NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WILLIAM MICHAEL LAUFENBERG, formerly doing business as Laufenberg Brothers, doing business as Laufenberg Hay Service, and JOLYNN KAY LAUFENBERG, Debtors.	BAP No. KS-04-053
LUELLA LAUFENBERG, LINDA GUMPENBERGER, and ART GUMPENBERGER, Appellants, v. WILLIAM MICHAEL LAUFENBERG, JOLYNN KAY LAUFENBERG, METROPOLITAN LIFE INSURANCE COMPANY, and EDWARD J. NAZAR, Trustee, Appellees.	Bankr. No. 03-12989-12 Chapter 12 ORDER AND JUDGMENT*

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

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

This is the story of a family farming operation. Originally, the operation involved two brothers, a sister, their mother, and the siblings' spouses. As the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

operation failed, disputes arose, followed by litigation, first in state court, and then in the bankruptcy court. Although the path to this court was a long and hard fought one, and the facts somewhat complex, the issues are quite simple. We are asked to determine whether the bankruptcy court abused its discretion when it granted relief from the automatic stay with the consent of the debtors. We are also asked to find that the bankruptcy court made a mistake when it failed to create an equitable remedy to the satisfaction of one group of squabbling siblings. Finding no error on either count, we affirm.

I. Background

The focal point of our dispute is family-owned real property located in Kansas. The property is described as consisting of six separate tracts, totaling 1,120 acres. The following persons have had or currently hold an interest of some sort in at least one of the tracts of land:

1. William Laufenberg ("William") and JoLynn Laufenberg, the debtors herein (collectively referred to as the "Debtors");
2. James Alan Laufenberg ("James") and Deborah Lynn Laufenberg (together, the "Laufenbergs"), William's brother and his spouse;
3. Linda Gumpenberger ("Linda") and Art Gumpenberger ("Art") (together, the "Gumpenbergers"), William's sister and her spouse; and
4. Luella Laufenberg ("Luella"), the mother of William, James and Linda.

In 1986, the Debtors and the Laufenbergs entered into a Partnership Agreement to farm some or all of the land. The partnership did business as "Laufenberg Brothers." Laufenberg Brothers farmed tracts of land owned by the brothers. In addition, the farming operation leased additional land from Luella (the "Lease").

On May 9, 1995, in the course of their farming operation, the Debtors and the Laufenbergs borrowed $340,000 from Metropolitan Life Insurance Company

("Metropolitan"). On that date, they executed a First Mortgage Note in favor of Metropolitan, requiring annual principal payments of $12,000, and interest payments semi-annually. On September 1, 2014, the Debtors and the Laufenbergs were jointly and severally obligated to pay Metropolitan the remaining principal balance of $112,000. Neither Luella nor the Gumpenbergers have any personal liability under this promissory note.

The Note was secured by a mortgage (the "Mortgage"), also dated May 9, 1995. The Mortgage was executed by the Debtors, the Laufenbergs, Luella, and the Gumpenbergers, and properly recorded by Metropolitan. The Mortgage encumbered tracts of the land owned by the Debtors and the Laufenbergs, including the Debtors' homestead. In addition, the Mortgage encumbered two other tracts of land: one tract, consisting of 80 acres owned by Luella; and a second consisting of 160 acres in which Luella has a life estate and the Gumpenbergers have a remainder interest. For ease of identification, we will refer to this property as the "L & G Property."

Apparently, either the farming operation or the relations between the parties (or both) fell upon hard times. In July 1999, William filed an action against James in state court, and James asserted several counterclaims.[1] In early 2000, Luella filed a lawsuit against William in state court related to a sale of two tracts of property to William. Shortly thereafter, in April of 2000, the Laufenbergs filed a Chapter 7 petition. The Laufenbergs received a Chapter 7 discharge, relieving them from any personal liability to Metropolitan.

The Debtors did not make the payments due to Metropolitan on September 1, 2002, and March 1, 2003. After notice to the Debtors, Metropolitan

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[1] The parties to this appeal have created a detailed record regarding the nature and extent of their litigation in the state courts. A recital of the same is not necessary to an understanding of our decision, and is not included in this order and judgment.

accelerated the Note. On March 12, 2003, Metropolitan commenced a foreclosure proceeding seeking to foreclose its interests in all of the real estate pledged to it by the Debtors, the Laufenbergs, Luella, and the Gumpenbergers. That foreclosure action remains pending.

On June 5, 2003, the Debtors filed a Chapter 12 petition. On that date the Debtors owed Metropolitan a total of $308,616.10, plus fees and costs. The unpaid amount continues to bear interest at the default rate of 16%. On July 3, 2003, Metropolitan filed a Motion for Relief From Stay, seeking, in relevant part, the following: (1) relief from stay as to the Debtors for "cause" under § 362(d)(1); and (2) a declaration that the codebtor stay in § 1201 did not apply to Luella and the Gumpenbergers (the "Relief Motion"). Both the Debtors and Luella and the Gumpenbergers responded to the Relief Motion. Luella and the Gumpenbergers admitted in their response that they were not entitled to the protection of a codebtor stay. They argued, however, that the L & G Property was property of the Debtors' estate because of William's interest in said property under the Lease and, therefore, any action against the L & G Property was stayed under § 362.

While the Relief Motion was pending, the Debtors filed a Chapter 12 plan (the "Plan"). Metropolitan was to paid in full under the Plan, but for a longer term at a reduced interest rate. Metropolitan objected to confirmation of the plan, stating that, as an oversecured creditor, it was entitled to be paid under the terms of its Note. Luella and the Gumpenbergers filed a limited objection to confirmation of the plan, stating that they did not object to the Plan on condition that the L & G Property was not affected.

Hearings on the Relief Motion and plan confirmation were continued for almost one year. The Debtors stipulated that they made no plan payments during this time, and admitted that they could not reorganize if forced to pay Metropolitan under the original terms of the Note. While the Relief Motion was

pending, the Debtors filed an Amended Chapter 12 Plan (the "Amended Plan"). Under the Amended Plan, the Debtors proposed to sell the land owned by Luella and the Gumpenbergers, and to waive any objections to the Relief Motion with respect to that property. All of the sale proceeds therefrom would be used to partially pay the Debtors' obligation to Metropolitan under the Note. After application of the sale proceeds, which they estimated would be approximately $104,000, the Debtors would still owe Metropolitan approximately $197,000, plus interest. They proposed to pay this sum over a thirty year period at 7.75% interest, and a balloon payment. The Debtors did not propose to sell any of their land. Put simply, under the Amended Plan, Debtors would keep their land, and Luella and the Gumpenbergers would lose theirs.

Luella and the Gumpenbergers and other parties in interest objected to the Amended Plan. Ultimately, the Debtors were able to resolve all objections, except for those lodged by Luella and the Gumpenbergers. The ability of the Debtors to confirm the Amended Plan was contingent upon whether the L & G Property could be sold to reduce the Debtors' obligations to Metropolitan. This required the bankruptcy court to rule upon the Relief Motion.

In April of 2004, the Debtors, Metropolitan, Luella and the Gumpenbergers, and the Chapter 12 Trustee filed "Stipulations of Fact" containing the facts to be used by the bankruptcy court in determining the Relief Motion (the "Stipulation"). The Stipulation states, in relevant part, that:

> Debtors hereby waive and agree to the termination of its leasehold interest in tracts (a) and (f) [the L & G Property] after the final crop harvest in calendar 2004 and William M Laufenberg hereby waives any first right of refusal as to Tract (f). Pursuant to § 365, [Luella and the Gumpenbergers] object to the Debtors rejecting in part above rather than accepting or rejecting in file.[2]

Furthermore, the parties stipulated that Metropolitan was oversecured "based on

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[2] Stipulation ¶ 24, Appellants' Appendix at 216.

the Debtors' appraisal" and would be oversecured even after the sale of the L & G Property.[3] The Debtors expressly consented to relief from the automatic stay with respect to the L & G Property.[4]

In opposition to the Relief Motion, Luella and the Gumpenbergers filed a brief, arguing that they were entitled to the application of the equitable doctrine of marshaling. Luella and the Gumpenbergers argued that they were in effect innocent third parties who stood to lose their land in order to facilitate the reorganization of the Debtors. At the close of briefing, the bankruptcy court held a hearing on the Relief Motion at which oral arguments were presented. Using the facts in the Stipulation, the bankruptcy court entered its "Order Granting Stay Relief to Creditor Metropolitan Life Insurance Company," allowing Metropolitan to proceed in state court against the L & G Property. The court held that the automatic stay did not apply to the L & G Property, and that they were not entitled to impose the equitable remedy of marshaling upon Metropolitan.

Luella and the Gumpenbergers timely filed a Notice of Appeal from the Lift Stay Order, and requested a stay pending appeal. The bankruptcy court denied the motion for stay pending appeal in part. It allowed Metropolitan to proceed with its sale of the L & G Property, but stated that the sale would be set aside if the Lift Stay Order were reversed on appeal. It also established a redemption period in the event that the order granting relief to Metropolitan was affirmed. Finally, the court continued confirmation of the Amended Plan pending appeal, but required the Debtors to make payments required under the Amended Plan.

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[3] *Id.* ¶ 25, Appellant's Appendix at 217.

[4] *See* Relief Order at 6, Appellants' Appendix at 310 (Acknowledging that the lease of the property owned by Luella and the Gumpenbergers was property of the estate, the court stated: "But the debtors have now agreed to relief from the automatic stay as to these tracts. The debtors apparently believe that they do not have an equity in the tracks and their lease rights in the tracts are not necessary to an effective reorganization, so Met Life is entitled to stay relief . . . .").

Since this appeal was filed, the L & G Property has been sold.[5] The sale generated proceeds of approximately $169,000, some $60,000 more than anticipated by the Debtors. That money is being held by Metropolitan pending the outcome of this appeal.

II. Appellate Jurisdiction

The order of the bankruptcy court was timely appealed.[6] The parties have not elected to have the appeal heard by the United States District Court for the District of Kansas.[7] Accordingly, the appeal is properly before this court.

An appeal may be properly brought from a final order of a bankruptcy court.[8] 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.'"[9] In this case, the order of the bankruptcy court fully resolved the Relief Motion. Nothing remains for the trial court's consideration. Thus, the decision of the bankruptcy court is final for purposes of appeal. We thus conclude that the Bankruptcy Appellate Panel has jurisdiction over this appeal.

III. Standard of Review

The decision of whether to grant relief from the automatic stay is reviewed

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[5] As announced at oral argument, the Court grants the two pending motions regarding the record on appeal: the Motion to Include Supplementary Item for Record on Appeal filed September 15, 2004, by Metropolitan, and the Motion to Include Supplementary Items for Record on Appeal filed September 13, 2004, by Luella and the Gumpenbergers.

[6] Fed. R. Bankr. P. 8002(a). Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* All other references to federal statutes and rules are also to West 2004 publications.

[7] 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

[8] 28 U.S.C. § 158(a)(1).

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

for an abuse of discretion.[10] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[11] An abuse of discretion occurs when the trial court's decision is "arbitrary, capricious or whimsical" or results in a "manifestly unreasonable judgment."[12]

IV. Discussion

Luella and the Gumpenbergers spent considerable time in their brief and in oral argument arguing matters relating to confirmation of the Amended Plan as well as the nature of Debtors' interests in the L & G Property. The bankruptcy court considered these matters in its memorandum opinion. This Court, however, is not constrained to consider matters relating to confirmation; indeed, those issues are not properly before us. In our eyes, the question is whether the bankruptcy court abused its discretion in granting Metropolitan relief that the Debtors consented to or in failing to fashion a remedy that would have rescued Luella and the Gumpenbergers from the fate dictated by their contractual agreement with Metropolitan: namely, the foreclosure of their land. We answer both questions in the negative.

The automatic stay exists for the protection of the debtor and the bankruptcy estate. It does not provide protection for third parties, such as Luella and the Gumpenbergers. Should a debtor determine that property is not necessary for reorganization, he, she, or it is free to surrender that protection by stipulating

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[10] *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994); *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987).

[11] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

[12] *Id.* at 1504-05 (quoting *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987)).

to relief from the automatic stay. Such an occurrence is commonplace in bankruptcy courts throughout this nation. In this case, all the trial court did was to acknowledge Debtors' rights in this regard, and grant relief according to the Debtors' wishes. We fail to see how such an action can be considered an abuse of discretion. Enough said.

We are equally unconvinced that the bankruptcy court abused its discretion in failing to apply the equitable doctrine of marshaling or in fashioning some other form of equitable remedy to prevent Metropolitan from enforcing its contractual rights. The bankruptcy court stated that the parties agreed that the application of this doctrine was based on the test set forth in *Morris v. Jack B. Muir Irrevocable Trust (In re Muir).*[13] That case states that marshaling is a remedy to be applied if three elements are met: (1) the existence of two creditors with a common debtor; (2) the existence of two funds belonging to the debtor; and (3) the legal right of one creditor to satisfy his demand from either of the funds, while the other may resort to only one fund.[14]

This doctrine has no application to the facts of this case. There are not two creditors with a common debtor. Here there is one debtor (the Debtors) and one creditor (Metropolitan), with Metropolitan having rights against property owned by the Debtors as well as third parties (Luella and the Gumpenbergers). There are not two funds belonging to the Debtors from which a debt can be satisfied. Rather, Metropolitan's claim against the Debtors can be satisfied by either the Debtors' property or the L & G Property.[15] There are *no* competing creditors with interests in the L & G Property. This case in no way involves the typical

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[13] 89 B.R. 157 (Bankr. D. Kan. 1988).

[14] *Id.* at 160–62.

[15] *See, e.g. In re Beach*, 169 B.R. 201 (D. Kan. 1994) (marshaling doctrine could not be invoked because the debtor had no interest in the nondebtor-co-mortgagees' property sought to be marshaled).

marshaling scenario where the court is seeking to "prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security."[16] The bankruptcy court did not err in refusing to apply the doctrine of marshaling to this case.

Luella and the Gumpenbergers admit that marshaling does not apply to the facts of this case as a matter of law.[17] Ceding this point, however, they have not advanced any equitable doctrine to prevent the result in this case, other than to argue that the bankruptcy court, as a court of equity, must do something to prevent this unfair result. This argument is not sufficient, especially given that the Mortgage has no provision requiring Metropolitan to seek payment from the Debtors' property first. We do not dispute the powers of a bankruptcy court as a court of equity. It may well have been possible for the bankruptcy court to fashion some sort of remedy within its equitable powers. That is not the question before us; instead, the question we must decide is whether the bankruptcy court abused its discretion in failing to fashion such a remedy.[18] Were we to agree with the position advanced by Luella and the Gumpenbergers, and order the bankruptcy court to do otherwise, we would be substituting our view of equity for that of the bankruptcy court. Under the standard of review that governs this appeal, such a substitution of judgment would be improper. We are not convinced that the decision of the bankruptcy court was "beyond the bounds of permissible

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[16] *Meyer v. United States*, 375 U.S. 233, 237 (1963); *see Markman v. Russell State Bank*, 358 F.2d 488, 490-91 (10th Cir. 1966).

[17] *See* Appellants' Brief at 10 ("Appellants freely concede that the facts of this case are inconsistent with any traditional marshaling remedy, as the doctrine has evolved over time.").

[18] We need not and do not reach this issue regarding the scope of the equitable powers of the bankruptcy court. We note, however, that if the bankruptcy court had done what Luella and the Gumpenbergers had requested, it would have impinged upon the ability of Debtors to propose a plan and limited their choices relating to the same.

choice" or "arbitrary, capricious or whimsical." Accordingly, we find no error.

V. Conclusion

The decision of the bankruptcy court is affirmed.