

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: **TUESDAY**
DATE: **NOVEMBER 10, 2015**
CALENDAR: **1:30 P.M. CHAPTER 11 CASES**

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 15-12885-A-11 ARS INVESTMENT GROUP,
HLF-2 LLC
ARS INVESTMENT GROUP, LLC/MV
JUSTIN HARRIS/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO AMEND
10-15-15 [51]

Tentative Ruling

Motion: Modify Order Granting Motion to Sell Real Property to Include § 363(f) Relief as to Disputed Lienholders

Notice: LBR 9014-1(f)(3) and order shortening time for notice; no opposition required; written opposition filed by the Bovees as trustee

Disposition: Granted in part, denied in part

Order: Prepared by the movant and prepared consistent with the terms of this ruling

The court previously granted the debtor's motion to sell real property located at 18931 Via Sereno, Yorba Linda, CA (the "real property"). The order granted the motion under § 363(b) only and did not grant § 363(f) relief. The court takes judicial notice of this order at docket no. 53. Fed. R. Evid. 201. Further, in the absence of an objection, the court finds that the copy of the order submitted as an exhibit to the motion is authentic.

The terms of the original sale order included authorization for the debtor to pay all costs of sale, consensual liens, taxes and other amounts directly from escrow. It authorized the debtor to pay \$10,660 to Aires Law Trust Account for the benefit of Matthew M. Bovee, Trustee in exchange for a release of the Bovees' judgment lien. The debtor now seeks to modify the order to add relief under § 363(f) against certain disputed lienholders. The debtor also requests that this prior order be "voided" as to the payment of \$10,660 to the Bovees in satisfaction of their lien.

BACKGROUND FACTS

Since the court issued the sale order authorizing sale of the real property, the debtor has discovered a number of liens that may or may not have attached to the real property, which prevents the title company from closing escrow for the sale. The disputed liens include liens held by:

- Engineering Ventures, Inc. in the amount of \$70,000
- Bovees as trustees in the amount of \$171,367.47
- Ford Motor Credit Co. in the amount of \$4776.24
- Newport Coast Community Association in the amount of \$10,364.81
- California Bank & Trust in the amount of \$1,548,972.51
- California Bank & Trust in the amount of \$444,672.31
- Orange County Department of Child Support Services in an unspecified amount
- Internal Revenue Service in the amount of \$37,265.54

(hereinafter, the "Disputed Liens").

According to the Declaration of Alex Kodnegah, these liens are "personal to" him and have nothing to do with the debtor or the real property. The court infers from this statement that these liens name only Kodnegah as judgment debtor. Supporting this inference is the abstract of judgment attached to the Bovee's opposition that was

recorded in Orange County in September 2008—this judgment lien names only Kodnegah as the judgment debtor, and not the debtor in this case, ARS Investment Group, LLC (“ARS”).

These Disputed Liens have arisen as potentially being liens on the real property because of a Grant Deed signed by Kodnegah on approximately February 2, 2015. The Grant Deed, a copy of which is attached to the motion as an exhibit, is ambiguous and unclear regarding all material terms. The Grant Deed is signed by Kodnegah, but no indication of whether he signed in his corporate or individual capacity appears. The Grant Deed also appears to suggest at first glance that the grantor is a 20% interest of ARS Investment Group, LLC. The grantee appears to be Kodnegah. The property transferred appears to be the real property. But then there are arrow markings beside these material terms that raise questions regarding these material terms and whether they should be switched. But when the arrow markings were made is also unknown.

Additionally, a 20% interest in ARS Investment Group, LLC, appears questionable as a valid identification of a grantor as the owner of the property was presumably “ARS Investment Group, LLC” before the Grant Deed was executed.

Before filing this bankruptcy case, two other bankruptcy cases were filed by this debtor. First, the debtor filed a bankruptcy in the Central District of California on October 9, 2015. This October 9, 2015, bankruptcy is referenced on the voluntary petition of the debtor’s January 23, 2015, bankruptcy case filed also in the Central District. The court takes judicial notice of the debtor’s schedules and statements in those prior cases, and absent objection, will find them authentic schedules and statements filed by this debtor.

The January 23, 2015, bankruptcy case was dismissed on February 2, 2015. This is the same date, incidentally, as the date shown on the Grant Deed signed by Kodnegah.

Lastly, the court notes the bankruptcy case of Kodnegah filed on February 7, 2015 of this year. The court takes judicial notice of the petition, statements and schedules in that case, and absent objection, will presume they are all authentic documents of Kodnegah’s bankruptcy case. Fed. R. Evid. 201.

More importantly, the court takes judicial notice of Schedule A in Kodnegah’s bankruptcy. In Schedule A, Kodnegah lists the same real property that is the subject of this motion as his “Primary Residence” and lists a 20% ownership interest in it. The court further notes that this statement by Kodnegah is inconsistent with statements he made in his declaration filed in support of this motion. In this declaration, he stated: “On February 4, 2015, I recorded a Grant deed with the Orange County Recorder’s Office, which purported to transfer a 20% interest in ARS Investment Group, LLC . . . to me, Alex Kodnegah. . . . The Grant Deed also included a legal description of the Property which made it look like I was receiving an interest in the Property.” On the one hand, Kodnegah appears to assert an ownership interest in the real property in his individual bankruptcy. On the other, he claims he intended only to transfer a corporate interest in ARS.

SECTION 363(f) RELIEF

Relief against All Disputed Lienholders except the Bovees

Kodnegah's argument for concluding a bona fide dispute exists as to the Disputed Liens is that the liens are personal to him and that the Grant Deed only transferred a corporate interest in ARS. But the court noted that his stated intent to transfer only a corporate interest conflict with his schedules in his individual bankruptcy which claimed an ownership interest in the real property.

But the court finds an alternative basis to allow the sale order to be modified to grant relief free and clear of the Disputed Liens other than the Bovees Lien.

Bona Fide Dispute under § 363(f) (4)

The term "bona fide dispute" in § 363(f) (4) means that "there is an objective basis for either a factual or legal dispute as to the validity of the debt." *Union Planters Bank, N.A. v. Burns (In re Gaylord Grain L.L.C.)*, 306 B.R. 624, 627 (B.A.P. 8th Cir. 2004); see also 3 *Collier on Bankruptcy* ¶ 363.06[5], at 363-53 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev. 2012) (citing cases). Under this subsection of § 363, the trustee has the burden of proof to show the existence of a bona fide dispute. See 3 *Collier on Bankruptcy, supra*, ¶ 363.06[5], at 363-53.

"Moreover, courts have recognized that to qualify as a 'bona fide dispute' under § 363(f) (4), the propriety of the lien does not have to be the subject of an immediate or concurrent adversary proceeding." *Burns*, 306 B.R. at 627. In *Burns*, the bankruptcy appellate panel for the Eighth Circuit found that an objective basis existed to avoid a bank's liens against two vehicles because the liens against those vehicles had not been perfected pursuant to the state statute governing perfection of liens against motor vehicles. *Burns*, 306 B.R. at 628-29.

Fraudulent-Transfer Analysis

Here, the motion, together with the schedules and statements filed in the debtor's prior bankruptcy cases, presents sufficient facts showing that an objective factual or legal dispute exists as to the validity of the liens.

Under section 548(a), a fraudulent transfer made within 2 years before the date of the filing of the petition is avoidable. A fraudulent transfer may be established by showing the debtor's actual intent to hinder, delay, or defraud a creditor. 11 U.S.C. § 548(a)(1)(A). Or a fraudulent transfer may be established constructively by showing that the debtor (i) received less than a reasonably equivalent value in exchange for such transfer and (ii) was insolvent on the date that such transfer was made, or became insolvent as a result of such transfer. *Id.* § 548(a)(1)(B). Insolvency is defined in § 101(32)(A). Insolvency means "with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of-[] property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors." 11 U.S.C. § 101(32)(A).

Alternatively, a fraudulent transfer may be established constructively by showing that the debtor (i) received less than a reasonably equivalent value in exchange for such transfer and (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital. *Id.* § 548(a)(1)(B).

In this case, the court does not decide what the Grant Deed effectively conveyed. The outcome of this motion does not depend on resolving finally the question whether the Grant Deed conveyed (i) all or a portion of the real property, (ii) a corporate interest in ARS, or (iii) no interest at all.

Moreover, the court will assume—without deciding—that the Grant Deed conveyed a 100% interest in the real property to Kodnegah. Without a transfer of the real property to Kodnegah, the Disputed Liens *against Kodnegah* would be invalid. If the Grant Deed conveyed a corporate interest only, all the Disputed Liens would be invalid as they would not have a basis to attach to real property owned wholly by ARS. Because the Disputed Liens' validity depends on Kodnegah's ownership of all or a portion of the real property, the court will assume for purposes of this motion that the Grant Deed transferred the entire interest in the real property to Kodnegah.

The transfer occurred on or about February 2, 2015. The debtor's bankruptcy was filed July 22, 2015. The transfer thus occurred within 2 years of the petition date.

The court next considers whether the debtor received "reasonably equivalent value" in exchange for the transfer. Kodnegah states that no consideration supported the transfer. Kodnegah Decl. ¶ 9, ECF No. 52.

Additionally, there is evidence that the debtor was insolvent, or became insolvent, as a result of the transfer of the real property. One of the debtor's prior bankruptcy cases was filed on January 23, 2015, and was dismissed on February 2, 2015. This date was the same date as the Grant Deed's date of execution. The court thus considers the schedules in the debtor's January 23, 2015, bankruptcy as some evidence of the debtor's financial condition on the date of the Grant Deed.

The Summary of Schedules in the January 2015 case shows the debtor's assets of \$1,345,000 and liabilities of \$978,384.52. Although this appears to indicate a solvent debtor under a balance sheet test (comparing debts to assets), it includes the real property, which is valued at \$945,000 shown on Schedule A. (The real property is currently under contract of sale for \$790,000.) Section 548 allows a consideration of whether the debtor became insolvent as a result of the transfer.

After subtracting the value of the real property as scheduled (\$945,000) from the total value of the debtor's *scheduled* assets of \$1,345,000, the total assets equal \$400,000. When comparing total assets of \$400,000 to total debt of \$978,384.52, the debtor was insolvent on or about the date of the transfer on February 2, 2015. Furthermore, these same facts are sufficient to support an inference that the debtor's transfer of real property, assuming it was valid, constituted a transaction for which any property remaining with the debtor was an unreasonably small capital. The sale price of the property under the current sale order is \$790,000. That is a very

significant portion (approximately 73%) of the total assets scheduled in this case of \$1,080,200.

Assuming the Grant Deed effected a transfer of real property to Kodnegah, an objective factual basis exists for disputing the validity of the transfer of real property to Kodnegah as a fraudulent transfer avoidable under § 548(a). The basis for disputing the validity of the transfer to Kodnegah is also an objective basis for disputing the validity of the Disputed Liens. Such liens are against Kodnegah individually, not the debtor. If the transfer of real property to Kodnegah is avoidable, then Kodnegah's interest in the real property ceases to exist. As a result, an objective factual basis exists for disputing the validity of the liens against Kodnegah's real property as the transfer leading to Kodnegah's interest appears objectively avoidable.

Section 363(f) Relief against the Bovees

The prior sale order reflects an agreement between the Bovees and the debtor regarding the Bovees interest, if any, against the real property. Because these terms remain effective, the court will not order section 363(f) relief against the Bovees. The court will therefore deny the motion to the extent it requests such relief against the Bovees.

RELIEF THAT WOULD VOID TERMS OF PRIOR ORDER

The prior sale order reflects an agreement between the Bovees and the debtor regarding the Bovees interest, if any, against the real property. In exchange for \$10,660 paid from escrow, the Bovees agreed to release their lien on the property. Absent relief under Fed. R. Civ. P. 60(b), the court will not void the terms of its prior order to avoid the deal between the Bovees and the debtor that is reflected in the prior sale order. Fed. R. Civ. P. 60(b), incorporated by Fed. R. Bankr. P. 9024. Therefore, the court will deny the motion in part to the extent it requests relief voiding the terms of the prior sale order.

INSTRUCTIONS FOR ORDER

The order shall state that the sale is free and clear of only the liens identified and that such liens shall attach to the proceeds of the sale with the same priority and validity as they had before the sale. The order shall also include the following statement verbatim: "If the filing fee for the motion was deferred and if such fee remains unpaid at the time the order is submitted, then the trustee or debtor in possession shall pay the fee for filing this motion to the Clerk of the Bankruptcy Court from the sale proceeds immediately after closing."