UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE MORTGAGES LTD.,

Debtor.

QUEEN CREEK XVIII, L.L.C.,

Appellant,

v.

ML MANAGER LLC,

Appellee.

2:12-cv-36-RCJ

ORDER

Currently before the Court are a bankruptcy appeal (#8) and a motion for judicial notice (#14). The Court heard oral argument on May 3, 3012.

FACTS

I. Background[1]

These cases arise out of the Chapter 11 bankruptcy proceedings for Mortgages Limited, case number BK No. 08-07465. Based on the pleadings and information that have been submitted to the Court, the Court notes by way of background that Mortgages Limited ("Mortgages Ltd.") once held a $900 million portfolio of loans and had over 1800 investors. Investors in Mortgages Ltd. owned fractional interests in promissory notes and deeds of trust. Investors entered agreements with Mortgages Ltd. prior to making these investments.

[1] ML Manager filed a motion for judicial notice. (Mot. for Judicial Notice (#14) at 1). In that motion, ML Manager moves for this Court to take judicial notice of its prior orders affirming the bankruptcy court's decisions in this case, notice of appeals, and other publicly recorded documents. (*Id.* at 2). The Court grants this motion (#14).

Because investors had fractional interests in the various mortgages, when borrowers defaulted and the properties were foreclosed upon, investors became part owners of properties as tenants in common with other investors who had interests in the same loan.

On June 28, 2008, Mortgages Ltd. filed for Chapter 11 bankruptcy. The company was thus reorganized pursuant to a plan that was confirmed by the bankruptcy court on March 20, 2009 ("the Plan"). As part of the Plan, an entity called ML Manager, LLC ("ML Manager") was created to manage and operate the loans in the portfolio. The original investors for the most part transferred their interests to 49 separate Loan LLCs. A number of investors, referred to as "pass through investors" did not transfer their interests. As part of the Plan, ML Manager took out $20 million in "exit financing" (the "Exit Financing") to help keep the company afloat during the reorganization.

After confirmation of the Plan, a dispute arose regarding the agency authority of ML Manager to take action on behalf of "pass through investors." A group of 17 "pass through investors," referred to as the Rev Op Group, took the position that ML Manager could not sell property in which its members had an interest without their approval and consent. ML Manager asserted that it had the agency power to sell property in which Rev Op investors had an interest without their consent. Because of the dispute, ML Manager initiated a declaratory action in the bankruptcy court, seeking a ruling on its ability to act as an agent for the Rev Op Group and filed a motion for Judgment on the Pleadings. The bankruptcy court ultimately issued a Declaratory Judgment, finding that investors in the Rev Op Group had signed agreements with Mortgages Limited that had incorporated an Agency Agreement, which created an irrevocable agency for Mortgages Ltd. to manage the loans. The bankruptcy court also ruled that the agency had been effectively and properly assigned to ML Manager and that ML Manager did not need the consent of Rev Op Group investors to liquidate assets in which they held an interest.

ML Manager has begun to sell properties that were part of the Mortgages Ltd. portfolio. ML Manager is selling these assets in an effort to obtain returns for investors, but also to make payments on the $20 million Exit Financing it obtained.

II. Dysart Property

On February 2, 2011, ML Manager filed a motion to sell real property located at 5116 North Dysart Road, Litchfield Park, Arizona ("Dysart Property") for $2,812,500 to JLJ Investments, LLC. (Feb. Mot. to Sell (#9-5) at 1). The anticipated closing date was March 17, 2011. (*Id.*).

Queen Creek XVIII, L.L.C. ("Queen Creek"), the appellant in this case and a Rev-Op Group pass-through investor, filed an objection to the motion. (Objection to Feb. Mot. to Sell (#9-6) at 1). Queen Creek objected to the sale motion on the basis that:

> (i) a "sale free and clear" mechanism [was] not provided for in the plan confirmed by the Court (the "Plan") and no applicable non-bankruptcy law allow[ed] for such mechanism; (ii) the [bankruptcy court] lack[ed] jurisdiction to approve such sale; (iii) ML Manager ha[d] no authority to act on behalf of Queen Creek with respect to the Property; and (iv) the proposed liquidation sale in the worst of market conditions [was] neither consistent with ML Manager's fiduciary duties nor a proper exercise of ML Manager's business judgment.

(*Id.* at 2). Queen Creek asserted that ML Manager lacked agency authority. (*Id.* at 3-5). Queen Creek also argued that the proposed sale was not consistent with ML Manager's fiduciary duties and was not a proper exercise of business judgment because $2.8 million failed to adequately compensate investors who were owed $5.2 million in the aggregate and that $2.8 million was not a fair market value for the property. (*Id.* at 5).

On February 23, 2011, ML Manager filed a notice of withdrawal of the February motion to sell because the buyer had terminated the purchase and sale agreement and the parties were unable to negotiate a suitable amendment to revive the sale. (Notice of Withdrawal (#11-5) at 1).

On November 30, 2011, ML Manager filed another motion to sell the Dysart Property to the Southwest Mack Corporation for $2.3 million on the terms set forth in the Agreement of Sale and Purchase ("Sale Agreement")[2] or upon better terms as reasonably determined by ML

[2] The Sale Agreement contained a provision that stated, "Upon a breach or default by [ML Manager] . . . [Southwest Mack Corporation] shall be entitled, as its sole remedies for [ML Manager's] default hereunder, to exercise any of the following remedies: (i) terminate this Agreement . . . ; (ii) proceed with the transaction and waive the default; or (iii) seek specific performance . . . ." (Sale Agreement (#9-7) at 19).

Manager. (Nov. Mot. to Sell (#9-7) at 1). The contemplated closing date was early January 2012. (*Id.*). The Dysart Property had an unpaid principal balance of $5,201,962 on the loan and interest and fees were due. (*Id.* at 2). ML Manager had retained the services of CB Richard Ellis, a leading real estate brokerage firm, to widely market the property for sale. (*Id.*). After completing substantial marketing efforts, Southwest Mack Corporation made an offer of $2.3 million and ML Manager entered into a Sale Agreement, subject to ML Manager's regular contingencies, with the purchaser for that price. (*Id.*). Southwest Mack Corporation had deposited $50,000 and had opened escrow at Thomas Title & Escrow. (*Id.*). Because the property had been fully marketed there was no proposed auction and no solicitations for any higher and better bids. (*Id.*). The contingencies included approval by the Loan LLC investors, the applicable MP Funds, and the bankruptcy court's approval. (*Id.*). The property contained partially completed buildings that were being sold "As-Is," "Where-Is," and "With all Faults." (*Id.*). Although the debt would not be paid in full, ML Manager believed that the price reflected the current market value of the property and that it was unlikely in the foreseeable future to get a higher amount for the property. (*Id.* at 2-3). ML Manager believed that the sale was in the best interests of the Loan LLC and the Pass-Through Investors and that it was a valid exercise of its business judgment consistent with any fiduciary responsibilities. (*Id.* at 3).

In response, on December 12, 2011, Queen Creek, via the Rev-Op Group, filed an objection to the motion to sell. (Objection to Nov. Mot. to Sell (#9-10) at 1). The objections stated that the Rev Op Group "incorporate[d] by reference . . . previous sale-motion objections filed by the Rev Op [Group] and affiliated parties (and the arguments and authorities set forth therein) at the following Docket Entry numbers: DE #2499; DE #2504; DE #2878; DE #2881; DE #2965; DE #3003; DE #3095; DE #3153; DE #3185; DE #3187; DE #3262; DE #3307; DE #3327; and DE #3343." (*Id.*). The Rev Op Group requested an order denying the sale motion. (*Id.* at 2).

On December 13, 2011, Mark Krasner, an attorney for a Mr. Steven Grady, filed a letter with the bankruptcy court. (Grady Letter (#11-6) at 1). The letter stated that the purpose of the correspondence was "to inform the [bankruptcy court] that [his] client [was] interested in

purchasing the Subject Property for an amount in excess of the referenced purchased price and on the same terms as those included in the [Sale Agreement]." (*Id.*). "As a higher sale purchase price undoubtedly benefits the bankruptcy estate, [they hoped that] counsel and the [bankruptcy court would] duly consider [his] client's offer." (*Id.*).

In reply, on December 16, 2011, ML Manager asked the bankruptcy court to overrule the Rev Op Group's objection and grant the motion because the Rev Op Group had incorporated several pleadings that the court had already overruled. (Reply to Mot. to Sell (#10-1) at 2). ML Manager notified the court that a third party had contacted it within the past 10 days and stated that it was interested in "making a bid and they would be willing to be a back up bid in the event that [Southwest Mack Corporation] did not close." (*Id.* at 3).

On December 19, 2011, the bankruptcy court held a hearing on the motion to sell the Dysart Property. (Transcript (#10-3) at 1). During the hearing, ML Manager acknowledged that there was one objection from Queen Creek, a Rev Op objector, and that the objection was the same as the other 14 objections that the Rev Op Group had filed in the case, which the bankruptcy court had ultimately overruled. (*Id.* at 3). ML Manager explained that the Dysart property had been marketed for over a year and was a partially completed building that was being sold as-is, where-is, with all faults for $2.3 million. (*Id.*). ML Manager explained that the property had been marketed for over a year to an extensive group of parties and believed that it was a valid exercise of its business judgment and was consistent with its fiduciary responsibilities to sell the property for the stated price to the current buyer. (*Id.* at 4). ML Manager stated that because the court had already found in previous hearings that the sales were not 11 U.S.C. § 363 sales, the sale would not be subject to a higher and better bid in the courtroom. (*Id.* at 6). ML Manager stated that its reliance on the marketplace and the relationship that ML Manager had established in the community with the buyers and brokers was important and an exercise of their business judgment. (*Id.* at 7).

At the hearing, the court asked about the "other offer" to which the court commented, "I don't know if I'd call it an offer, but a communication on behalf of Mr. Steven Grady." (*Id.*). The court noted that the December 12th letter did not appear to be an offer but rather an

indication of interest in purchasing the property. (*Id.*). ML Manager responded that Mr. Grady had orally expressed his intention to bid for the property in the courtroom, but explained that there was no written agreement and that no earnest money had been received. (*Id.* at 8). ML Manager clarified that Mr. Grady wanted to purchase the property and was not making a backup bid, although ML Manager would have been willing to accept a backup bid. (*Id.* at 8-9).

At the hearing, Queen Creek acknowledged that it had incorporated by reference the Rev Op Group's prior objections and that those objections had been ruled on previously by the court. (*Id.* at 9). Queen Creek argued that Mr. Grady's offer was for $250,000 more than what was currently being offered and did not see how ML Manager could ask for a finding that it had complied with the business judgment standard or its fiduciary duties when it was leaving $250,000 on the table. (*Id.* at 12-13). Queen Creek acknowledged that the sales were not being made pursuant to 11 U.S.C. § 363. (*Id.* at 14).

At the hearing, the bankruptcy court asked what authority did it have to accept or hear about a higher bid if the sale was not an 11 U.S.C. § 363 sale. (*Id.*). Queen Creek responded that the court had the same authority that it had to entertain the motion at all. (*Id.*). Queen Creek argued that if the court had no authority then there should be no sale order. (*Id.* at 14-15).

At the hearing, the bankruptcy court questioned whether ML Manager would be leaving $250,000 on the table if this was not a § 363 sale. (*Id.* at 15). The court found that the Sale Agreement was governed by state contract law for the sale of real property. (*Id.*). The court found that, if ML Manager had signed a contract for a certain price and then subsequently breached by refusing to close because they got a higher offer, ML Manager would be liable for damages. (*Id.*). Queen Creek disagreed because the Sale Agreement contained a contingency that ML Manager had to get bankruptcy court approval. (*Id.* at 16). The bankruptcy court found that the contingency was not that ML Manager could sell to a higher bidder or that the court could compel them to sell to a higher bidder as in a § 363 sale. (*Id.*).

At the hearing, ML Manager explained that, in the past, there had been situations in this

particular bankruptcy where someone had bid more, then later withdrew, and left ML Manager with a lost sale. (*Id.* at 21). ML Manager explained that, in its experience in the marketplace, the best way to negotiate these sales was through a private sale. (*Id.*). At the hearing, Mr. Grady and The Focus Group's attorney stated that The Focus Group was interested in purchasing the Dysart Property and that it was prepared to pay $230,000 more than the price listed in the Sale Agreement. (*Id.* at 22). The Focus Group stated that it had no due diligence to perform and was prepared to close on or before January 19th in the event that it received good title. (*Id.*). The Focus Group was also willing to put a non-refundable $50,000 security deposit down that day if it was approved as the buyer. (*Id.* at 24). The Focus Group's attorney offered to put Mr. Grady on the stand but the court declined. (*Id.*).

At the conclusion of the hearing, the bankruptcy court overruled Queen Creek's objection and granted ML Manager's sale motion. (*Id.* at 25). The bankruptcy court directed ML Manager to draft an order and stated that it could include its authority to close on the same terms or better with Mr. Grady and The Focus Group in the event that Southwest Mack did not close. (*Id.*). With respect to the Southwest Mack Corporation, the court found that ML Manager had entered into that sales contract by exercising its business judgment and fiduciary duties. (*Id.*).

On December 20, 2011, the bankruptcy court issued an order approving the sale of the Dysart Property to Southwest Mack Corporation. (Order (#10-4) at 1). The court found that: (1) it had jurisdiction over the issues presented in the motion, (2) the purchase price offered constituted fair consideration for the property; (3) ML Manager was authorized to enter in the Sale Agreement, to sell the property pursuant to the terms of the Sale Agreement, and to proceed with the sale and to execute all necessary documents to implement the sale; and (4) the decision to sell and enter into the Sale Agreement was supported by the best exercise of business judgment which was consistent with ML Manager's fiduciary duties and responsibilities. (*Id.* at 2). The court also overruled Queen Creek's objection. (*Id.*). The court found that in the event that the Sale Agreement was terminated, ML Manager was authorized to sell the property on the same or better terms to The Focus Group. (*Id.* at 3).

On December 29, 2011, Queen Creek filed a timely notice of appeal. (Notice of Appeal (#10-5)). Queen Creek raises the following issues on appeal: (1) whether the bankruptcy court erred in entering the order authorizing ML Manger to sell, over Queen Creek's objection, the Dysart Property in which Queen Creek held tenant-in-common ownership interests; (2) whether the bankruptcy court erred in authorizing the sale at a price substantially below a bona fide superior purchase offer; and (3) whether the bankruptcy court erred in finding that it had jurisdiction to approve the sale as requested by ML Manager. (Opening Brief (#8) at 5).

STANDARD OF REVIEW

This Court reviews a bankruptcy court's interpretation of the law *de novo* and its factual findings for clear error. *Blausey v. U.S. Trustee*, 552 F.3d 1124, 1132 (9th Cir. 2009).

DISCUSSION

Queen Creek argues that no evidence supports a finding that ML Manager complied with its fiduciary duties. (Opening Brief (#8) at 10-11). Queen Creek asserts that the bankruptcy court had no post-confirmation jurisdiction over the sale of the Dysart Property. (*Id.* at 11-12). Queen Creek argues that ML Manager's agency authority terminated upon the foreclosure of the property. (*Id.* at 13-15).

In response, ML Manager argues that Queen Creek's arguments are foreclosed by the law of the case. (Resp. Brief (#12) at 11). ML Manager asserts that this Court has already affirmed ML Manager's agency authority to act on behalf of the Rev Op Group and to use its business judgment. (*Id.* at 12). ML Manager also asserts that Queen Creek has waived the argument that ML Manager's agency terminated post-foreclosure because ML Manager never raised this argument before the bankruptcy court. (*Id.* at 13). ML Manager argues that the bankruptcy court did not err in evaluating ML Manager's conduct. (*Id.* at 14). ML Manager asserts that the argument that the bankruptcy court failed to take evidence regarding ML Manager's fiduciary duty is misplaced because the business judgment rule is the correct standard. (*Id.*). ML Manager asserts that the bankruptcy court did consider The Focus Group's allegedly competing offer by noting that it was a communication and by considering the breach of contract ramifications if ML Manager cancelled the sale to pursue a higher and

better bid. (*Id.* at 15). ML Manager asserts that the bankruptcy court had jurisdiction to approve the sale because a close nexus existed between the Plan and liquidating the loan portfolio. (*Id.* at 16). ML Manager also asserts that Queen Creek's arguments are foreclosed by mootness because the Plan has been substantially consummated. (*Id.* at 17-18).

In reply, Queen Creek argues that the law of the case does not apply because there was a superior offer. (Reply Brief (#15) at 4). Queen Creek argues that because there was a superior offer there was no basis for the bankruptcy court to find that ML Manager had exercised its business judgement or had fulfilled its fiduciary duties to Queen Creek. (*Id.* at 8).

As an initial matter, Queen Creek's arguments in its opening brief do not entirely correspond with its stated issues on appeal. This order will address Queen Creek's arguments and will not address its stated issues on appeal unless directly addressed by Queen Creek.

In this case, several of Queen Creek's arguments are foreclosed by prior rulings of this Court. This Court already has affirmed the bankruptcy court's post-confirmation jurisdiction to approve ML Manager's sale of foreclosed real property. (*See* CM/ECF case no. 2:11-cv-853-RCJ, Order (#34) at 2-3). This Court already has affirmed the bankruptcy court's irrevocable agency under the Agency Agreement and has found that ML Manager has agency authority post-foreclosure. (*Id.* at 3-4). Therefore, to the extent that Queen Creek challenges the bankruptcy court's order based on these issues, there is no error.

Moreover, with respect to the business judgment/fiduciary duties argument, the bankruptcy court did not err by approving the sale order of the Dysart Property. As noted in the proceedings below, ML Manager hired a broker to list and market the property for over a year and accepted the highest offer from a buyer during that period. Additionally, ML Manager explained how past sales fell through when it did accept last minute higher bids and then explained that, in this market, it felt that private sales were better. As such, the Court did consider ML Manager's business judgment with respect to this sales order.

Additionally, Queen Creek's argument that ML Manager could not properly exercise its business judgment by rejecting a superior offer is misplaced. First, it is questionable whether

a hard offer existed at the time of the hearing. As the bankruptcy court noted, Mr. Grady's letter was an indication of interest to purchase. Second, both parties conceded that the bankruptcy court was not conducting an 11 U.S.C. § 363 sale and, thus, did not have the authority to consider higher and better bids at the hearing. Third, the bankruptcy court found that, if it had rejected the sale in order to permit ML Manager to accept the higher offer, ML Manager would be liable for breach of contract pursuant to the Sale Agreement with Southwest Mack Corporation. The bankruptcy court found that, although the Sale Agreement provided a contingency that it had to approve the sale, there was no contingency that the bankruptcy court could reject the sale based on a finding that a higher bid existed. Queen Creek did not object to the bankruptcy court's finding that ML Manager could be held liable for breach if it had defaulted on the Sale Agreement based on a higher and better bid. As such, this Court finds that the bankruptcy court did not err in approving the sale of the Dysart Property. The bankruptcy court had considered the facts before it demonstrating ML Manager's exercise of the business judgment rule and made a finding that it could not reject the Sale Agreement based on a higher and better bid that had occurred after the execution of the Sale Agreement. Accordingly, the Court affirms the bankruptcy court's order (#8).

Pursuant to the discussions at oral argument, the Court finds that the bankruptcy court has post-confirmation jurisdiction to interpret and implement the Plan. Additionally, the bankruptcy court has the authority to give "comfort" order to approve the sales. This Court notes that these sales are not § 363 sales. Further, the bankruptcy court has jurisdiction to state whether the sale was done in bad faith or in good faith.

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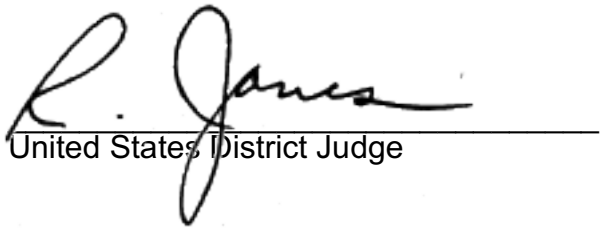
CONCLUSION

For the foregoing reasons, IT IS ORDERED that the bankruptcy appeal (#8) is AFFIRMED.

IT IS FURTHER ORDERED that the Motion for Judicial Notice (#14) is GRANTED.

DATED: This 6th day of July, 2012.



United States District Judge