NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 11-010

Bankruptcy Case No. 08-21085-JBH

ANTHONY A. GRASSI and
KELLEY G. LOVEJOY-GRASSI,
Debtors.

BAC HOME LOANS SERVICING LP,
Servicer for Deutsche Bank National Trust, Trustee on Behalf of
HSI Assets Securitization Corporation Trust 2007-HE1,
Appellant,

v.

ANTHONY A. GRASSI,
KELLEY G. LOVEJOY-GRASSI and
GRAND ATLANTIC CONDOMINIUM ASSOCIATION,
Appellees.

Appeal from the United States Bankruptcy Court for the District of Maine
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)

Before
Feeney, Tester, and Hoffman,
United States Bankruptcy Appellate Panel Judges.

Peter V. Doyle, Esq., on brief for Appellant.

November 21, 2011

Feeney, U.S. Bankruptcy Appellate Panel Judge.

BAC Home Loans Servicing LP, Servicer for Deutsche Bank National Trust, Trustee on Behalf of HSI Assets Securitization Corporation Trust 2007-HE1 ("BAC"), appeals from two bankruptcy court orders: (1) the December 13, 2010 order granting the motion of Anthony A. Grassi ("Grassi") to sell his condominium free and clear of liens ("Sale Order");[1] and (2) the January 5, 2011 order denying reconsideration of the Sale Order ("Order Denying Reconsideration") (collectively "the Orders"). For the reasons set forth below, the Orders are **AFFIRMED**.

BACKGROUND

Grassi and his wife, Kelley G. Lovejoy-Grassi (collectively "the Grassis"), filed a Chapter 7 petition in September 2008. They converted their case to one under Chapter 13 in January 2009, and the court set a bar date of May 11, 2009 for filing proofs of claim. The Grassis filed an amended Chapter 13 plan in March 2009, which provided that within 30 days, "the debtor [would] surrender" the condominium located at 207 E. Grand Avenue, Old Orchard Beach, Maine ("the Property") to, *inter alia*, Countrywide Home Loans, Selected Portfolio Servicing ("Countrywide"), BAC's predecessor in interest. The bankruptcy court entered an interim order confirming the amended plan in September 2009. Neither BAC nor Countrywide filed a proof of claim by the bar date.

Thirteen months after the court confirmed the amended plan, Grassi filed a "Motion to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363(f)" ("the Motion to Sell"), without indicating the particular subsection of that statute under which he was

[1] Although the Sale Order refers to both debtors, Grassi was the sole owner and movant.

proceeding. In the Motion to Sell, Grassi alleged that Shirley and Peter Liakos ("the Purchasers") offered to pay $137,300.00 for the Property. Grassi further alleged that the Property was subject to the following encumbrances: a $430,000.00 first mortgage in favor of "Deutsche Bank National Trust, as Trustee on Behalf of the HSI Assets Securitization Corporation Trust 2007-HE1;" a $110,000.00 second mortgage "held by Mortgage Electronic Systems, Inc." ("MERS"); and a $10,000.00 lien in favor of Grand Atlantic Condominium Association. Grassi represented that he would pay Countrywide from the sale proceeds, in partial satisfaction of its first priority mortgage claim, after payment of closing expenses.

Grassi attached to the Motion to Sell a proposed order authorizing the sale, as well as a notice of motion and hearing ("the Notice"), indicating a hearing date of December 22, 2010, and a deadline for objections of November 29, 2010. The Notice provided, in pertinent part:

> *If you do not object to the Motion, no action is required by you.* If you object to the Motion or if you wish to be heard, you must file a written objection or other written statement with the Clerk . . . on or before the close of business on November 29, 2010 . . . . If you or your attorney do not file a written response and appear at the hearing, the Court may grant the Motion according to its terms.

(emphasis added). Grassi's certificate of service indicated that he electronically served the Motion to Sell, Notice, and proposed order on: the United States Trustee's Office; the chapter 13 Trustee; Daniel Thornhill, Esq., attorney for HSI Asset Securitization Corporation ("HSI"); the corporate office for HSI; MERS; and all creditors on the mailing matrix, including Countrywide.[2] On December 8, 2010, nine days after the deadline for objecting to the proposed

[2] No attorney had filed an appearance on behalf of BAC, Countrywide, or HSI as of the date of such service.

sale, Grassi filed a copy of the purchase and sale agreement which he had referenced in the Motion to Sell as Exhibit A, but had inadvertently omitted.

Neither BAC nor any other party in interest objected to the proposed sale by the objection deadline. The bankruptcy court entered the Sale Order without a hearing on December 13, 2010. The Sale Order which the bankruptcy court judge signed was the proposed order that Grassi served with the Motion to Sell. That order provided, in pertinent part:

> A Motion having been made by the Debtors for an Order to sell [the Property] free and clear of liens and encumbrances, and after notice and opportunity to be heard, it is
> ORDERED, that the [Property] be sold free and clear of liens and encumbrances on the terms and conditions set forth in this motion; and it is further
> ORDERED, that the proceeds of said sale, after payment of Seller's closing expenses, [sic] to HSI Asset Securitization Corporation Trust 2007-HEI in partial satisfaction of its first priority mortgage claim.

The Sale Order did not contain any reference to statutory authority.

The next day, BAC filed a motion to reconsider the Sale Order and to file a late objection to the Motion to Sell ("Motion to Reconsider"). In support of its Motion to Reconsider, BAC explained that it "had not yet appeared in this case due to administrative error," claiming that the Motion to Sell was "sent to foreclosure counsel, who routed it to his contacts in the foreclosure department." BAC did not provide any legal argument or cite any statutory authority for the requested reconsideration. It attached its "Objection to Debtors' Motion to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363(f)" (the "objection") as an exhibit to the Motion to Reconsider. In the objection, BAC requested denial of the Motion to Sell, asserting: that it had a first lien on the Property, securing an amount due in excess of $515,272.24; that the proposed sale would yield only $137,300.00; and that a foreclosure of the

Property "would yield substantially higher proceeds." The Grassis objected to the Motion to Reconsider, arguing:

> [T]he secured debts far exceed the value of the [Property] and since [BAC] did not file a proof of claim and is not sharing in the estate as an unsecured creditor, it will not diminish dividends to unsecured creditors.

At the hearing on the Motion to Reconsider, BAC's counsel admitted that BAC had received notice of the Motion to Sell and acknowledged that its objection was late. He explained the untimely objection as follows:

> [N]otice went to the former attorney for Bank of America, Dan Thornhill, who's my partner, and the . . . office had closed his foreclosure file but he forwarded the notice along to his last contact in foreclosure . . . . That worked its way through channels . . . .

In the words of BAC's counsel, notice "plodded through a process." At the hearing, BAC once again complained about the low sale price at the hearing, arguing:

> [BAC has] a broker price opinion[3] that says the [P]roperty, right now, is worth $345,000.00 so that the price doesn't even remotely address the value of the [P]roperty. It's . . . not necessarily a good faith purchaser for value here.

After noting that "the sale was noticed for more than a month" and that there was "no indication of bad faith," the bankruptcy court entered the Order Denying Reconsideration, reasoning as follows:

> There's no indication that there's a lack of value. What you're saying is that after a duly [noticed] sale the price that was obtained did not reach the broker's opinion of value. So don't . . . say that it's not a good faith purchaser for value because that's simply not the case and if it were you could unwind the sale notwithstanding my order approving it . . . . [T]he fact that the bank has overextended credit on a condominium property doesn't necessarily mean that the property is or was ever worth $515,000.00 . . . . There was a final order. People

[3] BAC did not offer the broker's opinion into evidence during the proceedings below, and it is not part of the record.

> have changed positions in relation to that order, I'm sure. This court's not free to simply throw an order out because somebody made the mistake and put it through the slow channel when it should have gone through the fast channel.

On appeal, BAC raises six issues challenging the Sale Order and/or the Order Denying Reconsideration. Generally, the issues relate either to the purchase price, or the procedure the bankruptcy court followed when it acted on the Motion to Sell. With respect to price, BAC complains that the approved sale price is too low, given the value of the Property and the magnitude of its debt. With respect to procedure, BAC contends that the bankruptcy court abused its discretion by failing to a conduct a hearing on the Motion to Sell, by failing to consider the adequacy of the price obtained, and by failing to follow D. Me. LBR 6004-1(e)(1).[4]

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine whether it has jurisdiction, even if the litigants do not raise the issue. Aja v. Emigrant Funding Corp. (In re Aja), 442 B.R. 857, 860 (B.A.P. 1st Cir. 2011). The Panel has jurisdiction to hear appeals from (1) final judgments, orders and decrees, or (2) with leave of court, from certain interlocutory orders. Id. (citations omitted). A bankruptcy court's order authorizing a sale of assets is a final

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[4] D. Me. LBR 6004-1 provides, in pertinent part:

> (d) Hearings and Objections. The motion seeking approval of a proposed sale not in the ordinary course of business shall include a date and time for a hearing on the motion. The Court shall conduct a hearing on any timely objection to the sale at the appointed time. The notice may also provide that, absent timely objection, the proposed sale may be considered without a hearing.
>
> (e) Procedures to Obtain Order Authorizing Sale. Upon expiration of the objection period set in the notice promulgated in accordance with this rule and other pertinent rules, and upon written request of the sale proponent or other party-in-interest, the Court may, in its discretion, issue an order finding that no timely objection to the sale was filed and authorizing the sale without further notice or hearing.

order. Nesbit v. Rowbotham (In re Rowbotham), No. 06-050, 2007 WL 878499, *2 (B.A.P. 1st Cir. Mar. 22, 2007) (citing Jeremiah v. Richardson, 148 F.3d 17, 22 (1st Cir. 1988); Indian Motocycle Co, Inc. v. Sterling Consulting Corp. (In re Indian Motocycle Co., Inc., 289 B.R. 269, 280 (B.A.P. 1st Cir. 2003)). Consequently, the Panel has jurisdiction over the Sale Order. "An order denying reconsideration is a final, appealable order if the underlying order was a final, appealable order." Devila Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 505 (B.A.P. 1st Cir. 2005). Since the Sale Order is a final, appealable order, the Order Denying Reconsideration is also final and appealable, and the Panel, therefore, has jurisdiction to hear this appeal.

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). Bankruptcy court orders to sell property free and clear are reviewed for abuse of discretion. Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (B.A.P. 9th Cir. 2008) (citations omitted). Usually, the denial of a motion to reconsider also is reviewed for abuse of discretion. Ungar v. Palestine Liberation Org., 599 F.3d 79, 83 (1st Cir. 2010) (citation omitted). The First Circuit finds abuse of discretion when "a relevant factor deserving significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." Ameriquest Mortg. Co. v. Nosek (In re Nosek), 609 F.3d 6, 9 n.4 (1st Cir. 2010). "This standard is not monolithic: within it, embedded

findings of fact are reviewed for clear error, questions of law are reviewed *de novo*, and judgment calls are subjected to classic abuse-of-discretion review." Id.

DISCUSSION

I. The Applicable Standard Governing Authorization to Sell

Section 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). The meaning of the phrase, "after notice and a hearing," is set out in § 102 as follows:

> (1) "after notice and a hearing," or a similar phrase --
>
> > (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
> >
> > (B) authorizes an act without an actual hearing if such notice is given properly and if - -
> >
> > (i) such a hearing is not requested timely by a party in interest; or
> >
> > (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.

11 U.S.C. § 102.

Section 363(f) establishes five conditions when a debtor or trustee may sell free and clear of an interest of another party. That statute provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) *such entity consents*;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; *or*
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. 363(f) (emphasis added).

Because the language of § 363(f) is in the disjunctive, courts can approve a sale if any one of the five conditions is satisfied. In re Sumner Regional Health Sys., Inc., No. 310-04766, 2010 WL 2521081, at *2 (Bankr. M.D. Tenn. June 18, 2010); Liscinski v. Westgate (In re Westgate), No. 07-2161, 2008 WL 3887607, at *2 (Bankr. D.N.J. Aug. 19, 2008). The burden is on the moving party to "show that one of the provisions of § 363(f)(1)-(5) is applicable to each lien or interest from which the sale is to be free and clear." In re Daufuskie Island Props., LLC, 431 B.R. 626, 637 (Bankr. D.S.C. 2010).

"Bankruptcy courts have wide discretion with respect to sales of assets of a bankruptcy estate." VanCura v. Hanrahan (In re Meill), 441 B.R. 610, 615 (B.A.P. 8th Cir. 2010). Generally, "the policy of finality protects confirmed sales unless compelling equities outweigh the interests of finality." Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 346 (E.D. Pa. 1988); see also Ragosa v. Canzano (In re Colarusso), 295 B.R. 166, 176 (B.A.P. 1st Cir. 2003), aff'd, 382 F.3d 51 (1st Cir. 2004). Thus, an approved sale is set aside only "under the limited circumstances where there is fraud, mistake or a similar infirmity present." In re Elliot, 94 B.R. at 345; see also In re Webcor, Inc., 392 F.2d 893, 899 (7th Cir. 1968).

In the proceedings below, the bankruptcy court did not specify the subsection of § 363 upon which it relied; nor did it cite a specific subsection in the Sale Order. We are authorized, however, to supply the court's intent, when that intent is not clear, by combing the record. Negron-Almeda v. Santiago, 528 F.3d 15, 23 (1st Cir. 2008). Furthermore, the Panel may affirm the

decision of the bankruptcy court order "on any basis that is manifest in the record." Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 13 (1st Cir. 2003). The court's observation at the outset of the hearing on the Motion to Reconsider that the sale had been properly noticed for over a month without objection suggests that § 363(f)(2) provided the framework for its decision.

This Panel, as well other courts in this circuit and nationally, views silence as implied consent sufficient to satisfy the consent requirement for approving a sale under § 363(f)(2). In re Colarusso, 295 B.R. at 175; see also FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 285 (7th Cir. 2002); In re Elliot, 94 B.R. at 345; In re Blixseth, No. 09-60452-7, 2011 WL 1519914, at *14 (Bankr. D. Mont. April 20, 2011); Hargrave v. Township of Pemberton (In re Tabone, Inc.), 175 B.R. 855, 858 (Bankr. D.N.J. 1994); but see In re Silver, 338 B.R. 277, 280 (Bankr. E.D. Va. 2004) (holding that silence is not consent where sale proceeds are insufficient to satisfy liens and citing In re Roberts, 249 B.R. 152, 155-56 (Bankr. W.D. Mich. 2000)). Other courts hold that a creditor's silence in response to a properly noticed sale results in waiver of its objection. Village Ventures, Inc. v. The Official Comm. of Unsecured Creditors (In re EnvisioNet Computer Servs., Inc), 275 B.R. 664, 669 (D. Me. 2002); In re Table Talk, Inc., 53 B.R. 937, 941-42 (Bankr. D. Mass. 1985). The consent versus waiver distinction is one without a difference, because courts uphold sales under both views. The Seventh Circuit succinctly expressed the policy for this result as follows: "It could not be otherwise; transaction costs would be prohibitive if everyone who might have an interest in the bankrupt's assets had to execute a formal consent before they could be sold." FutureSource LLC, 312 F.3d at 285-86.

BAC did not argue, either in the proceedings below or on appeal, that notice of the sale was defective or that it did not receive notice. BAC concedes that it received notice, that it channeled

the notice improperly, and that as a result, it failed to object by the deadline established in the Notice. Because BAC admits it received notice of the proposed sale and also admits that it did not file a timely objection, it must bear the burden of its own failure to properly process or forward the notice of sale, once received. See In re Cone Mills Corp., 313 Fed. Appx. 538, 541 (3d Cir. 2009) (upholding sale free and clear where creditor failed to object to sale in spite of having received actual notice, stating that creditor's failure "to forward the notice to the legal department was its responsibility"). Thus, the Sale Order was proper under § 363(f)(2), under the prevailing law of this circuit, or as waiver of its objection.

II. Applicable Standard Governing Reconsideration

"While a motion for reconsideration is not one that is recognized by the Federal Rules of Civil Procedure, it is well-settled policy that courts can treat a motion which asks the trial court to modify a prior ruling as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), made applicable by Fed. R. Bankr. P. 9023, or as a motion for relief from judgment under Fed. R. Civ. P. 60, made applicable by Fed. R. Bankr. P. 9024." In re Rowbotham, 2007 WL 878499, at *3-4. "Which rule applies depends essentially on the time a motion is served." In re Dodson, No. 00-10464, 2003 WL 22056650, at * 2 (Bankr. D.N.H. Aug. 28, 2003). "Regardless of how it is characterized, a post-judgment motion made within [fourteen] days of the entry of judgment that questions the correctness of a judgment is properly construed as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e)." Aybar v. Crispin-Reyes, 118 F.3d 10, 14 n.3 (1st Cir. 1997); see also Schwartz v. Schwartz (In re Schwartz), 409 B.R. 240, 250 (B.A.P. 1st Cir. 2008). Although BAC did not label the Motion to Reconsider as one under Rule 59(e), it was filed within

fourteen days of the Sale Order. Thus, the Panel construes the motion as a motion under Rule 59(e).

"The federal courts have consistently stated that a motion for reconsideration of a previous order is an extraordinary remedy that must be used sparingly because of interest in finality and conservation of scarce judicial resources." Jimenez v. Pabon Rodriguez (In re Pabon Rodriguez), 233 B.R. 212, 219 (Bankr. D.P.R. 1999) (citations omitted). "In practice, [R]ule 59(e) motions are typically denied because of the narrow purposes for which they are intended." Id. (citation omitted). "In order to be successful on a Rule 59(e) motion, the moving party must establish a manifest error of law or fact or must present newly discovered evidence." In re Schwartz, 409 B.R. at 250 (citations omitted). In order to prevail on a Rule 59(e) motion made on the grounds of "newly discovered evidence," "the evidence must have become available only after judgment (with the exercise of reasonable diligence), and be both admissible and probative." In re Pabon Rodriguez, 233 B.R. at 222. "The moving party cannot use a Rule 59(e) motion to cure its procedural defects or to offer new evidence or raise arguments that could and should have been presented originally to the court." In re Schwartz, 409 B.R. at 250 (citations omitted).

As discussed above, although BAC attempted to present a manifest error of law, the record amply supports the approval of the proposed sale under the provisions of § 363(f)(2). BAC failed to demonstrate the existence of newly discovered evidence or otherwise sustain its burden under Rule 59(e).

CONCLUSION

Based on the foregoing, the bankruptcy court did not abuse its discretion when it entered the Sale Order and the Order Denying Reconsideration. Therefore, the Orders are **AFFIRMED**.