

Standards for approval of settlement

Ziegenhagen et al. v. Dorsey et al., Adversary No. 04-6297-fra
In re Adam Kara, Case No. 03-70384-fra7
Appellate No. OR-05-1024-MoBuB

09/07/05

BAP aff'g FRA

Unpublished

The Trustee, acting through special counsel, opposed foreclosure of certain property of the estate by a creditor which had previously been granted relief from the automatic stay to do so. Trustee filed a complaint seeking injunctive relief and a temporary restraining order was entered pending a hearing. The creditor opposed the injunctive relief requested. The Trustee, acting on her own behalf, thereafter filed a motion to settle and compromise the adversary proceeding whereby the creditor could proceed with the foreclosure sale, subject to a payment of \$18,000 to the Trustee from the proceeds of sale. Trustee's (former) special counsel, noting that he was an administrative expense creditor, objected to the settlement motion, as did two other parties.

At the hearing on the motion for a TRO, the Trustee explained that given the speculative nature of the litigation and the expenses involved, she felt that the settlement was in the best interests of creditors and the estate. The court also heard from the parties opposing the settlement. The court approved the settlement and the parties opposing appealed.

The BAP, citing A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986), stated that a settlement must be "fair and equitable" and "reasonable." A & C Properties provides four factors to consider in determining fairness and reasonableness of a proposed settlement. While creditors' objections to a compromise must be afforded due deference, they are not controlling. The bankruptcy court's function is to examine the proposed settlement to determine if it falls below the lowest point in the range of reasonableness. The BAP held that while the court did not explicitly check off each of the "fair and equitable" factors set forth in A & C Properties, it made general findings supporting the settlement and the record clearly reflected that application of the factors weighed in favor of the settlement.

SEP 07 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. OR-05-1024-MoBuB
)
ADEM KARA,) Bk. No. 03-70384
)
Debtor.) Adv. No. 04-06297
)

MARK and JANET ZIEGENHAGEN;
FIRST CALL MORTGAGE & INVS.;
G. JEFFERSON CAMPBELL, Jr.,
Appellants,

MEMORANDUM¹

v.

LEE DORSEY, Trustee of the
Dorsey Loving Trust; TRACY
D. TRUNNELL, Chapter 7
Trustee; UMPQUA BANK; MICHAEL
J. BIRD,
Appellees.

Argued By Video Conference and Submitted on July 29, 2005

Filed - September 7, 2005

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

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding.

Before: MONTALI, BUFFORD² and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Samuel L. Bufford, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The Chapter 7³ trustee moved for approval of a compromise of
2 an adversary proceeding initiated by the estate against the holder
3 of a first lien on real property co-owned by the debtor. Junior
4 lienholders and an administrative expense creditor opposed the
5 settlement. The bankruptcy court approved the settlement and we
6 AFFIRM.

7 I.
8 **FACTS**

9 Adem Kara ("Debtor") and his spouse filed a voluntary Chapter
10 13 petition in December 2003. Debtor's spouse was severed from the
11 case in March 2004. Debtor was represented by appellant G.
12 Jefferson Campbell, Jr. ("Campbell") in his Chapter 13 case.
13 Debtor's case was converted to Chapter 7 on July 28, 2004, and
14 appellee Tracy D. Trunnell ("Trustee") was appointed as Chapter 7
15 trustee.

16 Debtor was the co-owner of certain real and personal property
17 commonly known as the Phoenix Club (the "Property"). His co-
18 owner, Ahmet Turkemongnu ("Turkemongnu"), was shown on the title as
19 a tenant in common. While in Chapter 13, Debtor sued Turkemongnu
20 (a resident of Turkey) to have Debtor declared the sole owner of
21 the Property. Debtor valued the Property at \$400,000 in his
22 schedules and statement of financial affairs; he estimated the
23 amount of the secured claims against the Property to be \$225,000.

24 In 2001, prior to Debtor's bankruptcy, Debtor and Turkemongnu
25 executed a promissory note (the "Note") in the amount of

26 _____
27 ³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 \$135,000.00 to the order of appellee The Dorsey Loving Trust (the
2 "Trust") and a trust deed (the "Trust Deed") on the Property for
3 the benefit of the Trust. In 2004, while Debtor's case was still
4 in Chapter 13, appellee Lee D. Dorsey ("Dorsey"), as trustee of the
5 Trust, sought relief from the automatic stay. The bankruptcy court
6 entered an adequate protection order (the "APO") requiring Debtor,
7 inter alia, to repair the Property, to acquire and maintain
8 insurance, and to make monthly payments in the amount of \$1,954.00.

9 Debtor filed a motion to vacate the APO, arguing that Dorsey
10 had transferred the Trust's interests in the Trust Deed to appellee
11 Umpqua Bank ("Umpqua"). Debtor also filed a notice of intent to
12 sell the Property free and clear of the interests of several
13 creditors including the Trust, appellants Mark and Janet
14 Ziegenhagen (the Ziegenhagens),⁴ and appellant First Call Mortgage
15 & Investments, LLC ("First Call"). This notice did not mention
16 Turkemongnu and did not indicate whether he would consent to a sale
17 of the Property.⁵ Debtor indicated that he intended to sell the
18 Property to Michael and Else Beth Heckert (the "Buyers") for
19 \$350,000.00 (with the Buyers to obtain a closing bridge loan in the
20 amount of \$200,000.00).

21 The bankruptcy court heard Debtor's request to sell the
22 Property free and clear of liens in conjunction with a hearing on
23 confirmation of his Chapter 13 plan. On July 30, 2004, the court
24

25 ⁴ The Ziegenhagens agreed to the sale of the Property free
26 and clear of their liens in exchange for a discounted cash payment
of \$40,000.

27 ⁵ An adversary proceeding is required to obtain approval
28 under section 363(h) to sell jointly-owned property without the
consent of the co-owner. See Rule 7001(3).

1 denied confirmation, denied "all other motions by the Debtor" and
2 converted the case to Chapter 7. In so doing, the court ruled that
3 the automatic stay remain in place for two weeks after appointment
4 of the Chapter 7 Trustee.

5 On August 13, 2004, Trustee filed a motion to abate the APO,
6 requesting additional time to arrange a possible sale of the
7 Property to Buyers. Three days later, on behalf of Debtor,
8 Campbell filed an emergency motion for modification of the APO.
9 After a hearing on August 19 on both motions, the court amended the
10 APO only to provide that a foreclosure sale on the Property by the
11 Trust could not occur prior to October 2, 2004. The court also
12 ordered that objections to the claims of the Trust would proceed as
13 an adversary proceeding.

14 On September 21, 2004, the court granted relief from the stay
15 "without Cure Opportunity" providing that the stay "is terminated
16 to allow [the Trust] to foreclose on, and obtain possession of, the
17 [P]roperty provided that a foreclosure sale shall not occur prior
18 to 12:01 a.m. October 2, 2004." The foreclosure sale was scheduled
19 for October 18, 2004.

20 On October 1, 2004, Campbell, now acting as special counsel
21 for the Trustee, filed a Motion for New Trial, Motion for Relief
22 from Orders, Motion for Amendment to Findings, and Motion for
23 Reconsideration ("New Trial Motion"). Campbell again argued that
24 Dorsey (as trustee of the Trust) did not hold a beneficial interest
25 in the Trust Deed because it had been assigned to Umpqua. Campbell
26 also contended that the notice of default was made by Umpqua, that
27 the issuance of the notice of foreclosure sale was void and
28 defective, and that the publication and service of the notice of

1 sale was defective.

2 On October 5, 2004, the bankruptcy court denied the New Trial
3 Motion and issued a memorandum explaining its reasoning and noting
4 that the proper avenue for seeking relief would be an action to
5 enjoin the foreclosure sale (or an action in state court
6 challenging the sufficiency of the sale once it occurred).

7 On October 15, 2004, Trustee filed a motion for temporary
8 reinstatement of the automatic stay, seeking an opportunity to
9 attempt to sell the Property to the Buyers. On the same day, the
10 bankruptcy court entered an order denying the motion for temporary
11 reinstatement of the stay, noting that "[t]his is the latest in a
12 series of attempts by the Debtor, and later the Trustee, to prevent
13 sale on foreclosure of the principal asset of the estate." The
14 court emphasized that the ruling was based on the procedural
15 posture of the motion and that it was making no findings on the
16 substantive merits.

17 Also on October 15, 2004, Trustee (appearing through Campbell)
18 filed a complaint ("Complaint") against Dorsey and others to, inter
19 alia, avoid the Trust Deed and to permanently enjoin the
20 foreclosure sale by Dorsey and the Trust. The Complaint alleged
21 many of the same facts already raised by Debtor in his Chapter 13
22 case and by Trustee (through Campbell) in the Chapter 7 case,
23 including those related to the Trust's purported assignment of its
24 beneficiary interest in the Trust Deed to Umpqua. He also filed on
25 behalf of Trustee an emergency motion for temporary restraining
26 order and for preliminary injunction ("TRO Motion"). On October
27 17, 2004, the bankruptcy court entered a temporary restraining
28 order ("TRO") staying the October 18 foreclosure sale until a "show

1 cause evidentiary hearing can be held on the [TRO Motion]."

2 Dorsey, as trustee of the Trust, opposed the TRO Motion; the
3 opposition was not in the excerpts provided us.⁶ The hearing on
4 the TRO Motion commenced on October 22 despite Campbell's request
5 for a continuance. At the hearing, the "[p]arties announced a
6 settlement whereby the estate would receive \$18,000 from the
7 proceeds of a foreclosure sale conducted by Mr. Dorsey." On
8 October 25, 2004, Campbell filed a motion for leave to withdraw as
9 counsel for Trustee because Trustee was settling the adversary
10 proceeding against his recommendation.⁷

11 On October 27, 2004, Trustee (acting on her own behalf) filed
12 a Motion and Notice of Intent to Settle and Compromise Adversary
13 Proceeding ("Settlement Motion"). The notice stated that
14 "testimony may be received" at the hearing and described the terms
15 of the settlement as follows:

16 The Trustee has identified a potential claim to avoid the
17 Trust Deed held by the first lienholder, Dorsey Loving
18 Trust, on the real property located at 117 Main Street,
19 Phoenix, Oregon. Said claim could result in avoidance,
20 for the benefit of the unsecured creditors, of the
\$220,000 lien. The Dorsey Loving Trust asserts several
defenses to the avoidance. The Trustee intends to settle
its claim against Dorsey Loving Trust for payment of

21 ⁶ Where appellant has omitted something from the excerpts, we
22 are entitled to presume that appellant does not regard the missing
23 items as helpful to his appeal. Gionis v. Wayne (In re Gionis),
24 170 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd mem., 92 F.3d 1192
(9th Cir. 1996); McCarthy v. Prince (In re McCarthy), 230 B.R. 414,
416-17 (9th Cir. BAP 1999).

25 ⁷ No order approving Campbell's employment as special counsel
26 had been entered. In May 2005, the Trustee filed a notice with the
27 bankruptcy court attaching Campbell's employment applications, but
28 noted that she was not seeking approval of such employment for many
reasons, including her belief that his theories for avoiding the
Trust Deed "were speculative" and "several were completely without
merit."

1 \$18,000 from Dorsey Loving Trust. This settlement is
2 contingent upon dismissal of the above-referenced
3 adversary proceeding and the Dorsey Loving Trust
4 completing its foreclosure sale of the real property
described herein. Settlement will avoid further costs,
fees and risks associated with litigation, and is in the
best interest of creditors.

5 In other words, the Trust would be able to proceed with its
6 foreclosure sale, but would pay \$18,000 to the estate. The
7 Settlement Motion was not supported by declarations.

8 On November 5, 2004, Campbell, noting that he was an
9 administrative expense creditor affected by the proposed
10 settlement, filed an objection to the Settlement Motion. In
11 addition to the arguments already made to enjoin the foreclosure
12 sale, Campbell argued that the Trust had improperly charged an
13 excessive default interest rate against the estate, had improperly
14 charged late fees, and had charged improper and excessive
15 attorneys' fees.

16 First Call also objected by adding a handwritten note to the
17 bottom of a letter to it from Campbell. Similarly, the
18 Ziegenhagens submitted a letter objection to the Settlement Motion.

19 At the hearing on the Settlement Motion, Trustee described the
20 grounds supporting her decision to settle.⁸ Trustee, who is an
21 attorney, reviewed the Trust Deed and the various pleadings and
22 determined that the \$18,000 the estate would receive in the
23 settlement was equivalent to what the estate would receive in the
24 event it succeeded in speculative and expensive litigation against

25
26 ⁸ Trustee presented her case in support of the settlement
27 through oral argument. No party objected to the court's
28 consideration of arguments and no party requested that the
arguments be presented in the form of or supported by testimony or
exhibits.

1 the Trust.

2 Trustee noted that her communications with Turkemongnu were
3 difficult but that he disputed Debtor's rights to the Property. He
4 was not cooperating with a sale by her of the Property, so the
5 estate would have had to share any proceeds of a sale with
6 Turkemongnu absent costly and uncertain litigation to defeat his
7 co-ownership interests. After reviewing the litigation against
8 Dorsey and the Trust, Trustee determined that the probability of
9 success was "speculative" and that the litigation would be "quite
10 expensive."⁹ The Trustee determined that if the Trust's lien were
11 ultimately determined to be valid, the estate would only get
12 \$18,000, but that amount would have been subject to Turkemongnu's
13 co-ownership claim. By settling with Dorsey and the Trust,
14 however, she could avoid the cost and uncertainty of litigation
15 while retaining \$18,000 for the estate, free of the claims of
16 Turkemongnu.

17 Trustee also noted that with respect to the avoidance claims
18 against the Trust, "I have some concerns about whether the
19 documentation really is invalid as presented . . . The lien itself,
20 the trust deed itself, appears to have been valid, at least to
21 begin with." While she admitted that she had not had an
22 opportunity to conduct Rule 2004 examinations or more extensive
23 investigations into the claims, she also noted "from the

24
25
26

⁹ Campbell contends that he had already incurred more than
27 \$25,000 in fees and expenses pursuing the claims in Chapter 13.
28 Appellants' Opening Brief at page 26, footnote 9. Such fees and
costs would have only multiplied if this matter had gone to trial,
further eroding the likelihood that unsecured creditors would have
benefitted from the litigation.

1 information that I looked at, it appeared that the trust deed was
2 valid except for a possible technicality that it appeared [sic] had
3 been corrected." She also observed that Campbell had stated that
4 the litigation could not be resolved by a motion for summary
5 judgment, thus adding to potential expenses. She indicated that
6 her "immediate" concerns were that the foreclosure sale would not
7 be enjoined without the necessary witnesses and that "the
8 foreclosure would move forward and those [avoidance] claims would
9 essentially be moot and that no person would receive any funds
10 other than Mr. Dorsey."

11 The court questioned whether the proposed settlement was fair
12 to the junior lienholders, since it did not contemplate payment to
13 them (other than as general unsecured creditors of the estate). In
14 response, Trustee stated that the foreclosure sale had been set for
15 the Monday following the hearing on the TRO Motion, and that if she
16 had not prevailed on the request for the TRO, the foreclosure sale
17 would have proceeded and the junior lienholders and the estate
18 would have received nothing. She had to weigh the likelihood of
19 success on the merits against that of the costs of litigation and
20 the certainty of some recovery through settlement. She concluded
21 that the settlement was in the best interests of creditors and the
22 estate. She also observed that the junior lienholders had a way of
23 protecting their own interests: by state court claims or by making
24 bids at the foreclosure sale.

25 Trustee also stated that she had personally examined the
26 Property and that it was in "severe disrepair." She observed that
27 the estate could not continue to pay liability insurance on the
28 Property (\$4,000 a month) pending resolution of the avoidance

1 claim.

2 Campbell and Ms. Ziegenhagen presented argument against the
3 Settlement Motion, and a representative of First Call argued that
4 First Call had not received notice of the settlement. First Call,
5 however, was not on the mailing matrix and had not requested
6 special notice. The court also gave Debtor an opportunity to
7 speak.

8 In the course of his argument, Campbell revisited his
9 contentions that the Trust's lien was avoidable. He noted that the
10 settlement would not satisfy the "fair and equitable" standard set
11 forth in Martin v. Kane (In re A & C Properties), 784 F.2d 1377,
12 1380 (9th Cir. 1986), cert. denied sub nom. Martin v. Robinson, 479
13 U.S. 854 (1986). The court indicated that it believed the sound
14 business judgment standard also applied.

15 After argument, the court ruled that it would grant the
16 Settlement Motion, stating: "I know this is a difficult case for
17 everybody. We have been wrangling with different aspects of this
18 case for about 11 months now. It seems like every month new legal
19 issues spring up. But I believe that the Trustee's motion, with
20 some changes that we'll discuss, ought to be allowed."

21 The court then stated that the "standard the Trustee is held
22 to, I think, is two-fold. First, the settlement must be fair and
23 equitable. But it must also reflect the exercise of sound business
24 judgment on the part of the Trustee." Based on its history with
25 the litigation, the court observed that "I think it is at least as
26 likely at the end of the day that the estate will come up with
27 nothing [if it pursues the claims]. It will have to show for it
28 several thousand, maybe tens of thousands of dollars, in fees and

1 costs associated with the litigation." The court then noted that
2 even if the Trustee prevailed and sold the Property, she would have
3 to share the proceeds with the co-owner. He thought that "taking
4 \$18,000 net rather than buying into the litigation to preserve what
5 amounts, presumptively, to a half interest in the [P]roperty"
6 constituted "sound judgment" by Trustee.

7 The court also noted that it was "not unmindful of the
8 difficult position this puts the secured creditors in, but the
9 secured creditors have been in that position for some time because
10 the Court granted relief from the automatic stay some time ago"
11 because Debtor (and then Trustee) had not satisfied their adequate
12 protection obligations. "So the foreclosure that this [Settlement
13 Motion] permits is, frankly, what the Court contemplated some time
14 ago, without the benefit of the extra \$18,000 for the benefit of
15 the estate." (Emphasis added.) The court therefore approved the
16 settlement, but added a condition that the \$18,000 be paid on the
17 earlier of 60 days after execution of the settlement agreement or
18 thirty days after the foreclosure sale.

19 On December 2, 2004, the court entered an order granting the
20 Settlement Motion, effective nunc pro tunc to the November 10
21 hearing date. The notice of appeal was timely filed on December 9,
22 2004.

23 On January 3, 2005, Dorsey filed a motion to dismiss the
24 appeal on standing and mootness grounds. In the motion to dismiss
25 and supporting papers, Dorsey indicated that the foreclosure sale
26 of the Property had occurred on November 12, 2005, and that Dorsey
27 subsequently sold the Property to Buyers on November 17, 2004, and
28 disbursed the \$18,000 to Trustee on the same date. Appellants

1 opposed the motion, and the panel entered an order denying it on
2 March 21, 2005, "without prejudice to the parties raising the
3 mootness and standing issues in their briefs."

4 **II.**
5 **ISSUES**

6 (A) Whether this appeal is moot.

7 (B) Whether the bankruptcy court abused its discretion in
8 granting Trustee's motion for approval of compromise pursuant to
9 Fed. R. Bankr. P. 9019.

10 **III.**
11 **STANDARD OF REVIEW**

12 The bankruptcy court's decision to approve a compromise is
13 reviewed for abuse of discretion. A & C Properties, 784 F.2d at
14 1380. As noted by the Ninth Circuit in A & C Properties:

15 The law favors compromise and not litigation for its own
16 sake (citation omitted), and as long as the bankruptcy
17 court amply considered the reasonableness of the
18 compromise, the court's decision must be affirmed
19 (citation omitted).

20 Id. at 1381. "Approving a proposed compromise is an exercise of
21 discretion that should not be overturned except in cases of abuse
22 leading to a result that is neither in the best interests of the
23 estate nor fair and equitable for the creditors." CAM/RPC
24 Electronics v. Robertson (In re MGS Marketing), 111 B.R. 264, 266-
25 67 (9th Cir. BAP 1990).

26 Under the abuse of discretion standard, we cannot reverse the
27 bankruptcy court's ruling unless we have a definite and firm
28 conviction that the court committed a clear error of judgment in
the conclusion it reached upon a weighing of the relevant factors.
Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996).

1 IV.
2 DISCUSSION

3 A. Jurisdictional Issues

4 The bankruptcy court had jurisdiction to review and approve
5 the settlement under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A),
6 (H) and (K). We have jurisdiction over this matter pursuant to 28
7 U.S.C. § 158.

8 Dorsey asserts that the appeal is moot because the settlement
9 has been fully executed and because the Property has been sold to
10 Buyers. Dorsey also asserts that we lack jurisdiction over this
11 appeal because the settlement concerned the Property and the
12 Property is no longer property of the estate. We disagree.
13 "Mootness results when the court of appeal becomes powerless to
14 grant the relief requested by the appellant." Rosner v. Worcester
15 (In re Worcester), 811 F.2d 1224, 1228 (9th Cir. 1987). If we were
16 to reverse, the lawsuits against Dorsey could be reinstated and the
17 estate or the appellants could, should they prevail, obtain a money
18 judgment against the Trust or Dorsey for the value of the sums it
19 received in the sale of the Property. The sale does not have to be
20 undone, and the Property does not have to be property of the estate
21 for some type of relief to be fashioned for appellants.
22 Accordingly, the appeal is not moot and we have jurisdiction over
23 the appeal.

24 B. Substantive Issues

25 "The bankruptcy court has great latitude in approving
26 compromise agreements." Woodson v. Fireman's Fund Ins. Co. (In re
27 Woodson), 839 F.2d 610, 619 (9th Cir. 1987). The court's
28 discretion, however, is not unlimited; the compromise must be "fair

1 and equitable" and "reasonable." Id.; A & C Properties, 784 F.2d
2 at 1381. In determining the fairness and reasonableness of a
3 proposed settlement, the court must consider:

4 (a) The probability of success in the litigation; (b) the
5 difficulties, if any to be encountered in the matter of
6 collection; (c) the complexity of the litigation
7 involved, and the expense, inconvenience and delay
necessarily attending it; (d) the paramount interest of
the creditors and a proper deference to their reasonable
views in the premise.

8 A & C Properties, 784 F.2d at 1381. While creditors' objections
9 to a compromise must be afforded due deference, such objections are
10 not controlling. Id. "The opposition of the creditors of the
11 estate to approval of a compromise may be considered by the court,
12 but is not controlling and will not prevent approval of the
13 compromise where it is evident that the litigation would be
14 unsuccessful and costly." Official Unsecured Creditors' Comm. v.
15 Beverly Almont Co. (In re The General Store of Beverly Hills), 11
16 B.R. 539, 541 (9th Cir. BAP 1981) (emphasis added).

17 The court may give weight to the opinions of the trustee, the
18 parties and their attorneys. A & C Properties, 784 F.2d at 1384.
19 "Rather than conducting a detailed evaluation of the merits of the
20 state court action," the bankruptcy court's function is "to examine
21 the proposed settlement to determine if it falls below the lowest
22 point in the range of reasonableness." In re Hydronic Enterprise,
23 Inc., 58 B.R. 363, 366 (Bankr. D. R.I. 1986).

24 In this case, we affirm the bankruptcy court's approval of the
25 settlement; the record before the bankruptcy court was sufficient
26 to support the court's approval of the settlement and conclusion
27 that it was "fair and equitable." While the court did not
28 explicitly check off each of the "fair and equitable" factors set

1 forth in A & C Properties, it did make general findings supporting
2 the settlement and the record clearly reflects that application of
3 these factors weighs in favor of the settlement.¹⁰ Even though
4 creditors opposed the compromise, the court's approval was
5 appropriate where the record demonstrated that continued litigation
6 would not succeed or benefit the estate. The General Store of
7 Beverly Hills, 11 B.R. at 541.

8 In its analysis, the court indicated that it believed that the
9 standard for evaluating the settlement is two-fold: "First, the
10 settlement must be fair and equitable. But it must also reflect
11 the exercise of sound business judgment on the part of the
12 Trustee." (Emphasis added.) The Ninth Circuit does not
13 specifically impose the second of these standards on Trustee;
14 rather, it has stated that a settlement must be "fair and
15 equitable" and "reasonable." A & C Properties, 784 F.2d at 1381.
16 (setting forth factors to consider when determining if settlement
17 is "fair and equitable" and "reasonable"). The court erred in
18 imposing an additional burden on Trustee: demonstration of the
19 exercise of sound business judgment. However, the bankruptcy

20 _____
21 ¹⁰ While the record would have been much clearer had the
22 bankruptcy court identified, analyzed, and announced how it weighed
23 each of the A & C Properties factors, we will not overturn the
24 approval of the compromise merely because the court explicitly
25 failed to consider such factors. Rather, "where the record
26 supports approval of the compromise, the bankruptcy court should be
27 affirmed," even if the bankruptcy court has made only general
28 findings supporting the compromise. A & C Properties, 784 F.2d at
1383.

26 Nonetheless, we encourage the bankruptcy court to identify and
27 specifically analyze each of the A & C Properties factors when
28 deciding future motions to approve compromises, thereby eliminating
arguments that it has employed the improper standard for reviewing
settlements.

1 court's imposition of an additional standard for approving the
2 settlement (a determination of whether the settlement reflected the
3 exercise of sound business judgment by the Trustee), while
4 erroneous, was of no consequence. The court required the
5 settlement to satisfy this standard in addition to the standard
6 used by the Ninth Circuit (the "fair and equitable" standard). It
7 merely increased the burden of the Trustee, the appellee, and did
8 not affect the substantial rights of the complaining parties, the
9 appellants. The error in imposing an additional standard on
10 Trustee was therefore harmless. 28 U.S.C. § 2111 (appellate court
11 shall disregard "errors or defects which do not affect the
12 substantial rights of the parties"); First Card v. Carolan (In re
13 Carolan), 204 B.R. 980, 987 (9th Cir. BAP 1996) (same).

14 A & C Properties requires a bankruptcy court to consider the
15 probability of success in litigation when evaluating a proposed
16 settlement and determining whether it is "fair and equitable." It
17 further requires the court to consider the difficulties of
18 collection and the complexity, expense and delay attendant to the
19 litigation. Further, as this court has stated:

20 The function of compromise is to avoid litigation involving
21 delay and expense unless there appears to be a sound legal
22 basis for the litigation and a likelihood of substantial
23 benefit to the estate (citation omitted). Approval of
24 compromise is appropriate if the court finds that the outcome
25 of the litigation is doubtful, but even when a compromised
26 dispute was based on a substantial foundation and was not
27 clearly invalid as a matter of law, approval of compromise is
28 not an abuse of the court's discretion."

25 General Store of Beverly Hills, 11 B.R. at 541 (emphasis added).

26 Here, the bankruptcy court had been exposed many times to the
27 claims asserted against Dorsey and the Trust. The court noted that
28 the disputes had been before it for months; it had ruled on other

1 motions raising the same issues. Based on its familiarity with the
2 case, it concluded that the settlement provided creditors (even the
3 junior lienholders) more than what it had contemplated they would
4 receive had the litigation progressed.

5 Similarly, Trustee indicated that success in the litigation
6 appeared "speculative" and that she doubted the merits of some of
7 the claims attacking the validity of the Trust Deed. Both the
8 Trustee and the court indicated that the outcome of the litigation
9 was doubtful and that even if it were to succeed, the probability
10 of substantial benefit to the estate was small, particularly in
11 light of the possibility of sharing any proceeds from a sale with
12 the co-owner. Given the protracted history of the litigation, the
13 court's familiarity with it and Trustee's analysis of the claims
14 and the small benefit (if any) that the estate would derive from
15 successful prosecution of the claims, the record demonstrates that
16 continuation of the litigation would not result in a "likelihood of
17 substantial benefit" of the estate. Therefore, the factor of
18 probability of success in the litigation weighs in favor of the
19 settlement.

20 Likewise, the factor of "complexity" and "expense" of
21 litigation weighs in favor of the settlement. Trustee established
22 (and the court agreed) that the litigation would be expensive;
23 Campbell had already incurred \$25,000 in fees in the Chapter 13
24 case fighting Dorsey and the Trust. Trustee would have had to
25 maintain insurance and repairs on a deteriorating Property during
26 pendency of any litigation. Campbell had indicated to Trustee
27 that the matter could not be resolved by summary judgment. The
28 court, already exposed to the issues at litigation, noted that the

1 case was complex.¹¹

2 Both the court and Trustee considered the interests of
3 creditors, including the junior lienholders. Trustee concluded
4 that the chances of obtaining a preliminary injunction against the
5 foreclosure sale were not sufficient to justify risking a sure
6 \$18,000 recovery for the estate, especially when it was probable
7 that the estate and the junior lienholders would receive nothing
8 if the foreclosure sale occurred. The court agreed. While the
9 junior lienholders might have benefitted from a favorable
10 disposition of the litigation, they would have benefitted at the
11 expense of the estate, which would have borne the litigation,
12 property maintenance and insurance costs in the interim. The
13 record reflects that the settlement was in the best interests of
14 the estate, and that the court did not error in concluding that it
15 served the interests of creditors.

16 C. Procedural Issues

17 Appellants argue that the bankruptcy court erred by not
18 conducting an evidentiary hearing on the Settlement Motion. The
19 notice for the Settlement Motion indicated that the parties could
20 present testimony; Appellants chose not to do so. Appellants did
21 not object at the hearing to the presentation of the Trustee's
22 position through argument instead of sworn testimony. Therefore,
23 any objections as to the form of the arguments presented to the
24

25
26 ¹¹ No evidence or argument was presented by any party on the
27 factor of difficulty of collection. We note, however, that even if
28 collection on the judgment were not difficult, the record indicates
that a judgment would have been of minimal benefit to the general
unsecured creditors of the estate, given the costs of litigation
and Property maintenance.

1 bankruptcy court were waived. Hardin v. Gianni (In re King Street
2 Investments, Inc.), 219 B.R. 848, 859 (9th Cir. BAP 1998) ("The
3 Ninth Circuit recognizes that the failure of an appellant to raise
4 an objection to the admission of evidence before the trial court
5 precludes an appellant from doing so for the first time on
6 appeal.").

7 In any event, a full evidentiary hearing is not necessary when
8 approval of a settlement is sought. Depoister v. Mary M. Holloway
9 Foundation, 36 F.3d 582, 585-86 (7th Cir. 1994) ("we believe that
10 the bankruptcy court was not obligated to conduct an evidentiary
11 hearing as a prerequisite to approving the compromise"). This is
12 particularly true in a case such as this, where the court is
13 already highly acquainted with the litigation being settled and the
14 merits of that litigation. Here, the bankruptcy court was in
15 possession of sufficient facts "to form an educated estimate of the
16 complexity, expense, and likely duration of such litigation" and
17 was in a prime position to "compare the terms of the compromise
18 with the likely rewards of the litigation." Protective Committee
19 for Independent Stockholders of TMT Trailer Ferry, Inc. v.
20 Anderson, 390 U.S. 414, 424-25 (1968).

21 V.
22 CONCLUSION

23 Given the Trustee's arguments and the bankruptcy court's
24 analysis of the facts supporting settlement, we cannot say that the
25 court abused its discretion in approving the Settlement Motion. We
26 therefore AFFIRM.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-05-1024-MoBuB

RE: ADEM KARA

A separate Judgment was entered in this case on 9/7/05.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was mailed this date to all parties of record to this appeal.

By: Elaine Lewis

Deputy Clerk: September 7, 2005

A handwritten signature in cursive script, appearing to read "Elaine Lewis", is written over the typed name and date.