

1997

Golfland Entertainment Centers, Inc., Appellant, vs. Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, Appellee : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In re:

Southern American Insurance
Company,

GOLFLAND ENTERTAINMENT
CENTERS, INC.,

Appellant,

vs.

UTAH INSURANCE COMMISSIONER,
as Liquidator of Southern
American Insurance Company,

Appellee.

BRIEF OF APPELLEE

Case No. 970585

District Court No. 020001617

Priority No. 15

APPEAL FROM AN ORDER ENTERED IN THE THIRD JUDICIAL DISTRICT COURT
FOR THE STATE OF UTAH, SALT LAKE COUNTY, HON. STEPHEN L. HENRIOD,
DISTRICT JUDGE

UTAH COURT OF APPEALS
BRIEF

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(j).

STATEMENT OF ISSUES ON APPEAL

Did the Third District Court err in ordering a new sale of the SAIC Barn free and clear of all liens, interests, and encumbrances?

Standard of Review: The standard of review is clearly stated in the unambiguous language of Utah Rule of Civil Procedure 52(a). That rule provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous" (Emphasis added.) The decision of In re Infant Anonymous cited by Appellant does not govern this appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. Utah Code Ann. § 31A-27-314:

Unless the court orders otherwise, the liquidator has the following powers and responsibilities:

. . . .

(9) He may acquire, hypothecate, encumber, lease, improve, sell, transfer, or otherwise dispose of or deal with any property of the insurer at its market value or upon fair and reasonable terms and conditions, except that no transaction involving property with a market value exceeding \$25,000 may be concluded without the express permission of the court.

. . . .

(23) He may exercise all the powers conferred upon receivers by the laws of this state which are not inconsistent with this chapter.

2. Utah Code of Judicial Administration, Rule 4-501 (1)(a) and (b):

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. . . .

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. . . .

STATEMENT OF CASE

Southern American Insurance Company ("SAIC") was placed into liquidation in March of 1992 by order of the Third District Court (the "Third District Court"). The Utah Insurance Commissioner was appointed at that time as the statutory liquidator of SAIC (the "Liquidator"). As part of the Liquidator's statutory duties and responsibilities, the Liquidator is authorized to "exercise all the powers conferred upon receivers by the laws of this state" under the supervision of the Third District Court pursuant to Utah Code Ann. § 31A-27-314 (23).

One of the Liquidator's responsibilities is to liquidate SAIC's assets. The Utah Insurance Code requires the Liquidator to obtain the Third District Court's approval for the sale of assets with a market value exceeding \$25,000. Utah Code Ann. § 31A-27-314 (9). One of those assets is the former headquarters

building of SAIC (a converted dairy barn) commonly known as the "SAIC Barn".

In February of 1994, Appellant Golfland Entertainment Centers, Inc. ("Golfland") submitted an oral offer for the purchase of the SAIC Barn, which oral offer extended to the purchase of two adjacent properties, a water park and a storage shed, which were under the jurisdiction of the United States Bankruptcy Court for the District of Utah (the "Bankruptcy Court"). The three properties were being sold together, and the sellers required simultaneous closing of all three properties. The Third District Court entered an order of February 24, 1994 (the "1994 Order"), approving Golfland's purchase of the SAIC Barn, but subject to the terms and conditions submitted to the Third District Court. The Bankruptcy Court initially approved Golfland's purchase of the water park and the storage shed on February 23, 1994. However, the Bankruptcy Court later rescinded its approval of the sale of the water park, and eventually approved a sale of the water park to another buyer.

The agreement for the purchase of the SAIC Barn required the closing on all three properties to occur by April 8, 1994. However, because the Bankruptcy Court had rescinded its approval of the sale of the water park and because other conditions precedent for the sale to be consummated were not satisfied, the closing did not occur by that deadline.

Thereafter, the Liquidator received an offer from Provo City to purchase the SAIC Barn. The Liquidator then filed his "Motion for Supplemental Order Approving Sale of Southern American Insurance Company Headquarters Building Free and Clear of Liens, Interests and Encumbrances" (the "Liquidator's Motion") on August 12, 1994, seeking either the Third District Court's authorization to sell the SAIC Barn to Provo City, or alternatively, requesting the Third District Court to set the terms of any sale of the SAIC Barn to Golfland if the Third District Court determined that the Liquidator was still obligated to sell to Golfland. Golfland objected and filed several memoranda with attached documentation in support of its objection. Golfland requested oral argument but did not request an evidentiary hearing in its memoranda.

After oral argument on April 17, 1995, the Third District Court ruled that the Liquidator was not required to sell the SAIC Barn to Golfland, nor did it approve the Liquidator's request to sell the SAIC Barn to Provo City. Instead, the Third District Court exercised its discretion as the supervising Court for the SAIC liquidation by ordering the Liquidator to sell the SAIC Barn at a new auction to the highest bidder free and clear of all liens, interests, and encumbrances, with Golfland being allowed to participate in the new auction. The Third District Court's order reflecting its ruling was entered on July 11, 1995 (the "1995 Order"). Golfland has appealed the 1995 Order.

STATEMENT OF FACTS

Golfland's Offer to Purchase the SAIC Barn.

1. Golfland was the high bidder at a February 22, 1994 oral auction for the purchase of the SAIC Barn, the Seven Peaks Water Park (the "Water Park") owned by BCD Corporation (which was in bankruptcy), and an adjacent storage shed facility owned by CDX Corporation (also in bankruptcy) (the "Storage Shed"). R. 1855. (All references to the Record are cited as "R. ____"). Golfland submitted a single combined bid for the three properties of \$2,610,000, allocated as follows: \$2,200,000 for the Water Park, \$360,000 for the SAIC Barn, and \$50,000 for the CDX Storage Shed. R. 1989.

2. Golfland's oral offer to purchase the SAIC Barn and the other two properties adopted the terms of a previous offer submitted by B&B Properties Company, L.C. ("B&B"),¹ except that Golfland waived all of the conditions to closing contained in the

¹In the fall of 1993, the Liquidator received and accepted, subject to the Third District Court's approval and to higher and better offers, an offer (the "B & B Offer") from B & B to purchase the SAIC Barn for \$200,000 in conjunction with the sale of the Water Park and Storage Shed. The sale of the Water Park and Storage Shed were subject to the approval of the Bankruptcy Court. The terms of the B & B Offer were contained in the "Offer to Purchase and Sale and Purchase Agreement and Closing Instructions Relating Thereto", the "Extension and Amendment of Offer", the "Acceptance of Offer as Modified and Counteroffer", and the "Acceptance of Counteroffer and Counter-Counteroffer". (R. 1249-1271.) The Liquidator subsequently received several higher and better offers for the Water Park, the SAIC Barn, and the CDX Storage Shed, and an oral auction of the three properties was conducted on February 22, 1994. R. 1854.

B & B Offer other than title insurance, and Golfland also agreed to "close" in two weeks from the date of the auction. R. 1794.

3. Golfland's offer adopted the provisions of the B&B Offer, which reflected that the SAIC Barn had to be sold in conjunction with the sale of the Water Park and the CDX Storage Shed. R. 1254, 1267, 1794.

4. The B&B offer adopted by Golfland further stated that the deadline for closing the sale of the SAIC Barn was April 8, 1994, and outlined the following course of action if the sale of the SAIC Barn failed to close by that deadline:

[P]rovided further that unless the Closing shall occur on or before one hundred and twenty (120) days after the later of the dates appearing next to the signatures of Seller and Buyer on this Agreement, the Title Company Account shall terminate without further acts of the parties hereto, and in such event the Title Company shall, except as otherwise expressly provided in Paragraph 10 hereof, return all documents and funds deposited pursuant hereto to the parties depositing the same and neither party shall have any further liability to the other hereunder, except as otherwise expressly provided in said Paragraph 10 hereof.

R. 1264-1265.

5. Following the February 22, 1994 auction, the Third District Court entered its "Order Approving Sale of Property of the Liquidation Estate Free and Clear of Liens, Interests and Encumbrances" on February 24, 1994 (the "1994 Order"). R. 1539-1542.

6. A hearing was held before the Bankruptcy Court on February 23, 1994, seeking Bankruptcy Court approval of the sale

of the Water Park and the Storage Shed to Golfland, consistent with the requirement in the Golfland offer that these two properties be sold simultaneously with the SAIC Barn. R. 1796-1797. The Bankruptcy Court approved the sale of the Water Park and the Storage Shed to Golfland at that hearing, and written orders approving the sale were entered by the Bankruptcy Court on March 31, 1994. R. 1796-1797. A second bidder at the February 22, 1994 auction, Peak Investments Incorporated ("Peak") was approved by the Bankruptcy Court as a back-up purchaser of the Water Park and the Storage Shed. R. 1796-1797.

The Failed Sale of the SAIC Barn.

7. Following the entry of the 1994 Order, disputes arose between the Liquidator and Golfland concerning their respective obligations to each other with respect to the sale of the SAIC Barn. R. 1797, 1942.

8. In particular, questions arose as to whether an underground storage tank still existed on the SAIC Barn property, and whether there had been petroleum contamination from that underground storage tank. R. 2064. Golfland asserted that even though it had waived the conditions to closing contained in the B & B offer it adopted, including the right to receive and approve an environmental assessment report of the SAIC Barn, it had not waived its right to insist that the Liquidator give to Golfland at closing the environmental warranties originally required by B & B in its offer. R. 2063, 2640.

9. The Liquidator asserted that the waiver of the condition of closing relating to the environmental issues also constituted a waiver of the environmental warranty and that the risk of any environmental problems had been assumed by Golfland. R. 2063, 2640. Golfland demanded that the Liquidator provide the environmental warranty and insisted that it had not waived this requirement at the auction. R. 2063, 2640.

10. As a result of Golfland's demand, the parties eventually agreed to cap any potential liability of the SAIC estate associated with any environmental warranty for the SAIC Barn at \$200,000. R. 2605, 1795.

11. On March 8, 1994, Golfland deposited the sum of \$360,000 (along with other funds for the purchase of the Water Park and the CDX Storage Shed, totalling \$2,610,000) with Security Title and Abstract Company (the "Title Company") for the purchase of the SAIC Barn, subject to Golfland's sole discretion as to the disposition of the funds. R. 1934.

12. On April 7, 1994, Peak filed with the Bankruptcy Court a "Motion to Enforce Sale to Alternative Bidder and Motion for Stay" (the "Peak Motion for Stay"), seeking a stay of the Bankruptcy Court's Order authorizing the sale of the Water Park to Golfland. R. 1800.

13. Peak contended that Golfland had failed to meet the requirements set forth in the Bankruptcy Court's Order authorizing the sale of the Water Park, and that the terms and

conditions of the sale of the Water Park to Golfland were a major modification from those authorized by the Bankruptcy Court.

R. 2070.

14. Because of the filing of Peak's Motion for Stay, the Title Company declined to issue to Golfland a title insurance policy on the Water Park, which was a condition precedent to closing the sale of the Water Park which only Golfland could waive. R. 2071, 1801. Golfland declined to waive that condition precedent for its protection; accordingly, the sale of the SAIC Barn to Golfland did not close by April 8, 1994, R. 1801, as required by the B&B offer adopted by Golfland. R. 1264-1265.

Peak's Motion to Stay is Granted.

15. During the Bankruptcy Court proceedings, John Kenney, Golfland's representative at the auction, testified that he understood that the effect of waiving the conditions to closing, including the environmental report, was to subject Golfland to paying the costs associated with environmental problems. R. 1953. This statement was contrary to Golfland's post-auction assertions to the Liquidator when negotiating concessions concerning potential environmental problems. R. 2063.

16. On June 6, 1994, following a four day evidentiary hearing, and after weighing the testimony, the Bankruptcy Court found that all bidders at the February 22, 1994 auction "believed that the risk of environmental problems on the property being purchased was thereby shifted to the buyer," and that the final

terms of the sale of the Water Park to Golfland were not the sale terms approved by the Bankruptcy Court. R. 2605-2606. The Bankruptcy Court found that this agreement was a major change in the terms of the sale. R. 2607. The Bankruptcy Court also found that "[t]he terms that the parties thought they were bargaining on and bidding on turn out not to be the terms of the sale which is ultimately proposed to the court." R. 2606. The Bankruptcy Court held that the sale to Golfland was not authorized. R. 2608. The Bankruptcy Court ordered the owner of the Water Park not to proceed with a final sale of the Water Park without further order of the Bankruptcy Court. R. 2608. A copy of the Bankruptcy Court ruling is attached hereto in the Addendum at Exhibit "C."

17. On July 6, 1994, the Bankruptcy Court entered an order (the "1994 Bankruptcy Order") formally setting aside its March 31, 1994 Order authorizing the sale of the Water Park to Golfland. R. 1957-1959. A copy of the 1994 Bankruptcy Order is attached hereto in the Addendum at Exhibit "C."

18. The Liquidator subsequently received an offer from Provo City to purchase the SAIC Barn for \$395,000. R. 1863-1865.

19. On August 11, 1994, Golfland filed a Motion for Leave to File Complaint Against Liquidation Estate (the "Golfland Motion") and a supporting memorandum with the Third District Court. R. 1779-1814.

20. On August 12, 1994, the Liquidator filed "Liquidator's Motion for Supplemental Order Approving Sale of Southern American Insurance Company Headquarters Building Free and Clear of Liens, Interests and Encumbrances" (the "Liquidator's Motion"). R. 1815-1818. The Liquidator's Motion requested that the Third District Court authorize the sale of the SAIC Barn to Provo City because the conditions precedent relating to the sale of the SAIC Barn to Golfland had failed, or alternatively, that the Third District Court set the terms of the sale of the SAIC Barn to Golfland if the Third District Court determined that the Liquidator was still obligated to Golfland. R. 1815-1818.

21. The Liquidator and Golfland argued their respective motions before the Third District Court on April 17, 1995. R. 3131. After consideration of the parties' extensive briefs, the documentary evidence submitted by both parties, and the oral arguments of counsel, the Third District Court ordered the Liquidator not to sell to either Provo City or Golfland, but rather, to sell the SAIC Barn at a new auction to the highest bidder. R. 3133. The Third District Court also granted the Golfland Motion.² R. 2977.

²On June 22, 1995, Golfland filed a complaint against the Liquidator in the Third District Court (the "Golfland Complaint"). The Liquidator has filed a Motion to Dismiss the Golfland Complaint, which remains pending before the Third District Court.

22. The Liquidator subsequently prepared his proposed Order Approving Sale of Southern American Insurance Company Headquarters Building Free and Clear of Liens, Interests and Encumbrances (the "Proposed Order"). R. 2938-2944. On May 5, 1995, Golfland filed an objection to the Proposed Order, including an argument that evidence was taken at the hearing. R. 2933-2937. Documentary evidence was submitted by both Golfland and the Liquidator with the pleadings. R. 1835-1862; 1922-1956; 2055-2075; 2600-2644.

23. On July 7, 1995, the Third District Court entered its Order Approving Sale of Southern American Insurance Company Headquarters Building Free and Clear of Liens, Interests and Encumbrances (the "1995 Order"), R. 3131-3136, finding that:

- a. The sale of the SAIC Barn to Golfland was contingent upon conditions which never occurred. R. 3132, ¶ 2.
- b. Golfland's alleged tender of the purchase funds did not amount to a proper tender with respect to the closing. R. 3132, ¶ 3.
- c. The closing of the sale of the SAIC Barn did not occur in a timely fashion. R. 3132, ¶ 4.
- d. The condition precedent that the SAIC Barn simultaneously close with the sale of the Water Park was frustrated by the Bankruptcy Court's July 6, 1994 order; thus there was no binding agreement between the Liquidator and Golfland for the sale of the SAIC Barn. R. 3132, ¶ 5.
- e. Judge Stirba's February 24, 1994 order authorizing the sale of the SAIC Barn to Golfland was "ineffective" because the terms of the Original Barn Sale Order were different than the terms of

the Golfland offer that was frustrated by the Bankruptcy Court. R. 3133, ¶ 6.

- f. Specific performance was not an available remedy because the SAIC Barn was not "unique." R. 3133, ¶ 7.

24. On July 28, 1995, Golfland filed a Notice of Appeal of the 1995 Order. R. 3263-3271. Golfland's initial appeal was assigned to this Court under Court of Appeals No. 960419. On December 27, 1996, this Court dismissed Golfland's original appeal for lack of finality. R. 5157-5162. On July 22, 1997, the Third District Court certified the 1995 Order as a final order. R. 6316-6319. Golfland filed its second Notice of Appeal on August 20, 1997. R. 6307-6309.

SUMMARY OF ARGUMENT

The Third District Court correctly ordered the Liquidator to sell the SAIC Barn at a new auction. The Third District Court properly ruled that the terms for the sale of the SAIC Barn to Golfland under the 1994 Order had not been met because the contingencies for the sale never occurred. It is beyond dispute that the Bankruptcy Court withdrew approval for the sale of the Water Park, which was a condition precedent for the simultaneous sale of the SAIC Barn. The Bankruptcy Court's order has been affirmed by the Federal District Court (twice) and by the Tenth Circuit Court of Appeals. Golfland cannot change history. Moreover, Golfland is collaterally estopped from relitigating in the Third District Court the dispute over whether or not the

Bankruptcy Court should have ordered the sale of the Water Park to Golfland. The Third District Court properly ordered the Liquidator to hold a new auction for the SAIC Barn.

The Third District Court did not commit any procedural errors and did not deprive Golfland of any procedural rights. The Third District Court did not err in finding that documentary evidence was submitted to it in accordance with the Utah Code of Judicial Administration. The Third District Court also did not err by not holding an evidentiary hearing after Golfland failed to timely request such a hearing. Moreover, the Third District Court provided a forum for Golfland's grievances by granting leave for Golfland to file a complaint against the Liquidator if Golfland could prove any damages against the Liquidator. Golfland cannot litigate in this appeal issues which are still pending before the Third District Court in that lawsuit.

Golfland also waived any alleged procedural errors. Golfland acquiesced in the submission of documentary evidence and itself submitted documentary evidence to the Third District Court. Golfland also did not object to any of the documentary evidence offered by both the Liquidator and Golfland. Finally, the 1995 Order is not internally inconsistent or otherwise defective, and is fully supported by the record. This Court should affirm the 1995 Order.

ARGUMENT

I. THE THIRD DISTRICT COURT PROPERLY RULED THAT THE TERMS OF THE ORIGINAL SALES AGREEMENT WERE NOT MET BECAUSE THE CONTINGENCIES FOR THE SALE NEVER OCCURRED.

The Third District Court found that the sale of the SAIC Barn to Golfland was contingent upon conditions which never occurred, including the sale of the SAIC Barn in a timely fashion, and that the condition precedent that the SAIC Barn simultaneously close with the sale of the Water Park was frustrated by the Bankruptcy Court's order withdrawing approval of the sale of the Water Park to Golfland, thus resulting in no binding agreement between the Liquidator and Golfland for the sale of the SAIC Barn. These findings of fact are fully supported by the evidence before the Third District Court, and they are not clearly erroneous.³ Furthermore, these findings alone are sufficient to affirm the Third District Court's ruling.

A. The Evidence Before the Third District Court Supported Its Finding That the Bankruptcy Court Withdrew Approval for the Sale of the Water Park, Thereby Frustrating the Sale of the SAIC Barn.

The Third District Court ordered a new auction of the SAIC Barn because the contingencies for the sale of the SAIC Barn to Golfland did not occur. Although Golfland now belatedly regrets

³ Instead of attacking these findings as clearly erroneous, Golfland instead argues that these findings are mere "dicta" and should be ignored. Brief of Appellant ("Golfland Brief") at p. 21. It is clear that these findings are not dicta but are the central focus of the 1995 Order. Golfland obviously hopes to downplay these findings because they are so damaging to Golfland.

that it agreed to these two contingencies, Golfland concedes, as it must do, that these contingencies existed and that they did not occur. Golfland Brief at p. 35. Moreover, Golfland must concede that these two contingencies will never occur, no matter how many evidentiary hearings Golfland is given on these issues. Although Golfland has argued that the Third District Court's failure to give it an evidentiary hearing, such an evidentiary would have been futile, because an evidentiary hearing cannot change historical events (evidenced by documentary evidence submitted to the Third District Court) which cannot be reversed or changed.

The Third District Court was apprised by both Golfland and the Liquidator through documentary evidence that the contingencies of Bankruptcy Court approval and a simultaneous sale had failed. Notwithstanding Golfland's complaints about "procedural irregularities," Golfland admits that Bankruptcy Court approval was withdrawn and that the Third District Court was advised of that undisputed fact. The Bankruptcy Court's ruling was presented to the Third District Court, which properly took judicial notice of that ruling as a basis for its own ruling that the sale of the SAIC Barn was "contingent upon conditions which never occurred." R. 3132. Golfland grudgingly concedes that "on its face, the language of this factual finding is not erroneous." Golfland Brief at p. 35.

B. The Bankruptcy Court's Order Rescinding Approval of the Sale of the Water Park to Golfland Has Been Affirmed By the Federal District Court and the Tenth Circuit.

Golfland's plea for an evidentiary hearing is futile. The Bankruptcy Court's ruling withdrawing approval of the sale of the Water Park to Golfland has now been affirmed twice by the United States District Court for the District of Utah (the "Federal District Court") and once by the Tenth Circuit Court of Appeals. Golfland's attempt to reinstate the Bankruptcy Court's approval through its federal appeals has failed.

Golfland's first appeal in the federal system was assigned to Chief Judge David Sam of the Federal District Court. On September 19, 1995, Judge Sam affirmed the 1994 Bankruptcy Court Order as follows:

The court finds that the bankruptcy court's ruling that the sale should be set aside is not an abuse of discretion. The bankruptcy court found that there was a mistake in the sale sufficient to justify setting aside the sale because "[e]veryone at the auction believed that the risk of environmental problems on the property being purchased was shifted to the buyer." This factual finding is supported by sufficient evidence in the record, and the court's finding that this misunderstanding is a mistake as to a material term of the sale appears correct. Such a mistake would indicate that the bidders did not have a fair opportunity to bid at the sale, and mistakes which affect the fairness of the bidding process are the type which would ordinarily be seen as sufficient to justify setting aside a confirmed sale.

In re BCD Corp. (Golfland Entertainment Centers, Inc. v. Peak Investment, Inc., and BCD Corp.), No. 94-C-0329-S (DU, September 19, 1995).⁴

Golfland next appealed to the Tenth Circuit. On July 21, 1997, the Tenth Circuit affirmed the Bankruptcy Court and the Federal District Court. In re BCD Corporation (Golfland Entertainment Centers, Inc. v. Peak Investment, Inc.), 119 F.3d 852 (10th Cir. 1997). The Tenth Circuit ruled as follows:

Under this standard we are convinced that the bankruptcy court did not abuse its discretion in setting aside the original sale when it concluded that the confirmation had been granted through a mistake as to the terms of the sale. The bankruptcy court found that initially everyone present at the bidding "believed that the risk of environmental problems on the property being purchased was thereby shifted to the buyer." However, the sellers and Golfland disagreed as to the terms of the sale, in particular whether Golfland had assumed the risk of environmental remediation. The parties then agreed that the sellers would assume the risk of the first \$200,000 in environmental liability and half of a \$33,000 bond that had been filed to meet municipal requirements. As a result, the bankruptcy court found that "[t]he terms that the parties thought they were bargaining and bidding on turn out not to be the terms of the sale which is ultimately proposed to the court."

Id. at 860-61 (record citations omitted).

Although the court's findings could have been stated more clearly, we read the court as having found that

⁴ A copy of Judge Sam's 9/19/95 Order is attached hereto as Exhibit "A." The Liquidator has cited and attached copies of Chief Judge Sam's unpublished decision and the unpublished decision of Judge Kimball attached hereto as Exhibit "B" in accordance with the Federal District Court's Local Rule DUCiv R 7-2(a).

Golfland and BCD as the seller had never actually agreed upon the terms of the sale, specifically with regard to the environmental warranty provisions.

Id. at 861.

We are convinced, based on all the evidence, that the bankruptcy court's factual finding that there never were agreed-upon terms for the sale of the water park was not clearly erroneous. Furthermore, the bankruptcy court's decision to set aside the confirmed sale on the ground that it had been entered under a mistake as to the terms of the agreement was not an abuse of discretion. . . .

Golfland's other challenges to the decisions of the bankruptcy court and the district court are that the factual finding that Golfland waived the environmental warranties was clearly erroneous and that, even assuming that Golfland had changed the terms of the sale, the proper remedy would have been to allow the sale to go forward under the original terms presented to the bankruptcy court.

We have considered these arguments and are not persuaded that it was error or an abuse of discretion to set aside the sale. The argument regarding whether Golfland had waived the environmental warranties is irrelevant, given the finding, which we uphold, that there had not been an agreement as to the terms of the sale. Similarly the bankruptcy court could not enforce the original terms of the sale because there had been no agreement as to the original terms

Id. at 861-62.

Prior to the Tenth Circuit's ruling, Golfland had filed a Proof of Claim in the BCD bankruptcy case for its alleged damages arising from BCD's failure to sell the Water Park to Golfland. After the Tenth Circuit ruled, the Bankruptcy Court disallowed Golfland's Proof of Claim. Golfland again appealed to the Federal District Court, and its second appeal was assigned to

Federal District Judge Dale Kimball. On June 4, 1998, Judge Kimball affirmed the Bankruptcy Court, ruling as follows:

In BCD Corporation v. Peak Investment, Inc., 119 F.3d 852 (1997) the Tenth Circuit held that it was not error or an abuse of discretion on the part of the Bankruptcy Court to set aside the sale of the water park to Golfland. The Tenth Circuit further held that there had not been an agreement as to the terms of the sale and "the bankruptcy court could not enforce the original terms of the sale because there had been no agreement as to the original terms. . . ." Id. at 862. In other words, the Tenth Circuit's ruling makes it clear that no contract existed between Golfland and BCD Corporation. Even though Golfland's Proof of Claim was not brought in the identical case that was appealed to the Tenth Circuit, it is clear to this court that all claims brought in the Proof of Claim are untenable based upon the umbrella of the Tenth Circuit's ruling and the Bankruptcy Court's approval of the final sale for \$3,600,000.00 to a third party. All of Golfland's claims against BCD flow from the failure to perform under the February Contract. The Tenth Circuit has ruled that there was no meeting of the minds as to the February Contract and therefore no contract existed. If there was no contract, Golfland does not have a remedy at law. Although this may not be exactly the kind of case that the "law of the case" doctrine typically applies to, this court cannot reverse the Tenth Circuit's ruling that there was no contract between the parties which is what would have to be done in order for the appellant to have a cause of action.

In re BCD Corporation (Golfland Entertainment Centers, Inc. v. BCD Corporation and Southern American Insurance Company), No. 2:97 CV 953K (DU, June 4, 1998).⁵

The evidentiary hearing demanded by Golfland could never change the fact that there was no Bankruptcy Court approval and

⁵ A copy of Judge Kimball's 6/4/98 Order is attached hereto as Exhibit "B" in accordance with the Federal District Court's Local Rule DUCiv R 7-2(a).

no simultaneous sale, and no possibility of reinstating either of those contingencies. The undisputed facts that the Bankruptcy Court withdrew its approval of the sale of the Water Park and that the sale of the SAIC Barn did not occur simultaneously with the sale of the Water Park and the Storage Shed, coupled with the federal system's final affirmance of the Bankruptcy Court's actions, obviate the need for any further litigation or evidence on these historical facts.

- C. Collateral Estoppel Bars Golfland From Relitigating Issues In a Jury Trial Before the Third District Court That Have Been Conclusively Decided by the Bankruptcy Court and Affirmed by the Federal District Court and the Tenth Circuit.

Recognizing that it cannot change history, or change the rulings of three federal courts, Golfland now relies upon two arguments for asserting that Golfland is entitled to a jury trial to prove that the Liquidator is still contractually obligated to sell the SAIC Barn to Golfland. Golfland argues: (1) "a party who is responsible for the failure of a condition [precedent] may not escape liability based upon such failure," and (2) "where a party waives a condition, the contract may be enforced despite the failure of such condition." Golfland Brief at p. 35.

Both of these arguments are flawed. Golfland complains that it did not have its fair day in court on these two arguments. The reality is that Golfland has had two fair hearings on its claim that the Liquidator was responsible for the failed sale, a four day evidentiary hearing before the Bankruptcy Court and oral

argument based upon documentary evidence before the Third District Court. In rendering its decision, the Third District Court correctly applied collateral estoppel principles by finding that the contingencies to the sale were not met and the sale terms were not the same, and ordering a new auction for the SAIC Barn. The Third District Court did not usurp the role of the jury as alleged by Golfland, but had before it all of the necessary evidence to make these findings and to apply collateral estoppel against Golfland. Furthermore, Golfland's argument that the Liquidator allegedly waived the contingencies to the sale ignores the Third District Court's approval role in the process of concluding any sale of the SAIC Barn.

1. The Third District Court Correctly Applied Collateral Estoppel Against Golfland.

The case of Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 455 (Utah Ct. App. 1988), cert. denied, 769 P.2d 819 (Utah 1988), is remarkably similar to this case. In an earlier action, Trimble unsuccessfully sued the buyer in a real estate transaction for a real estate commission. Trimble lost, and the Utah Supreme Court affirmed on appeal. Trimble then sued the seller, Monte Vista, for his real estate commission. "Monte Vista moved for summary judgment on a number of grounds, including res judicata and collateral estoppel, and attached to its supporting memorandum a copy of the Utah Supreme Court opinion affirming the judgment in the prior trial. Id. at 452.

Trimble attempted to controvert the Utah Supreme Court opinion by "a single paragraph disputing, in conclusory terms, Monte Vista's argument that the question of whether any commission was owed to Trimble had been litigated in the first action and decided adversely to Trimble." Id. "Additional memoranda were submitted and the motion orally argued, but Trimble offered no other information relative to the res judicata issue." Id. at 453. The trial court in the second action ruled against Trimble, and "relied, as had the parties, exclusively on the Supreme Court's reported decision in the earlier case." Id.

On appeal, Trimble argued that the trial court improperly determined that collateral estoppel applied by relying solely upon the Utah Supreme Court opinion. This Court first reviewed the four elements of the test to determine whether collateral estoppel applies, namely:

- 1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- 2) Was there a final judgment on the merits?
- 3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
- 4) Was the issue in the first case competently, fully, and fairly litigated?

Id. at 454, citing, Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). This Court found that all four elements for applying collateral estoppel had been met.

Trimble claimed that the trial court was required to take judicial notice of the entire trial court record and determine for itself if it was consistent with the Utah Supreme Court opinion. This Court rejected Trimble's argument, concluding that Trimble acquiesced in the trial court's ruling based only on the published opinion:

As we see it, once Monte Vista submitted to the district court a copy of the Supreme Court opinion, which on its face showed that the key issue had been litigated and decided, the burden shifted to Trimble, if it believed more than the opinion was needed to make a fully informed decision, to produce the record of the prior proceeding, urge the court to take judicial notice of it, or otherwise show that the opinion should not be taken at face value. Instead, Trimble limited its resistance to arguing how the Supreme Court opinion should actually be construed and to the doctrinal requirements of collateral estoppel. . . . The trial court in this case was likewise led to believe that the opinion was all that it needed to decide the collateral estoppel aspect of the motion for summary judgment.

Id. at 455.

The four elements for the application of collateral estoppel likewise were satisfied before the Third District Court.⁶ First, the two issues before the Bankruptcy Court (i.e., whether or not the Bankruptcy Court would approve the sale of the Water Park to

⁶ Under the Mel Trimble analysis, the Third District Court was not required to take judicial notice of the entire Bankruptcy Court record in order to rule on collateral estoppel grounds. Id. at 455-456. The Third District Court ruled on the basis of those portions of the Bankruptcy Court record and other documentary evidence submitted to it by the parties. However, the Mel Trimble case makes it clear that the Third District Court's judicial notice of the 1994 Bankruptcy Order by itself would be a sufficient basis to uphold the 1995 Order.

Golfland, and whether or not there a binding agreement on the terms of the sale of the combined properties that would give Golfland a vested right to the properties) were also at issue before the Third District Court. Second, it is beyond dispute that the Bankruptcy Court's decision, as affirmed by the Federal District Court and the Tenth Circuit, is a final decision on the merits. Third, Golfland was a party to both actions. Fourth, the issue was competently, fully and fairly litigated⁷ in a four day evidentiary hearing before the Bankruptcy Court in which Golfland fully participated.

Golfland will undoubtedly argue, as it has argued before in its federal court appeals, that collateral estoppel does not apply because Golfland and the sellers of the combined properties were allegedly not adversaries at the Bankruptcy Court hearing. However, that argument does not make any sense with respect to the undisputed fact that Bankruptcy Court approval of the sale of the Water Park to Golfland was withdrawn. That argument, if

⁷ Golfland will undoubtedly argue, as it repeatedly did in its federal appeals, that it was "ambushed" before the Bankruptcy Court and was therefore prejudiced and did not get a fair hearing. The Tenth Circuit rejected this argument. "[T]here was no lack of vigorous action by Golfland in building the record to uphold the first sale to Golfland. Nor has Golfland suggested or shown that BCD somehow obstructed or prevented it from developing any aspect of the record that would have a material impact on this appeal. Considering the lack of such a showing, and the extensive record [from the four day evidentiary hearing] -- much of which consisted of Mr. Shields' [Golfland's attorney] questioning -- we are at a loss to understand how Golfland has been prejudiced." In re BCD Corp., supra, 119 F.3d at 858-59.

applicable, could apply only to the Bankruptcy Court's finding that there was no enforceable contract.

The Utah courts do not adhere to the requirement of strict "adverseness" to apply collateral estoppel. Indeed, this Court in the Mel Trimble case stated that collateral estoppel, or issue preclusion, could be applied "even if only 'the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication.'" Id. at 453, quoting, Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 390 (Utah Ct. App. 1987). Accord, Oldham v. Pritchett, 599 F.2d 274, 278 (8th Cir. 1979) (requirement of strict "adversity" to apply collateral estoppel relaxed; "[i]f a stranger to the prior litigation may invoke estoppel as a defense, then a fortiori a co-party in the prior action ought to be able to preclude a former co-party from relitigating issues finally adjudicated in the prior lawsuit").

Even if adversary status is required, the Tenth Circuit has recognized that even co-parties who technically are on the same side of a controversy on the pleadings, but who are in fact adversarial to each other as to an issue, can be bound by the adjudication of that issue in the prior controversy:

But the formal arrangement of the parties on the record is not important, and if coparties on the record were in fact adversaries as to an issue, and such issue was in fact litigated and they had full opportunity to contest it with each other, either upon the pleadings between themselves and the plaintiff or upon cross-pleadings between themselves, they are concluded by the adjudication of such issue in a subsequent controversy between each other.

Ohio Casualty Ins. Co. v. Gordon, 95 F.2d 605, 609 (10th Cir. 1938) (emphasis added) (citation omitted).

Comment (a) to Section 38 of the Restatement Second of Judgments provides further support for why parties who are technically not adversaries under the pleadings can still be bound by collateral estoppel:

[P]arties aligned on the same side in the pleadings may be drawn into controversy between themselves on an issue that is at the same time material to their rights or obligations regarding their common adversary and to rights and obligations subsisting between them. Thus, defendants sued by a plaintiff who has stated a claim against them in the alternative may defend not only by disputing the plaintiff's case but by adducing proof and argument against each other. . . . In such circumstances, the co-parties may have an opportunity and incentive to litigate the issues arising between them that is equivalent to that between parties whose opposition is defined through pleadings. . . . Where those criteria are satisfied, the determination of the issues has equivalent effect as if they were pleaded.

Restatement Second of Judgments, Section 38, Comment (a) (1982).

In this case, SAIC and Golfland were "drawn into controversy between themselves" during the 1994 hearing before the Bankruptcy Court because of the differing proof supplied by witnesses for SAIC and Golfland as to whether or not there had been agreement on the original terms for the sale of the combined properties. The attorney for the Liquidator testified that there was confusion about the sale terms. In re BCD Corp., supra, 119 F.3d at 861-62. "[T]he bankruptcy court could not enforce the original terms of the sale because there had been no agreement as

to the original terms, as demonstrated by the testimony of Mr. Monson." Id. at 862.

Golfland's attorney called various witnesses in an attempt to show that Golfland had not altered the sale terms, id. at 859 n.6, but even Golfland's main witness, Mr. Kenney, was forced to concede that there was confusion as to the sale terms. Id. at 861. SAIC and Golfland had the opportunity and the incentive to litigate whether the parties had agreed upon sale terms for the combined properties, and the Bankruptcy Court's finding that "the parties could not agree on the terms of the sale," id. at 861 n.7, was essential to "the bankruptcy court's decision to set aside the confirmed sale on the ground that it had been entered under a mistake as to the terms of the agreement [which the Tenth Circuit ruled] was not an abuse of discretion." Id. at 861-62.

Even if this Court were to conclude that SAIC and Golfland were not adverse to each other in presenting proof to the Bankruptcy Court on whether there was a meeting of the minds on the sale terms for the combined properties, formal "adversity" is not required if the finding made in the first suit is an essential element in the subsequent action:

Co-parties who are not adversaries, may be bound by a judgment in a subsequent controversy between each other where they, in fact, occupied, in the prior trial, the attitude of adversaries, or where some finding of fact is made in the first suit which is an essential element in the subsequent claim or action. On the questions whether parties are bound by a judgment, the formal arrangement of parties on the record is unimportant, so that if co-parties on the record were, in fact,

adversaries on an issue, and the issue was actually litigated, and they had full opportunity to contest it with each other, either on pleadings between themselves and the plaintiff, or on cross-pleadings between themselves, co-parties are concluded by adjudication of that issue in a subsequent controversy between each other.

Fidelity & Casualty Co. of New York v. Federal Express, 136 F.2d 35, 38-39 (6th Cir. 1943).

In this instance, the Bankruptcy Court's finding "that there had not been an agreement as to the terms of the sale" of the water park, In re BCD Corporation, *supra*, 119 F.3d at 862, was an essential element in the Third District Court's ruling that the terms of the 1994 order were different than the terms that Golfland was trying to enforce. Golfland is barred by collateral estoppel from relitigating that issue.

2. The Third District Court Was Fully Entitled to Decide the Issues Before It and Did Not Usurp the Role of the Jury.

Golfland argues that the Third District Court usurped the role of the jury as the fact-finder and committed procedural error because it failed to give Golfland the benefit of a jury trial. Golfland Brief at pp. 22-23. Golfland's argument lacks credence, however, because no complaint was on file and no jury was in place. The Liquidator's Motion sought the "permission of the court" to sell the SAIC Barn. The Third District Court had full authority to rule on the Liquidator's Motion. No jury trial

is available to an objecting party under the Utah Insurance Code.⁸

Despite the fact that the Golfland Motion was on file, the Third District Court was not required to defer its decision on whether the SAIC Barn could be sold until a complaint was filed by Golfland and that Golfland's lawsuit fully resolved. The Liquidator clearly has the power under the Utah Insurance Code to sell SAIC's property, including the SAIC Barn, free and clear of all liens, interests and encumbrances and to request, by motion, approval from the Third District Court for any proposed sale.⁹ By seeking leave to sue the Liquidator, Golfland did not automatically obtain a stay of all further proceedings in the Third District Court regarding the SAIC Barn.

D. The Third District Court Correctly Ruled That the 1994 Order Was No Longer Effective And That the SAIC Barn Should Be Reauctioned.

⁸If a jury trial had to be held each time the Liquidator sought to sell an asset, the liquidation of an insurance company would required years of litigation, and virtually all of the assets of the insurance company would be expended in litigation costs, leaving nothing for policyholders and creditors. The Utah Insurance Code properly requires only that the Liquidator obtain the "permission of the court" and not that jury trials be conducted every time the Liquidator seeks Third District Court approval to sell an asset.

⁹The powers of the Liquidator outlined in Utah Code Ann. § 31A-27-314 include the following power: "He may exercise all the powers conferred upon receivers by the laws of this state which are not inconsistent with this chapter." Utah Code Ann. § 31A-27-314 (23). Utah law has long provided that receivers are entitled to sell receivership property free and clear of liens in order to facilitate the sale of the receivership property. Chapman v. Schiller, 95 Utah 514, 83 P.2d 249, 252 (Utah 1938).

1. The Third District Court Correctly Found That The Conditions Precedent To Closing The Sale of the SAIC Barn to Golfland Had Failed.

The Third District Court correctly applied the collateral estoppel principles outlined above and found, based upon the Bankruptcy Court's ruling, that at least three conditions precedent to the sale of the SAIC Barn to Golfland as approved by Judge Stirba in the 1994 Order were not met. The Third District Court's legal conclusion that the Liquidator was no longer obligated to sell the SAIC Barn to Golfland naturally flowed from those findings.

It is well settled that if a condition precedent does not occur according to the express or implied terms of a contract, and the condition precedent is not excused, the conditional duty to close is discharged. See Restatement, Contracts (2d) § 251 (1). For instance, in Welch Transfer and Storage, Inc. v. Oldham, 663 P.2d 73 (Utah 1983), the Utah Supreme Court held that "[w]here fulfillment of a contract is made to depend upon the act or consent of a third person over whom neither party has any control, the contract cannot be enforced unless the act is performed or the consent given." Id. at 76.

2. The Third District Court Correctly Found That the Terms of the Original Barn Sale Order Were Not the Terms Golfland Was Seeking to Enforce.

The Third District Court also found in the 1995 Order that:

Judge Stirba's February 24, 1994 Order authorizing the sale of the SAIC Barn to Golfland is ineffective because the terms of the sale that Judge Stirba

approved in her Order were not the terms of the sale that was frustrated by the Bankruptcy Court Order.

R. 3133. This finding mirrors the finding of the Bankruptcy Court that "[t]he terms that the parties thought they were bargaining and bidding on turn out not to be the terms of the sale which is ultimately proposed to the court." R. at 2606. See also, In re BCD Corp., supra, 119 F.3d at 861. The Bankruptcy Court found that the parties did not agree on the terms of the sale, and there was no meeting of the minds for an enforceable contract.¹⁰

Golfland is barred by the doctrine of collateral estoppel from relitigating these findings of the Bankruptcy Court, which the Third District Court relied upon to conclude that the sale terms which Golfland was attempting to enforce were not the sale terms which Judge Stirba had approved. Moreover, Golfland is precluded on two grounds from arguing that Judge Henriod should have enforced the original terms approved by Judge Stirba. First, the original sale terms approved by Judge Stirba required a simultaneous sale of all three combined properties by a certain

¹⁰ The Tenth Circuit reconciled an apparent inconsistency in the Bankruptcy Court's findings as follows: "We recognize an apparent inconsistency in the bankruptcy court's oral findings regarding whether all of the bidders understood that the environmental warranties had been waived or whether the parties could not agree on the terms of the sale. Nevertheless, it is clear that, to reach its stated holding of vacating the confirmed sale, the bankruptcy court must have relied on the finding that the parties could not agree on the terms of the sale." In re BCD Corp., supra, 119 F.3d at 861 n.7.

deadline. A simultaneous sale could not longer be accomplished once the Bankruptcy Court withdrew approval of the sale of the Water Park to Golfland and eventually approved its sale to a third party. Second, Golfland also advanced the same argument to the Tenth Circuit, who rejected it on the basis that "the bankruptcy court could not enforce the original terms of the sale because there had been no agreement as to the original terms" In re BCD Corp., supra, 119 F.3d at 862.

3. Golfland is Precluded From Arguing That the Failure of the Conditions Precedent Was Caused By the Liquidator.

Golfland insists that the Liquidator allegedly caused the conditions precedent to fail. However, if anything, the evidence before the Third District Court demonstrated that the conditions precedent were not met because of Golfland's actions, not those of the Liquidator. R. 2062-2064, 2640. Golfland claims that the Liquidator should have sought additional approval from the Bankruptcy Court because, according to Golfland, the parties entered into a new agreement to supplement the provisions of the previous contract for the sale of the Water Park. Golfland Brief at pp. 7-8, ¶ 12.

It is inconsistent for Golfland to assert that the Liquidator should have obtained approval for a "new" agreement when Golfland repeatedly (but unsuccessfully) argued to the Bankruptcy Court, to the Federal District Court, and to the Tenth Circuit that there was no change in the terms of the sale. See,

In re BCD Corp., supra, 119 F.3d at 862. Furthermore, Golfland's argument assumes that the Bankruptcy Court would have approved the alleged "new" terms for the sale. However, the Bankruptcy Court found that there was never any agreement on the material sale terms to create an enforceable contract for the Bankruptcy Court to enforce or approve.¹¹

4. The Third District Court Did Not Approve Any Alleged Waiver of the Conditions Precedent Mandated by Judge Stirba's Original Barn Sale Order.

Golfland insists that the Liquidator "waived" the conditions precedent to the sale of the SAIC Barn, and complains that the Third District Court did not enforce the alleged "waiver."¹²

¹¹ Golfland also complains that the Liquidator engaged in "secret negotiations" and "double-dealing" with Peak, the back-up bidder for the Water Park. Golfland Brief at p. 8. Golfland evidently believes that the approved back-up bidder for the Water Park should have been kept in the dark about the dispute between Golfland and the sellers of the combined properties over the terms of the sale. Golfland undoubtedly concludes that if Peak had been kept in the dark, the sale to Golfland would never have been upset. Golfland's obsession with secrecy highlights Golfland's sole responsibility for causing the sale of the Water Park and the simultaneous sale of the SAIC Barn to unravel.

¹² The Liquidator previously acknowledged in the first appeal to this Court that on April 8, 1994, the Liquidator offered to proceed with the sale of the SAIC Barn separately on that date. (Had such an offer been accepted by Golfland, immediate approval for such an offer from the Third District Court would have been mandated by Utah Code Ann. § 31A-27-314 (9)). However, Golfland refused the Liquidator's offer, choosing instead to "wait and see" how the Bankruptcy Court ruled. The Liquidator's offer to close solely on the SAIC Barn expired the same day it was made, April 9, 1994, which was the deadline for the simultaneous sale of the combined properties. Obviously Golfland is not attempting retroactively to enforce this offer, which Golfland never

(continued...)

However, this argument ignores the fact that no evidence of any enforceable waiver was presented by Golfland to the Third District Court,¹³ and also ignores the well-settled principle that it is not the Liquidator, but the Third District Court which must approve the terms of sale of property under the court's receivership supervision, including any waiver of court-approved conditions.

When the Third District Court entered the 1994 Order and when it ordered that the SAIC Barn be reauctioned in the 1995 Order, it was functioning as a supervising receivership court. See, Utah Code Ann. § 31A-27-314 (17) (Liquidator has all powers conferred upon receivers by Utah state law) and Utah Code Ann. § 31A-27-314 (9) ("no transaction involving [SAIC] property with a market value exceeding \$25,000 may be concluded without the express permission of the [Third District] court.")

A receivership is an equitable matter and is entirely within the control of the court. . . . The possession by the court of the res in a receivership proceeding gives the court the power to determine all questions concerning the ownership and disposition of the property. The receiver is an officer and arm of the court and acts under the direction and supervision of the court. As such, he has only very limited powers and should apply to the court for advice and directions.

¹²(...continued)
accepted, but rather is alleging a different "open-ended" waiver allegedly made after this date.

¹³While Golfland cites to memoranda in its Brief, these citations are almost exclusively to legal argument and not to any documents or other evidence before the Third District Court.

Interlake Co. v. Von Hake, 697 P.2d 238, 239-40 (Utah 1985).

In Chapman v. Schiller, 95 Utah 514, 83 P.2d 249, 251 (Utah 1938), the Utah Supreme Court stated the following:

A receiver's sale is said to be a judicial sale as contradistinguished from a sheriff's sale on execution or foreclosure. And such judicial sales, unless defined or regulated by statute, rest upon and are governed by the order of the court decreeing the sale. In a judicial sale the court makes its own law of the sale, subject only to the use of the sound discretion in the exercise of the power.

(Emphasis added and citation omitted).

It is beyond dispute that the Third District Court had the power and exercised that power to approve the conditions to the sale of the SAIC Barn presented to it initially by the Liquidator. Those conditions were "set in stone" in the 1994 Order, and could not be altered without court approval.

When it became clear to the Third District Court that the original conditions for the sale of the SAIC Barn to Golfland had not been met, the Third District Court as the supervising receivership court established new conditions for the sale (a new auction), thereby modifying its original "law of the sale." The Third District Court's discretion in dealing with property in its control of is not limited as Golfland contends. Furthermore, Golfland had no vested rights in the SAIC Barn when the conditions for the sale to Golfland failed. The Third District Court was not required to adhere to Golfland's demands for the property any more than the Third District Court was required to

honor the Liquidator's request for authorization to sell the SAIC Barn to Provo City. The Third District Court did not abuse its discretion when it ordered a new auction of the SAIC Barn, giving all interested parties, including Golfland and Provo City, the opportunity to participate. Likewise, the Liquidator acted appropriately by going to the Third District Court in his capacity as receiver and seeking the direction of the supervising receivership court on disposition of the SAIC Barn when the original sale to Golfland failed.

Golfland's complaints suffer from the same defects identified by Judge Kimball in the third BCD appeal. See, Exhibit "B." Golfland would like to have its original contract for the SAIC Barn enforced. Unfortunately for Golfland, the conditions precedent for the sale never materialized, and there was never any meeting of the minds to create an enforceable contract in any event. Golfland would also like to have its new "contract" for the SAIC Barn enforced, which Golfland claims was created when the Liquidator allegedly agreed to waive the conditions precedent.

Golfland's standing to seek enforcement of any "new contract" for the sale for the SAIC Barn is also seriously in question. When the 1994 Order became ineffective after the conditions to the sale of the SAIC Barn to Golfland were not met, Golfland was relegated to the status of a mere disappointed bidder for the SAIC Barn, with no recognizable claim to enforce.

In In re Broadmoor Place Investments, L.P. (G-K Development Company, Inc. v. Broadmoor Place Investments, L.P.), 994 F.2d 744 (10th Cir. 1993), cert. denied, 510 U.S. 1071 (1994), an unsuccessful bidder for a Chapter 11 bankruptcy debtor's property which was sold to another bidder with the bankruptcy court's approval argued that it was the rightful purchaser of the property. G-K, the unsuccessful bidder, argued on appeal that it had a contract with the debtor for the purchase of the property. The Tenth Circuit rejected this assertion.

While G-K calls its collective signed instruments here a "contract", this is a misnomer since there can be no contract in this situation without Bankruptcy Court approval, *In re Landscape Properties, Inc.*, 100 B.R. 445, 447 (Bankr.E.D.Ark. 1988). Accordingly, these instruments are but binding bids, and we so refer to them hereafter.

Id. at 745 n.1. The Tenth Circuit determined that G-K as an unsuccessful bidder was not an "aggrieved person" with standing to appeal the bankruptcy court's approval of the sale to another party. Absent court approval, a mere bidder for receivership property has no recognizable interest in the disposition of the receivership property.

5. The Third District Court Properly Found That Golfland's Tender Was Insufficient As a Matter of Law.

Golfland argues that the Third District Court erred in ruling that Golfland failed to make a proper tender of the purchase funds for the SAIC Barn. Golfland Brief at p. 46. "To obtain a decree of specific performance . . . , the aggrieved

party must make an unconditional tender of the performance required by the agreement." Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1243 (Utah 1992). To make an unconditional tender, the party tendering must tender exactly what it agreed to perform when the contract was made, and may not impose new conditions. "A tender that contains an improper condition or requirement disqualifies a party from obtaining a decree of specific performance." Id.

Under the terms of the Golfland Offer for the SAIC Barn, Golfland was to "deposit with the Title Company the entire balance of the Purchase Price in cash or other immediately available funds." R. 1250. Golfland deposited the funds with the Title Company, but with the express instruction that the funds on deposit were there at the sole discretion of Golfland. R. 1934. Because the Golfland deposit was conditional, the Third District Court was fully justified in finding that Golfland failed to make an unconditional tender of the purchase price and thus lost its right to seek specific performance, even assuming that a contract for the sale of the SAIC Barn was formed.

II. THE THIRD DISTRICT COURT DID NOT COMMIT ANY PROCEDURAL ERRORS BY ORDERING A REAUTION OF THE SAIC BARN.

Golfland contends in Point II of its Brief that the Third District Court committed "glaring" procedural errors and that as a result of those errors, Golfland has been deprived of its constitutional right to due process and to a jury. Golfland

Brief at pp. 22-26. Golfland's due process argument ignores the collateral estoppel effects of the four day evidentiary hearing before the Bankruptcy Court. The issues before the Third District Court were fully and fairly litigated, with both SAIC and Golfland presenting documentary evidence, lengthy memoranda, and oral arguments. Moreover, none of the purported procedural errors were ever raised by Golfland before the Third District Court, and therefore Golfland cannot now raise them for the first time on appeal.

A. The Third District Court Did Not Err in Finding That Evidence Was Submitted With the Pleadings.

Golfland argues that no evidence was submitted to the Third District Court. Golfland Brief at p. 24. This is incorrect. Both SAIC and Golfland submitted substantial documentary evidence with their pleadings (See R. 1835-1862; 1922-1956; 2055-2075; 2600-2644) in accordance with Rule 4-501(1)(a) & (b) of the Utah Code of Judicial Administration. Those sections set forth the "procedure for filing motions, supporting memoranda and documents with the court." They provide in relevant part as follows:

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. . . .

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. . . .

(Emphasis added).

The Liquidator and Golfland utilized the foregoing procedure to present to the Third District Court lengthy memoranda and supporting documentation and deposition excerpts which both the Liquidator and Golfland contended supported their respective positions. Golfland did not object, nor did Golfland claim that any of the documents attached to the Liquidator's memoranda were not relevant or admissible or that they lacked foundation. Golfland itself used this procedure for bringing before the Third District Court the evidence and documents that it asserted were relevant to its position. It is ironic that Golfland is now arguing that the documents and other evidence submitted to the Third District Court should not be considered when Golfland itself followed this procedure in support of its position.¹⁴

1. Golfland Waived By Acquiescence Any Objection to the Submission of the Documentary Evidence.

Golfland waived by acquiescence any objection to the submission of evidence in the form of documents attached to the parties' memoranda. Golfland could have objected to the evidence, moved to strike, submitted affidavits of its own, or requested an evidentiary hearing. Compare, Mel Trimble Real Estate v. Monte Vista Ranch, Inc., supra, 758 P.2d at 455. Golfland did none of these things. Instead, Golfland limited its

¹⁴ It is also ironic that Golfland cites to the allegedly "inadmissible" or "incompetent" documentary evidence in its appeal brief. See, Golfland Brief at pp. 5-10.

response to arguing the meaning of the facts in the Liquidator's documents and to legal arguments, and then Golfland attached its own documents to its memoranda and argued the meaning of the facts in those documents. Golfland cannot complain about this procedure for the first time on appeal when it acquiesced in this process before the Third District Court and even submitted its own evidence in this form. As this Court stated in the Mel Trimble case under similar circumstances, "[s]ince the parties all but conceded that the opinion alone would permit the district court to make an informed decision on the applicability of collateral estoppel, the trial court did not err in failing to review the record of the prior proceeding on its own motion." Mel Trimble Real Estate v. Monte Vista Ranch, Inc., supra, 758 P.2d at 456.

As in Mel Trimble, the Liquidator raised collateral estoppel agreements. Also, as in Mel Trimble, Golfland limited its response to arguing what the documents meant and to legal arguments. Thus, evidentiary objections were waived, and Golfland may not now argue that the Third District Court erred in finding that evidence was submitted with the pleadings.

Golfland also argues that even though documents and deposition excerpts were submitted to the Third District Court, they were not admissible. However, under Rule 103 of the Utah Rules of Evidence, Golfland was obligated to raise any objections that it may have had to the admissibility of the documents that

were submitted to the Third District Court by the Liquidator.¹⁵ Golfland never argued that the documents submitted to the Third District Court by the Liquidator were inadmissible because they contained hearsay, were not authenticated, lacked foundation, or had some other defect. Having failed to raise those issues prior to the hearing, Golfland waived any objections it may have had to the evidence submitted to the Third District Court by the Liquidator.¹⁶ D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989) (party's failure to object to evidentiary problems or errors waives the objection).

Golfland maintains that it objected to the portion of the Proposed Order that stated that evidence was submitted with the pleadings. Golfland Brief at p. 23, n.20. However, this objection went only to the form of the Third District Court's order. This was after the hearing had already been conducted and the Third District Court had already ruled. This was too late to raise evidentiary objections. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial

¹⁵Obviously, Golfland is estopped from objecting to the admissibility of the documents which Golfland itself submitted to the Third District Court.

¹⁶Even on appeal, Golfland does not challenge the accuracy or the evidentiary value of any of the documents submitted to the Liquidation Court by the Liquidator. Golfland merely argues that the documents were not "supported by any affidavit or otherwise submitted in admissible form." Golfland Brief at p. 25. Thus, Golfland has failed to show that a "substantial right" was affected, as required by Utah Rule of Evidence 103(a).

right of a party is affected, and . . . a timely objection or motion to strike appears of record." Utah R. Evid. 103(a) (emphasis added). By the time the Proposed Order was submitted, the hearing was over. The Third District Court could not rule on evidentiary objections nor could the Liquidator take steps to overcome any objection. For example, if Golfland had concerns about lack of foundation for a document, the Liquidator could have offered affidavits or other testimony. It is now too late to do so and it is also too late for Golfland to object. Its objections, if any, are not "timely" under Rule 103(a).

B. The Third District Court Did Not Err By Not Holding An Evidentiary Hearing.

The Liquidator and Golfland had the opportunity to explain their respective positions at the Third District Court hearing. During the hearing, the Third District Court also considered the arguments of counsel relating to the Bankruptcy Court's four day evidentiary hearing, where Golfland had the benefit of an exhaustive consideration of all aspects of the failed sale of the combined properties. The Third District Court chose to rule based upon the evidence presented to it (on judicial notice and collateral estoppel grounds) rather than ordering an evidentiary hearing. That decision by the Third District Court was not in error.

Golfland had full notice of the issues being raised. The matters before the Third District Court were fully and

extensively briefed by both the Liquidator and Golfland with supporting documentation and deposition excerpts. Golfland was given every opportunity to address the Liquidator's position, to object to the evidence submitted by the Liquidator, and to convince the Third District Court of Golfland's position at the hearing. This amounts to full and fair litigation.

1. Golfland Waived Its Right to An Evidentiary Hearing.

Moreover, Golfland also waived the right to an evidentiary hearing. None of Golfland's memoranda requested an evidentiary hearing on the Liquidator's Motion for Supplemental Order, or even suggested that an evidentiary hearing would be appropriate or necessary for the District Court to rule on the Liquidator's motion. In the case of Hi-Country Estates Homeowners Assoc. v. Bagley & Co., 863 P.2d 1 (Utah Ct. App. 1993), rev'd on other grounds, 901 P.2d 1017 (Utah 1995), the Utah Court of Appeals held the following: "[T]he fact that none of the parties requested an evidentiary hearing prior to October 25, 1988, the date of oral argument, suggests that, as of that date, they saw no need for such a hearing and thus waived it." Id. at 7. See also Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1987) ("Issues not raised in the trial court in timely fashion are deemed waived, precluding this court from considering their merits on appeal.")

Golfland never suggested that the rules governing summary judgment motions should apply to the Liquidator's Motion.

Golfland only requested oral argument on the Liquidator's Motion, which the Third District Court granted. By failing to request an evidentiary hearing prior to oral argument, Golfland waived any right to an evidentiary hearing on the Liquidator's Motion, and may not belatedly raise that issue for the first time on appeal.

III. THE THIRD DISTRICT COURT'S ORDER IS NOT INTERNALLY INCONSISTENT OR OTHERWISE FATALLY FLAWED.

Notwithstanding Golfland's complaints, the Barn Order is not internally inconsistent or otherwise fatally flawed. The Barn Order does not deprive Golfland of any rights because it orders the Liquidator to sell the SAIC Barn at a new auction to the party making the highest and best offer, thereby providing Golfland an opportunity to participate.

The fact that the Third District Court granted the Golfland Motion at the same time it granted the Liquidator's Motion does not render the 1995 Order internally inconsistent. The Golfland Motion was a procedural motion. Under the Utah Insurance Code all actions against SAIC and the Liquidator are stayed. Utah Code Ann. § 31A-27-317 (1). In granting the Golfland Motion, the Third District Court merely lifted the stay and gave Golfland the opportunity to file a complaint setting forth whatever causes of action it deemed appropriate against SAIC. The fact that the Third District Court granted the Golfland Motion did not

constitute a ruling on the sufficiency of the Golfland Complaint, nor the claims set forth therein. Nor does it preclude the Liquidator from arguing that Golfland's claims are barred by collateral estoppel.¹⁷

A. The District Court's Finding That the SAIC Barn Was Not Unique Was Not Central to the Finding That the Conditions Precedent to Sale the SAIC Barn to Golfland Were Not Met.

After ruling that the Liquidator had no contractual duty to sell the SAIC Barn to Golfland, the Third District Court went on to find that the SAIC Barn was not so unique that specific performance would be warranted. Golfland complains that the record does not support this finding and that the Third District Court therefore erred. Golfland Brief at pp. 27-28. However, the finding of uniqueness was not central to the Third District Court's finding that the conditions precedent for a sale of the SAIC Barn to Golfland had not been satisfied. This Court can still affirm the 1995 order without relying upon this finding. Whether or not the SAIC Barn is unique, the Liquidator had no obligation to sell it to Golfland.

B. Golfland's "Shocks The Conscience" Standard is Not Applicable in This Case.

¹⁷ Neither party appealed the Third District Court's order granting the Golfland Motion. The validity of the Golfland Complaint is not before this Court but remains before the Third District Court.

Golfland has devoted much time and energy to decisions from various federal courts regarding the finality of judicially-approved sales, while virtually ignoring the Tenth Circuit's pronouncements on this issue in the companion Water Park case lost by Golfland. See, In re BCD Corporation, supra, 119 F.3d at 859-860. Golfland asserts that the Third District Court exhibited a "complete misunderstanding" of the legal standard governing judicial sales. Golfland Brief at p. 30.

The cases cited by Golfland are not relevant. The Third District Court did not set aside the 1994 Order, which merely authorized (but did not order) the Liquidator to sell the SAIC Barn to Golfland if all of the conditions outlined in the approval documents submitted to the Third District Court were met. Those conditions were not met, and the anticipated sale failed. Once the sale failed, the 1994 Order became "ineffective" as found by Judge Henriod; not because the 1994 Order was "set aside," but because the conditions for the 1994 Order to take effect were never met.

Even if the Third District Court is deemed to have vacated a judicial sale of the SAIC Barn, the standard adopted by the Utah Supreme Court is "that a court of equity may overturn a judicial sale for good and sufficient cause." Mower v. Bohmke, 9 Utah 2d 52, 337 P.2d 429, 430 (1959).

The policy of the courts is to uphold judicial sales except when they are manifestly unfair. . . . This is because courts hope that such a policy will

encourage bidding at judicial sales and because it appears to be a waste of time to require a new sale where little evidence is presented to show that the bid price at the new sale will be any different from the bid at the old.

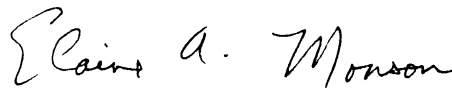
Id. at 431 (citations omitted). Such good and sufficient cause was clearly established by the evidence presented to the Third District Court, and it would be manifestly unfair to mandate that the SAIC Barn be sold to Golfland when the carefully negotiated conditions precedent to the sale approved by the Third District Court were never met. The Barn Order is neither internally inconsistent, nor erroneous in any other way.

CONCLUSION

Notwithstanding Golfland's arguments that it has been deprived of due process, ordering the Third District Court to conduct a meaningless additional evidentiary hearing on Golfland's meritless claims would be an enormous waste of judicial resources. Notwithstanding three federal appeals, Golfland has been unsuccessful in reversing the Bankruptcy Court's withdrawal of approval of the sale of the Water Park to Golfland, which "frustrated" the sale of the SAIC Barn to Golfland as found by the Third District Court. The Third District Court acted properly and within its powers as the supervising receivership court in ordering a new auction of the SAIC Barn. The Liquidator respectfully requests that the Sale Order be affirmed.

DATED this 15th day of July, 1998.

RAY, QUINNEY & NEBEKER



CRAIG CARLILE

DOUGLAS M. MONSON

ELAINE A. MONSON

Attorneys for Appellee, Utah Insurance
Commissioner, as Liquidator of
Southern American Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on July 15th, 1998, two true and
correct copies of the foregoing BRIEF OF APPELLEE were served by
United States first-class mail, postage prepaid, addressed to:

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Attorneys for Appellee

Exhibit A

A-1015

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SEP 20 1995

MARKUS B. ZIMMER, CLERK

BY DEPUTY CLERK

In re BCD CORP.,

)

Case No. 94-C-0829-S

Debtor.

)

GOLFLAND ENTERTAINMENT CENTERS, INC.,

Plaintiff,

)

vs.

)

PEAK INVESTMENT, INC., and BCD CORP.,

Defendant.

)

O R D E R

RAY QUINNEY

SEP 21 1995

& NEBEKED

This case is an appeal from the bankruptcy court's order setting aside its approval of a sale of property to appellant Golfland Entertainment Centers, Inc. and accepting a new bid from appellee Peak Investment, Inc. on the same property. The court has considered the arguments presented by all parties, and rules as follows:

The court finds that the bankruptcy court's ruling that the sale should be set aside is not an abuse of discretion. The bankruptcy court found that there was a mistake in the sale sufficient to justify setting aside the sale because "[e]veryone at the auction believed that the risk of environmental problems on the property being purchased was shifted to the buyer." This factual finding is supported by sufficient evidence in the record, and the

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A-1016


court's finding that this misunderstanding is a mistake as to a material term of the sale appears correct. Such a mistake would indicate that the bidders did not have a fair opportunity to bid at the sale, and mistakes which affect the fairness of the bidding process are the type which would ordinarily be seen as sufficient to justify setting aside a confirmed sale. See Mason v. Ashback, 383 F.2d 547, 552 (10th Cir. 1967).

In addition, the court finds that appellee Peak Investments, Inc. had sufficient interest as an approved backup bidder to give it standing to challenge the confirmation of the sale, and that the bankruptcy court had jurisdiction to consider the objection, which was relevant to the sale of the property over which the bankruptcy court had jurisdiction due to the fact that the mistake in the bidding process affected the sale of all three properties, and not just the one property which was found to actually have environmental cleanup problems.

For the foregoing reasons, the ruling of the bankruptcy court is hereby AFFIRMED.

DATED this 19th day of September, 1975.

BY THE COURT:


DAVID SAM
U.S. DISTRICT JUDGE

United States District Court
for the
District of Utah
September 20, 1995

mjm

A-1017

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:94-cv-00829

True and correct copies of the attached were mailed by the clerk to the following:

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Lisa Bernson
US BANKRUPTCY COURT

Exhibit B

Exhibit "B" to
Brief of Appellee

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

FILED
JUN 11 1998
DISTRICT CLERK
BY: _____
DEPUTY CLERK

IN RE BCD CORPORATION,

Debtor,

GOLFLAND ENTERTAINMENT
CENTERS, INC.,

Appellant,

v.

BCD CORPORATION and SOUTHERN
AMERICAN INSURANCE COMPANY,

Appellees.

OPINION AND ORDER

District Court No. 2:97 CV 953K

RAY QUINNEY

JUN 08 1998

& NEBEKER

This matter is before the court on an appeal from the United States Bankruptcy Court for the District of Utah, Central Division. This matter came on for oral argument on June 2, 1998. The appellant was represented by Zachary T. Shields, Southern American Insurance Company was represented by Craig Carlile and Duane H. Gillman represented himself as the trustee. Oral argument was heard and the court took the matter under advisement. The court has carefully considered all briefs and other materials submitted by the parties. The court has further considered the law and facts relevant to this appeal. Now being fully advised, the court enters the following Opinion and Order.

I. BACKGROUND

This appeal arises out of three consolidated orders entered by the Bankruptcy Court for

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the District of Utah, Central Division. The first Order is dated October 2, 1997 and is an Order Sustaining Trustee's Claims Objection and Disallowing the Proof of Claim filed by Golfland against the Debtor. The second Order is dated November 5, 1997 and authorizes the Trustee's entry into settlement stipulation and mutual release of claims. This Order specifically gave court approval for the payment of estate funds to Southern American Insurance Company ("SAIC"). The final Order is also dated November 5, 1997 and authorizes interim distribution to creditors. The appellant, Golfland, seeks reversal of these orders on the basis that actions of the Debtor in 1994 resulted in damage to Golfland and Golfland should be given an opportunity to litigate the issues giving rise to these damages.

In 1994 the Debtor, BCD, filed Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. At the time of the filing, BCD attempted to sell its major asset, Seven Peaks Water Park in Provo, Utah. An auction was held and Golfland entered the highest bid of \$2,200,000.00. BCD and Golfland entered into a contract for the sale and purchase of the water park at that price in February of 1994 (the "February Contract"). The terms of the February Contract were set forth in a written document, except as modified orally by the parties. The terms of the February Contract were presented to the Bankruptcy Court at a hearing on February 23, 1994 and the Court approved the sale of the water park pursuant to the contract. At the time of the auction, a second company, Peak Investment, entered a backup bid for the water park for approximately \$400,000.00 less than the bid of Golfland.

After the approval of the February Contract some disputes arose between the Debtor and Golfland. After negotiations, a second contract was entered into between the parties in April of 1994 (the "April Contract"). The parties did not seek, nor did they obtain, court approval of this

contract. On April 7, 1994, Peak Investment filed a Motion with the Bankruptcy Court challenging the Court's approval of the February Contract. Both Golfland and the Debtor opposed Peak's Motion, however, the Bankruptcy Court granted the Motion vacating its approval of the February Contract. Although the Debtor opposed the Motion, once the Bankruptcy Court vacated the February Contract, the Debtor held a second auction for the water park in an attempt to make more money. The water park was sold to a third party for \$3,600,000.00.

Subsequent to the sale of the water park to a third party, Golfland appealed the Bankruptcy Court's Order vacating the February Contract. In September of 1995, Judge David Sam of the United States District Court for the District of Utah affirmed the Bankruptcy Court's Order. This decision was affirmed by the Tenth Circuit in *BCD Corporation v. Peak Investment, Inc.*, 119 F.3d 852 (1997). Golfland also filed a Proof of Claim in the Debtor's Bankruptcy Case which was objected to by the Trustee. A hearing was held on the matter and the Bankruptcy Court initially disallowed the Proof of Claim on the basis of collateral estoppel. Golfland filed a Motion for Reconsideration. The Bankruptcy Court held a hearing on the Motion for Reconsideration and again disallowed the Proof of Claim, this time citing the Tenth Circuit opinion and the "law of the case" doctrine. Shortly thereafter the Bankruptcy Court entered the Stipulation Order and the Disbursement Order.

II. STANDARD OF REVIEW

In the review of orders from the Bankruptcy Court, there are three standards of review that may be applied. First, where the Bankruptcy Court is the finder of fact, the court's factual determinations will not be set aside unless they are "clearly erroneous." *See* Bankruptcy Rule

8013 and *Taylor v. I.R.S.*, 69 F.3d 411 (10th Cir. 1995). A finding of fact is clearly erroneous only if the court has a definite and firm conviction that a mistake has been committed. *See In re Mama D'Angelo, Inc.*, 55 F.3d 552 (10th Cir. 1995). Secondly, a bankruptcy court's ruling involving findings of fact may be overturned if the findings are premised on improper legal standards or on proper legal standards improperly applied. In these instances, the review of this court shall be *de novo*. *See In re Hedged-Investment Associates, Inc.*, 84 F.3d 1267 (10th Cir. 1996). Lastly, this court will exercise *de novo* review over the Bankruptcy Court's conclusions of law. *See Hall v. Vance*, 887 F.2d 1041 (10th Cir. 1989). Further, mixed questions of law and fact which involve primarily a consideration of legal principles are reviewed *de novo*. *See In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988). Approvement of a compromise settlement and of interim distributions are reviewed for an abuse of discretion. *See Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989) and *In re Smith*, 180 B.R. 648, 651 (D. Utah 1995).

III. DISCUSSION

Golfland's Proof of Claim consisted of seven causes of action. These included (1) breach of the February Contract, (2) breach of the April Contract, (3) breach of implied covenant of good faith, (4) negligence, (5) willful misconduct and bad faith, (6) remedies for detrimental reliance and (7) unjust enrichment. As stated above, the Bankruptcy Court disallowed the Proof of Claim on the basis that the Tenth Circuit had already decided that no contract existed and therefore Golfland did not have a cause of action. The Bankruptcy Court cited the "law of the case" doctrine in support of this ruling. In discussing the "law of the case" doctrine in *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1543 (10th Cir. 1996), the Court stated that:

The law of the case doctrine obligates every court to honor the

decisions of higher courts in the judicial hierarchy. “When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” Thus, for example, a trial court may not reconsider a question decided by an appellate court.

(*citations omitted*). Golfland argues on appeal that this was error for the reason that the Proof of Claim was not brought in the same case as was considered by the Tenth Circuit.

In *BCD Corporation v. Peak Investment, Inc.*, 119 F.3d 852 (1997) the Tenth Circuit held that it was not error or an abuse of discretion on the part of the Bankruptcy Court to set aside the sale of the water park to Golfland. The Tenth Circuit further held that there had not been an agreement as to the terms of the sale and “the bankruptcy court could not enforce the original terms of the sale because there had been no agreement as to the original terms. . . .” *Id.* at 862. In other words, the Tenth Circuit’s ruling makes it clear that no contract existed between Golfland and BCD Corporation. Even though Golfland’s Proof of Claim was not brought in the identical case that was appealed to the Tenth Circuit, it is clear to this court that all claims brought in the Proof of Claim are untenable based upon the umbrella of the Tenth Circuit’s ruling and the Bankruptcy Court’s approval of the final sale for \$3,600,000.00 to a third party. All of Golfland’s claims against BCD flow from the failure to perform under the February Contract. The Tenth Circuit has ruled that there was no meeting of the minds as to the February Contract and therefore no contract existed. If there was no contract, Golfland does not have a remedy at law. Although this may not be exactly the kind of case that the “law of the case” doctrine typically applies to, this court can not reverse the Tenth Circuit’s ruling that there was no contract between the parties which is what would have to be done in order for the appellant to have a cause of action.

This court agrees with the appellees that when the February Contract was vacated, Golfland became nothing more than an unsuccessful and disappointed bidder. In *In re Broadmoor*, 994 F.2d 744 (10th Cir. 1993), the Tenth Circuit held that an unsuccessful bidder does not have a breach of contract claim. In its ruling, the Bankruptcy Court stated that:

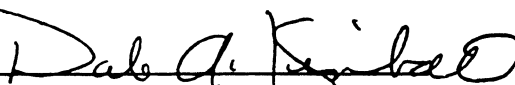
This Court ruled that there was no contract and that was affirmed by the Tenth Circuit. I think the concept that is bothering Golfland is that there is not a remedy for every occurrence of damages. Before you can have damages you must have a cause of action.

Transcript of September 4, 1997 Hearing at p. 20. Golfland may very well have been damaged by the actions of the Debtor in this matter, however, it simply does not have a cause of action under the law.

Lastly, Golfland argues that even if some of its allegations are barred by the Tenth Circuit ruling, not all of the allegations should be barred, specifically the claim for unjust enrichment. Golfland had the opportunity at two different hearings before the Bankruptcy Court to put forth evidence to support its claim that some of its causes of action encompassed different issues than the issue ruled upon by the Tenth Circuit. The fact that Golfland did not put on sufficient evidence when it had the chance does not mean that it should have another opportunity before the Bankruptcy Court. The Bankruptcy Court heard the evidence and found that Golfland did not meet its burden of proof. This is a factual finding that will not be disturbed by this court. Therefore, it is hereby

ORDERED that the Judgment of the Bankruptcy Court is AFFIRMED.

DATED this 4th day of June, 1998


DALE A. KIMBALL
United States District Judge

klh

United States District Court
for the
District of Utah
June 5, 1998

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:97-cv-00953

True and correct copies of the attached were mailed by the clerk to the following:

Jeffrey L. Shields, Esq.
CALLISTER NEBEKER & MCCULLOUGH
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Lisa Bernson
US BANKRUPTCY COURT
,
FAX 9,5261213

Exhibit C

EXHIBIT C

ADDENDUM

--Bankruptcy Order dated July 6, 1994 entered by the Honorable Glen E. Clark

--Transcript of June 6, 1994 hearing before the Honorable Glen E. Clark on
Motion to Enforce Sale to Alternative Bidder and Motion for Stay and Motion for
Relief from Stay

JUL 07 1994

& NEBEKER

MICHAEL R. CARLSTON (A0577)
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SNOW, CHRISTENSEN & MARTINEAU
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Telephone: (801) 521-9000

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

O R D E R

BCD Corporation,

Bankruptcy Number 92C-22663
(Chapter 11)

Debtor.

Peak Investment, Inc.'s Amended Motion to Enforce Sale to Alternative Bidder and Motion for Stay, came before the Court for hearing on June 1, 2, 3, and 6, 1994. BCD Corporation ("Debtor") was represented by William Thomas Thurman and Mona Lyman; Golfland Entertainment Centers, Inc. ("Golfland") was represented by Jeffrey L. Shields and Steven L. Tyler; Robert E. Wilcox, the Commissioner of Insurance of the State of Utah and liquidator of Southern American Insurance Company was represented by Brent D. Wride and Rick L. Rose; Peak Investments, Inc. was represented by Michael R. Carlston, Kim R. Wilson and Ryan E. Tibbitts.

The Court having heard the evidence and arguments of counsel, having reviewed the memoranda submitted by the parties,

EXHIBIT "F"

00171

7-6

and other pertinent law, and being fully advised in the premises, made its findings of fact and conclusions of law on the record which are incorporated herein and adopted by this reference. Based upon those findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed as follows:

1. The sale to Golfland is not a sale which has been approved by the Court, and that sale is, therefore, not authorized.

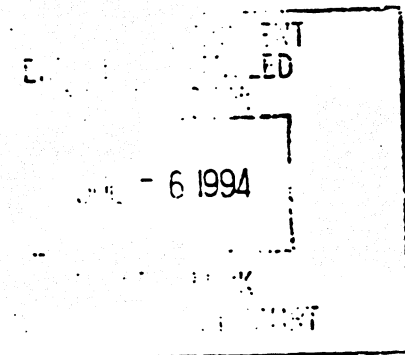
2. The major changes in the terms of the sale did not give the bidders a fair opportunity to bid at the sale and the notice and further proceedings did not give the Court an opportunity to make a reasoned decision about whether or not to approve the sale and other parties an opportunity to properly object.

3. The Order Approving Sale of Property Free and Clear of Liens, Interests and Encumbrances dated March 31, 1994, is hereby set aside.

4. The Debtor is ordered not to proceed with a final sale of the water park property without further order of the Court.

DATED this 6 day of July, 1994.

BY THE COURT:



/s/
Glen E. Clark, United States
Bankruptcy Judge

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 1994, I served copies of the foregoing ORDER, Bankruptcy No. 92C-22663, in the United States Bankruptcy Court for the District of Utah, Central Division, by first-class mail, postage prepaid, upon the following parties:

Michael R. Carlston
Ryan E. Tibbitts
Kim R. Wilson
SNOW, CHRISTENSEN & MARTINEAU
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Salt Lake City, UT 84145

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Rick L. Rose
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Jeffrey L. Shields, Esq.
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Salt Lake City, UT 84133

Clerk

COPY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)
BCD CORPORATION,) 92C-2263

Debtor.)

BEFORE THE HONORABLE GLEN E. CLARK

Monday, June 6, 1994

2:00 p.m.

Motion to Enforce Sale to Alternative
Bidder and Motion for Stay
Motion for Relief From Stay

ALPHA COURT REPORTING SERVICE
520 Judge Building
Salt Lake City, Utah 84111
810-532-5645

PAM SMITH, CSR, RPR, CM
6-6-94ps.

1 APPEARANCE OF COUNSEL:
2 For the Debtor: MCKAY, BURTON & THURMAN.
3 BY: Mona Lyman
4 & William Thurman
5 10 East South Temple, #600
6 Salt Lake City, Utah 84133
7
8 For Peak Investments, Inc.: SNOW, CHRISTENSEN & MARTINEAU
9 BY: Michael Carlston
10 & Ryan Tibbetts
11 10 Exchange Place, #1100
12 Salt Lake City, Utah 84111
13
14 For the Utah State Insurance Commissioner: RAY, QUINNEY & NEBEKER
15 BY: Rick L. Rose
16 79 So. Main, #400
17 Salt Lake City, Utah 84111
18
19 For Golfland Entertainment: CALLISTER, DUNCAN & NEBEKER
20 BY: Jeffrey L. Shields
21 10 East South Temple, #800
22 Salt Lake City, Utah 84133
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25

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INDEX

EXHIBIT

RECEIVED

Exhibits GE-11 through GE-23

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1 SALT LAKE CITY, UTAH, JUNE 6, 1994, 2:00 P.M.

2 PROCEEDINGS.

3 THE CLERK: This is in the matter of BCD.

4 THE COURT: Will counsel note your appearance.

5 MR. CARLSTON: Michael Carlston and Ryan Tibbetts
6 for Peak Investment.

7 MS. LYMAN: Mona Lyman and Bill Thurman on behalf
8 of the debtor.

9 MR. ROSE: Rick Rose on behalf of Southern
10 American Insurance Company in liquidation.

11 MR. SHIELDS: Jeffrey L. Shields on behalf of
12 Golfland Entertainment Centers, Inc.

13 THE COURT: As I understand it the Court has
14 allocated for closing arguments up to 40 minutes per side. We
15 will be timing that. Mr. Carlston, you may begin.

16 MR. SHIELDS: Your Honor, I had just one
17 procedural matter. I realized I had neglected to move for
18 admission of GE-11 through GE-23. I would so move at this
19 time.

20 MR. CARLSTON: Your Honor, subject to my earlier
21 objection, which was primarily wasted on duplication, and on
22 the additional qualification relating to certain of those
23 exhibits, that they contain information that was not really
24 offered for the truth of the matter presented, I would not
25 object to the admission of the exhibits.

1 came to the court with. I didn't hear one thing from them
2 explaining how they could justify this allocation in a way
3 that deprives BCD of a hundred and thirteen thousand that
4 ought to be in it. I didn't hear anything at all about the
5 other conditions.

6 We submit, Your Honor, that it's appropriate to set
7 this aside and warrant Peak to have other bidding take place,
8 and the fact there's some complications from it isn't a
9 justification for not doing it when the integrity of the
10 process is called into being in such a primary way by the way
11 they've acted.

12 I submit it.

13 THE COURT: Thank you. The court will attempt to
14 rule on the record sooner rather than later this afternoon.

15 (Whereupon, a brief recess was held.)

16 THE COURT: The court has heard the evidence and
17 the arguments of counsel and reviewed the pertinent law, and
18 will now make its findings of fact and conclusions of law on
19 the record.

20 The chronology here is important. On December 22nd,
21 1993, the debtor filed a motion to approve a sale. It had
22 received and accepted, subject to court approval, an offer
23 from B&B Properties to purchase the water park of the debtor
24 and two adjacent properties for \$1,950,000 subject to higher
25 and better offers presented in writing two days before a

hearing on the motion.

On February 22nd, one day prior to a hearing, having received written offers from Peak, Golfland, and University Properties, the debtor and the other sellers determined to conduct an auction and gave bidders approximately two hours notice thereof.

All of the written offers track the B&B offer except that of University which waived nearly all of the conditions.

At the auction University agreed that that included most of paragraph 5 of the B&B offer. Everyone at the offer believed that the risk of environmental problems on the property being purchased was thereby shifted to the buyer. Golfland submitted the highest bid at the auction.

On February 23rd there was a hearing before this court in both the BCD and the CDX cases. The sellers asked the court to approve the Golfland bid, and the Peak bid as a backup bid.

Thereafter, a dispute arose between the sellers and Golfland about the terms of the sale. The sellers agreed to make the following concessions to Golfland. Among others they were that the sellers would bear up to \$200,000 of the costs of environmental remediation and one half of a \$33,000 bond, which had been filed to meet the requirements of the City of Provo.

On March 28th an order approving the sale to Golfland was presented to the court by the debtor and signed by the court on March 31st.

The mailing certificate prepared by the sellers and attached to that order did not include Peak. At the time of the hearing Peak was not advised of the concessions or the disputes. The court knew nothing about the concessions or the disputes until after the order was signed.

Mr. Monson, the attorney documenting the transaction for the sellers, wanted to attach to the order a document showing what the offer was, but because the parties couldn't agree just referred to the offer made at the sale.

This factual situation prompted the court to inquire of the parties whether an oral auction could ever be conducted subject to higher and better offers. Upon the court's -- upon consideration of this matter the court believes that it can because the parties are obligated to give notice to the court, including all of the terms of the auction, and the parties who are affected thereby are able to come to the court and argue as to what offer was actually a better offer.

In this case the terms were not disclosed to the court. The terms that the parties thought they were bargaining on and bidding on turn out not to be the terms of the sale which is ultimately proposed to the court. The court

didn't have the opportunity to give that vital protection because the court didn't have the information that it needed. The parties didn't have the information they needed to make appropriate objections and arguments. That part of the notice and hearing requirement for the sale of property simply was not met.

The buyer and the debtor argue about the importance of the finality of the sale, and the court certainly agrees that that is very important, and it is important. Its importance is illustrated here.

The sale in question before the court has not been consummated. The terms of that sale were first brought to the attention of this court in connection with this hearing. They weren't brought to the attention of this court in connection with any prior hearing. Although the debtor in the shoes of the Trustee needs some flexibility, the major change in the terms of this sale simply did not give the bidders a fair opportunity to bid at the sale. The notice did not give the court an opportunity to make a reasoned decision about whether or not to approve the sale.

The court notes that the order with respect to both the sale to Golfland and the sale to Peak was permissive. That permission having been given, any change of the terms should have been noticed and brought to the attention of the court to rule upon. That did not happen.

It is argued that the parties are before the wrong court being in this case before this case in BCD. The hearing, however, was in both the BCD and the CDX cases. It is clear that the property being sold out of the BCD estate is the lead property of the three properties being sold. The CDX order, like the BCD order, is permissive.

Although this court at this time is not able to rule in the other two cases, it did rule in the BCD case with respect to the water park property and can rule in the motion before it with respect to that property.

The court finds that the sale proposed to Golfland is not a sale which has been approved by the court, and that the sale is, therefore, not authorized.

The debtor asks for some direction from the court. The debtor in the first instance has the responsibility to design an appropriate sale and ask the court to approve that design or to proceed with it. But ultimately it has the responsibility to ask the court to approve what it's done to make its sale only subject to notice and approval by the court. That's what the debtor needs to do in order to have an effective sale in this case.

Therefore, the debtor is ordered not to proceed without further order of the court with a final sale of the water park property.

Mr. Carlston, you may prepare an order consistent

with these findings and conclusions.

MR. CARLSTON: Thank you, Your Honor.

THE COURT: Court is in recess.

(Whereupon, court was held in recess at 4:25.)

STATE OF UTAH)

: ss

COUNTY OF SALT LAKE)

I, PAMELA C. SMITH, Certified Shorthand Reporter,
Registered Professional Reporter and Notary Public within and
for the County of Salt Lake, State of Utah, do hereby
certify:

That the foregoing proceedings were taken before me
at the time and place set forth herein and were taken down by
me in shorthand and thereafter transcribed into typewriting
under my direction and supervision:

That the foregoing pages contain a true and correct
transcription of my shorthand notes so taken.

In witness whereof, I have subscribed my name and
affixed my seal this 17th day of August, 1994.

Pamela C. Smith
PAMELA C. SMITH, C.S.R., R.P.R.
Notary Public

My Commission Expires:

July 20, 1997

