

**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: WEDNESDAY
DATE: SEPTEMBER 23, 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. [13-17136](#)-A-11 BHAVIKA'S PROPERTIES, DISCLOSURE STATEMENT FILED BY
EVN-15 LLC DEBTOR BHAVIKA'S PROPERTIES,
LLC
8-5-15 [[354](#)]
ELAINE NGUYEN/Atty. for dbt.

No tentative ruling.

2. [15-12885](#)-A-11 ARS INVESTMENT GROUP, CONTINUED MOTION TO SELL FREE
HLF-2 LLC AND CLEAR OF LIENS
ARS INVESTMENT GROUP, LLC/MV 7-29-15 [[11](#)]
JUSTIN HARRIS/Atty. for dbt.

Tentative Ruling

Motion: Sell Free and Clear of Liens

Notice: LBR 9014-1(f)(2) / continued hearing; no written opposition required

Disposition: Continued to October 21, 2015, at 1:30 p.m.

Order: Civil minute order

NOTICE

Notice of a proposed sale other than in the ordinary course of business must be noticed to all creditors and parties in interest in the debtor's bankruptcy case as required by Federal Rule of Bankruptcy Procedure 2002(a)(2). The movant has noticed all parties appearing on the court's ECF master mailing list (or matrix). Notice is sufficient at this time.

SERVICE

In the civil minutes from the hearing on this matter dated August 19, 2015, the court explained that the motion had not been properly served according to Rule 7004 on the relevant parties holding a lien or interest in the property to be sold. Fed. R. Bankr. P. 6004(c), 7004. The court also identified a service deficiency as to the Bovees, trustees of the Bovees' trust.

These service deficiencies have not been corrected. Although the motion has been properly noticed to the court's matrix, as required for the motion given the relief it seeks under § 363(b), notice is not equivalent to service. In addition to such notice, service is required on *all parties holding a lien or interest in the property being sold* against whom § 363(f) relief is sought.

Alternatively, the movant may choose to forgo § 363(f) relief as to all parties having a lien or interest in the property, except for the trustees of the Bovee Family Trust. All such lien and interest holders, other than the Bovee trustees, appear to be paid or resolved fully at the closing on the sale. Thus, § 363(f) relief does not appear necessary to allow escrow of the sale to close as to all lien or interest holders other than the Bovee trustees. Even the City of Yorba Linda appears to be releasing its lis pendens when the sale closes based on an agreement with the proposed buyer (or an agreement

to be signed with any overbidder before the sale closes).

Thus, if the movant will be satisfied with an order authorizing only § 363(b) relief and not § 363(f) relief as to all lien or interest holders *other than the Bovee trustees*, then notice to the court's matrix will suffice as to all parties *except for the Bovee trustees*. As to the Bovee trustees, each of them must be served in person as trustees before the court will grant § 363(f) relief against them. Service on an attorney is insufficient unless the proof of service offers evidence that such attorney represents the Bovee trustees *in this bankruptcy case*. See Civ. Mins. Hr'g Aug. 19, 2015, ECF No. 23.

A supplemental proof of service for this motion shall be filed no later than 14 days before the continued hearing date.

EVIDENCE OF CONSENT UNDER SECTION 363(f) (2)

In light of the court's comments regarding § 363(f)(2) relief against all lien or interest holders other than the Bovee trustees, the movant may decide to forgo such relief against such parties. However, if the movant nonetheless decides to pursue § 363(f)(2) relief against all lien or interest holders other than the Bovee trustees, the movant shall file evidence of consent from each lien or interest holder against whom such relief is sought. Such evidence shall be filed no later than October 7, 2015.

Alternatively, each such lien or interest holder may appear at the hearing and provide evidence of their consent on the record at the continued hearing on October 21, 2015. If this is the method of consent to be given, however, a status statement indicating this fact, and the parties to whom it applies, shall be filed no later than October 7, 2015.

SECTION 363(f) (4) RELIEF AS TO LIS PENDENS

Section 363(f)(4) relief is sought as to both the City of Yorba Linda and the Bovees as trustees of the Bovee Family Trust. The movant requests a sale free and clear of these parties' lis pendens. The court questions whether a lis pendens is an interest within the meaning of § 363(f).

The court will provide here some of the pertinent authorities it has reviewed.

Lis Pendens Defined

"'Notice of pendency of action' or 'notice' means a notice of the pendency of an action in which a real property claim is alleged." Cal. Civ. Proc. Code § 405.2. "In proceedings under this chapter, the court shall order the notice expunged if the court finds that the pleading on which the notice is based does not contain a real property claim." Cal. Civ. Proc. Code § 405.31. "'Real property claim' means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility." Cal. Civ. Proc. Code § 405.4.

"A lis pendens filed with the county recorder is a *notice* that an action is pending *'concerning real property or affecting the title or*

right of possession of real property.' " *In re Lane*, 980 F.2d 601, 603 (9th Cir.1992) (quoting Cal.Civ.Pro.Code § 409(a)). Section 409(a) has since been repealed and replaced with § 405.20. This new section still defines a lis pendens action as "a real property claim" which is further defined as "the cause or causes of action in a pleading which would, if meritorious, affect ... title to, or the right to possession of, specific real property...." Cal.Civ.Pro.Code § 405.4 (West Supp.1995).

Feiler v. United States, 62 F.3d 315, 319 (9th Cir. 1995) (emphases added).

Nature and Effect of Lis Pendens

"It is true that a Lis pendens is a 'conveyance' within the meaning of Civil Code sections 1214 and 1215; a purchaser or encumbrancer thereafter has constructive notice of it, and a subsequent judgment in the action is conclusive as against them." *Putnam Sand & Gravel Co. v. Albers*, 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636, 638 (Ct. App. 1971).

A leading treatise explains this aspect of a lis pendens further. "A lis pendens is considered a 'conveyance' or 'transfer' within the provisions of the recording laws, but this is only in regard to its effect as a recorded instrument providing notice." 5 Harry D. Miller & Marvin B. Starr, *California Real Estate* § 11:148 (3d ed.) (footnote omitted). Furthermore, "[t]he sole effect of the lis pendens is to impart constructive notice that an action involving a real property claim affecting the described property is pending, and to bind subsequent persons who acquire an interest to the outcome of the litigation. After the *judgment* is rendered, the effect of the lis pendens is also to defeat or take priority over a prior transfer or encumbrance that was not of record before the lis pendens was recorded." *Id.* (footnote omitted).

"[U]nder California law, a party attains an interest superior to subsequent purchasers upon recordation of the lis pendens. It is the fact of attainment of a superior interest, not the creation of a lien or the rendering of a judgment, that creates a transfer under the Bankruptcy Code in both California and Arizona." *In re Lane*, 980 F.2d 601, 606 (9th Cir. 1992). "[A] subsequent purchaser cannot acquire an interest in property superior to the interest of a party that has filed a lis pendens. In the present case, the Superior Court's judgment merely quantified the extent of Hurst's perfected interest. Until judgment, his interest may have been the entire property, a lien on the property, or zero interest in the property." *Id.* at 605.

"A recorded lis pendens effectively clouds the title to the property described in the notice. As a practical matter, it may impede or prevent a sale or encumbrance of the property until the litigation is resolved or the lis pendens is expunged. It does not legally restrain the owner from conveying or encumbering the property, however; it merely puts subsequent purchasers or encumbrancers on notice of the . . . adverse claim." 5 Harry D. Miller & Marvin B. Starr, *supra*, § 11:151 (footnote omitted).

Lis Pendens Gives Priority Only to Portion of Judgment Deciding a Real Property Claim

"In determining how a judgment relates back to the lis pendens, the distinction between a *judgment lien* which enforces a money judgment against real property and a *judgment affecting title or possession* of real property is important. Only the portion of the judgment deciding a real property claim takes priority from the lis pendens." 5 Harry D. Miller & Marvin B. Starr, *California Real Estate*, § 11:151 (3d ed.).

Supplemental Briefing

In light of such authorities provided by the court, the court requests supplemental briefing on the purely legal question whether a lis pendens is a real property interest within the meaning of section 363(f). Further, the court notes that only a real property claim may be the subject of a lis pendens. The movant shall file a supplemental declaration describing the nature of the claim for which the lis pendens was filed.

All supplemental declarations or briefing shall be filed no later than 14 days before the date of the continued hearing.

BONA FIDE DISPUTE UNDER SECTION 363(f) (4)

The motion does not present sufficient factual grounds for the court to conclude a bona fide dispute exists as to the lis pendens held by the Bovee Family Trust. 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, or the DIP, 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.

Here, the motion presents insufficient facts showing that an objective factual or legal dispute exists as to the validity of the lien or the debt that the lien secures. The motion does not state what "real property claim" has been alleged in the state court action that would affect title to the real property being sold. The motion does not present a legal or factual basis for finding the lis pendens to be invalid.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The movant's motion to sell real property free and clear of liens and interests has been presented to the court. Having reviewed the papers

IT IS ORDERED that the hearing on the motion is continued to October 21, 2015, at 1:30 p.m. Any supplemental proof of service or declarations shall be filed no later than 14 days before the date of the continued hearing.

- ## Tentative Ruling

Order: Civil minute order

This chapter 11 case has been closed by order issued and entered on September 11, 2015. All property of the estate has reverted in the Debtor upon entry of the final decree and case-closing order, so the stay terminates as to all property of the estate. 11 U.S.C. § 362(c)(1). After a bankruptcy case is closed, the automatic stay terminates as to any other act. 11 U.S.C. § 362(c)(2). Thus, the motion is moot because the court is unable to grant effective relief given the reverting of property and the case's closure.

The motion for relief from automatic stay filed by State Farm General Insurance Company has been presented to the court. Because the case

has been closed and property of the estate has revested in the debtor,
and the court is precluded from granting any effective relief,

IT IS ORDERED that the motion is denied as moot.

4. [13-17136](#)-A-11 BHAVIKA'S PROPERTIES,
LLC

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
11-1-13 [[1](#)]

ELAINE NGUYEN/Atty. for dbt.

No tentative ruling.