

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 00-016

**IN RE: DAVID B. EDMONSTON
Debtor.**

**DAVID B. EDMONSTON AND BETTIE G. EDMONSTON,
Appellants,**

v.

**HAROLD B. MURPHY, CHAPTER 7 TRUSTEE,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)**

Before

GOODMAN, LAMOUTTE AND HAINES, U.S. Bankruptcy Judges

George R. Desmond, on brief for Appellants.

Harold B. Murphy, Andrew Lizotte and Hanify & King, on brief for Appellee.

August 4, 2000

Goodman, B.J.

I. Statement of the Case.

The debtor appeals from the bankruptcy court order approving the chapter 7 trustee's final account that proposed distribution pursuant to 11 U.S.C. §726. Part of the distribution included proceeds the Trustee had received from the debtor to compromise a complaint that sought to compel a sale of both the estate's interest and the nondebtor co-owner's interest in residential real estate pursuant to 11 U.S.C. §363(h). The debtor argued that the settlement proceeds were subject to distribution limitations imposed by 11 U.S.C. §363(j). The bankruptcy court rejected that argument. The debtor appeals, arguing that 11 U.S.C. §363(j) requires distribution of the settlement proceeds only to joint creditors, with any excess returned to the debtor under his claimed exemption or to his nondebtor wife to the extent there was a surplus over amounts claimed by their joint creditors

II. Standard of Review.

Since the facts are not in dispute, we review the bankruptcy court's legal conclusion *de novo*. Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997).

III. Discussion.

At the time the debtor, David Edmonston, filed a Chapter 7 petition on March 10, 1995, he alleged that he and his wife, Bettie Edmonston, were joint owners, tenancy by the entirety, of their residence located in Norwood, Massachusetts. (the "Residence").

The debtor claimed an exemption in the Residence based on the statutory tenancy by the entirety in Mass. Gen. L., ch. 209 § 1. The Trustee objected to the exemption on the grounds that since there were joint creditors of the debtor and his nondebtor wife, the Residence was not protected from the reach of the joint creditors. The bankruptcy court sustained the Trustee's objection. The debtor appealed, arguing that the Trustee did not have standing to object to the exemption. The decision of the bankruptcy court was affirmed by the District Court, Edmonston v. Murphy, No. 95-12559-RCL (D.Mass. June 12, 1996), and by the First Circuit Court of Appeals, Edmonston v. Murphy, No. 96-1840 (1st Cir. Feb. 27, 1997).

The Trustee initiated an adversary complaint seeking authority to sell the interests of both the debtor and his wife pursuant to 11 U.S.C. §363(h), which in certain circumstances permits the sale of the both the estate's interest and the interests of the nondebtor co-owner.¹ The parties agree that the Trustee's complaint seeking to compel a sale of the Residence pursuant to 11 U.S.C. §363(h) was settled after trial and prior to entry of judgment. Appellant's Brief at 5. The parties also agree that

¹ 11 U.S.C. §363(h) provides, in relevant part, as follows:

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

there was no sale of property. App. at 92. The settlement of the Trustee's complaint provided, in part, that the debtor and his wife would execute a note payable to the Trustee in the face amount of \$30,000, plus interest, secured by a mortgage on the Residence (the "Settlement Proceeds"). The Trustee's motion to approve this compromise, stated in relevant part, as follows:

[t]he settlement is fair and equitable and should be approved by this Court. **The Trustee believes that recovery in this action would otherwise be limited to the amount of creditors asserting claims against both the Debtor and Mrs. Edmonston**, and the administrative costs incurred by the Trustee and his counsel. These amounts would likely not significantly exceed \$30,000. Moreover, by executing a mortgage in favor of the trustee and assuming the burden of attempting to refinance the Property, the Defendants will likely minimize the future administrative costs to the estate. In the event the Note is not paid at maturity, the estate may assert its costs in connection with collection actions. **The agreement therefore provides for a substantial and expeditious settlement for the estate.**

App. at 35 (emphasis added).

The settlement was approved and the adversary complaint was dismissed pursuant to the parties' stipulation of dismissal. App. at 43. The specific language highlighted above is the only language in any document that addresses recovery and distribution in the event the Trustee had successfully prosecuted the complaint and compelled a sale pursuant to 11 U.S.C. §363(h).

After receiving payment of the Settlement Proceeds, the Trustee filed a final account that proposed distribution that included payment of the Trustee's commission, fees and expenses to

Trustee's counsel,² and payment of any remaining funds to general unsecured creditors *pro rata*. The debtor objected, arguing that the funds received by the Trustee should be distributed like proceeds from the sale of entireties property and that such sales proceeds may only be distributed to joint creditors, with any surplus over their claims refunded to the debtor and/or his nondebtor spouse. We need not examine the second premise because the first is simply wrong. The funds at issue were, as the bankruptcy court noted, proceeds of a settlement, not proceeds of a sale.

The bankruptcy court rejected the debtor's argument, finding that there was no sale of property that triggered the distribution requirements of 11 U.S.C. §363(j).³ The bankruptcy court concluded that 11 U.S.C. §726 controlled the distribution of all funds held by the Trustee, including the Settlement Proceeds. The bankruptcy

² By separate order, from which no appeal has been taken, the bankruptcy court allowed the Trustee's commission as well as the fees and expenses to his counsel. App. at page 97. The Edmonstons did not object to allowance, nor do they challenge the reasonableness of the commission and fees. They object to any distribution of these sums from the Settlement Proceeds because they claim such distribution is not permitted by 11 U.S.C. §363(j).

³ 11 U.S.C. §363(j) provides, in relevant part:

After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of the property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interest of such spouse or co-owners and of the estate.

court approved the Trustee's final account and proposed distribution concluding:

[S]ection 363(j) is irrelevant. ... But the -- here there was no sale of property, so 363 simply doesn't come into - is simply irrelevant. The \$30,000 that came into the estate was as the result of the settlement between and among the debtor, the debtor's non-debtor spouse, and the Trustee. I believe section 726 controls and I agree with Judge Boroff's decision, IN RE: Van Rye, [⁴] that all creditors, not just the joint creditors of the debtor and the non-debtor spouse, should be paid from the proceeds of the \$30,000 settlement.

App. at 94.

On appeal, the debtor and his wife claim that the "bankruptcy court err[ed] in approving payment of the fees of the trustee and the attorney for the trustee, and dividends to creditors who did not hold joint claims against the debtor and his wife from the proceeds of the settlement of the adversary case." Appellants' Brief at 3. The Edmonstons make this argument even though they concede there was no sale and they filed no objection to the Trustee's motion to compromise.

We find no error with the bankruptcy court's conclusion that the distribution was governed by 11 U.S.C. §726, and was not governed by 11 U.S.C. 363(j). By settling, the parties avoided a judicial determination of their respective rights under 11 U.S.C. §363(h) and the debtor and his wife avoided a sale of the

⁴ Although we agree with the bankruptcy court's conclusion that the settlement proceeds should be distributed *pro rata*, we do not rely on In re Rye, 179 B.R. 375, 378 (Bankr. D. Mass. 1995) (Boroff, J.), which dealt with the specific issue of *pro rata* distributions to pre-homestead declaration and post-homestead declaration creditors under Massachusetts law.

Residence. The compromise expressly stated that it was "a substantial and expeditious settlement for the estate." We cannot ignore the settlement. There was no judicial determination that the Residence was entireties property subject to sale pursuant to 11 U.S.C. §363(h), there are no sale proceeds that could be subject to the distribution constraints of 11 U.S.C. §363(j);⁵ there is no language in the compromise that limits distribution; and the express language of the compromise provides that the proceeds are for the benefit of the estate.

The bankruptcy court properly approved the Trustee's final report and account which proposed distribution pursuant to 11 U.S.C. §726. For the reasons set forth, the decision of the bankruptcy court is AFFIRMED.

⁵ Because the parties voluntarily compromised the Trustee's §363(h) complaint, we need not reach the issues presented in In re Monzon, 214 B.R. 38 (Bankr. S.D. Fla. 1997), wherein the bankruptcy court concluded that the Trustee could administer entireties property without conducting a sale and distribute entireties proceeds only to joint creditors.