UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: FAIRFIELD SENTRY LIMITED Debtor.	:	**ORDER AFFIRMING DECISION OF BANKRUPTCY COURT** 15 Civ. 9474 (AKH)
FARNUM PLACE, LLC, APPELLANT, -against- KENNETH KRYS, APPELLEE.	:	

ALVIN K. HELLERSTEIN, U.S.D.J.:

Farnum Place, LLC ("Farnum") appeals from a final order of the U.S. Bankruptcy Court of the Southern District of New York disapproving Farnum's purchase of assets of Fairfield Sentry Limited ("Fairfield"), an investment fund incorporated and located in the British Virgin Islands. The assets sold by Fairfield were substantially a claim in the liquidation of the estate of Bernard L. Madoff Investment Securities LLC ("Madoff").

That sale has had thorough consideration by the courts. It was first approved in a proceeding in the British Virgin Islands ("BVI"). It was then challenged and affirmed in the Bankruptcy Court, as well as in this court, in a decision then vacated by the Court of Appeals. *See in re Fairfield Sentry Ltd.*, 484 B.R. 615, 618-22 (Bankr. S.D.N.Y. 2013), *aff'd*, *Krys v. Farnum Place, LLC* (*In re Fairfield Sentry Ltd.*), No. 13 Civ. 1524 (AKH) (S.D.N.Y. July 3,

2013), *vacated,* 768 F.3d 239 (2d Cir. 2014). Familiarity with the facts and proceedings is assumed.

In brief summary: Fairfield is in liquidation proceedings under the supervision of the BVI courts; Krys is Fairfield's liquidator. Subsequent to the sale of Fairfield's Madoff claim to Farnum, the value of the asset materially increased when a settlement made available new monies to claimants in the Madoff liquidation. Farnum sought confirmation of the sale in the British Virgin Islands, over opposition from Krys. The sale was approved by the BVI supervising court as valid under BVI insolvency law. Krys then sought disapproval of the sale in the Bankruptcy Court of this district, where a "foreign main proceeding" had been pending. *See* 11 U.S.C. §§ 1517, 1520(a); *In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010), *aff'd*, No. 10 CIV. 7311 GBD, 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), *aff'd*, 714 F.3d 127 (2d Cir. 2013). Again, Krys did not succeed in his attempt to invalidate the sale, both before the Bankruptcy Judge and, on appeal, before me. However, on appeal to the Second Circuit, the Court of Appeals vacated, holding that the Krys-organized sale was "a transfer of the interest of the debtor in property that is within the territorial jurisdiction of the United States," 11 U.S.C. § 1120(a)(2),[1] and thus a bankruptcy court was required to review the sale pursuant to 11 U.S.C. § 363. The mandate remanded the case to me, and thence to the Bankruptcy Court to conduct the required review.

That review now has been undertaken. Krys, as liquidator of Fairfield, argued for disapproval because of the greatly increased value of the assets shortly following the sale in December of 2010. Farnum argued that the sale had been made in an auction, that the auction

[1] Section 1120(a)(2) provides "[u]pon recognition of a foreign proceeding that is a foreign main proceeding . . . section[] 363 . . . appl[ies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate."

had integrity, and that the sale should be approved. The Bankruptcy Court, reviewing the matter following the mandate of the Court of Appeals, upheld Krys' position to disapprove the sale to Farnum, and rejected Farnum's position. I agree with the Bankruptcy Court.

I. Bankruptcy Court's Section 363 Review

The Second Circuit, instructing the bankruptcy court to conduct section 363 review on remand, provided some "guiding principles" from its case law.[2] *In re Fairfield Sentry*, 768 F.3d at 246. The Court of Appeals, following its decision in *Comm. of Equity Sec. Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063 (2d Cir. 1983), identified a non-exclusive list of "salient factors" the bankruptcy judge should consider when deciding if the trustee has shown a "good business reason" for the relief he seeks. *In re Fairfield Sentry*, 768 F.3d at 246 (quoting *In re Lionel Corp.*, 722 F.2d at 1071). The Court of Appeals identified an asset's change in value as a salient factor, and explicitly directed the Bankruptcy Court to consider "the increase in value of the Sentry Claim between the signing of the Trade Confirmation and approval by the bankruptcy court." *Id.* at 247.

The Court of Appeals also recognized that bankruptcy courts "must have 'broad discretion and flexibility . . . to enhance the value of the estates before it,'" *In re Fairfield Sentry*, 768 F.3d at 246 (quoting *Consumer News & Bus. Channel P'ship v. Fin. News Network Inc. (In re Fin. News Network Inc.)*, 980 F.2d 165, 169 (2d Cir. 1992)), and that "the bankruptcy court's 'principal responsibility . . . is to secure for the benefit of creditors the best possible bid,'" *id.* at 246-47 (quoting *In re Fin. News Network Inc.*, 980 F.2d at 169).

These considerations amply support the decision of the Bankruptcy Court. The court found that the increased value of the Madoff claim was the "most important factor" and

[2] Section 363 provides that: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate [. . . .]" 11 U.S.C. § 363(b)(1).

"plainly weighs against the approval of the sale." *In re Fairfield Sentry Ltd.*, 539 B.R. at 669. The court thus agreed with the liquidator that there was a "good business reason" for disapproval of the sale. *In re Lionel Corp.*, 722 F.2d at 1071.

Farnum argues that the bankruptcy court failed to give weight to the interests of the BVI liquidation proceeding. Though acknowledging the BVI liquidation proceeding, the Bankruptcy Court properly found that the Second Circuit's mandate required an independent review. *In re Fairfield Sentry Ltd.*, 768 F.3d at 246. The Bankruptcy Court determined the relative weight to be accorded the relevant factors, and concluded that the increased market value of the Madoff claim was of overarching importance, as suggested by the Second Circuit's decision. *In re Fairfield Sentry*, 768 F.3d at 246-47. I agree and affirm the decision of the Bankruptcy Court.

II. Statutory Argument

Farnum also contends that the Second Circuit's mandate does not preclude its statutory argument based on a different provision in the bankruptcy code, 11 U.S.C. § 1521(a)(5). But the Second Circuit's instructions for remand were mandatory: upon vacating the bankruptcy court's decision, the case was remanded "to the district court with instructions to remand to the bankruptcy court to conduct the section 363 review." *In re Fairfield Sentry Ltd.*, 768 F.3d at 246. The Second Circuit also suggested that the requirement of section 1520 was unequivocal: "[t]he language of the statute makes it plain that the bankruptcy court was required to conduct a section 363 review." *Id.*

Farnum's statutory argument, even if it were outside of the mandate, is unpersuasive. Farnum rests its argument on the bankruptcy court's 2010 decision, which recognized the BVI liquidation proceeding as a "foreign main proceeding" and granted the

liquidator Krys' request for entrustment authority under section 1521(a)(5). *In re Fairfield Sentry Ltd.*, 440 B.R. at 67; *see also generally* 11 U.S.C. § 1521(a) (providing for various forms of relief upon a bankruptcy court's recognition of a foreign proceeding). Section 1521(a)(5) allows a bankruptcy court to "entrust[] the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court." 11 U.S.C. § 1521(a)(5). Farnum argues that the entrustment authority of section 1521(a)(5) is "unencumbered" and thus that the bankruptcy court's 2010 order "entrusting" Krys with the "administration or realization" of Fairfield's assets under 11 U.S.C. § 1521(a)(5) obviated the need for later judicial review.

But Farnum's reading of section 1521(a)(5) is not convincing. Since "entrusting" is not defined within the statute, Farnum looks to its ordinary meaning: "to give (a person) the responsibility for something." Farnum conclusorily assumes that the statutory delegation of responsibility must be unlimited or unreviewable. To the contrary, a foreign representative can have the authority to administer the divestiture of assets even if such divestiture of US-located assets is subject to judicial review under the terms of section 1520(a)(2). And, such a reading is confirmed by the mandatory and unequivocal language of the Second Circuit's opinion. *In re Fairfield Sentry Ltd.*, 768 F.3d at 246.

Farnum also references the drafting history of this particular provision and argues that the drafters' use of "entrust[]" was intended to expand the scope of delegated authority.[3]

[3] Farnum's argument about the drafting history again assumes "entrust" should be read as an indication about the nature of the delegated authority. Earlier versions of this provision described that, upon recognition of a foreign main proceeding, a bankruptcy court could "grant turnover of assets to the foreign representative for administration, realization or distribution in the foreign proceeding." A subsequent draft then authorized the court to "permit the foreign representative to administer, realize and distribute assets." The provision was later revised to "entrust[]." The changing verbiage could also reflect the nature of a bankruptcy proceeding: that assets would not be physically turned over to the foreign representative, but rather, the debtor would be divested of assets and the administration of that divestiture delegated to the foreign representative.

But Farnum merely assumes the relevance of the drafters' intentions, even as it acknowledges that section 1521(a)(5) was drawn from Article 21 of the United Nations Commission on International Trade's Model Law on Cross-Border Insolvency. Congress did not import the Model Law wholesale, but rather, revised various sections including other subsections of section 1521. Farnum's argument about the drafting history of this particular phrase does not illuminate how Congress intended for sections 1520 and 1521 to interact.

Farnum argues the Second Circuit's determination as to what constitutes property within the territorial jurisdiction of the United States under section 1520(a)(2), thus subject to section 363 review, does not bear on the nature of entrustment authority. But the Second Circuit's opinion treats section 1520 as a categorical requirement for transfers of property within the territorial jurisdiction of the U.S., and in so doing, precludes the treatment of section 1521(a)(5) as a carve-out. The Second Circuit's mandate leaves little room for doubt: section 1520 applies to the transfer at issue in this case and section 363 review was properly undertaken.

III. Conclusion

The bankruptcy court's decision is affirmed, and the Clerk shall mark the case closed.

SO ORDERED.

Dated: June 2, 2016
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge