

Westlaw.

Not Reported in F.Supp.

Page 1

Not Reported in F.Supp., 1997 WL 154052 (S.D.N.Y.)
 (Cite as: Not Reported in F.Supp.)

H

Briefs and Other Related Documents

255 West 4th Street Realty Corp. v. Nisselson S.D.N.Y., 1997. Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

255 WEST 4TH ST. REALTY CORP., a debtor under Chapter 11 of title 11 of the U.S. Code, and Joseph Fischer, the sole Equity Security Holder of the Debtor, Appellants,

v.

Alan NISSELSON, As Trustee of the Debtor's estate, and Abraham J. Backenroth and Robert E.

Grossman, doing business as Backenroth and Grossman, a law firm partnership, former counsel to the Debtor in its former trustee (DIP) capacity, Appellees.

In the Matter of 255 WEST 4TH ST. REALTY CORP., Debtor.

Nos. 95 Civ. 7218 (DC), 96 Civ. 4177 (DC).

April 2, 1997.

Joseph Fischer, New York City, Pro Se.

Ernest H. Hammer, New York City, for Debtor-Appellant.

Jonathan D. Bachrach, New York City, for Noel Wiggins, Dorothy Wiggins.

Brauner Baron Rosenzweig & Klein, L.L.P. by Howard L. Simon, Alan Nisselson and Krista Abolins, New York City, for Appellee Chapter 11 Trustee Alan Nisselson.

MEMORANDUM DECISION

CHIN, District Judge.

*1 In case No. 95 Civ. 7218, Joseph Fischer ("Fischer"), in his self-styled capacity as the "sole equity holder" of 255 West 4th St. Realty Corp. (the "Debtor"), a corporation in reorganization proceedings under Chapter 11, appeals from an order dated May 26, 1995, of the United States Bankruptcy Court for the Southern District of New York (Bankruptcy Judge Blackshear) granting the

application of the Debtor's Chapter 11 Trustee Alan Nisselson (the "Trustee") to approve and authorize the contract and sale of the real property located at 255 West 4th Street (the "Property") to a bona fide good faith purchaser, Noel Wiggins ("Wiggins"). In a related action, case No. 96 Civ. 4177, Fischer moves for a **withdrawal of the reference** with respect to his May 31, 1996 motion pursuant to Fed.R.Civ.P. 60(b)(2)(3) to vacate and set aside the bankruptcy court's May 26, 1995 Order. Fischer's appeal and motion are both patently frivolous. The motion for the withdrawal of the reference is denied and the May 26, 1995 Order of the bankruptcy court is in all respects affirmed.

On April 19, 1993, the Debtor filed with the United States Bankruptcy Court for the Southern District of New York a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor managed the property as a debtor-in-possession until June 9, 1994 when Alan Nisselson was appointed Chapter 11 Operating Trustee of the Debtor. On February 22, 1994, prior to the Trustee's appointment, Fischer moved the bankruptcy court for approval of an order authorizing and approving the sale of the Property to 255 Holding Corp. The bankruptcy court granted the motion and issued an Order Approving the Sale (the "Fischer Sale Order") on March 22, 1994.

On January 19, 1995, the Trustee moved to have the Fischer Sale Order vacated and set aside, which the bankruptcy court granted on February 3, 1995 (the "Vacating Order") after a three-day evidentiary hearing established that the Debtor had obtained both the court's authorization to sell the Property and the Fischer Sale Order through misrepresentation and fraud on the court. The bankruptcy court vacated the sale and directed the Trustee to attempt to sell the property to a good faith purchaser on reasonable commercial terms. Thereafter, the Trustee made an application to the bankruptcy court for authorization to sell the Property to Wiggins, which the court granted. On

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 2

Not Reported in F.Supp., 1997 WL 154052 (S.D.N.Y.)
(Cite as: Not Reported in F.Supp.)

May 26, 1995, the court issued an Order Approving Contract of Sale and Authorizing Sale of Debtor's Real Property (the "Wiggins Sale Order"). Fischer filed the instant appeal from the Wiggins Sale Order, as well as an appeal from the Vacating Order before Judge Duffy. No stay of the sale was granted and title to the Property was conveyed by the Trustee to Wiggins.

As an initial matter, the bankruptcy court properly found that the Fischer Sale Order transferring the Property to 255 Holding Corp. was a sham, obtained by Fischer through misrepresentation and fraud upon the Court. In his recent affirmance of that decision of the bankruptcy court, Judge Duffy held that "[t]here is absolutely nothing to [Fischer's] totally frivolous appeal [of the Vacating Order]." *255 West 4th St. Realty Corp. v. Nisselson, et al.*, Nos. 95 Civ. 0689, 95 Civ. 3344, at 3 (March 7, 1997 S.D.N.Y.). I agree.

*2 Now Fischer claims that the Wiggins Sale Order was an improper exercise of the bankruptcy court's authority under Bankruptcy Code § 363(b). Under § 363(b), the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." The Second Circuit has adopted a flexible approach to § 363(b), finding that a sale outside the ordinary course of business may be authorized by the bankruptcy court if the evidence shows that there is "a good business reason" for the sale. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir.1983).

Here, the bankruptcy court properly found that there was a clear business justification for the sale. The Property was a decaying asset in need of substantial repair. At the same time, the Debtor's estate had no liquid assets to carry out the necessary repairs, or even to insure the property. Moreover, the Property was generating no income because the tenants refused to turn over rents due, in part because the tenants asserted substantial rent overcharge claims against the Debtor. Fischer's argument that the sale price to Wiggins of \$550,000 was \$175,000 less than the sham sale price of \$725,000 to 255 Holding Corp. which the bankruptcy court voided is irrelevant and frivolous. The conveyance to 255 Holding Corp. was

properly determined to be fraudulent. The \$550,000 sale price was in line with the appraisal obtained, which noted the poor condition of the Property and set its market value at \$450,000-\$500,000. Notice of the sale hearing was served on all interested parties, including all secured and unsecured creditors listed in the Debtor's bankruptcy schedules, and was published in *The New York Times*. The fact that no better and higher offers were made prior to the sale hearing indicates that \$550,000 was the highest price the market would support.

Fischer's argument that he was denied a hearing on the Trustee's application to sell the property is also meritless. On May 26, 1995 the bankruptcy court held such a hearing. Prior to that date, notice was provided directly to all interested parties including Fischer, advance notice was published to the public in *The New York Times*, Fischer submitted his written objections to the sale, and the Trustee submitted his response to Fischer's objections. At the hearing, the bankruptcy judge noted his review of the submissions and issued his detailed opinion rejecting numerous objections to the sale raised by Fischer. Under the circumstances, nothing more was required.

Lastly, I note that Wiggins was a good faith bona fide purchaser within the meaning of § 363(m) of the Bankruptcy Code, and that no stay of the sale was obtained pending appeal. Accordingly, Fischer's appeal is moot, in addition to meritless.

I have reviewed all of Fischer's grounds for appeal, including his rambling assertions of breach of fiduciary duty and "corruption" against the Trustee, his challenges to the integrity of the appraisal, his criticism of the bankruptcy judge's finding of a "good business reason" under § 363(b), his accusations of personal prejudice and judicial misconduct on the part of the bankruptcy judge, his claims of incompetence and malpractice on the part of his lawyer Abraham Backenroth, and his assertions that Wiggins is a "bad faith purchaser." There is absolutely nothing to this totally frivolous appeal either. The instant motions are simply further evidence of Fischer's efforts to subvert the ends of justice with baseless claims.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.

Page 3

Not Reported in F.Supp., 1997 WL 154052 (S.D.N.Y.)
(Cite as: Not Reported in F.Supp.)

CONCLUSION

*3 For the foregoing reasons, the decisions of the bankruptcy court are in all respects affirmed and the motion for a partial withdrawal of the reference is denied.

SO ORDERED.

S.D.N.Y., 1997.
255 West 4th Street Realty Corp. v. Nisselson
Not Reported in F.Supp., 1997 WL 154052
(S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

- 1:96cv04177 (Docket) (Jun. 06, 1996)
- 1:95cv07218 (Docket) (Aug. 31, 1995)

END OF DOCUMENT