

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: CHRISTOPHER R. MORENO and
ERNESTINA S. MORENO,

No. 7-09-10073 JL

Debtors.

PHILIP J. MONTOYA, TRUSTEE,

Plaintiff,

v.

Adversary No. 09-1174 J

CHRISTOPHER MORENO, TERESA MORENO,
MONICA MORENO, and LARRY MORENO,

Defendants.

**ORDER GRANTING PARTIAL FINAL SUMMARY
JUDGMENT IN FAVOR OF PLAINTIFF PURSUANT TO RULE 54(B) WITH
RESPECT TO PROPERTY LOCATED AT 4570 LOS MORENOS COURT**

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment and Memorandum of Law ("Motion") filed by Philip J. Montoya, Trustee (the "Trustee"), by and through his attorneys of record, Moore, Berkson & Gandarilla, P.C. (Bonnie B. Gandarilla). *See* Docket No. 70.¹ The Trustee requests the court to enter summary judgment in his favor with respect to certain real property located at 4570 Los Morenos Court (the "Property").² A trial on the merits of this adversary proceeding is currently set in Las Cruces on January 23, 2014. For the reasons set forth below, the Court finds that there are no genuine issues of material fact and

¹At a pre-trial conference held December 10, 2013, the Court informed Defendant Teresa Moreno that the deadline to file a response to the Motion was December 19, 2013. Defendant Teresa Moreno did not file a response.

²The Trustee's Amended Complaint to Sell Estate's Interest and Interest of Co-Owners in Real Property ("Amended Complaint") sought to sell four separate parcels of real property, identified in the Amended Complaint as Subject Property I, Subject Property II, Subject Property III, and Subject Property IV. *See* Docket No. 25. The Court has already approved the Trustee's motion to sell Subject Property IV. *See* Bankruptcy Case No. 09-10073 - Docket No. 68. The Trustee asserts in the Motion that he is entitled to sell the bankruptcy estate's interest in Subject Properties I, II, and II, but limits his request for relief to the property identified as Subject Property II located at 4570 Los Morenos Court. *See* Motion, pp. 4 and 8. This Order is limited to Subject Property II located at 4570 Los Morenos Court.

that the Trustee is entitled to judgment as a matter of law on the issue of whether the Trustee has the authority to sell both the bankruptcy estate's interest in the Property and Teresa Moreno's co-ownership interest in the Property.

SUMMARY JUDGMENT STANDARDS

Summary judgment, governed by Rule 56, Fed.R.Civ.P., will be granted when the movant demonstrates that there is no genuine dispute as to a material fact and that the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a), made applicable to adversary proceedings by Rule 7056, Fed.R.Bankr.P. “[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In considering a motion for summary judgment, the Court must “examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.” *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793, 796 (10th Cir. 1995) (quoting *Applied Genetics Int’l, Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990)). “[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial” through affidavits or other supporting evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FACTS NOT SUBJECT TO GENUINE MATERIAL DISPUTE

1. Christopher Moreno and Ernestina Moreno (together, the Debtors) filed a voluntary petition under Chapter 7 of the Bankruptcy Code on January 9, 2009 (the “Bankruptcy Case”). *See* Case No. 09-10073.
2. The Property is located at 4570 Los Morenos Court, Las Cruces, New Mexico. Trustee's Amended Complaint to Sell Estate's Interest and Interest of Co-Owners in Real Property

(“Amended Complaint”), ¶ 7 – Docket No. 25; Answer of Teresa Moreno, p. 1 – Docket No. 28.

3. The Property is a residential rental property. A duplex apartment is situated on the Property. Answer of Teresa Moreno, p. 1 Docket No. 28 (describing the Property as “Duplex Apts.”).
4. Teresa Moreno does not reside in the Property.³
5. The real property description of the Property is “a 0.706 acre tract of land in Block 27, EBL&T Co. Sub. ‘A.’” Amended Complaint, ¶ 7; Answer of Teresa Moreno, p. 1.
6. The Property is listed on the Debtors’ Schedule A with a zero value and the following description: “claims no interest, put under debtor’s name for probate purposes . . .” *See* Case No. 09-10073, Docket No. 1 and Verified Statement of Philip J. Montoya, Trustee Supporting Motion for Summary Judgment and Memorandum of Law (“Montoya Affidavit”), ¶ 3, attached to Motion.
7. Schedule A filed in the Debtors’ bankruptcy case reflects that the Property is unencumbered. *See* Case No. 09-10073, Docket No. 1.
8. As of January 9, 2009, the following persons held an interest in the Property: Christopher Moreno and Teresa Moreno. *See* Montoya Affidavit, ¶ 4; Quitclaim Deed dated May 1, 2005 for a .706 acre tract of land recorded in the records of Dona Ana County on May 17, 2005 at Book 609, pages 1305 – 1308, a copy of which is attached to the Montoya Affidavit.
9. On January 6, 2010, Teresa Moreno executed a transfer on death deed on the Property to her grandson, Josue Samaniego, a minor. *See* Montoya Affidavit, ¶ 6; Real Property Transfer on Death Deed dated January 6, 2010 for a .706 acre tract of land recorded in the records of Dona Ana County on January 6, 2010 as Instrument No. 1000428, a copy of which is attached to the Montoya Affidavit.
10. On January 11, 2011, Christopher Moreno executed a warranty deed (the “Warranty Deed”) transferring his one-half interest in the Property to the Trustee. Montoya Affidavit, ¶ 7; Warranty Deed dated January 11, 2011 for a .706 acre tract of land, a copy of which is attached to the Montoya Affidavit.
11. The Warranty Deed has not been recorded. Montoya Affidavit, ¶ 7.
12. The total amount of scheduled unsecured claims in the Bankruptcy Case is \$44,881.57. *See* Case No. 09-10073, Docket No.1 - Schedules E and F.

³Teresa Moreno confirmed on the record at the status conference held January 14, 2014 that she does not reside in the Property.

13. The total amount of the unsecured claims filed in the Debtors' bankruptcy case is \$21,775.74. *See* Claims Register - Case No. 09-10073.⁴
14. Defendant Teresa Moreno estimates that the value of the Property is \$150,000. *See* Answer of Teresa Moreno, Docket No. 28.

DISCUSSION

The Trustee seeks authority to sell the Property pursuant to 11 U.S.C. 363(h), which provides:

Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b)⁵ or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h).

The Quitclaim Deed to the Property reflects that the Property is titled in the name of Chris Moreno and Teresa Moreno. As a preliminary matter, the Court finds that Christopher Moreno's interest in the Property reflected on the Quitclaim Deed is property of the bankruptcy estate notwithstanding his contention in his bankruptcy schedules and in his answer to the Trustee's initial complaint that he has no actual ownership interest in the Property such that the

⁴The Trustee did not include information regarding the total amount of unsecured claims in his Statement of Undisputed Facts. In the argument section of the Motion, the Trustee reports that "[t]he unsecured claims filed in this case total \$20,974.98, excluding Claim No. 3, which is a secured claim for a vehicle." *See* Motion, p. 7. The figure included in the undisputed facts is based on the total amount of the claims filed of record in the Debtors' bankruptcy case without examining the validity or nature of any of the filed claims.

⁵Subsection (b) of 11 U.S.C. § 363 authorizes the trustee to sell property of the estate other than in the ordinary course of business. 11 U.S.C. § 363(b)(1). The Trustee seeks to sell the Property other than in the ordinary course of business.

Property is not property of the bankruptcy estate.⁶ Teresa Moreno likewise asserted in her answer to the Trustee's original complaint that the Property is not property of Christopher Moreno's bankruptcy estate, and asserted that Christopher Moreno held the Property "in a resulting trust only." *See* Answer, Docket No. 5. Christopher Moreno bears the burden of demonstrating that his ownership of the Property is contrary to what is reflected on the face of the recorded Quitclaim Deed. *See Morris v. Kasparek (In re Kasparek), Kasparek*, 426 B.R. 332, 340 (10th Cir. BAP 2010)(debtor who asserted that his interest in property was not property of the estate subject to sale under § 11 U.S.C. 363(h) had the burden, as the party contesting record title, to demonstrate the validity and extent of his interest (citing 11 U.S.C. § 363(p), which provides that "the entity an interest in property has the burden of proof on the issue of the validity, priority or extent of such interest.")).

Under New Mexico law, real property conveyed by quitclaim deed conveys the grantor's ownership of the property to the grantees. N.M.S.A. 1978 § 47-1-30 (Repl. Pamp. 1995) ("A deed in substance following the form entitled 'quitclaim deed' shall, when duly executed, have the force and effect of a deed in fee simple to the grantee, his heirs and assigns, to his and their own use of any interest the grantor owns in the premises, without warranty."). Once property has been conveyed, the person or persons to whom it has been conveyed owns it. *Gonzales v. Gonzales*, 116 N.M. 838, 844-845, 867 P.2d 1220, 1226-1227 (Ct.App. 1993)("in general, once property has been conveyed by deed from the record owner, the person to whom the property has been conveyed owns it.") *See also, Kasparek*, 426 B.R. at 342 ("a recorded deed that is unambiguous on its face establishes record ownership."). No evidence has been submitted by any Defendant that the grantor under the Quitclaim Deed did not own the Property in fee simple

⁶*See* Answer to Trustee's Complaint to Sell Estate's Interest and Interest of Co-Owners in Real Property filed by Christopher Moreno - Docket No. 6 (stating that he does not own any interest in the Subject Properties and that his father put his name on the deeds for probate purposes only).

at the time of the conveyance under the Quitclaim Deed, or that otherwise contradicts the ownership interest reflected in the unambiguous, recorded Quitclaim Deed.

Property titled in the name of two individuals without specifying the type of tenancy is held by the two individuals as tenants in common. *See* N.M.S.A. 1978 § 47-1-15 (Repl. Pamp. 1995)(“All interest in any real estate, either granted or bequeathed to two or more persons . . . shall be held in common, unless it be clearly expressed in said grant or bequest that it shall be held by both parties.”). The Quitclaim Deed for the Property dated May 1, 2005 reflects that the Property is titled in the names of Christopher Moreno and Teresa Moreno. Thus, the undisputed facts establish that the debtor (Christopher Moreno) and Teresa Moreno held a co-ownership interest in the Property as tenants in common as of the commencement of the Bankruptcy Case. Further, Christopher Moreno’s co-ownership interest in the Property as tenant in common constitutes property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(property of the bankruptcy estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.”).

Having confirmed that Christopher Moreno’s interest in the Property is property of the bankruptcy estate, the Court will next review the requirements under 11 U.S.C. § 363(h) for a bankruptcy trustee’s sale of both the estate’s and a co-owner’s interest in the Property. Because the Property is a residential rental property, the requirement that the property not be used in the “production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light or power” is not in dispute and has clearly been satisfied. 11 U.S.C. § 363(h)(4). At a status conference held January 14, 2014, Teresa Moreno agreed that each side of the duplex cannot be sold separately.⁷ Therefore, partition of the Property is impracticable.⁸

⁷Teresa Moreno stated on the record at the status conference held January 14, 2014 that one of the duplex units on the Property could not be sold separately from the other unit, that the two units of the duplex that comprise the

The facts not subject to genuine dispute satisfy the remaining two requirements set forth in 11 U.S.C. §§ 303(h)(2) and (3). First, selling only Christopher Moreno's one-half interest in the Property would likely realize significantly less than the sale of the Property as a whole, free and clear of Teresa Moreno's one-half interest in the Property. This is because "[i]t is difficult to see that any investor would be interested in investing in a rental property, part of which was owned or controlled by a stranger." *Gabel v. Spicer (In re Gabel)*, 353 B.R. 295, 302 (Bankr.D.Kan. 2006).⁹ This is particularly true where, as here, the Property is an income producing residential duplex, and, upon a sale, there would be no agreement in place between the two co-owners regarding management of the Property or the sharing of income and expenses associated with the Property.

Second, sale of the Property free and clear of Ms. Moreno's co-ownership interest outweighs any detriment to her. The Property is not encumbered by a mortgage. Based on the estimated value of the Property and the total amount of the unsecured claims filed in the bankruptcy case, the Court finds that the sale of the Property will likely result in sufficient funds to pay in full all allowed unsecured claims in the bankruptcy estate. Teresa Moreno does not live in the Property and has failed to identify facts that would demonstrate a detriment sufficient to overcome the benefit to the estate established by the facts not subject to genuine dispute. *See*

Property are attached, that she believes the Property is situated on one lot, and that, even if only half of the Property were sold, water service issues would likely arise.

⁸In considering whether a sale of bankruptcy estate property co-owned by a non-debtor party is impracticable, courts are guided by the following standard: "[p]racticable is not a synonym for possible; nor is it a synonym for practical. Its meaning falls between the two concepts of possibility and practicality, and incorporates both ideas—something that is not only possible, but also feasible and sensible." *56 Assoc. v. DiOrio*, 381 B.R. 431, 436 (D.R.I. 2008).

⁹The *Gabel* court noted that several courts go so far as to take judicial notice of the fact that the sale of the bankruptcy estate's interest real property co-owned by a non-debtor party is likely to realize less than a sale of the entire property free and clear of the co-owner's interest. *Gabel*, 353 B.R. at 302 n. 24 (citing *In re Griffen*, 123 B.R. 933, 935-36 (Bankr.S.D.Fla. 1991) and *In re Jenkins*, 347 B.R. 77, 84-85 (Bankr.N.D.Ill. 2006)). *See also, Yoppolo v. Schwenker (In re Ziegler)*, 396 B.R. 1, 4 (Bankr.N.D.Ohio 2008)(acknowledging that "[i]t is generally accepted that the sale of a bankruptcy estate's undivided interest will generate substantially less than the sale of the property free of each owner's interest because of the chilling effect that the sale of the undivided interest usually has on prospective purchasers of the property.")(quoting *Maxwell v. Barounis (In re Swiontek)* 376 B.R. 851, 866 (Bankr.N.D.Ill. 2007)).

Mostoller v. Kelley (In re Kelley), 304 B.R. 331, 339 (Bankr.E.D.Tenn. 2003)(explaining that “[t]he Trustee bears the burden of showing that the estate will benefit from the sale of the property, and once that burden is met, it shifts to the Defendant to prove that he will suffer a greater detriment that outweighs any benefit.”)(citing *Gazes v. Roswick (In re Roswick)*, 231 B.R. 843, 847 (Bankr.S.D.N.Y. 1999)). The fact that, post-petition, Ms. Moreno deeded her interest in the Property to her grandson, a minor, through a Transfer on Death Deed does not change this result. As explained below, upon a sale of the Property, the non-debtor co-owner will have an opportunity to purchase the Property for the sales price, or will be compensated for her interest in the Property. *See* 11 U.S.C. §§ 363(i) and (j).

By concluding that the Property is subject to sale under 11 U.S.C. § 363(h), the Court has not approved the sale of the Property. The Trustee will be required to file a motion to sell the Property with a notice of an objection deadline that will give all creditors and parties in interest, including Teresa Moreno, an opportunity to object to the proposed sale. *See* Fed.R.Bankr.P. 2002(a)(1) (a proposed sale of property of the estate other than in the ordinary course of business requires a twenty-one day notice period). In addition, as co-owner of the Property, Teresa Moreno will have the right of first refusal to purchase the Property prior to consummation of a sale the Trustee proposes at the price at which the sale would be consummated. *See* 11 U.S.C. § 363(i)(“Before the consummation of a sale of property to which subsection . . . (h) of this section applies . . . a co-owner of such property . . . may purchase such property at the price at which the sale is to be consummated.”). If Teresa Moreno does not purchase the Property, Teresa Moreno will be compensated for her one-half interest in the Property from the proceeds of the sale. *See* 11 U.S.C. § 363(j)(“After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to . . . the co-owners of such property . . . the proceeds of such sale,

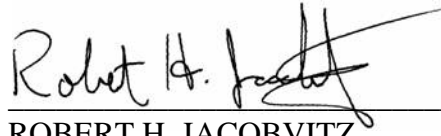
less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such . . . co-owners”).

Finally, the Amended Complaint also seeks authority to sell certain real properties located at 4595 Los Morenos Court, 4597 Los Morenos Court, and 4560 Los Morenos Court. But because the proceeds from the sale of the Property may be sufficient to satisfy all unsecured claims against the Debtors’ bankruptcy estate, there is no just reason to delay the entry of a partial final judgment with respect to the sale of the Property. *See* Fed.R.Civ.P. 54(b), made applicable to adversary proceedings by Fed.R.Bankr.P. 7054 (“When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay.”).

WHEREFORE, IT IS HEREBY ORDERED that the Motion is GRANTED. Partial final summary judgment is entered in favor of the Trustee and against Defendants Christopher Moreno and Teresa Moreno as to the Property as follows:

The Trustee may sell both the estate’s interest and Teresa Moreno’s interest in the Property (located at 4570 Los Morenos Court), subject to the Trustee filing a motion to sell the Property with a twenty-one day notice of objection deadline to all creditors and parties in interest pursuant to 11 U.S.C. § 363(b)(1), and, if applicable, § 11 U.S.C. § 363(f).

ORDERED FURTHER, any relief requested in the Motion that is inconsistent with the relief granted in this Order is DENIED.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: January 14, 2014

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