FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
August 3, 2005
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE THERON DANIEL WHITING, doing business as Dan Whiting Construction, and SUSIE GRACE WHITING, Debtors.	BAP No. UT-05-019
THERON DANIEL WHITING and SUSIE GRACE WHITING, Appellants, v. QUESTAR GAS COMPANY, a Utah Corporation, KENNETH BROWN, VAUGHN SHOSTED, LARRY THORSON, and DUANE H. GILLMAN, Trustee, Appellees.	Bankr. No. 03T-27493 Chapter 11 ORDER AND JUDGMENT*

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

Before MICHAEL, NUGENT, and BROWN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

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.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

8012. The case is therefore ordered submitted without oral argument.

Debtors Theron Daniel Whiting and Susie Grace Whiting ("Debtors") appeal an order of the United States Bankruptcy Court for the District of Utah approving a settlement between their bankruptcy trustee, Appellee Duane H. Gillman ("Trustee"), and certain individuals who were connected with Questar Gas Company: Kenneth Brown, Vaughn Shosted, and Larry Thorson ("Individuals"). Finding no abuse of discretion, we AFFIRM.

I. Background

From 1992 to 2000, Debtor Theron Daniel Whiting, doing business as Dan Whiting Construction, performed work installing gas pipelines for Questar, pursuant to contracts Questar awarded Whiting as the successful bidder. In late 2000, Questar accepted bids for a contract beginning in 2001. That contract was awarded to a competitor of Whiting. The Debtors allege that the process under which that contract was awarded violated applicable law.[1]

In 2002, Mr. Whiting filed a lawsuit in Utah State Court, Fourth Judicial District, Utah County, civil case number 020404275, against Questar and the Individuals ("State Court Lawsuit"). The State Court Lawsuit asserted violation of the Unfair Practice Act, Utah Code Ann. § 13-5-2.5; violation of the Utah Antitrust Act, Utah Code Ann. § 76-10-913; conspiracy under Utah Code Ann. § 76-4-201; and violation of the Trade Secret Act, Utah Code Ann. § 13-24-1 to 13-24-9.

In April 2003, the Debtors filed their voluntary Chapter 11 petition. Questar removed the State Court Lawsuit to the bankruptcy court, but on the Debtors' motion, the bankruptcy court abstained and remanded to the Utah State Court. In January 2004, Duane Gillman was appointed to serve as the Debtors'

[1] For additional factual background, see *In re Whiting*, BAP No. UT-04-052 (10th Cir. BAP May 19, 2005) ("*Whiting I*").

Trustee and assumed control of the State Court Lawsuit.

On January 15, 2004, shortly after the Trustee's appointment, the Utah State Court granted summary judgment in favor of Questar and the Individuals. The Trustee timely filed a notice of appeal to the Utah Court of Appeals.

On May 21, 2004, the bankruptcy court confirmed a liquidating Chapter 11 plan. Pursuant to the plan, the Trustee was appointed as the liquidating trustee. The plan requires the Trustee to investigate and evaluate the Debtors' claims against Questar and the Individuals and authorizes the Trustee to "pursue [or] compromise . . . such claims in accordance with the best interest of the Creditors. A compromise may include the Estate receiving nothing if the Trustee's investigation indicates that the claim has no net value to the Estate."[2] Finally, the plan states that the Trustee has the authority to "convey, transfer, or otherwise dispose of, Property of the Estate without further order of the Court."[3]

A. Settlement with/Sale to Questar: *Whiting I*

The Trustee and Questar agreed to settle the claims against Questar for $5,000. At a hearing on the Trustee's motion to approve the settlement, the bankruptcy court determined that the settlement was not in the best interests of creditors. The Trustee and Debtor Susie Whiting then entered into a Purchase and Sales Agreement, pursuant to which the Trustee agreed to sell Whiting's claims against Questar to Whiting for $10,000, subject to bankruptcy court approval.

The Trustee filed a motion for authorization to conduct an auction of the claims against Questar. The Debtors objected, arguing that the Purchase and Sales Agreement did not provide that the sale was subject to higher offers and that the bankruptcy court should require the Trustee to sell the claim to them as set forth in that agreement. Questar also objected, requesting certain procedures

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[2] Plan ¶ 10.2, *in* Appellee's Appendix at 33.

[3] Plan ¶ 9.1, *in* Appellee's Appendix at 25-26.

as part of the bidding, including that any bidder be qualified as a good faith purchaser prior to the commencement of bidding.

The bankruptcy court ruled that the auction could take place, although it stated that if Questar were the successful bidder, the court would require the Trustee to show that the bid met the standards for approval of a settlement as set forth in *In re Kopexa Realty Venture*.[4] The bankruptcy court declined to rule that Questar was a good faith purchaser. At the auction, Questar was the only bidder, with a winning bid of $11,000. The bankruptcy court found that the Trustee had properly considered the probability of success in the litigation, the potential difficulty in collection (which was not a factor), and the complexity and expense of the litigation. The court then made a conclusory finding that the $11,000 offer was in the best interests of creditors and approved the sale.

On appeal, this Court concluded that the bankruptcy court's findings of fact and conclusions of law were insufficient.[5] The bankruptcy court's judgment was vacated and remanded with directions that the court make additional findings of fact and conclusions of law as to the *Kopexa Realty* factors and as to Questar's status as a good faith purchaser.

B. Settlement with Individuals

While *Whiting I* was pending before this Court, the bankruptcy court determined that the claims against the Individuals were not included in the sale to Questar.[6] The Trustee filed a Notice of Trustee's Intent to Sell Property of Estate, providing that the claims against the Individuals would be sold to Questar for $500, subject to higher and better offers and subject to bankruptcy court

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4 213 B.R. 1020, 1022 (10th Cir. BAP 1997).

5 *Whiting I*, BAP No. UT-04-052, at *10.

6 *See* Appellant's Appendix at 185-86.

approval.[7] The bankruptcy court denied approval of the sale by order entered October 29, 2004.[8]

The Trustee and the Individuals subsequently agreed to settle the claims against the Individuals for $5,000, to be paid by Questar.[9] The bankruptcy court approved the settlement after an evidentiary hearing, analyzing the *Kopexa Realty* factors and making detailed findings of fact and conclusions of law.[10] The bankruptcy court's order incorporating by reference its findings and conclusions made on the record was entered February 28, 2005.[11] On March 2, 2005, the Debtors filed their notice of appeal.[12]

II. Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. The Debtors timely filed a Notice of Appeal from the bankruptcy court's order, which is a final order under 28 U.S.C. § 158(a).[13] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Utah.[14]

The Appellees argue that this appeal is moot. In their brief, they allege that the appeal of the State Court Lawsuit "*will be dismissed* pursuant to a stipulation among the parties (i.e., the Trustee and the [Individuals]) in accordance with the

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7 Appellant's Appendix at 241-45.

8 Appellant's Appendix at 248-49. The order recites that the bankruptcy court's findings and conclusions were made on the record. Those findings and conclusions are not before this Court.

9 Settlement Stipulation, *in* Appellant's Appendix at 3-5.

10 Transcript at 48-55, *in* Appellant's Appendix at 196-203.

11 Appellant's Appendix at 250-51.

12 Appellant's Appendix at 259-260.

13 *See Kopexa Realty*, 213 B.R. at 1021-1022.

14 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

Settlement Stipulation resolving those claims."[15] Notably, the Appellees do not assert that the appeal of the State Court Lawsuit *has been* dismissed. The Debtors state that the appeal has not been dismissed.[16] Therefore, it does not appear that it is "impossible for the court to grant 'any effectual relief whatever,'"[17] and this appeal will not be dismissed as moot.[18]

We review the bankruptcy court's order approving settlement for abuse of discretion.[19] "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.'"[20]

III. Discussion

Rule 9019 of the Federal Rules of Bankruptcy Procedure provides in pertinent part: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."[21] This Court has compiled the standards for approval of a settlement in the *Kopexa Realty* case:

> The decision of a bankruptcy court to approve a settlement must be "an informed one based upon an objective evaluation of developed

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15 Appellees' Brief at 8 (emphasis added).

16 Appellants' Reply Brief at 2.

17 *In re Osborn*, 24 F.3d 1199, 1203 (10th Cir. 1994) (citing *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

18 *See Whiting I*, at *2 n.1 (declining to dismiss appeal as moot, where appeal of State Court Lawsuit was pending).

19 *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989) ("A bankruptcy court's approval of a compromise may be disturbed only when it achieves an unjust result amounting to a clear abuse of discretion."); *Kopexa Realty*, 213 B.R. at 1022.

20 *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)).

21 Fed. R. Bankr. P. 9019(a).

> facts." *Reiss v. Hagmann,* 881 F.2d 890, 892 (10th Cir. 1989). In considering the propriety of the settlement it is appropriate for the court to consider the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views.[22]

The *Kopexa Realty* standard requires a bankruptcy court to make its own evaluation of a proposed settlement.[23]

Regarding the first element, probability of success in the underlying litigation, the bankruptcy court noted that the State Court Lawsuit had an adverse decision at the trial level and that the Trustee had received an opinion from his special counsel that the trial court's decision would likely be affirmed.[24] Although the Debtors argue that the State Court Lawsuit has merit and should be pursued, the evidence supports the bankruptcy court's conclusion as to the likelihood of a successful appeal. As to the second element, the bankruptcy court held that the collection of any judgment would not be problem. The second element was therefore a "nonissue."[25] As to the third element, complexity and

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[22] 213 B.R. at 1022.

[23] *Id.* (quoting *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989)). The Appellees cite *In re Carla Leather, Inc.*, 44 B.R. 457, 465-66 (Bankr. S.D.N.Y. 1984), for the proposition that when considering a settlement, the bankruptcy court should not substitute its judgment for the business judgment of the trustee. While this is correct, this does not mean that the bankruptcy court may simply defer to the trustee's decision. *Carla Leather* recognizes that the bankruptcy court's judgment must be "'informed and independent.'" *Id.* at 465 (quoting *Protective Committee v. Anderson*, 390 U.S. 414, 424 (1968)). *See Whiting I*, at *5-6; *see generally Kayo v. Fitzgerald*, 91 Fed. Appx. 714, 716 (2nd Cir. 2004) (vacating and remanding order approving settlement, noting: "Instead of independently assessing the strength of the estate's claims, the Bankruptcy Court largely focused on whether the Trustee had conducted an adequate investigation before accepting the proposed settlement. While the basis for the Trustee's acceptance of the settlement is certainly relevant, we remain concerned that the Bankruptcy Court may have simply deferred to the Trustee's judgment instead of independently exercising its discretion in evaluating the reasonableness of the $150,000 settlement.").

[24] Transcript at 49, *in* Appellant's Appendix at 197.

[25] *Id.* at 50, *in* Appellant's Appendix at 198.

expense of the litigation, the bankruptcy court found that the State Court Lawsuit – involving antitrust as well as other causes of action – was "extremely complex," and, as the estate was administratively insolvent, there was no money to prosecute the appeal.[26] Finally, as to the fourth element, the bankruptcy court held that the settlement was in the best interests of all creditors, including administrative creditors. The court stated that to require administrative creditors to pursue a cause of action that was not likely to succeed created an "unbearable burden."[27] The bankruptcy court properly considered each of the *Kopexa Realty* factors and made its independent determination that the settlement should be approved.

In *Whiting I*, this Court held that the bankruptcy court's findings and conclusions were insufficient. This appeal does not present the additional layer of § 363 considerations that attended *Whiting I*. Particularly, there was no need for the bankruptcy court to determine that any purchaser acted in good faith, as required by *In re Independent Gas & Oil Producers, Inc.*[28] In this case, the bankruptcy court's findings and conclusions were lengthy and detailed and indicated that the bankruptcy court's decision was based upon its own objective evaluation of the facts.[29] The bankruptcy court's ultimate finding was made after it received evidence over the course of several hearings, and there is adequate evidence in the record to support the court's finding. The bankruptcy court therefore did not abuse its discretion in approving the settlement.

The Debtors argue that the Trustee, as one who is supervised by the United

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[26] *Id.*

[27] *Id.* at 52, *in* Appellant's Appendix at 200.

[28] 80 Fed. Appx. 95 (10th Cir. 2003). See *Whiting I*, at *9-10.

[29] *See Jeremiah v. Richardson*, 148 F.3d 17, 22-23 (1st Cir. 1998) (affirming sale and compromise of adversary proceeding over objection of debtor, noting: "Although the [bankruptcy] court accepted the proposal and reasoning of the Trustee, it did so only after searching hearings involving all parties and its independent conclusion that the proposal was in the best interest of the estate.").

States Department of Justice, cannot settle an antitrust lawsuit. Their claim is not supported by case law or argument, and this Court is unaware of any authority preventing a trustee from pursuing or settling an antitrust claim. The Debtors further argue that Questar and the Individuals are not good faith purchasers. The § 363(m) analysis that was relevant in *Whiting I* is not applicable here. The bankruptcy court applied the correct analysis, and its determination will not be disturbed.[30]

IV. Conclusion

The bankruptcy court did not abuse its discretion in approving the settlement with the Individuals. We therefore AFFIRM.

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[30] *See, e.g., In re Martin*, 212 B.R. 316, 320 (8th Cir. BAP 1997) (" Finally, the Debtor contests the court's failure to consider the Trustee's 'motive' in settling the . . . litigation. The record reflects that the court properly considered the correct legal standard in evaluating the . . . [s]ettlement, and allegations of the Trustee's alleged 'ill motive' remain unsupported.")