

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Acorn Capital Group, LLC,

Case No. 09-996 (JMR)

Appellant,

vs.

United States Trustee,

Appellee,

Polaroid Corporation, et al.,¹

Debtors-in-Possession.

BRIEF OF APPELLEE,
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

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¹ The Debtors include Polaroid Corporation; Polaroid Holding Company; Polaroid Consumer Electronics, LLC; Polaroid Capital, LLC; Polaroid Latin America I Corporation; Polaroid Asia Pacific LLC; Polaroid International Holding LLC; Polaroid New Bedford Real Estate, LLC; Polaroid Norwood Real Estate, LLC; and Polaroid Waltham Real Estate, LLC. The Debtors' chapter 11 cases are jointly administered in the Bankruptcy Court under Case No. 08-46617 (GFK).

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I. INTRODUCTION

Acorn's request to overturn the Sale Order, which authorized the sale of substantially all of the Debtors' assets free and clear of Acorn's purported liens, must fail for several reasons. First, Acorn's appeal is moot under section 363(m) of the Bankruptcy Code, which protects the Buyer as a good faith purchaser. Second, even if Acorn's appeal is not moot, at least two of the conditions enumerated in section 363(f) under which a debtor may sell its assets "free and clear of any interest in such property" are present here: (i) Acorn's interest is in bona fide dispute under section 363(f)(4), and (ii) Acorn could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest under section 363(f)(5). Third, Acorn's argument that the Bankruptcy Court violated its due process rights ignores well-settled law and the factual findings of the Bankruptcy Court. For all those reasons and as explained more fully herein, Acorn's appeal should be denied.

II. STATEMENT OF FACTS

A. Background

On December 18, 2008, each of the above-referenced Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code in the Bankruptcy Court for the District of Minnesota (the "Bankruptcy Court"). As the chapter 11 proceedings commenced, it quickly became evident that a prompt sale of the Debtors' assets under section 363 of the Bankruptcy Code would maximize the Debtors' value and be in the best interests of creditors and other stakeholders. On January 28, 2009, the Debtors' filed a motion requesting, among other things, Bankruptcy Court approval of

auction and bidding procedures, as well as approval of the sale of its assets outside the ordinary course of business (the “Sale Motion”). (A1-A53.)

Following an exhaustive marketing process for the sale of the assets, on February 18, 2009, the Bankruptcy Court approved the auction and bidding procedures, authorizing Polaroid to sell certain of its assets outside the ordinary course of business (“Bidding Procedures Order”). (C0001-C0018.) The Debtors held a staunchly competitive and robust auction for the sale of its assets that was continued multiple times for further bidding and concluded on April 16, 2009 (the “Auction”). By order dated the following day (the “Sale Order”), the Bankruptcy Court authorized the sale of Polaroid’s assets free and clear of any liens to PLR Holdings, LLC (the “Buyer”), a joint venture between Hilco Consumer Capital Corporation and Gordon Brothers Brands, LLC. (A973-A999.) Among other things, the Sale Order included an explicit finding that the Buyer was a good faith purchaser. (See A979, at ¶ O.) The sale was consummated on May 7, 2009. (C0019-C0020.)

B. The Asserted Liens

Since November 2004 until approximately one year prior to the Debtors’ filing of their voluntary petitions, Acorn Capital Group, LLC (“Acorn”) made substantial loans to PAC Funding, LLC (“PAC”) pursuant to multiple credit agreements between the two parties (the “PAC Credit Agreements”). None of the Debtors were parties to, nor beneficiaries of, the PAC Credit Agreements. After PAC defaulted on the PAC Credit Agreements, Acorn, PAC and Thomas Petters (“Petters”), whose entity, Petters Group Worldwide, LLC (“PGW”) had acquired Polaroid Corporation (“Polaroid”) in 2005,

entered into a Forbearance Agreement. Under that Forbearance Agreement, Petters caused Polaroid to execute and deliver a promissory note in the principal amount of \$15 million in favor of PAC with a maturity date 45 days from the issuance date. In addition, Petters caused Polaroid to deliver two security agreements. The first purportedly pledged and granted PAC a security interest in United States inventory and accounts in order to secure undefined obligations, while the second – with nearly identical provisions – was secured in favor of Acorn. Polaroid repaid the \$15 million note in accordance with its terms prior to the maturity date.

Shortly after the repayment of the \$15 million note, Polaroid executed another promissory note in favor of PAC, in exchange for \$10 million. Pursuant to that transaction, Acorn required Petters to execute an amended and restated security agreement that, among other things, imposed additional obligations upon Polaroid in excess of \$250 million. Polaroid derived little or no benefit from the execution of that security agreement.

On May 12, 2008, Acorn required Petters to again execute and deliver additional security agreements to secure the defaulting obligations of PAC to Acorn. In doing so, Petters caused Polaroid to purportedly pledge to Acorn all of its right, title and interest in Polaroid trademarks and related intellectual property rights in North America. Petters was subsequently arrested on charges of mail and wire fraud, money laundering and conspiracy, and was later indicted by a federal grand jury. (C0021-C0033.)

C. The Adversary Proceeding

Upon filing the Sale Motion on January 28, 2009, the Debtors stated their intention to commence adversary proceedings against Acorn, and specifically to:

- (i) set aside, avoid and recover certain fraudulent and preferential transfers made and obligations incurred to or for the benefit of those creditors; (ii) obtain declaratory relief and a determination relative to the validity, extent, nature and propriety of liens and agreements delivered in favor of Acorn; . . . and (iii) disallow, subordinate and/or recharacterize claims that have been or may be asserted against the bankruptcy estates by Acorn. . . .

(A9-A10, at ¶ 24.) On February 12, 2009, the Debtors filed a well-articulated and detailed adversary complaint against Acorn (the “Adversary Complaint”), which alleges that the pre-petition loan transactions, including the multiple security agreements between Polaroid and Acorn, were fraudulent. (A54-A83.) Among other things, the Adversary Complaint includes counts seeking to avoid the fraudulent transfers free and clear from any interest asserted by Acorn, disallow all claims asserted by Acorn and declare invalid any such liens asserted by Acorn. As evidenced by the factual accounts detailed and supported in the Adversary Complaint, substantial and legitimate disputes exist with respect to the liens and claims that Acorn asserts. These disputes are bona fide and concern the validity, extent, priority and voidability of liens and the allowability of related claims. Indeed, rather than seeking to dismiss the Adversary Complaint, or any counts thereof, Appellant subsequently filed its Answer and Counterclaim to the

Adversary Complaint on March 16, 2009.² (A200-A230.)

On February 13, 2009, Acorn objected to the Sale Motion and asserted that the Debtors' assets could not be sold free and clear of Acorn's and PAC's liens. (A84-A107.) Specifically, Acorn argued that the Debtors could not establish consent under 11 U.S.C. § 363(f)(2) or the existence of a bona fide dispute under 11 U.S.C. § 363(f)(4). After hearing argument from Acorn on February 18, 2009, the Bankruptcy Court concluded that it "need not reach the very specific discreet statutory issue on [the] merits of whether there is a bona fide dispute over Acorn Capital's claim within the meaning of 363(f)(4) [because] it is technically not ripe until a sale is actually presented to the Court for approval." (C0092, at 86.)

Following the February 18, 2009 hearing, Acorn sought discovery to ascertain the basis for the allegations contained in the Adversary Complaint, including requests to depose certain executives of Polaroid. Polaroid moved for a protective order to prevent the depositions, and on March 26, 2009, the Bankruptcy Court granted Polaroid's motion for a protective order. (C0034.)

Acorn filed an objection to the Sale Motion on March 26, 2009, and on April 3, 2009, Acorn renewed its objection to the sale (collectively, the "Sale Objections"). (A231-A269, C0035-C0040.) During the Sale Hearing on April 16, 2009, the Bankruptcy Court heard lengthy and largely uninterrupted argument from Acorn's

² The Adversary Case is captioned Polaroid Corp. v. Acorn Capital Group, LLC, No. 09-04031.

counsel before overruling the Sale Objections and approved the Sale Motion. (A973-A999.) On April 20, 2009, Acorn filed an Emergency Motion for Stay Pending Appeal in which it sought to stay the closing of the sale to the Buyer pending resolution of this appeal. (C0041-C0068.) The Bankruptcy Court denied that motion on April 23, 2009. (C0069-C0070.) Acorn then renewed its motion for stay pending appeal with this Court. (A1077-A1079.) The closing of the sale mooted that motion before this Court issued an order.

III. LEGAL ARGUMENT

A. Acorn's Request to Reverse the Sale Order and Reattach Liens, Claims and Interest in Those Assets is Moot.

At the outset, under applicable Eighth Circuit law, Acorn's appeal is moot because section 363(m) of the Bankruptcy Code protects a good faith purchaser from reversal on appeal of a sale order. Section 363(m) states in full:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Thus, in the absence of a stay pending appeal – which was not granted in this case – section 363(m) renders moot an appeal of a sale pursuant to section 363(b) or (c) to a “good faith” purchaser, such as the Buyer. (A979, at ¶ O.)

As the Eighth Circuit has stated, “[i]n bankruptcy appeals, the ‘finality rule’ found within 11 U.S.C. § 363 prevents the overturning of a completed sale to a good-faith

purchaser in the absence of a stay.” *In re Rodriguez*, 258 F.3d 757, 759 (8th Cir. 2001) (citing *In re Wintz Cos.*, 219 F.3d 807, 811 (8th Cir. 2000)). Furthermore, the Eighth Circuit has been particularly hesitant to “supply a remedy once property has left the bankruptcy estate.” *In re Rodriguez*, 258 F.3d at 759. The policy favoring finality in bankruptcy sales, in the end, “enhances the value of the debtor’s assets sold in bankruptcy.” *In re Trism, Inc.*, 328 F.3d 1003, 1006 (8th Cir. 2003). Allowing Acorn’s appeal would contradict the Eighth Circuit’s clearly expressed preference for finality in bankruptcy sales and would inhibit a bankruptcy court’s ability to maximize the value of a debtor’s estate.

Appellant cites no Eighth Circuit law on the issue of mootness, but, it instead exclusively relies upon a decision from the Ninth Circuit Bankruptcy Appellate Panel, *Clear Channel Outdoor v. Knupfer*, 391 B.R. 25 (9th Cir. B.A.P. 2008), which held that section 363(m) does not prevent an appeal of the “free and clear” provisions of a sale order under section 363(f). As such, the *Clear Channel* court concluded that a junior lienholder’s appeal was not mooted by section 363(m). Not only is the *Clear Channel* decision not controlling authority in this Circuit, but it is at odds with recent Eighth Circuit precedent, which firmly has expressed the preference for finality afforded by section 363(m).³ For these reasons, Appellant’s arguments are moot under section 363(m), and the appeal should be denied.

³ Appellant’s reliance on *Clear Channel* also is misplaced because the facts in *Clear Channel* are clearly distinguishable from the case *sub judice*. A primary basis for
(continued...)

B. The Bankruptcy Court Did Not Err in Approving The Sale Free and Clear of the Alleged Acorn Liens.

1. Standard of Review

This Court should not reverse findings of fact by the Bankruptcy Court absent a finding of clear error. *In re Food Barn Stores, Inc.*, 107 F.3d 558, 562 (8th Cir. 1997). Legal conclusions made by the Bankruptcy Court are reviewed *de novo*. *Id.* “If the bankruptcy court’s account of the evidence is plausible in light of the entire record viewed, it must be upheld even though [the appellate court] might have weighed the evidence differently had [it] been sitting as the trier of fact.” *In re Forbes*, 215 B.R. 183 (8th Cir. 1997) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

2. The Liens Asserted by Acorn are in Bona Fide Dispute and, thus, the Debtors’ Assets Can Properly Be Sold Free and Clear of Those Asserted Liens.

Section 363(f) of the Bankruptcy Code sets forth those situations where a debtor may sell property of the estate free and clear of any asserted liens. 11 U.S.C. § 363(f). Among these, a debtor may sell property of the estate free and clear of these interests in such property if “such interest is in bona fide dispute.” *Id.* § 363(f)(4). Such a rule is

the *Clear Channel* holding was that the lienholder had “not identified any third party who would be prejudiced because it relied on the bankruptcy court’s orders.” *Id.* at 35. A similar lack of prejudice cannot be found in this case. The future viability of PLR IP Holdings, LLC (“PLR”), the newly-formed entity that owns the assets acquired from the Debtors, would be in danger if Acorn’s liens attached to its recently-acquired assets. Furthermore, those employees of PLR, along with other third parties who have already contracted with PLR, would be adversely affected by their reliance on the Sale Order.

essential to allow liquidation of an estate's assets while such disputes are being litigated. *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (9th Cir. B.A.P. 2001).

While the Bankruptcy Code does not define “bona fide dispute,” courts in this Circuit have interpreted the phrase broadly to further the policy behind the rule. In fact, an adversary proceeding need not even be filed to establish a “bona fide dispute.” *See In re Gaylord Grain, L.L.C.*, 306 B.R. 624, 627 (8th Cir. B.A.P. 2004). When an adversary complaint related to the liens at issue is filed, the Eighth Circuit has suggested that such a filing may be sufficient to establish a “bona fide dispute.” *See id.* (“In this case, the trustee did *not* file an adversary proceeding seeking to avoid the creditor’s liens before he sought to sell the property free and clear of interests. *Thus, the issue becomes* whether there is a “bona fide dispute” for purposes of 11 U.S.C. § 363(f)(4).”) (emphasis added).

In any event, as Acorn points out, some courts have concluded that a “bona fide dispute” exists when the allegations contained in an adversary complaint “state an objective basis for the Court to find that a bona fide dispute exists.” *In re Robotics Vision Systems, Inc.*, 322 B.R. 502, 506 (Bankr. D.N.H. 2005). Such a standard is similar to the standard applied by courts for determining whether an adversary complaint would survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See In re BDC 56 LLC*, 330 F.3d 111, 119 (2d Cir. 2003); *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 533 (Bankr. E.D. Va. 2004). This standard is the most stringent standard courts have articulated in determining whether a bona fide dispute exists. Yet, it is telling that Appellant is unable to cite a single relevant case where an adversary complaint was filed

but a court nonetheless held, based on the facts set forth in that complaint, that no “bona fide dispute” existed.⁴

Polaroid clearly has established that a “bona fide dispute” exists. The Adversary Complaint unequivocally “states a disputed claim for which relief may be granted,” and thus, exceeds the threshold that Appellant advocates for establishing a bona fide dispute. *In re Robotics Vision Systems, Inc.*, 322 B.R. at 507. Significantly, Acorn did not move to dismiss these claims, but instead answered the Adversary Complaint and filed counterclaims. If, as Acorn asserts, the Adversary Complaint “is deficient on its face and fails to meet even the Rule 12(b)(6) standard,” it is difficult to imagine why Acorn did not move to dismiss the Adversary Complaint, and instead chose to file an answer and counterclaims to the Adversary Complaint. Acorn has yet to explain this glaring inconsistency.

⁴ Indeed, in the only cases that Appellant cites where adversary complaints were filed but the courts nevertheless found that a “bona fide dispute” did not exist, the courts’ ultimate rulings were based upon wholly unrelated circumstances which are not present in this case. *See In re Sw. Fla. Heart Group, P.A.*, 342 B.R. 639 (Bankr. M.D. Fla. 2006) (bankruptcy court found that interest at issue was merely an interest in a lease, and the adversary proceeding did not attempt to dispute that interest); *In re Robotics Vision Systems, Inc.*, 322 B.R. 502, 507 (Bankr. D.N.H. 2005) (bankruptcy court found that the “allegations state an objective basis for the Court to find that a bona fide dispute exists,” but ultimately disallowed a sale free and clear on wholly unrelated grounds that the disputed property was found not property of the estate).

3. Acorn Can Be Compelled to Accept a Money Satisfaction Under Section 363(f)(5), and thus, the Debtor's Assets Can Properly be Sold Free and Clear of Acorn's Asserted Liens.

Under section 363(f)(5), a sale can be approved free and clear of an interest in the sold property if the entity asserting the interest “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). Such is the case for Acorn.

Distilled to its essence, Acorn claims that it loaned money to the Debtors or some affiliates of the Debtors and was thereby granted a security interest in certain assets of the Debtors. The value of Acorn's interest thereto is determined by the value of the underlying collateral. *See* 11 U.S.C. § 506(a)(1) (“An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property.”) The value of Acorn's alleged collateral was established through the conduct of the indisputably robust Auction that resulted in a sale price more than double the value of the stalking horse bid. *See id.* (stating that the value of a secured creditor's interest “shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property”). Acorn then can be compelled to accept money in satisfaction of its interest, with its collateral valued by the auction and sale process.

Stated differently, for Acorn to show that it would be harmed by a sale free and clear of its disputed liens, it would have to prove that the value of the liens on the assets subject to the sale, to the extent proven valid, is materially greater than the amount of the liens which would be attached to the proceeds of the sale. Absent that showing, Acorn

would not be harmed if its asserted liens attach to the proceeds of the sale, rather than to the assets that were sold. Acorn has not made such a claim, and thus, can be compelled to accept money from the proceeds of the sale to the extent of its liens.

C. THE SALE OF DEBTORS' ASSETS FREE AND CLEAR OF ACORN'S ASSERTED LIENS IN COMPLIANCE WITH SECTION 363(F) DOES NOT VIOLATE DUE PROCESS.

Acorn lastly argues that the Bankruptcy Court's refusal to allow Acorn an opportunity to present evidence and argument violated its rights afforded under the due process clause. This argument – as evidenced by Acorn's failure to cite even a single case on this issue – is utterly meritless. Acorn mischaracterizes the facts surrounding the Bankruptcy Court's willingness to entertain the merits of Acorn's objections and ignores the relevant legal requirements of a due process claim.

Acorn has been afforded every opportunity to fully exercise its rights through both its filings and oral argument throughout this case. Indeed, Acorn submitted an Objection to the Sale Motion related to the bidding procedures, a Response to Motions for Protective Orders, an Objection to Sale Free and Clear of Liens and a Continuing Objection to Polaroid's 363 Sale Proposal. In sum, Acorn has filed nearly 200 pages of motions and objections, which is utterly inconsistent with the claim that “[t]he Bankruptcy Court refused to provide Acorn with a sufficient opportunity to present evidence and arguments” (Appellant's Brief at 27.) Acorn simply confuses the Bankruptcy Court's denial of Acorn's objections on the merits with a claim that those arguments were not considered.

Acorn also claims that the Bankruptcy Court's statements during oral argument at the Sale Hearing deprived Acorn of a fair opportunity to present evidence. Acorn fails to acknowledge, however, that the Bankruptcy Court allowed its counsel to present lengthy, nearly uninterrupted argument that comprised fifteen pages of transcript. (C0146-C0149.) Thus, Acorn received a full and fair opportunity to present its arguments on its objection to the sale of Polaroid's assets and cannot now claim a due process violation.

Finally, as noted earlier, Acorn fails to cite any legal authority to support its claim that the Bankruptcy Court violated its due process rights. Of course, bankruptcy courts are not required to hold evidentiary hearings, and such a decision "whether to hold one is within the court's discretion." *In re BDC 56 LLC*, 330 F.3d 111, 119 (2d Cir. 2003). Indeed, a sale under section 363 was found to violate a lienholder's due process rights only when the lienholder received insufficient notice of the sale. *See, e.g., In re Rounds*, 229 B.R. 758 (Bankr. W.D. Ark. 1999). Acorn has not contended, nor could it given its presence and active participation at the Sale Hearing, that it has received insufficient notice of the sale. Thus, Acorn's due process rights were not violated when it received proper notice of the sale, filed multiple objections and fully presented its argument at the Sale Hearing.

IV. CONCLUSION

For the reasons stated above, the Committee respectfully requests that the Court affirm the Sale Order set forth by the Bankruptcy Court.

Dated: June 3, 2009

Respectfully submitted,
/e/ Theresa H. Dykoschak

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