United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

BAUER USA, INC.,
Debtor.

Case No. 11-98-10886 SR

MEMORANDUM OPINION ON
JOHN HAZEN & ASSOCIATES, INC.'S
MOTION FOR § 506 SURCHARGE

This case involves an attempt by a buyer's broker that was not employed under section 327 to obtain a commission from the sale of estate property. Specifically, the matter is before the Court upon John Hazen & Associates, Inc.'s ("Hazen's") Motion for § 506 Surcharge ("Motion"), and the objections thereto filed by: the United States Trustee, the New Mexico Department of Labor, the Debtor, the Gerussis, and Telerent Leasing Corporation. Hazen had earlier filed an Application to Employ Real Estate Broker, Nunc Pro Tunc, to which objections were filed by the same objecting parties. That Application was withdrawn by Hazen in its Reply Memorandum of Real Estate Broker. Therefore, only Hazen's § 506(c) motion is pending[1]. In its legal memoranda, however, Hazen also argues various other theories under which it might recover commissions. These other theories of recovery are addressed in this opinion as well. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). This opinion constitutes the

[1] There are, however, two other pending motions related to the outcome of this motion. Namely, a motion by debtor to reconsider allowance of claim of Hazen in earlier sale orders, and a motion by debtor to disburse funds from the court registry and the objection thereto by Hazen.

Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

As discussed below, the motion stresses that Hazen represented the buyers, not the seller (the bankruptcy estate), of a motel property in a sale approved by the Court. Two separate orders approve the sale, and each refers to commissions.[2] Hazen seeks $86,250 plus interest and attorney's fees, of which $31,250 has been previously paid. Hazen's theories in support of its claim are: 1) section 506(c) surcharge (to the extent that Hazen seeks recovery from funds that would otherwise be paid to one or more of the secured creditors), 2) assumption of executory contract, and 3) res judicata, collateral estoppel, equitable estoppel and finality of sale orders.

Objections.

The United States Trustee objects to surcharge because Hazen's fees were arguably earned prepetition so do not qualify as an administrative claim amenable to surcharge. The UST also argues that Hazen has not met his burden of showing that the expenses were reasonable and necessary, or that the creditors benefitted. The Gerussis adopted the objections of the UST.

[2]These are the orders entered April 30, 1998 in the bankruptcy case and the order entered May 26, 1998 in Bauer, USA, Inc. v. Choice Hotel International, Inc., Adversary 98-1100 S (Bankr. D. N.M.).

The debtor argues that Hazen lacks standing to pursue a surcharge claim, and also argues that Hazen's claim is a prepetition unsecured claim for which surcharge is not available. Debtor also claims that approval under section 327 is required before Hazen could have any claim on which surcharge could be based. Finally, debtor claims that this action is barred by state law because Hazen is not licensed in New Mexico.[3]

The New Mexico Department of Labor objects to surcharge on several grounds: 1) Hazen has a conflict of interest that would prohibit its employment under the Bankruptcy Code, 2) Hazen failed to comply with the requirements for employment, 3) Hazen is a "gratuitous intermeddler" employed by no one; if in fact it represented the buyer it should be paid by the buyer; 4) Hazen attempts to use surcharge to circumvent procedures regarding compensation from the estate; and 5) Hazen has not benefitted the secured creditors.

Telerent's objection is that Hazen has a conflict of interest that should bar compensation from the estate. It further claims that it received no benefit from Hazen's services.

FINDINGS OF FACT

1. Debtor filed its voluntary petition on February 13, 1998.

[3]The Court will dispose of the licensing issue by citing Hayes v. Reeves, 91 N.M. 174, 177, 571 P.2d 1177, 1180 (1977), which allows a foreign broker to maintain a cause of action in New Mexico for work done in the licensing state.

2. On March 20, 1998, the debtor filed a motion to sell real estate and other assets (furniture and fixtures) of the debtor for the sale price of $1,250,000. The motion states that this would be a sale of the sole asset of debtor, and that if allowed to proceed to sale the $1,250,000 proceeds would pay all creditors in full. The motion itself makes no reference to real estate commissions, employment of a broker, costs associated with the sale, or any specific proposed distribution of proceeds. Attached to the motion, but not referenced in the motion, are 11 pages of documents that memorialize the proposed transaction (hereafter "Contract"). The first five pages are a form "Commercial Contract to Buy and Sell Real Estate," prepared by Hazen and dated February 1, 1998. It is a straightforward contract to sell specifically described real estate in Roswell, New Mexico for the sum of $1,250,000. It lists the buyers as Wladyslaw S. Hornik and Stephanie M. Hornik, and the seller as Bauer, USA, Inc. Page 4 specifies that Hazen is "Buyers' Agent." It was signed by the buyers on February 3, 1998. Page 5 lists Blue Ridge Realty, Inc. as the "Listing Company" and Hazen as "Selling Company." Pages six and seven are "Continuations of Real Estate Purchase Contract" that designate contingencies, treatment of earnest money, tax treatment, and a section on commissions:

> The listing broker shall split the commission with John Hazen & Associates, Incorporated (an out-of-state broker licensed in the State of Colorado) and said listing broker shall instruct the title company and or closing agent (by title company check or other good funds) to pay amount directly to John Hazen & Associates, Incorporated at successful closing. The percentage amount payable to John Hazen & Associates, Incorporated shall not be less than 3% of the gross selling price or 50% of the commission whichever is greater. The brokers shall enter into a foreign broker agreement stating the amount of commission payable at closing to Hazen, however, the amount payable to Hazen shall not be less than 3%. If for any reason the State of New Mexico requires that the listing broker also be the Selling Broker, then the listing Broker hereby agrees to pay the above amount as agreed in the foreign broker agreement to John Hazen & Associates, Incorporated as a referral fee which shall be payable at successful closing by the title company/closing agent as outlined in the foreign broker agreement.

One of the contingencies specified is that the sale was conditioned upon the buyers' sale of a motel in Illinois. Pages eight and nine of the attachment deals with the buyer's financing arrangements. Page 10 is an "Amendment Agreement with Foreign Broker" signed by [illegible] for Blue Ridge Realty, Inc. on March 10, 1998 and by John Hazen for Hazen, no date specified. The Amendment Agreement was also signed at the bottom margin by Ernst Bauer (debtor's principal) on March 10, 1998. The Agreement provides:

> New Mexico Broker and Foreign Broker agree[4] as follows: ... 6. COMPENSATION...
> (A) 2.5% plus see paragraph 9 total paid to Hazen [illegible]...
> (B) WHEN DUE
> Except as otherwise provided above, if a transaction is closed which involves the Seller, Buyer, or Property described above, New Mexico Broker shall pay to Foreign Broker at funding of the transaction compensation as set forth above in Paragraph 6(A). New Mexico Broker will collect and pay gross receipts tax on this entire commission.
> 7. BROKERAGE RELATIONSHIPS (IF KNOWN)
> New Mexico Broker is acting as Seller's agent. Foreign Broker is acting as referral broker. ...
> 9. ADDITIONAL TERMS. Additional $5,000 bonus to be paid to John Hazen & Associates, Inc. if property sells for more than $1,150,000, plus anything over $1,150,000 will be split equally.

Page eleven is an Agreement to Amend/Extend Contract, dated March 9, 1998 that provided for a closing date of April 15, 1998, and agreed to "credit buyer at closing, an additional $10,000 for needed repairs." This Agreement was signed by E. Bauer for Bauer, USA, Inc.

3. Notice of the motion was sent to the official mailing list on March 20, 1998, according to the certificate of service filed on April 29, 1998 (which failed to attach the mailing list as represented in the notice). The notice states that

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[4]The Court has serious questions whether Hazen is a creditor of the estate at all. Page 7 of the attachments to the motion states "the listing broker shall split the commission with John Hazen & Associates, Incorporated" and the Amendment Agreement with Foreign Broker clearly states that the New Mexico Broker will pay Hazen.

Debtor received an offer on or about February 1, 1998 to purchase all assets for $1,250,000, which will enable the debtor to pay all creditors. The notice makes no reference to real estate commissions or the employment of professionals.

4. One objection to the sale was filed by Telerent Leasing, stating that the motion did not take into account its collateral position, and stating that it needed more information to determine if creditors would in fact be paid in full.

5. The Court entered an Order, prepared and submitted by counsel for debtor, on April 30, 1998, granting the motion to sell. This order was approved by Telerent. One of the Court's findings was "That the real estate broker responsible for the sale, John Hazen and Associates, Inc. should be allowed to obtain its bargained-for commission." The Court ordered the sale, made special provisions for Telerent's collateral, and ordered "That the proceeds of sale will be applied to the amounts due to secured creditors having priority over Telerent Leasing Corporation, then the amount due Telerent, then to the amounts due to priority creditors, the real estate commission of John Hazen and Associates, unsecured creditors, with any balance going to Bauer, USA, Inc." In retrospect this order should neither

have been presented to the Court or entered because it granted relief not sought in the motion, i.e., payment of real estate commissions.

6. On May 14, 1998, the debtor commenced adversary proceeding 98-1100, Bauer, USA, Inc. v. Choice Hotel International[5] against all parties claiming liens on the motel property. The complaint alleges that the Court authorized a sale on April 30, 1998, and that "a portion of the sale price, $210,000, was to be in the form of a deed to a residential property near Chicago, Illinois."[6] Because this Illinois property had not sold, there were insufficient funds to remove all liens and close on the Roswell property. The complaint sought to sell the property free and clear of liens, with proceeds to be deposited in the Court's Registry. There is no reference in the complaint to hiring or paying realtors. Debtors sought and obtained an expedited hearing on May 18, 1998, and the Court entered an order on May 26, 1998 authorizing the sale free and clear of liens. This order makes no findings on employment of realtors or payment of real estate commissions, but orders:

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[5]The summons was issued May 15, 1998, but there is no indication in the file that it was ever served.

[6]The Court has been unable to locate in the file any prior mention of taking residential property in trade as part of the purchase price. Page 6 of the contract makes the sale contingent upon the sale of a motel.

"The claims of the real estate professionals involved in the sale shall be paid as expeditiously as possible, preferably from cash funds, or if these are insufficient for payment in full, then to the extent possible with the balance to be paid from the proceeds of the Chicago property." In retrospect this order should neither have been presented to the Court or entered because it granted relief not sought in the motion, i.e., payment of real estate commissions. Furthermore, there is no notice in the main bankruptcy case concerning this or any other proposed settlement of the adversary proceeding, so creditors other than the lien claimants were not given the opportunity to object.

7. The debtor has not filed a motion to employ either Hazen or Blue Ridge Realty, Inc.

8. The debtor sold the property on May 28, 1998, and, upon request of the Court, filed a report of the sale on November 18, 1998. Debtor supplemented the report on November 24, 1998. The closing statement attached to the report shows a purchase price of $1,250,000 with various disbursements including: $70,137.50 in broker's commissions (a footnote says that $38,887.50 went to Blue Ridge and $31,250.00 to Hazen), $160,000 into a "repair escrow," and an amount due on a franchise of $42,177.90.[7]

[7]The motion, contract, and order all do not anticipate the repair escrow or payment of franchise fees.

DISCUSSION

1. **The surcharge claim**.

There is a split among the circuits on the issue of whether a creditor has standing to pursue a motion for surcharge under § 506.[8] The Court has reviewed the arguments of counsel, and the applicable law, and is persuaded that the better reasoned cases find that only the trustee, or debtor in possession, has standing to pursue an action under § 506(c).

The Court finds that the language of the statute is unambiguous and should be applied according to its terms. "When the language of the Bankruptcy Code is clear and unambiguous, [the Court's] sole function is to enforce it according to its terms." Hartford Underwriters Insurance Co. v. Magna Bank, N.A.

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[8]Compare, e.g. Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re: JKJ Chevrolet, Inc.), 26 F.3d 481, 484 (4th Cir. 1994) and Hartford Underwriters Insurance Co. v. Magna Bank, N.A. (In re: Hen House Interstate, Inc.), 177 F.3d 719, 1999 WL 360193, 5 (8th Cir. 1999), *petition for cert. filed* (U.S. September 3, 1999)(finding standing only in the trustee) with, e.g. North County Jeep & Renault, Inc. v. General Electric Capital Corp. (In re Palomar Truck Corp.), 951 F.2d 229, 232 (9th Cir. 1991), *cert. denied* 506 U.S. 821 (1992); In re Parque Forestal, Inc., 949 F.2d 504, 511 (1st Cir. 1991); New Orleans Public Service, Inc. v. First Federal Savings & Loan Assn. (In re Delta Towers, Ltd.), 924 F.2d 74, 77 (5th Cir. 1991); and Equitable Gas Co. v. Equibank, N.A. (In re McKeesport Steel Castings Co.), 799 F.2d 91, 94 (3rd Cir. 1986) (finding that creditors may have standing); but also see Gallivan v. Springfield Post Road Corp., 110 F.3d 848, 850, n.3 (1st Cir. 1997)(suggesting Parque Forestal may be limited to special circumstances). See also Jeremy Galton, *Standing under Section 506(c) of the Bankruptcy Code Reexamined*, 99 Com. L.J. 464, 466-70 (1994).

(In re: Hen House Interstate, Inc.), 177 F.3d 719, 1999 WL 360193, 2 (8th Cir. 1999), *petition for cert. filed* (U.S. September 3, 1999)(citing Rake v. Wade, 508 US 464, 471 (1993)). Code section 506(c) reads as follows:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

The terms of § 506(c) entitle only the trustee to seek surcharge. Hen House, 1999 WL 360193 at 2. See also Patricia Lindauer, *Professional Fees and Section 506(c) of the Bankruptcy Code*, 98 Dick. L.Rev. 401, 427 (1994) (Section 506(c) is plain and unambiguous and should be enforced accordingly.)[9]

Some cases limiting standing to the trustee cite at least two policy arguments in support of that position: 1) allowing a claimant to proceed directly against a secured creditor would circumvent the statutory distribution scheme, causing an inequitable division of the estate between creditors of the same class, see JKJ Chevrolet, 26 F.3d at 484 and cases cited therein; and 2) the purpose of § 506(c) is to recover estate assets to the extent they were used to preserve a secured claimant's

[9] Hazen has not argued that it should be granted derivative standing to prosecute a §506(c) claim. See JKJ Chevrolet, 26 F.3d 481, 485, n.7 (4th Cir. 1994). Given the circumstances in which Hazen's claim has arisen, it is unlikely that such a request would be granted, assuming it is not too late to argue that position now.

collateral, not to guarantee a trustee's or professional's compensation, see In re J.R. Research, Inc., 65 B.R. 747, 750 (Bankr. D. Ut. 1986), In re Air Center, Inc., 48 B.R. 693, 694 (Bankr. W.D. Ok. 1985), and Galton, 99 Com. L.J. at 472. See also 124 Cong. Rec. H11089, 11095 (daily ed. Sept. 28, 1978)(statement of Rep. Edwards) *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451 *and* Appendix D, Lawrence P. King, Collier on Bankruptcy § App. Pt. 4(f)(i) at 4-2441 (15th ed. rev. 1999); 124 Cong. Rec. S17406, 17411 (daily ed. Oct. 6, 1978)(statement of Sen. DeConcini) *reprinted in* 1978 U.S.C.C.A.N. 6505, 6520 *and* Appendix D, Lawrence P. King, Collier on Bankruptcy § App. 4(f)(iii) at 4-2555; (Section 506(c) applies when trustee or debtor in possession "expends" money.) That is, Section 506(c) is a reimbursement remedy for a trustee. Gregory Hesse, *One Statute, Three Disparate Interpretations: Standing to Pursue Recovery from a Secured Creditor Pursuant to Bankruptcy Code Section 506(c)*, 47 Baylor L. Rev. 39, 54 (1995). Having determined that the language of the statute is unambiguous in limiting standing to the trustee, the Court does not need to rely on these policy arguments.

In summary, the Court finds that Hazen lacks standing to pursue the relief requested under § 506(c), and the motion for surcharge should be denied.

2. **The executory contract claim.**

Hazen argues that the orders approving the sale implicitly recognized the existence of an executory contract and approved assumption of it.

A) The contract was not executory.

First, the Court finds that the commission contract with Hazen was not executory. Generally, a commission contract is considered to be a contract separate from the underlying purchase/sale contract. Baxter Dunaway, Law of Distressed Real Estate §26.03 (1999)("Dunaway")("It is well established that a purchase and sale contract and an agreement to pay a commission constitute two separate agreements, even when they are contained in a single document."); Coldwell Banker and Company v. Godwin Bevers Co., Inc., 575 F.2d 805, 807 (10th Cir. 1978); In re Snowcrest Development Group, Inc., 200 B.R. 473, 477 (Bankr. D. Ma. 1996).

A determination of whether a contract is executory begins with an examination of the contract and , at least for reference purposes, applicable state law. Id.; but see Coldwell Banker, 575 F.2d at 807 (suggesting the determination is a matter of federal law.) Under New Mexico Law, it is clear that a commission is earned when a broker "produces a prospect who is ready, willing and able to purchase on terms agreeable to the seller." Stewart v. Brock, 60 N.M. 216, 225, 290 P.2d 682, 687 (1955)(citations omitted); Harp v. Gourley, 68 N.M. 162, 170, 359

P.2d 942, 947 (1961); Katson v. Fidel, 82 N.M. 636, 637, 485 P.2d 970, 971 (1971); Hayes v. Reeves, 91 N.M. 174, 178, 571 P.2d 1177, 1181 (1977)(in dicta, citing Stewart as the rule). A commission may, as in this case, be payable at closing but that does not render the commission unearned or the contract executory. Harp, 68 N.M. at 225, 359 P.2d at 947; Snowcrest Development, 200 B.R. at 477; Gallivan, 110 F.3d at 851; Indian River Homes, Inc. v. Sussex (In re Indian River Homes, Inc.), 108 B.R. 46, 49-50 (D. De. 1989)("The sole remaining obligation of the debtor to pay the commissions cannot be regarded as calling for any further performance on the part of the professionals"); Dunaway, at §26.03.

In this case Hazen produced a buyer acceptable to debtor before the bankruptcy was filed. The sales contract is dated February 1, 1998 and the case was filed on February 13, 1998. Hazen's right to a commission was fixed when the buyer was produced to the debtor's satisfaction, and there was nothing left for Hazen to do after that point to "produce[] a prospect who is ready, willing and able to purchase on terms agreeable to the seller." Stewart, 60 N.M. at 225, 290 P.2d at 687. See also Marcus & Millichap Incorporated of San Francisco v. Munple, Ltd. (In re Munple, Ltd.), 868 F.2d 1129, 1130 (9th Cir. 1989)("By the time the purchase agreement was signed, [broker] had completed

all the performance necessary to earn its commission if and when the sale closed."); Snowcrest, 200 B.R. at 788-78.

Hazen argues in its memorandum that the February 1, 1998, contract was not valid or enforceable because both the debtor and buyers continued to amend the terms until May 21, 1998, and that it was executory up to the point of closing. The Court disagrees. The February 1 contract clearly identifies the parties to the contract, the description of the property, the purchase price, the date of closing, and provides consideration in the form of a deposit. Page 5 was signed by the buyers, and pages 10 and 11 were signed by the seller. This group of documents satisfies the statute of frauds, and is an enforceable contract. See e.g. Ochs v. Weil, 142 F.2d 758, 760 (D.C. Cir. 1944). Subsequent changes based on facts discovered after the contract was entered do not retroactively make the contract itself unenforceable. Moreover, the Court has no doubt that the brokers could have sued in state court for their commission based on the February 1, 1998 contract if seller refused to go through with the sale.[10] See Stewart, 60 N.M. at 222. Furthermore, this is the same argument used in many other cases without success. See e.g. Munple, 868 F.2d at 1131, Gallivan, 110 F.3d at 852, In

[10]Hazen also argues in the alternative that the contract was a post-petition contract. Even if the sale contract were a post-petition contract, the Court finds that the commission contract was pre-petition, and no longer executory when the case was filed.

re HSD Venture, 178 B.R. 831, 832 (Bankr. S.D. Ca. 1995). See also In re L.D. Patella Construction Corp., 114 B.R. 53, 56 (Bankr. D. N.J. 1990)("Although brokers often render services between contract and closing in various ways, such services are gratuitous.") All of these cases find that post-contract and post-petition services do not make the commission contract executory. In summary, the Court finds that the commission contract was not executory as of the date the petition was filed.

B) Even if the contract were executory, it was neither assumed nor capable of assumption.

Even if the commission contract were executory, the debtor never assumed it. Assumption requires court approval, 11 U.S.C. § 365(a) ("[T]he trustee, subject to the court's approval, may assume ... any executory contract.") There is no order approving assumption in this case, or even a motion to assume.

Furthermore, real estate brokers are professional persons whose employment is subject to court approval. See, e.g. In re Channel 2 Associates, 88 B.R. 351, 352 (Bankr. D. N.M. 1988); F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.), 844 F.2d 99, 108 (3rd Cir.), *cert. denied* 488 U.S. 852 (1988). Therefore, to assume a contract with a professional, that professional must be employed under section 327. Channel 2, 88 B.R. at 352-53 ("Section 365 cannot be used to circumvent the requirements of section 327".) Hazen holds a claim for its

commission, is not a "disinterested person" under § 101(14), and therefore cannot meet the requirements of 327(a) in order to be employed or compensated. In re Federated Department Stores, 44 F.3d 1310, 1319 (6th Cir. 1995). Furthermore, as a matter of law Hazen holds or represents an interest adverse to the estate. See e.g., Moser v. Bertram, 858 P.2d 854, 855, 115 N.M. 766, 767 (1993)(Buyer's broker owes fiduciary duty to buyer.) and In re Buchanan, 1998 WL 1041291, 3 (Bankr. E.D. Va. 1998):

> [A] buyer's broker owes a duty to the buyer to act in the buyer's interests and to maintain confidential information acquired. Its duties necessarily include obtaining the lowest possible price for the real estate. This goal is in direct conflict with the estate's interest in obtaining the highest possible price for the sale of the property. This conflict is sufficient to conclude that such party holds an interest adverse to the estate.

The Debtor could not employ Hazen, and therefore could not assume the contract.

3. The claim that as buyer's broker, Hazen's employment was not necessary.

Hazen stresses that it was the buyer's broker, and therefore did not need to be employed by the estate to receive a commission. The Court disagrees for two reasons. First, the Bankruptcy Code does not differentiate between a buyer's broker and a seller's broker. Rather, the inquiry directed by Section 327 is: 1) is the person a professional, and 2) does that person hold or represent an interest adverse to the estate and is that person disinterested. 11 U.S.C. § 327(a). Accord In re

Interwest Business Equipment, Inc., 23 F.3d 311, 317 (10th Cir. 1994)("A bankruptcy court has the authority and the responsibility to only approve employment of professionals who meet the minimum requirements set forth in 327(a), independent of objections.")(citation omitted). Second, the Court finds no statutory authority for paying professionals other than through section 330, which requires compliance with section 327. Federated Department Stores, 44 F.3d at 1319 ("Our authority to award fees is circumscribed by 11 U.S.C. § 330(a), which provides that 'the court may award [reasonable fees and expenses] ... to a professional person employed under [§] 327.") Accord In re F/S Airlease II, Inc., 844 F.2d at 109 (cannot use §503(b)(1)(A) as a way of circumventing § 327(a)); HSD Venture, 178 B.R. at 834 (cannot use §503(b)(3)(D) as a way of circumventing §327(a)); In re WAPI, Inc., 171 B.R. 130, 133 (Bankr. N.D. Al. 1994)(use of §105(a) would eviscerate §327). Furthermore, as a general policy issue, it would be improper for the Court to award fees and expenses to a broker whose fiduciary duty to its client would require the absolute minimum payment to the estate for its assets. See Buchanan, 1998 WL 1041291 at 3.

4. **The res judicata, collateral estoppel, judicial estoppel, and finality of sales orders claims**.

Hazen claims that the doctrines of res judicata, collateral estoppel, judicial estoppel[11], and finality of sales orders require that the issue of entitlement to broker fees not be relitigated. This argument necessarily requires that the orders were actually litigated in the first place. As discussed above, the broker/commission contract is a separate contract from the sale contract and the Court will view the order as if two motions were filed.

The motion to sell filed in the main bankruptcy case does not request employment of a broker or payment of brokerage commissions. It is only the unreferenced exhibit to the motion that mentions a broker. The notice to creditors also was silent on the issue of a broker or payment of a commission or its amount. The Court therefore finds that the issue of employment of a broker or payment of a brokerage commission was never in fact litigated, and could not have been litigated because creditors had no notice of the "motion" to employ[12].

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[11] Hazen's claim that debtor cannot take inconsistent positions fails. Judicial estoppel which "bars a party from adopting 'inconsistent positions in the same or related litigation'" is generally not recognized by the Tenth Circuit. Golfland Entertainment Centers v. Peak Investment, Inc., 119 F.3d 852, 858 (10th Cir. 1997)("The Tenth Circuit, however, has rejected the doctrine of judicial estoppel as being inconsistent with the spirit of the Federal Rules of Civil Procedure." (Citations omitted)). See also Dewey v. Dewey, 223 B.R. 559, 566 n.9 (10th Cir. BAP 1998).

[12] In fact, no motion to employ realtor or pay commission was ever filed.

Furthermore, the Court finds that a determination of the issue of employment of a realtor or payment of a commission was not necessary to granting the relief requested in the motion to sell. The main issue in a motion to sell is whether the price offered is fair, not how the proceeds will be distributed. Collateral estoppel would therefore not apply.

Even assuming that the Court could find that the motions to sell implicitly sought to employ and pay a professional, and assuming that the orders properly granted that relief, the Court would have the power under § 328(c) to reexamine those orders. That section provides:

> [T]he court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

Therefore, the Court could deny compensation even if Hazen had been hired, because it was not disinterested during the entire period of employment.

Finally, the Court should mention that there was never any notice to creditors regarding the amounts of commission. The Court may approve reasonable compensation for actual, necessary services and expenses "after notice." Federal Rule of Bankruptcy Procedure 2002(a)(6) requires twenty days notice on all

applications that seek in excess of $500. Since there was no notice of the amount of fees, they were improvidently approved in the orders. See In re CIC Investment Corp., 192 B.R. 549, 554 (9th Cir. BAP 1996)(Case remanded to allow 20 days notice of fees.)

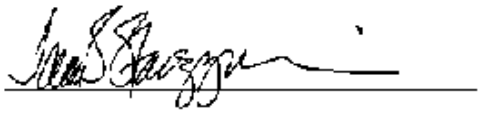
In sum, the Court finds that the orders were improvidently entered to the extent that they granted relief related to employment of a broker or payment of a commission, and finds that those portions of the orders should be set aside. See In re Allegheny International, Inc., 100 B.R. 244, 245 (Bankr. W.D. Pa. 1989).

The Court will issue separate orders 1) denying Hazen's Motion for surcharge, 2) setting aside portions of the earlier sale orders, sua sponte, 3) denying a motion by debtor to reconsider those earlier sales orders as moot, and 4) overruling Hazen's objection to the debtor's motion to disburse funds held in the Court registry.

A potential outcome of this decision may be the filing of a motion or complaint directed at Hazen to disgorge the sums paid to it.[13] Since no such request is pending before the Court, the Court will not enter any such relief, and in any event would not

[13]The Court at previous hearings has inquired whether the Debtor intends to look into the other payments at the closing that were paid from the sale proceeds without court order.

do so without providing Hazen the opportunity to address that issue explicitly.



Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following:

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