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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

IN RE MORTGAGES LTD.,
Debtor.

BEAR TOOTH MOUNTAIN HOLDINGS,
LLP, et al.,
Appellants,
v.
ML MANAGER LLC,
Appellee.

2:10-cv-1917-RCJ

ORDER

Currently before the Court is a bankruptcy appeal (#43) arising out of a Chapter 11 bankruptcy proceeding for Mortgages Limited, Case No. 2:08-bk-7465-RJH. This particular appeal relates to the sale of two properties approved by the bankruptcy court.

BACKGROUND

I. Background¹

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 These facts are taken from Judge Murguia’s order denying Appellant Rev Op Group’s motion for a stay pending appeal. (Order (#19)).

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

4 On June 28, 2008, Mortgages Ltd. filed for Chapter 11 bankruptcy. The company was
5 thus reorganized pursuant to a plan that was confirmed by the bankruptcy court on March 20,
6 2009 (“the Plan”). As part of the Plan, an entity called ML Manager, LLC (“ML Manager”) was
7 created to manage and operate the loans in the portfolio. The original investors for the most
8 part transferred their interests to 49 separate Loan LLC’s. A number of investors, referred to
9 as “pass through investors” did not transfer their interests. As part of the Plan, ML Manager
10 took out \$20 million in “exit financing” (the “Exit Financing”) to help keep the company afloat
11 during the reorganization.

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

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

1 Court denied the Rev Op Group's motions for a stay pending appeal. (See Order (#19) at 4,
2 8). In denying the motion for a stay, Judge Murguia found that "[m]ore fundamentally, the
3 ability to sell assets in the portfolio is a critical function of ML Manager, essential to fulfilling
4 its role following the reorganization of Mortgages Ltd. to keep the company afloat and ensure
5 some eventual return to investors." (*Id.* at 6).

6 **II. CITLO & ZDC Properties**

7 On July 30, 2010, ML Manager filed a motion to sell six acres of real property ("CITLO
8 property") in Maricopa County for \$1.925 million dollars free and clear of liens, claims,
9 encumbrances, and interests to Endres, LLC. (CITLO Sale Motion (#36-4) at 1). The motion
10 stated the following. After Borrower City Lofts, LLC defaulted on its loan with Mortgages, Ltd.,
11 ML Manager foreclosed on the property. (*Id.* at 2). Pursuant to the Plan, CITLO Loan, LLC
12 was formed and the fractional interests in the note and deed of trust which had been held by
13 MP Funds and Mortgages Ltd. were transferred into CITLO Loan, LLC. (*Id.*). All but four
14 pass-through investors had transferred their fractional interests. (*Id.*). As a result, 86.798%
15 of the interest in the real property was owned by CITLO Loan LLC and 13.202% was owned
16 by the four pass-through investors. (*Id.*). ML Manager sought an order that the sale would be
17 free and clear of all liens, claims, encumbrances, and interests; that the purchaser have a
18 good faith purchaser status; that ML Manager had exercised valid business judgment
19 consistent with any fiduciary responsibilities; and that the bankruptcy court had retained and
20 reserved jurisdiction in the Plan on the matter. (*Id.* at 2-4). ML Manager also argued that, as
21 the agent for the four pass-through investors, it had the authority to sell the property and
22 execute documents on behalf of the four pass-through investors. (*Id.* at 4).

23 In response, Bear Tooth Mountain Holdings, LLP ("Bear Tooth"), Queen Creek XVIII,
24 L.L.C. ("Queen Creek"), and Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan ("MR
25 Plan"), three of the four pass-through investors and a subset of the Rev-Op Group, objected
26 to the CITLO property sale motion. (Resp. to CITLO Sale (#36-6) at 1-2; CITLO Transcript
27 (#37-1) at 2). Specifically, they objected to the motion on grounds that a "sale free and clear"
28 mechanism was not provided for in the Plan and that 11 U.S.C. § 363(f), (h) did not apply.

1 (Resp. to CITLO Sale (#36-6) at 2). They also objected on grounds that the bankruptcy court
2 did not have post-confirmation jurisdiction because the Plan did not provide for retained
3 jurisdiction and there was no close nexus for post-confirmation jurisdiction. (*Id.*).

4 Blackeye Capital, L.L.C., a prospective bidder, filed a response to the motion to sell the
5 CITLO property and argued that the bankruptcy court should permit it to purchase 86.798%
6 of the property for \$1.9 million. (Blackeye CITLO Resp. (#36-9) at 1-2).

7 On August 5, 2010, ML Manager filed a motion to sell 66 partially developed lots in
8 Phoenix, Arizona (“ZDC property”) for \$2,112,000 free and clear of liens, claims,
9 encumbrances, and interests to WESCAP Investments. (ZDC Sale Motion (#36-5) at 1). The
10 motion stated the following. After Zacher Development Company defaulted on its loan with
11 Mortgages Ltd., ML Manager foreclosed on the property. (*Id.* at 1-2). Pursuant to the Plan,
12 ZDC II Loan LLC was formed and the fractional interests in the note and deed of trust which
13 had been held by the MP Funds and Mortgages Ltd. were transferred into the ZDC II Loan
14 LLC. (*Id.* at 2). All but nine pass-through investors had transferred their fractional interests.
15 (*Id.*). As a result, 75.293% of the interest in the real property was owned by ZDC II Loan LLC
16 and 24.707% was owned by the nine pass-through investors. (*Id.*). ML Manager sought an
17 order that the sale would be free and clear of all liens, claims, encumbrances, and interests;
18 that the purchaser have a good faith purchaser status; that ML Manager had exercised valid
19 business judgment consistent with any fiduciary responsibilities; and that the bankruptcy court
20 had retained and reserved jurisdiction in the Plan on the matter. (*Id.* at 2-4).

21 In response, Queen Creek and Pueblo Sereno Mobile Home Park L.L.C. (“Pueblo
22 Sereno”), two of the nine pass-through investors and a subset of the Rev-Op Group, objected
23 to the ZDC property sale motion. (Resp. to ZDC Sale (#36-7) at 1). Specifically, they objected
24 to the motion on grounds that a “sale free and clear” mechanism was not provided in the Plan
25 and that 11 U.S.C. § 363(f), (h) did not apply. (*Id.* at 1-2). They also objected on grounds that
26 the bankruptcy court did not have post-confirmation jurisdiction because the Plan did not
27 provide for retained jurisdiction and there was no close nexus for post-confirmation jurisdiction.
28 (*Id.* at 2).

1 Blackeye Capital, L.L.C., a prospective bidder, filed a response to the motion to sell the
2 ZDC property and argued that the bankruptcy court should permit it to purchase 75.293% of
3 the property for \$1,646,446. (Blackeye ZDC Resp. (#37-5) at 1-2).

4 On August 25, 2010, the bankruptcy court held a hearing on the CITLO property.
5 (CITLO Transcript (#37-1) at 1). During the hearing, ML Manager clarified that it was not
6 seeking an order from the court pursuant to 11 U.S.C. § 363(f) and that there was no
7 requirement under the Plan that required it to get court approval for sales. (*Id.* at 3). ML
8 Manager clarified that the buyers and the title company felt it was helpful to have a court order
9 to aid in the implementation of the Plan and to assist in closing the sale. (*Id.* at 4). ML
10 Manager argued that Blackeye Capital's response should be disregarded because it lacked
11 standing and that its offer was untimely. (*Id.* at 7). ML Manager asserted that, even though
12 the CITLO sale was not an 11 U.S.C. § 363(f) sale, it did not think that there was anything that
13 prohibited the court from finding that the purchaser was a good faith purchaser. (*Id.* at 8).

14 In response, the subset of the Rev Op Group argued that the bankruptcy court had not
15 retained jurisdiction in the matter. (*Id.* at 12). With respect to the Blackeye Capital offer, the
16 subset of the Rev Op Group argued that, ML Manager had a fiduciary obligation to either take
17 the offer or at least look at it. (*Id.* at 14). The subset of the Rev Op Group also argued that,
18 to the extent that ML Manager's agency authority was valid, the agency did not exist post-
19 foreclosure of the property. (*Id.* at 16).

20 The bankruptcy court found that jurisdiction existed because the motion was related to
21 the bankruptcy case and that there was a close nexus for post-confirmation jurisdiction. (*Id.*
22 at 19). Additionally, based on the law of the case at the time, the bankruptcy court concluded
23 that ML Manager had authority under the Plan, agency agreements, and the declaratory
24 judgment ruling. (*Id.*). The bankruptcy court found that the purchaser was a good faith
25 purchaser for fair consideration and noted that there had been no objections to that finding.
26 (*Id.*).

27 The Court entered an order granting the CITLO sale motion. (CITLO Order (#37-4) at
28 2). The order stated the following. ML Manager, as the manager of CITLO Loan LLC and as

1 agent for the non-transferring pass-through investors, had authority and was directed to enter
2 into the sale agreement, to consummate the sale, to sell the CITLO property pursuant to the
3 terms of the sale agreement, and to execute any and all documents needed to consummate
4 the sale. (*Id.*). The sale and transfer of the CITLO property to the purchaser shall be free and
5 clear of all liens, claims, encumbrances and interests with such liens claims, encumbrances
6 and interests to attach to the proceeds. (*Id.* at 3). The purchaser was a good faith purchaser
7 for fair consideration of the property. (*Id.*).

8 On August 26, 2010, the bankruptcy court held a hearing on the ZDC property. (ZDC
9 Transcript (#37-2) at 1). The parties stated that the ZDC property objections were the same
10 as the CITLO property objections. (*Id.* at 10). The bankruptcy court entered an order which
11 stated the following. (ZDC Order (#37-6) at 2). ML Manager, as the manager of ZDC II Loan
12 LLC and as agent for the non-transferring pass-through investors, had authority and was
13 directed to enter into the sale agreement, to consummate the sale, to sell the property
14 pursuant to the terms of the sale agreement, and to execute any and all documents needed
15 to consummate the sale. (*Id.* at 2-3). The sale and transfer of the ZDC property to the
16 purchaser shall be free and clear of all liens, claims, encumbrances and interests of any kind
17 with such liens claims, encumbrances and interests to attach to the proceeds. (*Id.* at 3). The
18 purchaser was a good faith purchaser for fair consideration of the property. (*Id.*).

19 Appellants Bear Tooth, Pueblo Sereno, Queen Creek, and MP Plan (collectively
20 "Appellants") filed timely notices of appeals on those orders. (See Notice of Appeal (#37-7)
21 at 1). On appeal, Appellants raise six issues: (1) whether the bankruptcy court erred in
22 entering the subject orders and authorizing ML Manager, the appellee, to sell certain real
23 property in which Appellants held tenant-in-common ownership interests on Appellants behalf
24 and without their consent; (2) whether the bankruptcy court erred in finding that it had
25 jurisdiction to approve the sales as requested by ML Manager; (3) whether the bankruptcy
26 court erred in ruling that ML Manager, as the asserted agents for Appellants, had authority to
27 sell the subject properties and to execute any and all documents on behalf of Appellants
28 necessary to consummate the sales; (4) whether the bankruptcy court erred in failing to

1 consider the revocation of ML Manager's asserted agency authority following foreclosure of
2 the subject properties; (5) whether the bankruptcy court erred in ruling that the sale and
3 transfer of the subject properties shall be free and clear of all liens, claims, encumbrances,
4 and interests, and the purchasers were entitled to good faith purchaser findings; and (6)
5 whether the bankruptcy court erred in approving the sales of the subject properties without
6 considering ML Manager's failure to fulfill its fiduciary obligations to Appellants. (Opening Brief
7 (#43) at 5). Appellants seek an order reversing the sale orders in their entirety. (*Id.* at 21).

8 STANDARD OF REVIEW

9 This Court reviews the bankruptcy court's conclusions of law *de novo* and its factual
10 findings for clear error. *In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005). This Court must
11 accept the bankruptcy court's findings of fact unless upon review, this Court is left with the
12 definite and firm conviction that a mistake has been committed. *In re Straightline Invest., Inc.*,
13 525 F.3d 870, 876 (9th Cir. 2008). This court reviews jurisdictional issues in bankruptcy cases
14 *de novo*. *In re Wiersma*, 483 F.3d 933, 938 (9th Cir. 2007). Additionally, issues not raised to
15 the bankruptcy court generally cannot be raised for the first time on appeal. *In re Enewally*,
16 368 F.3d 1165, 1173 (9th Cir. 2004).

17 DISCUSSION

18 In this appeal, the issues can be classified into four categories: (1) jurisdiction; (2) free
19 and clear; (3) ML Manager's irrevocable agency authority; and (4) fiduciary duties. As an initial
20 matter, Appellants did not object to the bankruptcy court's finding that the purchasers were
21 good faith purchasers and, thus, that argument is waived on appeal.

22 I. Jurisdiction

23 Post-confirmation bankruptcy court jurisdiction is more limited than pre-confirmation
24 jurisdiction. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005). A bankruptcy
25 court has post-confirmation jurisdiction over a matter when "there is a close nexus to the
26 bankruptcy plan or proceeding." *Id.* Matters affecting the interpretation, implementation,
27 consummation, execution, or administration of the confirmed plan will typically have the
28 requisite close nexus." *Id.*

1 In this case, the bankruptcy court had jurisdiction over the sale of the two properties
2 because the Plan created ML Manager to manage and operate the loans in the portfolio,
3 including the CITLO Loan LLC and the ZDC II Loan LLC. Therefore, the sale of the CITLO
4 and ZDC properties affected the administration of the Plan and provided the requisite close
5 nexus for post-confirmation jurisdiction.

6 **II. Free & Clear**

7 Appellants argue that the bankruptcy court had no authority under the bankruptcy code
8 or non-bankruptcy law to order the sale of the properties free and clear of liens. (Opening
9 Brief (#43) at 17). In response, ML Manager argues that a good faith purchaser takes title of
10 real estate free of any competing liens or interest and that the Court cannot undo the sale
11 because Appellants did not object to the good faith purchaser language. (Answering Brief
12 (#47) at 10).

13 In this case, it is unclear under what authority the bankruptcy court issued the sale of
14 the properties “free and clear” of any liens. The record demonstrates that the bankruptcy court
15 did not issue the “free and clear” language based on 11 U.S.C. § 363(f), which provides that
16 a trustee may sell a property free and clear of any interest. (See CITLO Transcript (#37-1) at
17 3). The bankruptcy court did not state under what authority it was issuing the sale of the
18 properties free and clear. Additionally, ML Manager does not provide this Court with any law
19 providing the bankruptcy court with the authority to issue a sale “free and clear” absent the
20 provisions of § 363(f). As such, the bankruptcy court erred by issuing the sale of the
21 properties free and clear absent any authority to do so.

22 Nevertheless, Appellants are not entitled to a reversal of the sale orders based on this
23 error. Appellants did not object to the purchasers as being “good faith purchasers.” Under
24 Arizona law, bona fide purchasers are purchasers who purchase property in good faith, for
25 value, and without notice. See *Hunnicut Constr., Inc. v. Stewart Title & Trust of Tucson*, 928
26 P.2d 725, 731 (Ariz. Ct. App. 1996). A bona fide purchaser takes title to property free of any
27 constructive trust or equitable lien. *Id.* at 730. Because Appellants did not object to the
28 purchasers as being good faith purchasers and have not argued that the purchasers took

1 property with notice to any liens, Appellants are not entitled to any relief under this issue.

2 **III. ML Manager's Irrevocable Agency Authority**

3 Appellants argue that, to the extent that ML Manager had agency authority, such
4 authority terminated upon foreclosure of the properties because ML Manager's interest de-
5 coupled from Appellants' interests rendering the agency power revocable. (Opening Brief
6 (#43) at 18-19). Appellants assert that the bankruptcy court should have held an evidentiary
7 hearing to determine whether ML Manager held any such interest or whether its agency
8 authority became revocable and was in fact revoked. (*Id.* at 20). In response, ML Manager
9 argues that it had valid agency authority. (Answering Brief (#47) at 14).

10 A power or agency coupled with an interest is irrevocable. See *Phoenix Title & Trust*
11 *Co. v. Grimes*, 416 P.2d 979, 981 (Ariz. 1966). The phrase "coupled with an interest" refers
12 to an interest in the property on which the power is to operate. *Id.* In this case, Appellants
13 offer no argument on why ML Manager's interest in the properties did not continue to flow to
14 ML Manager upon foreclosure of the collateral securing the loans. (See Opening Brief (#43)
15 at 19). Instead, Appellants only conclusively state that the interest did not continue and, thus,
16 ML Manager's interest was "de-coupled." (See *id.*). Here, the purpose of the irrevocable
17 agency was to permit ML Manager to administer the Plan by foreclosing on the loan portfolio
18 and reducing it to cash. As such, ML Manager's interest in the property extended past
19 foreclosure to distributing the proceeds. Accordingly, the bankruptcy court did not err.
20 Additionally, the bankruptcy court did not err in failing to hold an evidentiary hearing on this
21 issue because Appellants never requested one.

22 **IV. Fiduciary Duties**

23 Appellants argue that the bankruptcy court erred by approving the sale orders without
24 considering whether ML Manager had considered its fiduciary duties to Appellants. (Opening
25 Brief (#43) at 21). Specifically, Appellants argue that ML Manager refused to consider
26 Blackeye Capital's offers or to consider any higher or better offer. (*Id.*).

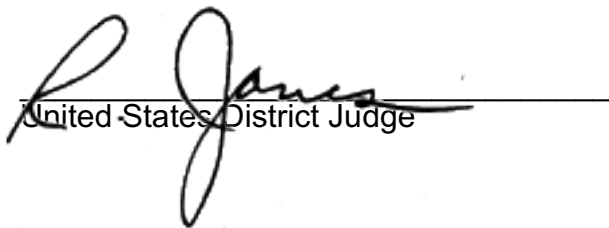
27 Here, the bankruptcy court did not err in approving the sale of the properties. As noted
28 in the proceedings below, ML Manager hired a broker to list and market the property over a

1 period of time, reviewed the offers to the property, and accepted the highest offer from a buyer
2 that it thought would close. (Reply to CITLO Sale (#36-8) at 3; Reply to ZDC Sale (#37-3) at
3 3). Appellants did not object to this process, but instead argued that Blackeye Capital's
4 untimely, last minute offers should have been considered. As Blackeye Capital notes in its
5 responses, it was a "prospective bidder" and only submitted a bid to purchase the properties
6 after ML Manager had listed the property, reviewed the offers, and accepted an offer from a
7 buyer that it thought would close. Because ML Manager did exercise its fiduciary duties with
8 respect to actual offers during the listing period, the bankruptcy court did not err in approving
9 the sale. As such, the Court affirms the CITLO and ZDC sale orders.

10 **CONCLUSION**

11 For the foregoing reasons, IT IS ORDERED that the bankruptcy appeal (#43) is
12 AFFIRMED.

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14 Dated: This 2nd day of May, 2012.

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16 
United States District Judge

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