FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
February 12, 2004
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE A. DAVID SILVER and JERILYN H. SILVER, Debtors.	BAP No. NM-03-042
YVETTE J. GONZALES, Trustee, and THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, individually and as Assignee of Santa Fe (Jointly Administered) Private Equity Fund II, L.P., Plaintiffs – Appellees, v. UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), Defendant – Appellant.	Bankr. No. 7-96-11879-SS Bankr. No. 7-96-11878-SS (Jointly Administered) Adv. No. 99-1240-S Chapter 7 SUPPLEMENTAL ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, MICHAEL, and BROWN, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

In an Opinion filed in the above-captioned appeal on January 16, 2004,[1] we

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* This Supplemental Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Gonzales v. United States of America (In re Silver), __ B.R. __, 2004 WL 73417 (10th Cir. BAP filed Jan. 16, 2004) [hereinafter the "Opinion"]. In the

(continued...)

retained jurisdiction over a portion of the bankruptcy court's Amended Judgment holding that the IRS's Prepetition Tax Liens were not secured by certain "Art" because the Plaintiffs' Exhibits, relied on by the bankruptcy court in making its Amended Judgment, had not been included in the appellate record.[2] We ordered the IRS to supplement our record to include the Plaintiffs' Exhibits. On January 30, 2004, the IRS filed a "Supplemental Appendix." Based on the contents of the Supplemental Appendix, we REVERSE the portion of the bankruptcy court's Amended Judgment related to the IRS's interest in the Art. Thus, together with and as more fully stated in the Opinion and herein, we REVERSE the Amended Judgment in part and AFFIRM it in part.

The only issue on which we have retained jurisdiction is whether the bankruptcy court erred in determining that the Art did not secure the IRS's claim against the Debtors. The bankruptcy court based this ruling on its finding that the LANB Foreclosure cut off the IRS's junior Prepetition Tax Liens against the Art. We requested the IRS to supplement the record to assist us in determining whether this finding of fact was clearly erroneous.[3]

The IRS's Supplemental Appendix includes, in relevant part, the Plaintiffs' Exhibit List. This List shows that the only Exhibit pertinent to review of the finding of fact at issue is Plaintiffs' Exhibit 5, described in the Exhibit List and in an attached paper as "Bill of Sale or other evidence of conveyance of title for Artwork and Furniture from Los Alamos National Bank to ADS Financial."[4] The "Bill of Sale or other evidence," however, was not included in the Plaintiffs'

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[1] (...continued)
Opinion, we also reversed the Amended Judgment in part, and affirmed it in part.

[2] Unless stated herein, all capitalized words and phrases are defined in the Opinion.

[3] Silver, Slip Op. at 10-13.

[4] Supplemental Appendix at 303 & 318.

Exhibits because the paper designated as Plaintiffs' Exhibit 5 states: "Will be served as soon as it has been received."[5] The record below, as originally provided to us and as now supplemented by the IRS, does not show that such "evidence" was ever filed with the bankruptcy court and served on the parties. Absent this evidence, we are "left with the definite and firm conviction that a mistake has been committed" by the bankruptcy court.[6] The parties agree that but for LANB's purported interest in the Art, the IRS's Prepetition Tax Liens are secured by the Art, and the IRS properly refuted LANB's purported interest in the Art below. The Plaintiffs produced absolutely no evidence that LANB had any interest in the Art prior to the LANB Foreclosure. The bankruptcy court's findings of fact on this point are without any basis in the record and, therefore, the portion of the Amended Judgment related to the Art must be reversed.

In the Opinion we stated that the mandate in this appeal would issue immediately upon the filing of this Supplemental Order and Judgment. However, we will issue the mandate in accordance with our usual rules of procedure so as to allow the Plaintiffs time to file a motion for rehearing from this Supplemental Order and Judgment. Any motion for rehearing must contain (1) proof that the

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[5] Id. at 318. The Exhibit List also reflects the following: (1) Exhibit 1 is described as an "Amended Proof of Claim filed by the IRS"; (2) Exhibit 2 is described as "Transcripts of IRS liens"; and (3) Exhibit 3 is described as "Master Tax Transcript." Id. at 303. None of the described Exhibits are included in the Supplemental Appendix. Rather, as with Exhibit 5, papers were submitted describing each of those Exhibits with notations stating: "self proving exhibit," or "to be provided at trial." Id. at 306, 308 & 310. Thus, as with Exhibit 5, it appears that copies of the described documents were not provided to the bankruptcy court at trial. Such papers, however, appear to overlap with the IRS's Exhibits, and all of the IRS's Exhibits were made part of the appellate record. IRS's Appendix at 1-177. Furthermore, to the extent that these Plaintiffs' Exhibits do not overlap with the IRS's Exhibits, they are not necessary to our decision, because the existence of and perfection of the IRS's Prepetition Tax Liens and the claims asserted by the IRS were not disputed.

[6] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), *cited in* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985), *quoted in* Opinion at n.32.

documents described as Plaintiffs' Exhibit 5 were in fact filed with the bankruptcy court and served on the IRS prior to the bankruptcy court's entry of the Amended Judgment; and (2) copies of any documents that were filed and served as Plaintiffs' Exhibit 5.

Accordingly, for the reasons stated herein and in the Opinion, the portion of the Amended Judgment related to the IRS's interest in the Art is REVERSED. The Amended Judgment is, therefore, REVERSED in part and AFFIRMED in part.