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09/07/05 BAP aff'g FRA Unpublished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.

NOT FOR PUBLICATION

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.,	M E M O R A N D U M[1]
Appellants,	
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, BUFFORD[2] 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.

The Chapter 7[3] trustee moved for approval of a compromise of an adversary proceeding initiated by the estate against the holder of a first lien on real property co-owned by the debtor. Junior lienholders and an administrative expense creditor opposed the settlement. The bankruptcy court approved the settlement and we AFFIRM.

I.
FACTS

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

sale was defective.

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

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

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

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

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

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

> The Trustee has identified a potential claim to avoid the Trust Deed held by the first lienholder, Dorsey Loving Trust, on the real property located at 117 Main Street, Phoenix, Oregon. Said claim could result in avoidance, 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

---

[6] Where appellant has omitted something from the excerpts, we are entitled to presume that appellant does not regard the missing items as helpful to his appeal. Gionis v. Wayne (In re Gionis), 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).

[7] No order approving Campbell's employment as special counsel had been entered. In May 2005, the Trustee filed a notice with the bankruptcy court attaching Campbell's employment applications, but 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."

> $18,000 from Dorsey Loving Trust. This settlement is contingent upon dismissal of the above-referenced adversary proceeding and the Dorsey Loving Trust 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.

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

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

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

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

---

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

the Trust.

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

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

---

[9] Campbell contends that he had already incurred more than $25,000 in fees and expenses pursuing the claims in Chapter 13. 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.

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

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

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

claim.

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

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

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

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

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

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

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

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

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

II.
ISSUES

(A) Whether this appeal is moot.

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

III.
STANDARD OF REVIEW

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

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

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

Under the abuse of discretion standard, we cannot reverse the bankruptcy court's ruling unless we have a definite and firm 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).

IV.
DISCUSSION

A. Jurisdictional Issues

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

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

B. Substantive Issues

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

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

> (a) The probability of success in the litigation; (b) the difficulties, if any to be encountered in the matter of collection; (c) the complexity of the litigation 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.

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

The court may give weight to the opinions of the trustee, the parties and their attorneys. A & C Properties, 784 F.2d at 1384. "Rather than conducting a detailed evaluation of the merits of the state court action," 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." In re Hydronic Enterprise, Inc., 58 B.R. 363, 366 (Bankr. D. R.I. 1986).

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

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

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

---

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

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

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

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

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

General Store of Beverly Hills, 11 B.R. at 541 (emphasis added). Here, the bankruptcy court had been exposed many times to the claims asserted against Dorsey and the Trust. The court noted that the disputes had been before it for months; it had ruled on other

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

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

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

case was complex.[11]

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

C. Procedural Issues

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

---

[11] No evidence or argument was presented by any party on the factor of difficulty of collection. We note, however, that even if 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.

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

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

V.
CONCLUSION

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

Elaine Lewis