the bankruptcy court held an evidentiary hearing in which it focused on the issue of good faith. After hearing evidence and argument, the bankruptcy court made specific findings that Wolf Creek had purchased the property in good faith. This order was entered on September 28, 2006 ("Good Faith Order"). FSOC timely appealed the Good Faith Order on October 10, and the appeal was docketed in this Court as BAP Appeal No. WO-06-104. The Trustee timely filed an election to have the appeal heard by the United States District Court for the Western District of Oklahoma, pursuant to 28 U.S.C. § 158(c) and Federal Rule of Bankruptcy Procedure 8001(c), and the case was transferred by the BAP to that court. On January 24, 2008, the district court entered an order transferring the appeal to this Court, finding that by limiting the scope of the remand, the *Lotspeich I* panel implicitly retained jurisdiction of the appeal.[7]

In this appeal, FSOC argues the bankruptcy court erred in its determination that Wolf Creek was a good faith purchaser under § 363(m). FSOC attacks the credibility of the sale, claiming that Wolf Creek was not a good faith purchaser

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[5] *Id.* at 221.

[6] *In re Lotspeich*, Nos. 05-6284 and 05-6285 (10th Cir. February 13, 2006).

[7] *See In re W. Pointe Ltd. P'ship*, 215 B.R. 865 (8th Cir. BAP 1998) and *Weihs v. Kenkel (In re Weihs)*, 229 B.R. 187 (8th Cir. BAP 1999).

because: (1) the sale notice omitted any disclosure of Lotspeich's right to use the property post-sale and the buyers's water usage rights; (2) the sale conferred unfair, "insider perks" on Lotspeich and his wife (*i.e.*, they were allowed to stay on the property rent-free); and (3) the sale violated the bankruptcy code and the absolute priority rule to the extent a portion of the sale proceeds paid to the FSA ($50,000) was made by the Lotspeich Group, LLC, an alleged insider, and not Wolf Creek. FSOC seeks to invalidate the sale and asks that we require FSA to return $50,000 to the bankruptcy estate. After oral argument and careful review of the record before us, we AFFIRM.

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 Trustee filed a valid election in this case, but the district court held that the *Lotspeich I* panel retained jurisdiction of the case. Thus, we are presented the constitutionally troubling question of whether the district court's "transfer" of this case to us vests us with jurisdiction or whether this Court retained jurisdiction in the prior panel's *Lotspeich I* remand order.

We find no statutory basis for a district court to "transfer" an appeal to the BAP when a party has made a valid election under § 158 which we understand to be the sole source of our jurisdiction in any case. This leaves only the possibility that the prior panel retained BAP jurisdiction when it remanded for limited findings.

The Bankruptcy Appellate Panel of the Eighth Circuit has twice considered this issue. In *In re West Pointe Partnership*, the aggrieved parties appealed a

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[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.

bankruptcy court decision confirming a Chapter 11 plan to the BAP, but one party elected district court review. On appeal, the district court remanded the case to the bankruptcy court for further findings pertaining to asset value. After the bankruptcy court issued a further order, the parties appealed to the BAP, neither side electing district court review. The BAP dismissed its appeal, concluding that the district court had expressly retained jurisdiction of the case while remanding to the bankruptcy court for specific fact-finding.[9]

In *In re Weihs*, the district court remanded a § 523(A)(15) dischargeability determination to the bankruptcy court for an additional determination that the debtor lacked the ability to repay his marital debt. On subsequent appeal to the BAP, that court concluded that the district court had implicitly retained jurisdiction of the case while returning the matter to the bankruptcy court for "further factual development and other significant judicial activity involving the exercise of considerable discretion."[10]

In this case, the previous bankruptcy appellate panel remanded for the very limited purpose of having the bankruptcy court make findings concerning the good faith aspects of the sale under § 363(m).[11] We read the former panel's limitation on remand to be an implicit retention of its jurisdiction. So did the district court. Thus, while we are sensitive to a party's absolute right to district court review upon a valid election under § 158, we consider that this Court retained jurisdiction of the good faith issue and that this panel has jurisdiction of

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[9] 215 B.R. 865 at 866-67.

[10] 229 B.R. at 189. It should be noted that at the time of the district court's initial remand in *Weihs* the Eighth Circuit BAP had yet to be formed, resulting in its observation that "the district court could fairly assume that, if there was another appeal, it would come back to the district court."

[11] *See Lotspeich I*, 328 B.R. at 221.

this appeal.[12]

III. Standard of Review

We review a bankruptcy court's determination of good faith under § 363(m) for clear error.[13]

IV. Discussion

We must initially consider whether this appeal is moot. Section 363(m) provides that:

> 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.[14]

This provision plainly requires that a stay must be obtained and that the court conclude the good faith factors have been met. Here, no stay was obtained. The sale was closed. Indeed, the proof at trial in the bankruptcy court suggests that Wolf Creek has sold some of this property to third parties. Where a sale order is in question, if the aggrieved party fails to obtain a stay pending appeal, the good faith issue is lost.[15] FSOC failed to secure a stay pending appeal in the bankruptcy court and does not appear to have even sought that relief before this tribunal. Therefore, the relief available under § 363(m) is lost and this appeal is moot.

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[12] Future panels remanding cases for limited purposes may wish to make specific their intentions regarding retaining jurisdiction.

[13] *In re Bel Air Assocs., Ltd.*, 706 F.2d 301, 305 (10th Cir. 1983); *In re Crowder*, 314 B.R. 445, 450 (10th Cir. BAP 2004). *But see In re Made in Detroit, Inc.*, 414 F.3d 576, 580 (6th Cir. 2005) (the good-faith purchaser determination is a mixed question of law and fact).

[14] 11 U.S.C. § 363(m).

[15] *In re Telluride Income Growth LP*, 364 B.R. 407, 412-13 (10th Cir. BAP 2007) (effect of § 363(m) is that failure to seek a stay of an order approving a sale of assets renders any appeal of the sale order moot).

Even were we to reach the merits, we cannot say that the bankruptcy court committed clear error in finding that Wolf Creek was a good faith purchaser for value. There is more than sufficient evidence in the record to support the bankruptcy court's conclusion in that regard. It is abundantly clear that the sale was "for value." Wolf Creek paid approximately 87.6% of the appraised value of the property. This is well in excess of the 75% threshold for good faith outlined by the Tenth Circuit in the *Bel Air* case.[16]

Regarding good faith, the arrangement between Lotspeich and the FSA concerning Wolf Creek's future use of water from Lotspeich's adjoining tract can only have increased the sale value of the property and simply was not shown to be collusive or fraudulent. Wolf Creek's agreement with Lotspeich to allow him to remain on the property rent-free appears to have been struck after the sale was negotiated and relates to Wolf Creek's intended use of the property post-sale. This arrangement cannot be said to affect property of the estate or any contemplated distribution and therefore does not adversely reflect on the good faith of the transaction.

The Lotspeich Group LLC's $70,000 payment to the Trustee appears to have been for the purpose of clearing an FSA lien on the property that was sold. The fact that the FSA and the Trustee agreed that $20,000 of that amount would remain in the estate for administrative allowances and unsecured creditors does not render the whole transaction suspect, especially since it was disclosed in the Notice. We fail to see how this arrangement can amount to fraud or collusion between the Trustee and bidders when it was disclosed and no other creditor objected. There is simply no evidence to support FSOC's complaint that this arrangement permeates the sale with bad faith. There is no showing in the record that Wolf Creek or the Trustee attempted to take "grossly unfair advantage" by

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[16] *See Bel Air Assoc.*, 706 F.2d 301, 305 n.12 (10th Cir. 1983).

agreeing to this term. The manner in which the $20,000 is distributed by the Trustee can be resolved without upsetting the sale or clouding Wolf Creek's title or that of its vendees.

We cannot say with definite and firm conviction that the bankruptcy court erred. Indeed, the Good Faith Order is amply supported by the evidence.

V. Conclusion

For the foregoing reasons, the Good Faith Order is AFFIRMED.[17]

[17] Further, Appellant's Construed Motion to File Statements Out of Time, referred to this Court on March 5, 2008, is HEREBY GRANTED.