NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2344

In re: PAZZO PAZZO INC; and BERLEY ASSOCIATES LTD., Debtors

SPEEDWELL VENTURES LLC;

v.

BERLEY ASSOCIATES LTD, and PAZZO PAZZO INC;,
Appellants

v.

62-74 SPEEDWELL AVE. LLC

v.

STEWART TITLE GUARANTY CO.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:18-cv-15361)
District Judge: Honorable Esther Salas

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 22, 2022

Before: AMBRO, RESTREPO and FUENTES, *Circuit Judges*

(Filed: December 15, 2022)

OPINION*

RESTREPO, *Circuit Judge*

Appellants Pazzo Pazzo, Inc. ("Pazzo") and Berley Associates, Ltd. ("Berley") (collectively "Debtors") appeal the District Court's order affirming the Bankruptcy Court's judgment for Appellees Speedwell Ventures, L.L.C. ("Speedwell") and 62-74 Speedwell Ave. LLC ("62-74 Speedwell"). The Bankruptcy Court ruled Pazzo's lease and Berley's option to repurchase the Property were validly terminated, and the termination of the option was not a "transfer" under the Bankruptcy Code. Because we agree with these rulings, we will affirm the District Court.

I. Facts and Procedural History

Berley owned a parcel of land and building in New Jersey known as 62-74 Speedwell Avenue (the "Property"). Berley leased the Property to Pazzo, who operated a restaurant on the Property for over twenty years. Following financial difficulties, Berley filed for Chapter 11 bankruptcy in 2012, resulting in a confirmed plan reorganization.

Berley's reorganization plan called for a sale of the Property to a secured creditor, who ultimately assigned its rights to Speedwell. The plan provided that Pazzo sign a new ten-year lease, which granted Berley the option to repurchase the Property. The option rights had to be exercised before the end of the ten-year lease or thirty days after termination of the lease and Pazzo's tenancy, whichever occurred first. The lease stipulated

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

that Speedwell could terminate the lease "not less than ten (10) days" after it gave Debtors a termination notice. After the ten days had passed, Speedwell could serve Debtors an option notice, demanding that Debtors exercise their option rights within the next thirty days.

From April 2017 to August 2017, Speedwell issued four notices to Debtors: the April notice warning of the possible termination of the lease and service of the option notice; the June 9 notice serving as both the termination notice for "abandonment, vacation, or desertion," and the option notice demanding Debtors exercise their right to repurchase within thirty days; and the August 1 and 16, 2017 notices informing Debtors their option rights had lapsed and that Speedwell was filing to discharge the option in the County Clerk's office. Debtors met each of these notices with "radio silence."[1] On August 18, 2017, Speedwell filed the discharge, and sold the Property to 62-74 Speedwell on February 16, 2018.

On February 23 and 28, 2018, Debtors filed Chapter 11 petitions and listed both the lease and option to repurchase the Property in their asset schedules. Following a bench trial, the Bankruptcy Court ruled the lease had been terminated for abandonment and vacation on or before June 9, 2017, and the option to repurchase was terminated as of August 1, 2017. The Court also found the termination of the lease and option were not "transfers" under § 548(a)(1)(B) of the Bankruptcy Code and therefore could not be

[1] The "one exception" to this "radio silence" was a June 2017 meeting between Mr. Lawrence Berger, counsel for Debtors, and Mr. Jack Zakim, an escrow agent for Speedwell. Despite Mr. Berger stating he "would fight" for the Property, no promises were made that Debtors would satisfy their unpaid bills on the Property.

recoverable as fraudulent conveyances. Debtors appealed this decision to the District Court, which affirmed.

In their reply brief to the District Court, Debtors argued for the first time that Speedwell's June 9 option notice was invalid because the same document also served as the notice of lease termination. Under the terms of the lease, Speedwell could serve the option notice only after the lease had been terminated, which could occur - at the earliest - ten days after the notice of lease termination was issued. Debtors claimed the option notice was premature and therefore invalid under the terms of the lease. The District Court deemed this argument waived and did not address the merits. Debtors timely appealed to this Court.

II. Jurisdiction and Standard of Review

The Bankruptcy Court had original jurisdiction under 28 U.S.C. §§ 157(b) and 1334(b), and the District Court exercised appellate jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

"Because the district court sat as an appellate court reviewing an order of the bankruptcy court, our review of its determinations is plenary." *In re Trans World Airlines, Inc.*, 145 F.3d 124, 130 (3d Cir. 1998) (internal quotation marks omitted). "In reviewing the bankruptcy court's determinations, we exercise the same standard of review as the district court." *Id.* Thus, "we review the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *Id.* at 131.

III. Discussion

We will affirm the Bankruptcy Court's ruling that the lease and option to repurchase were validly terminated. The District Court acted within its discretion in deeming the challenge to the validity of the option notice waived, but we conclude that, even if addressed on its merits, the argument does not warrant relief. Lastly, we agree with the Bankruptcy Court that the termination of the repurchase option did not constitute a "transfer" under the Bankruptcy Code.

a. Termination of the lease and repurchase option.

The Bankruptcy Court ruled the lease was terminated for abandonment and vacation no later than June 9, 2017, and the repurchase option was terminated as of August 1, 2017; the District Court affirmed these findings. Debtors claim this decision is unsupported by fact and law. We disagree.

Under the terms of the lease, Speedwell could terminate for "abandonment, vacation or desertion" of the Property. The Bankruptcy Court properly defined abandonment as an "act accompanied by an intent to abandon," and vacation as "depriv[ing the premises] of contents of 'substantial' value." *Liqui-Box Corp. v. Estate of Elkman*, 570 A.2d 472, 476–77 (N.J. Super. App. Div. 1990).[2]

The Bankruptcy Court did not err in finding the totality of the circumstances established Debtors' intention to abandon the Property. *United States v. Green*, 201 F.3d

[2] Because there is no dispute that New Jersey law governs in this case, we do not question its application. *Transportes Ferreos de Venezuela II CA v. NKK Corp.*, 239 F.3d 555, 560 (3d Cir. 2001).

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