FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
July 6, 2011
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JONATHON W. KASPAREK, also known as J.W. Kasparek, and MANDY K. KASPAREK, formerly known as Mandy K. Hawn, Debtors.	BAP No. KS-10-075
J. MICHAEL MORRIS, Trustee, Plaintiff – Appellee, v. WAYNE A. KASPAREK, Defendant – Appellant, and JAMES KASPAREK and JONATHON W. KASPAREK, Defendants.	Bankr. No. 07-13019 Adv. No. 08-05085 Chapter 7 OPINION*

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

Before BROWN, THURMAN, and ROMERO, Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

This appeal marks the second time these parties have been before this

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

Court.[1] In the first appeal, *Morris v. Kasparek (In re Kasparek)*, 426 B.R. 332 (10th Cir. BAP 2010) ("*Kasparek I*"), another panel of this Court reversed the bankruptcy court's order denying the Trustee's request to sell real property held in joint tenancy by Debtor Jonathon Kasparek ("Debtor" or "Jonathon"), his brother James Kasparek ("James"), and his father, Wayne A. Kasparek ("Wayne"), holding the Trustee qualified as a bona fide purchaser under Kansas law and, therefore, held the Debtor's interest in the property free of Wayne's equitable interest. However, because the bankruptcy court concluded the estate did not have an interest in the property, it did not address the issue of whether the property could be sold under 11 U.S.C. § 363(h),[2] thus the matter was remanded to the bankruptcy court to make the requisite § 363(h) findings. Upon remand, the bankruptcy court issued its Order Resolving Adversary Action (the "Remand Order"), implicitly adopting this Court's rulings regarding ownership and specifically making the § 363(h) findings.[3] Wayne now appeals the Remand Order. We conclude the doctrine of law of the case bars consideration of the merits of this appeal and AFFIRM.

---

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[2] All future references to "Section" or "§" refer to Title 11 of the United States Code unless otherwise noted.

[3] *Remand Order*, *in* Second Amended Appendix of Appellant Wayne A. Kasparek ("App.") at 57-59. Wayne filed his original appendix on April 15, 2011, which was deficient in various aspects. In response to a notice of deficiency, Wayne filed an Amended Appendix on April 22, 2011 and a Second Amended Appendix on April 22, 2011. On April 28, 2011, an Order Referring [the Second Amended Appendix] to [the] Merits Panel was entered, noting that Wayne's Second Amended Appendix did not comply with 10th Circuit BAP Local Rule 8009-3(e). That rule requires the bankruptcy court docket sheet be the first document in the appendix. Notwithstanding Wayne's non-compliance with the local rule, we nevertheless considered all documents in the Seconded Amended Appendix in our review.

I. Appellate Jurisdiction and Standard of Review

We have jurisdiction over this appeal. Wayne timely filed his notice of appeal from the bankruptcy court's final order, and the parties have not elected to have the appeal heard by the United States District Court for the District of Kansas.[4]

This appeal involves this Court's statutory construction and its application of bankruptcy law and Kansas law to the undisputed facts, which presents questions of law we review *de novo*.[5] Whether the law of the case doctrine applies is reviewed under the abuse of discretion standard.[6]

II. Facts

The facts pertinent to this appeal were set out in *Kasparek I*.

In 2005, Wayne purchased approximately 80 acres of farmland in Kansas (the "Property") for $72,000. Wayne paid the entire purchase price for the Property. At Wayne's direction, the seller of the Property executed a warranty deed to Wayne and his two sons, Jonathon and James, as joint tenants with right of survivorship, not as tenants in common. Wayne placed his sons on the deed for the purpose of passing title in the event of his death.

Since 2005, the Property has been leased to an unrelated tenant on a crop-share basis. Wayne receives all income from the landlord's share, and pays all of the landlord's share of expenses. Jonathon and James must obtain their father's

---

[4] 28 U.S.C. § 158(b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a).

[5] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (questions of law reviewed *de novo*); *Manchester v. Annis (In re Annis)*, 232 F.3d 749, 751 (10th Cir. 2000) (interpretation of statute reviewed *de novo*); *In re Kwiecinski*, 245 B.R. 672, 675 (10th Cir. BAP 2000) (application of state law to undisputed facts presents question reviewed *de novo*).

[6] *In re Buckner*, 218 B.R. 137, 141-42 (10th Cir. BAP 1998). *But see Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 121 F.3d 1027, 1031 (7th Cir. 1997) (whether law of case doctrine applies is question of law that a court of appeals reviews *de novo*).

permission before entering the land to go hunting.

On December 12, 2007, Jonathon and his wife filed Chapter 7 bankruptcy. In their schedules, they disclosed Jonathon's one-third fee simple interest in the Property and valued it at $63,760. On April 3, 2008, the Trustee filed a Complaint to Sell Jointly Owned Property, naming Jonathon, Wayne and James as defendants and alleging all elements of § 363(h) were met. Wayne answered that the Property was entirely owned by him and is not an asset of Jonathon's estate.

On July 29, 2009, after a trial on the merits, the bankruptcy court denied the Trustee's request to sell the Property under § 363(h) (the "Order"), finding (1) the estate did not have an interest in the Property for purposes of a sale under § 363(h); (2) the estate's interest is limited to Jonathon's bare legal title; (3) the strong arm powers of § 544(a)(3) are limited to recovery of transfers made by a debtor and do not include recovery of an equitable interest in real property held by a debtor's joint tenant; and (4) the Trustee was not a bona fide purchaser ("BFP") as he had notice of Wayne's equitable interest in the Property. The Trustee appealed the Order to this Court.

In *Kasparek I*, this Court held: (1) § 544(a)(3) granted the Trustee all the rights and powers of a BFP as against Wayne's implied trust claim under Kansas law; (2) the Trustee's interest could not be defeated by an unrecorded implied trust unless he had notice of the trust; (3) the Trustee had no constructive or implied notice that Jonathon held his interest in trust for his father; and (4) the Trustee qualified as a BFP and held Jonathon's interest in the Property free of Wayne's equitable interest. Wayne appealed *Kasparek I* to the Tenth Circuit, but that court dismissed the appeal as interlocutory.

On remand, the parties agreed (1) the partition in kind of the Property among the estate and the co-owners was impracticable; (2) sale of the estate's undivided interest in the Property would realize significantly less for the estate than the sale of the Property free and clear of the interest of the co-owners; (3)

the benefit to the estate of a sale of the Property free of the interests of the co-owners outweighs the detriment, if any, to the co-owners; and (4) the Property is not used in the production, transmission, or distribution, for sale of electric energy or of natural or synthetic gas for heat, light or power.[7] "Pursuant to the BAP's remand, and agreement of the parties," the bankruptcy court made the requisite § 363(h) findings and authorized the Trustee to sell the jointly owned property.[8] Wayne appeals the Remand Order, alternately arguing the bankruptcy court or this Court erred in holding (1) the Trustee qualified as a bona fide purchaser of real estate under § 544(a)(3) and had no inquiry notice of Wayne's 100% equitable ownership in the Property and (2) the Trustee's avoidance powers under § 544(a)(3) are not limited to transfers made by a debtor. Wayne claims the bankruptcy court's initial conclusion that the minority view, which posits § 544(a)(3) is limited to transfers made by a debtor, is the better and correct view.

III. Discussion

Before reaching the merits of Wayne's claims of error, we must decide whether to bar them under the law of the case doctrine. In *Greene v. Safeway Stores, Inc.*,[9] the Tenth Circuit succinctly explained this doctrine:

> "The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998) (quoting *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983))). "Accordingly, 'when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.'" *Id.* (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995)). "This doctrine is 'based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of

---

7 *Remand Order* at 2-3, ¶6, *in* App. at 58-59.

8 *Id.* at 2-3, ¶¶ 6 and 7, *in* App. at 58-59.

9 210 F.3d 1237 (10th Cir. 2000).

> disputes by preventing continued re-argument of issues already decided.'" *Id.* (quoting *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (citations omitted)). The rule "also serves the purposes of discouraging panel shopping at the court of appeals level." *Monsisvais*, 946 F.2d at 116.[10]

The Tenth Circuit recognizes three narrow grounds to depart from this rule: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice.[11]

Kasparek I constitutes the law of the case with respect to the issues raised by Wayne. On remand, the bankruptcy court implicitly adopted this Court's rulings on the scope of a trustee's avoidance power under § 544(a)(3) and the scope of Kansas' constructive notice statutes. Thus, it applied the law of the case in issuing the Remand Order. We must do so as well.[12]

Wayne does not contend any of the three circumstances that might justify departing from the law of the case exist in this case, and it is clear that none do. The "different or new evidence" exception does not apply because no evidence was produced on remand. The parties agreed to the § 363(h) findings.[13] Wayne cites no subsequent controlling, contrary decision and this Court has found none. Neither has Wayne argued the decision in *Kasparek I* is manifestly unjust. If the decision of *Kasparek I* is to be altered or reversed, that is a matter left to the

---

[10] *Id.* at. 1241.

[11] *Id.* citing *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1988).

[12] This Court has previously recognized the applicability of the law of the case doctrine to appeals before it. *In re Blagg*, 271 B.R. 213, 2001 WL 725993, at *6-8 (10th Cir. BAP June 28, 2001), *aff'd*, 43 F. App'x 266 (10th Cir. 2002); *In re Buckner*, 218 B.R. 137, 142-43 (10th Cir. BAP 1998).

[13] *Remand Order* at 2-3, ¶6, *in* App. at 58-59.

Court of Appeals.[14]

IV. Conclusion

Wayne essentially urges this Court reverse itself and adopt the bankruptcy court's initial Order. We decline to do so. We conclude the law of the case doctrine bars consideration of the merits of this appeal and AFFIRM.

[14] We note Wayne attempted to appeal the Remand Order directly to the Tenth Circuit. He, however, failed to complete the process and neglected to file a timely petition with the Tenth Circuit under Fed. R. Bankr. P. 8001(f)(5).