



Entered on Docket
April 19, 2005

Hon. Bruce A. Markell
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

PATRICK FULLMER,

Debtor.

)
) BK-S-03-23102-BAM
) Chapter 11

SCOTT ACTON,

Plaintiff,

)
) Adv. Proceeding No.: 04-1228 BAM

vs.

PATRICK FULLMER,

Defendant.

)
) DATE: April 5, 2005
) TIME: 1:30 p.m.

**AMENDED AND RESTATED OPINION
ON REQUEST FOR STAY PENDING APPEAL**

Scott Acton ("Acton") applies for a stay pending appeal of this court's judgment denying him specific performance of a land sale contract ("Contract"). Specifically, he seeks a stay of this court's order that his lis pendens against the property subject to the Contract be expunged. The court will deny Acton's application.

Patrick Fullmer ("Fullmer") filed a Chapter 11 case in October of 2003. As explained below, part of the reason for Fullmer's filing was to reject certain executory contracts for the sale of four parcels of land, with the intent to then resell them at a higher

1 price. After Fullmer successfully rejected these pre-petition contracts, he entered into a
2 process, approved by the court, to resell the parcels for 60% more than the pre-petition
3 price.

4 One of the buyers in this process was Acton. As set forth below, a dispute arose
5 during July of 2004 over when Acton had to pay the purchase price. When that dispute
6 could not be resolved, Acton filed an adversary proceeding against Fullmer for specific
7 performance of Fullmer's obligations to improve the land, and for a conveyance of the land
8 after the price was paid. To preserve his right, Acton also immediately filed a lis pendens
9 against the land.

10 Trial on this adversary proceeding was held on March 5, 2005. Each side filed
11 post-trial briefs on March 11, 2005. The court entered judgment for Fullmer and against
12 Acton on March 25, 2005. A written opinion setting for the grounds for this judgment was
13 also entered on that date.

14 Following entry of judgment, Fullmer has moved: (1) to expunge the lis
15 pendens; (2) for authority to sell the land at issue to another person; and (3) for attorneys'
16 fees due him under the terms of the Contract.

17 Acton filed his notice of appeal on March 30, 2005. By this application, Acton
18 seeks to stay or prevent items (1) and (2) above. Despite the filing of a notice of appeal,
19 this court has jurisdiction to hear Acton's motion. *Ho v. Dai Hwa Elec. (In re Ho)*, 265 B.R.
20 603 (9th Cir. B.A.P. 2001).

21 **I. Applicability of Rules 7062 and 8005**

22 This action arises out of an adversary proceeding, and thus the 7000 series of
23 rules of the Federal Rules of Bankruptcy Procedure apply. Rule 7062, in turn, incorporates
24 the provisions of Rule 62 of the Federal Rules of Civil Procedure. Acton believes that Rule
25 62(d) applies to this case. That rule states:

26 (d) **Stay Upon Appeal.** When an appeal is taken the appellant by

1 giving a supersedeas bond may obtain a stay subject to the
2 exceptions contained in subdivision (a) of this rule. The bond may be
3 given at or after the time of filing the notice of appeal or of procuring
4 the order allowing the appeal, as the case may be. The stay is
5 effective when the supersedeas bond is approved by the court.

6 In this regard, Acton asserts that a stay is his right under Rule 62(d) upon
7 posting of an appropriate bond. *See, e.g.*, 11 CHARLES A. WRIGHT, ARTHUR R. MILLER &
8 MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2905, at 520 (2d ed. 1995)
9 (indicating that “[t]he stay issues as a matter of right in cases within Rule 62(d).”); 12
10 MOORE’S FEDERAL PRACTICE § 62.03[1] (3d ed. 2005) (“An appealing party is entitled to a
11 stay of enforcement as a matter of right under Rule 62(d) if a supersedeas bond is filed
12 with the court.”).

13 The initial issue, however, is whether Acton’s appeal falls within Rule 62(d).
14 Acton throughout this case has not sought damages for the alleged breach, but has
15 steadfastly demanded specific performance. Fullmer’s judgment on his counterclaim is
16 also non-monetary. He sought and received a judicial determination that Acton had
17 materially breached the contract, and that such material breach was grounds for
18 termination of the contract. The result is that all relief requested and ordered was non-
19 monetary in nature.

20 Cases are uniform, however, that Rule 62(d) pertains primarily, if not
21 exclusively, to monetary judgments. *NLRB v. Westphal*, 859 F.2d 818, (9th Cir. 1988)
22 (defendant’s motion for stay upon issuance of bond denied when appeal was from
23 subpoena compliance order); *In re Capital West Investors*, 180 B.R. 240, 242-43 (N.D. Cal.
24 1995), *rev’d on merits after stay denied*, 186 B.R. 497 (N.D. Cal. 1995) (appeal from plan
25 confirmation order not subject to Rule 62(d)); *Government Guarantee Fund of Finland v.*
26 *Hyatt Corp.*, 167 F.R.D. 399, 400 (D.V.I. 1996) (“The loser in an action for an injunction thus

1 is not entitled to a stay by giving a supersedeas bond.”); *Stephenson v. Rickles Electronics*
2 & Satellites (*In re Best Reception Systems, Inc.*), 219 B.R. 988, 996 (Bankr. E.D. Tenn. 1998)
3 (“[C]ourts have restricted the application of Rule 62(d)’s automatic stay to judgments for
4 money because a bond may not adequately compensate a non-appealing party for loss
5 incurred as a result of the stay of a non-money judgment.”), *quoting Hebert v. Exxon Corp.*
6 953 F.2d 936, 938 (5th Cir. 1992).

7 This view is rooted in the text of Rule 62. Rule 62(d) provides that its provisions
8 regarding the provision of a supersedeas bond are “subject to the exceptions contained in
9 subdivision (a) of this rule.” Rule 62(a), in turn, provides for a ten-day automatic stay of
10 the effect of a judgment unless that judgment is a “final judgment in an action for an
11 injunction.” Such injunctions include injunctions requiring specific performance, as was
12 requested here. *Miller v. LeSea Broadcasting, Inc.*, 927 F.Supp. 1148, 1151 (E.D. Wisc.
13 1996). *See also Moore v. Townsend*, 577 F.2d 424, 426 (7th Cir. 1978). As stated by Wright,
14 *Miller & Kane*: “[i]f the district court has denied an injunction . . . defendant is free to take
15 the action sought to be enjoined” 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY
16 KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2904, at 498 (2d ed. 1995).

17 There is a procedure, of course, to obtain a stay in such circumstances. Rule
18 62(c) fulfills this role. Under Rule 62(c):

19 When an appeal is taken from [a] . . . final judgment . . . denying an
20 injunction, the court in its discretion may suspend, modify, restore,
21 or grant an injunction during the pendency of the appeal upon such
22 terms as to bond or otherwise as it considers proper for the security
23 of the rights of the adverse party.

24 The factors that the court must consider in analyzing Acton’s request for an injunction
25 under Rule 62(c) are:

26 (1) whether the stay applicant has made a strong showing that he is

1 likely to succeed on the merits; (2) whether the applicant will be
2 irreparably injured absent a stay; (3) whether issuance of the stay
3 will substantially injure the other parties interested in the
4 proceeding; and (4) where the public interest lies.

5 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also* 11 CHARLES A. WRIGHT, ARTHUR R.
6 MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2904, at 501 (2d ed. 1995).

7 Not surprisingly, these same factors have been incorporated under Federal Rule
8 of Bankruptcy Procedure 8005. That rule states:

9 Notwithstanding Rule 7062 but subject to the power of the district
10 court and the bankruptcy appellate panel reserved hereinafter, the
11 bankruptcy judge may suspend or order the continuation of other
12 proceedings in the case under the Code or make any other
13 appropriate order during the pendency of an appeal on such terms
14 as will protect the rights of all parties in interest.

15 Courts in the Ninth and other circuits have construed this rule to incorporate essentially
16 the same standards as applicable under Rule 62(c). *In re Universal Life Church, Inc.*, 191
17 B.R. 433, 444 (E.D. Cal. 1995), *aff'd in part and dismissed in part*, 128 F.3d 1294 (9th Cir. 1997),
18 *cert. denied*, 524 U.S. 952 (1988). *See also* *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1067 (5th
19 Cir. 1986); *Virginia Dep't of Med. Assistance Servs. v. Shenandoah Realty Partners, L.P.* (*In*
20 *re Shenandoah Realty Partners, L.P.*), 248 B.R. 505 (W.D. Va. 2000); *In re Holtmeyer*, 229
21 B.R. 579, 581 (E.D.N.Y. 1999); *In re Bradford*, 192 B.R. 914, 917 (E.D. Tenn. 1996); *Beneficial*
22 *Homeowner Service Corp. v. Moreau* (*In re Moreau*) 135 B.R. 209 (N.D.N.Y. 1992); *In re*
23 *Edwards*, 228 B.R. 573, 575 (Bankr. E.D. Pa. 1999); *In re Great Barrington Fair &*
24 *Amusement, Inc.*, 53 B.R. 237 (Bankr. D. Mass. 1985); 10 COLLIER ON BANKRUPTCY ¶ 8005.7
25 (15th rev. ed. 2005).

26 Accordingly, I have to assess Acton's request for a stay under the discretionary

1 standards of Rule 62(c) and 8005, not the more mechanical provisions of Rule 62(d). There
2 are thus four elements to consider: (1) Acton's likelihood of success on the merits; (2)
3 whether Acton will be irreparably injured; (3) whether issuance of the stay will
4 substantially injure Fullmer; and (4) where the public interest lies. In applying these
5 factors, the court is mindful that a discretionary stay pending appeal is viewed as an
6 extraordinary remedy. *Minor Metals, Inc. v. United States*, 38 Fed. Cl. 379 (Ct. Claims
7 1997).

8 **II. Application of the Four Factors Related to Equitable Relief**

9 *A. Acton's Success on the Merits*

10 1. Background on the Trial

11 During the trial, the court found that the Contract initially obligated Fullmer to
12 sell and Acton to buy real property in the northwest area of the greater Las Vegas
13 metropolitan area. Both parties testified, as did Christopher White, who was Acton's and
14 Fullmer's real estate broker ("White"). Testimony was also received from three
15 individuals, Adam Knecht, Karl Wolff and Louis Hillegas, who purchased land from
16 Fullmer adjacent to the land covered by the Contract under terms virtually identical to
17 those in the Contract.

18 After consideration of the testimony and the pleadings, including the post-trial
19 briefs, the court denied the relief requested by Acton, and entered judgment in favor of
20 debtor and defendant, Fullmer. Further, pursuant to Fullmer's request made at the
21 conclusion of the trial, the pleadings were deemed amended to conform to proof at trial
22 under Rule 7015. Pursuant to this amendment, Fullmer was deemed to have
23 counterclaimed against Acton for declaratory relief to the effect that Acton was in material
24 breach of the Contract, and that Fullmer's obligations under the contract were terminated.
25 The court found for Fullmer on this counterclaim, and entered judgment thereon.
26

2. Background on the Contract

Fullmer is a general contractor. Before filing this chapter 11 case, he owned property he wished to develop into four residential lots. Fullmer had signed contracts to sell those lots for \$100,000 each. After Fullmer filed his case, he moved to reject those contracts under Section 365, since by then the purchase prices were below market rates. That motion was ultimately granted.

Freed from these pre-petition contracts, Fullmer then sought to resell the four lots. There was a small problem, however. The lots did not have APN designations (Assessor’s Parcel Numbers), and thus under applicable state law Fullmer could not convey the lots individually. Instead, Fullmer, through White, a real estate salesperson, took offers on the lots, with the understanding that they would be subdivided according to Fullmer’s preliminary plans. Within 48 hours of this decision, White had four offers of \$160,000 each, one of which was Acton’s. Offers on the other three lots were made by Adam Knecht, Karl Wolff and Louis Hillegas, and, as applicable, their respective spouses. As indicated above, each of these individuals testified at trial.

Each offer was prepared by White, and each was signed by the prospective purchasers. More importantly for this case, each offer contained the following condition: Buyer will be given 10 days to close escrow and purchase lot from the day they *[sic]* receive written notice of successful subdivision.

This language proved to be the center of the controversy during the trial, although the debate about it would not be known for more than six months after all agreed to it.

Initially, everything was fine. Fullmer sought and obtained court approval for the new contracts. A hearing was held on March 17, 2004 at which time the bankruptcy judge withheld approval of the sales until Fullmer had conducted an auction for the lots; the court ordered this delay so that the individuals whose \$100,000 contracts had been

1 rejected could bid. In accordance with this order, an auction was held on March 24, 2004,
2 but no one but the four \$160,000 offerors showed up. They declined to increase their bids,
3 and thus the four written offers for \$160,000 were attached to a motion for court approval.
4 At a hearing on April 13, 2004, the court approved the motion, and thus the offers and
5 sales related to them. On April 26, the court entered an order formally approving
6 contracts on the terms set forth in the offers, and approved the estate's sale of the lots to
7 each of the four offerors.

8 The auction required each purchaser to deposit \$8,000 in the trust account of
9 Fullmer's lawyer, and authorized disbursement of those funds for water connection fees.
10 Each purchaser paid the \$8,000, and Fullmer used the funds as required. As a result,
11 sometime in July of 2004 Fullmer received approval to record his subdivision map, the
12 official act that resulted in the issuance of APN designations for each of the four parcels.

13 After the recordation, White prepared and had all four purchasers, including
14 Acton, sign an "Addendum to Purchase Agreement" (the "Addendum"). This was a half-
15 page document prepared on a standard form. It recited that the subdivision map had been
16 recorded, and that "[a]s per original contract this is the written notice that escrow has been
17 opened." Apart from this notice function, it further stated that "the close of escrow will be
18 on the 19th of July, 2004," and that "per request it is clarified in this addendum that lots are
19 being sold with out all work being finished. Seller does have all utilities and
20 improvements approved by the county and will be finishing the work in a timely manner."
21 In return, Fullmer obtained Acton's acknowledgment that failure to pay the purchase price
22 as and when due would effectively terminate the Contract. As the Addendum stated, "it is
23 clarified if or when the ten days is [sic] up and we are set to close on said property and the
24 buyer [Acton] is not ready the properties [sic] will be put back on the market." Acton
25 acknowledged that he signed the Addendum on July 9, 2004. As a consequence, Acton
26 acknowledged that his purchase price would be due on July 19th.

1 All purchasers except Acton then paid the balance of their purchase prices in
2 July, and deeds conveying the property to each of them were thereafter recorded. Acton
3 balked, however, claiming that without installation of all improvements (curbs, paving,
4 utilities, grading, etc.), there could be no "successful subdivision." And without a
5 "successful subdivision," Acton contended that his obligation to pay his purchase price
6 had not yet matured.

7 Acton filed this action for specific performance on July 21, 2004, and filed a lis
8 pendens against the property on the same day.

9 3. Legal Arguments Regarding the Invalidity of the
10 Addendum

11 Acton contends that the original offer controls, and that the court should not
12 look to anything signed by him after the court approved the sale in April of 2004. His
13 argument on this point is twofold: first, that anything signed after April lacked
14 consideration, and thus is a legal nullity; and second, that anything signed after April was
15 not approved by the court, and thus was void.

16 If these arguments fail, Acton argues that "successful subdivision" as used in
17 the Contract means completion of *all* improvements, and thus the Addendum was an
18 improper notice of the maturation of his obligation to pay the balance of the purchase
19 price. Since Fullmer disagreed, Acton believes that Fullmer is in breach, and requests an
20 order for specific performance requiring Fullmer to complete installation of all
21 improvements.

22 Fullmer's position is that Acton's lawsuit is a material breach of the Contract,
23 enabling Fullmer to terminate his obligations thereunder.

24 a. *Lack of Consideration*

25 Acton's argument regarding a lack of consideration fails for two reasons. First,
26 the offer Acton signed specifically noted that a further notice would be provided of the

1 time escrow was to close, and the provision of that notice was the primary function of the
2 Addendum. No issue of consideration is thus presented with respect to the simple
3 provision of a notice anticipated by the Contract. The notice was anticipated by the
4 original terms of the deal, and there is no dispute that Acton signed it.

5 What might be presented, however, is an issue of whether Fullmer
6 inappropriately gave the notice before he was entitled to under the terms of the Contract.
7 That issue, however, goes to breach of a valid contract, not to whether the Addendum was
8 a legally binding document that memorialized Acton's assent to the closing date.

9 With respect to validity, Acton admitted signing the Addendum, and further
10 admitted that he signed it without a complete understanding of what it required.
11 Nevertheless, the presumption is that he is bound by what he signed. *Campanelli v.*
12 *Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (Nev. 1970) ("when a party to
13 a written contract accepts it is (sic) a contract he is bound by the stipulations and
14 conditions expressed in it whether he reads them or not. Ignorance through negligence or
15 inexcusable trustfulness will not relieve a party from his contract obligations. He who
16 signs or accepts a written contract, in the absence of fraud or other wrongful act on the
17 part of another contracting party, is conclusively presumed to know its contents and to
18 assent to them . . ."), *quoting* *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 111
19 N.E.2d 218 (1953).¹

22 ¹As summarized by the late Professor Farnsworth:

23
24 The fact that one gives the matter no thought does not impair the effectiveness
25 of one's assent, for there is no requirement that one intend or even understand
26 the legal consequences of one's actions. For example, one who signs a writing
may be bound by it, even though one neither reads it nor considers the legal
consequence of signing it. This rule, making a party's intention to be legally

1 Acton argues, however, that to the extent that the Addendum altered legal
2 rights, it was not bargained for. Specifically, Acton argues that the Addendum's
3 acknowledgment that Fullmer did not have to install improvements before the purchase
4 price was due is not binding against him since Fullmer gave no legal consideration for it.

5 Nevada law governs the Contract, and so Nevada law on consideration is
6 relevant here. Nevada adopts the *Restatement of Contracts* view of consideration that "[t]o
7 constitute consideration, a performance or return promise must be bargained for. A
8 performance or return promise is bargained for if it is sought by the promisor in exchange
9 for his promise and is given by the promisee in exchange for that promise." *Pink v. Busch*,
10 100 Nev. 684, 688, 691 P.2d 456, 459 (Nev. 1984), quoting RESTATEMENT (SECOND) OF
11 CONTRACTS § 71(1), (2) (1981). See also *Zhang v. Eighth Judicial Dist. Court of State ex rel.*
12 *County of Clark*, 103 P.3d 20, 23-24 (Nev. 2004) (referring to "better-reasoned view" of the
13 pre-existing duty rule under the *Restatement*); *Berge v. Fredericks*, 95 Nev. 183, 187, 591
14 P.2d 246, 247 (Nev. 1979) (adopting test in context of a contract for marriage); *Unruh v.*
15 *Nevada Nat. Bank*, 88 Nev. 427, 429, 498 P.2d 1349, 1350 (Nev. 1972).

16 As a result, if Fullmer promised to do or refrain from doing anything in
17 exchange for Acton's acknowledgment of the closing date, Acton is bound by the
18 Addendum. But Acton contests that Fullmer gave up anything. In particular, Acton
19 contests that Fullmer exchanged anything of value for that part of the Addendum that
20 states, "[P]er request it is clarified in this addendum that lots are being sold with out all
21 work being finished. Seller does have all utilities and improvements approved by the
22

23 bound irrelevant, has the salutary effects of generally relieving each party to
24 a dispute of the burden of showing the other's state of mind in that regard and
25 of helping to uphold routine agreements.

26 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.7 (2d ed. 2001).

1 county and will be finishing the work in a timely manner.”²

2 Acton argues that the recent case of Zhang v. Eighth Judicial Dist. Court of State
3 *ex rel.* County of Clark, 103 P.3d 20 (Nev. 2004) supports his position. In that case, Zhang
4 had a contract for sale of a house, and entered into a replacement contract for that house
5 that changed the original contract in only one respect: an increased price. When Zhang
6 sought to close on the earlier, cheaper contract, the seller refused to sell, and litigation
7 ensued.

8 The Nevada Supreme Court dispensed with the seller’s argument by invoking
9 the pre-existing duty rule. Since the seller’s bundle of obligations did not change, there
10 was no consideration for the modification. Even the argument that the new agreement
11 represented a novation, and thus the requisite bargained-for exchange was provided by
12 the mutual rescission, could not save the seller’s position:

13 But the better reasoned approach is articulated in the *Restatement*
14 *(Second) of Contracts* and *Corbin on Contracts*, which reject the notion
15 that rescission of a contract that is executory on both sides supplies
16 consideration for a simultaneous new agreement differing in terms
17 of promised compensation. . . . Further, the Restatement and Corbin
18 express concern that overlooking the preexisting duty rule for a
19 simultaneous rescission/modification might permit fraudulent or
20 unfair modifications.

21 *Zhang*, 103 P.2d at 23-24 (citations in original omitted).

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25 ²If valid, of course, Acton would have no cause of action for breach. With the
26 concession that lots were “being sold with out all work being finished,” Acton would be
contractually bound to accept that Fullmer’s demand for final payment was timely.

1 The problem with Acton's argument is that Fullmer did not propose a novation
2 or a rescission. Thus, *Zhang*, and its salutary effort to block evasions of the pre-existing
3 duty rule, is not applicable.

4 But it is also not the case that Fullmer failed to provide consideration for
5 Acton's acknowledgment. The text of the Addendum recites that there was some need for
6 "clarification"; that is, there was some dispute – or need for clarification – over when the
7 improvements were to completed. By executing the Addendum, the parties resolved this
8 point, and their consent to this clarification essentially surrendered this issue. In short,
9 Acton agreed to close without all improvements being done, and Fullmer agreed not to
10 treat Acton's prior actions as a breach. As noted by the Ninth Circuit, when interpreting
11 Nevada law:

12 the general principle of contract law that "[f]orbearance to assert or
13 the surrender of a claim or defense which proves to be invalid is not
14 consideration unless (a) the claim or defense is in fact doubtful
15 because of uncertainty as to the facts or the law. . . ." *Restatement*
16 *(Second) of Contracts* § 74(1)(a) (1981).

17 *Union Oil Co. of California v. Terrible Herbst, Inc.*, 331 F.3d 735, 741 (9th Cir. 2003).

18 As a result, Acton's undertaking in the Addendum — to close on July 19th —
19 was supported by Fullmer's continued preparation for closing instead of for litigation. In
20 short, in light of Acton's purported anticipatory repudiation, for which "clarification" was
21 sought, Fullmer agreed to refrain from suing Acton. Put another way, it is a fair reading of
22 the document that Acton signed that Fullmer had contemplated, in the absence of
23 "clarification," to declare the Contract terminated and seek other purchasers. This was not
24 a frivolous claim, as the remainder of this opinion underscores. Fullmer's implied promise
25 to continue with Acton after he signed the Addendum thus provided the necessary
26

1 consideration.³ Cf. *United Services Auto Ass'n v. Schlang*, 111 Nev. 486, 493, 894 P.2d 967,
2 971 (Nev. 1995) (court will imply promise when "apparent that a binding contract was
3 intended.")⁴

4 Acton is thus bound, at least under Nevada law, to the terms of the Addendum.
5 But he has another argument that, even if consideration were given, he is not bound.

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9 ³Yet another interpretation of the Contract would have the Addendum serve as proof
10 of Acton's adequate assurance of future performance; that is, upon Acton's balking at closing,
11 Fuller requested and received adequate assurance in the form of the Addendum. This
12 interpretation would also not require consideration for the request (since Acton was already
13 bound by the implied obligation to provide such adequate assurance), but Nevada has yet
14 to rule as to whether such an implied obligation exists in contracts governed by the common
15 law. See *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 682
16 N.Y.S.2d 664, 705 N.E.2d 656 (1998) (finding obligation to provide adequate assurance of
17 future performance a part of the common law); *RESTATEMENT (SECOND) OF CONTRACTS* § 251
18 (1981).

19 ⁴Alternatively, the Addendum can be viewed as a simple modification to the Contract,
20 which, under modern contract law, does not require formal consideration. This view is
21 embodied in Section 89 of the *Second Restatement of Contracts*:

22 A promise modifying a duty under a contract not fully performed on either
23 side is binding:

24 (a) if the modification is fair and equitable in view of circumstances not
25 anticipated by the parties when the contract was made; or

26 (b) to the extent provided by statute; or

(c) to the extent that justice requires enforcement in view of material
change of position in reliance on the promise.

See also U.C.C. § 2-209(1) (stating consideration not necessary to support the modification of
a contract under the Uniform Commercial Code). The court does not rest on this ground,
however, since the Nevada Supreme Court has yet to adopt Section 89, although it
consistently tends to follow the *Restatement of Contracts*. See *Union Oil Co. of California v.*
Terrible Herbst, Inc., 331 F.3d 735, 741 (9th Cir. 2003).

b. *Lack of Necessary Court Approval Under Section 363*

Acton next argues that the Addendum is void because no bankruptcy court approval was sought or obtained for it. Again, to the extent the Addendum sets a closing date in accordance with the original offer and Contract, no authorization was necessary, as such actions were already contemplated and present in the Contract when the court approved it. But even if the Addendum did modify the Contract, it is not invalid for lack of authorization. The changes effected by the Addendum were, for the most part, anticipated by the original Contract; no one disputes that the obligation to pay would be triggered by completion of a "successful subdivision."

Moreover, even if the changes weren't explicitly anticipated, they were reasonably foreseeable and did not materially change the estate's obligations. Approval by the court of a transaction outside of the ordinary course of business under Section 363(b) does not set in stone all terms approved, leaving no room for any modifications, unless what is approved is a judicial sale pursuant to some form of auction with skeleton terms. *See, e.g., Winston Inn & Restaurant Corp. v. DeMichiel (In re Winston Inn & Restaurant Corp.)*, 120 B.R. 631 (E.D.N.Y. 1990).

Here, the court did not approve a judicial sale. Rather, it authorized the entry by the estate (via Fullmer) into contracts, the forms of which had been presented to the court and noticed to creditors. By proceeding in this fashion, rather than by a straight judicial sale, the estate (and not the court) became the seller, and approved the sale terms for each sale. Those terms, however, contained a process for amendment. Section 16 of the Contract said, "This Agreement may be modified only in writing signed and dated by both parties." Thus the court approved a modification process, and the Addendum conformed to this process.

Such flexibility is desirable when the parties elect to proceed by approved standard contract rather than by a judicial sale. When non-debtors are able to purchase

1 from the estate on terms and conditions not necessarily satisfied at the time of court
2 approval, common sense dictates that minor changes agreed to by all parties need not be
3 renounced and be placed on the court's docket. For example, the approval of a contract that
4 called for a closing 30 days after the entry of the order approving the sale would not
5 preclude the parties from agreeing to closing in 20 days so long as there was no adverse
6 effect on the estate.

7 Indeed, this type of flexibility is inherent in the Code's decision to divide those
8 activities that require court approval by whether the activity was in the "ordinary course"
9 of the debtor's business. *See* 11 U.S.C. § 363(b)(1), (c). Fullmer's pre-petition creditors
10 assumed the risk of transactions that were in the ordinary course of Fullmer's pre-petition
11 business, and thus no court approval is required for such ordinary course transactions.
12 *See Burlington Northern R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853
13 F.2d 700 (9th Cir. 1988). Transactions outside the norm, however, require the independent
14 review of the court and the creditor body. 11 U.S.C. § 363(b)(1).

15 As a consequence, an estate representative (the role here assumed by Fullmer as
16 debtor in possession) may amend contracts for sales approved by the court so long as the
17 modification itself is of a type that the debtor could or would have made in the ordinary
18 course of its pre-petition business, and so long as the change does not materially modify
19 the estate's obligations. *See In re Dant & Russell*, 853 F.2d at 704-06.

20 Here, the change was the type of transaction that was in the ordinary course of
21 the debtor's business — a modification of an existing contract to set closing dates or to
22 clarify terms. Contractors such as Fullmer execute such types of changes all the time, and
23 there was testimony at trial to that effect. And the change did not result in an adverse
24 effect on the debtor's estate. It either clarified and set the closing date in accordance with
25 the original contract (as the court found at trial), or it set a concrete date for Acton's
26 payment of the purchase price which, in turn, would aid the estate in recovering whatever

1 profit there was to be realized on the sale.⁵

2 All of this means that the Addendum was part and parcel of the Contract. It
3 was anticipated and authorized by the original offer signed by Acton, and thus was
4 anticipated and authorized by the court's order approving the sale.⁶ None of this matters,
5 however, if there was not a "successful subdivision," as that term was used in the Contract.

6 4. Construction of the Term "Successful Subdivision"

7 a. *Initial Procedural Issues*

8 At the beginning of the trial, the court ruled that a series of Acton's requests for
9 admission had been deemed admitted because of Fullmer's failure to respond to them.
10 These admissions were potent and potentially dispositive — they included admissions that
11 a "successful subdivision" included the installation of offsite improvements such as water,
12 power, and paving, and an admission that these offsite improvements had not been
13 installed.⁷ This ruling was based on Acton's counsel's claim of prejudice in marshaling his

14
15 ⁵Moreover, even if the change required court approval, Acton does not have standing
16 to contest it. Under Section 549 of the Bankruptcy Code, unauthorized post-petition
17 transactions may be avoided. The key word is "may." Avoidance is discretionary with the
18 representative of the estate. If Acton had any questions about the estate's performance of its
19 duties, he could have filed an action requesting clarification, or sought to compel the estate
20 to avoid the Addendum. He did neither.

21 ⁶A lot of pain would have been avoided, however, if Fullmer's counsel had borrowed
22 a page from a corporate lawyer's textbook and inserted a clause in the order authorizing the
23 estate, via Fullmer, to take such actions, including any conforming or clarifying amendments,
24 as were necessary and appropriate to conclude the sale.

25 ⁷There were other admissions that were not responded to, but they required Fullmer
26 to make legal conclusions — such as the existence of consideration and the scope of this court's
authorization order — that were legal conclusions, and therefore the request for such
admissions was improper. *See Gallegos v. City of Los Angeles*, 308 F.3d 987, 993 (9th Cir.
2002) (police officer permitted to withdraw admission that stop was arrest in civil action
under Section 1983 since allowing such admission would "confuse" the issues in the case).

1 proof on the meaning of “successful subdivision.” BANKR. R. 7036 (incorporating FED. R.
2 CIV. PRO. 36(b)).

3 Notwithstanding the explicit ruling that Acton’s requests for admission would
4 be deemed admitted, counsel for Acton persisted in introducing evidence and asking
5 questions about the scope of the term “successful subdivision.” Indeed, he even
6 questioned his own client on these terms. Of course, counsel for Fullmer took advantage
7 of these opportunities to further Fullmer’s theory through the evidence thus adduced.
8 These questions and actions effectively reopened the issue, as they contradicted the earlier
9 assertions that proof at trial of such issue would prejudice Acton’s case. “‘The prejudice
10 contemplated by Rule 36(b) . . . relates to the difficulty a party may face in proving its
11 case,’ including problems ‘caused by the unavailability of key witnesses,’ or ‘the sudden
12 need to obtain evidence with respect to the questions previously deemed admitted.’”
13 *Gallegos v. City of Los Angeles*, 308 F.3d 987, 993 (9th Cir 2002), *quoting* *Hadley v. United*
14 *States*, 45 F.3d 1345, 1348 (9th Cir. 1995) *and* *Brook Village N. Assocs. v. General Elec. Co.*,
15 686 F.2d 66, 70 (1st Cir.1982). *See also* *Manatt v. Union Pacific R.R.*, 122 F.3d 514, 517 (8th
16 Cir. 1997), *cert. denied*, 522 U.S. 1050 (1998); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER
17 & RICHARD L. MARCUS, *FED. PRAC. & PROC. CIV.* § 2264 (2d ed.1994 & Supp. 2004).

18 Since Acton was clearly ready and prepared to present evidence on the scope of
19 “successful subdivision,” there would be no prejudice in allowing evidence on the point
20 and holding that the issue was back in play. In short, Acton waived the benefit of the
21 deemed admission. In the words of Rule 36(b), his waiver and lack of prejudice help
22 establish that “the merits of the action would be subserved” by determination from the
23 proof adduced the meaning of “successful subdivision.” Fullmer’s counsel requested and
24
25
26

1 received a ruling to that effect at the close of testimony.⁸

2 b. *The Contractual Meaning of "Successful Subdivision"*

3 From the beginning, the Contract conditioned payment by Acton on completion
4 of a "successful subdivision." Acton's interpretation of this phrase takes the not
5 unreasonable view that a "successful subdivision" is one in a state or condition suitable for
6 Acton to begin building; that is, the streets would be paved, the land graded, and all
7 utilities available for hook-up.

8 While that definition is not unreasonable, it is by no means the only reasonable
9 interpretation. "Successful" could have just as easily been construed as Fullmer contends;
10 that is, "successful" meant in a state in which Fullmer could legally convey title to the
11 particular lot purchased. Under Nevada law, "[a] contract . . . is ambiguous if it is
12 reasonably susceptible to more than one interpretation." *Econ. Forms Corp. v. Law Co.,*
13 *Inc.*, 593 F. Supp. 539, 540 (D. Nev. 1984). As "successful subdivision" is ambiguous under
14 this standard, the parties proffered parol evidence of their views as to its meaning. *See*
15 *Stratosphere Litigation L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1141 (9th Cir. 2002)
16 (interpreting Nevada law); *Farmers Ins. Exch. v. Young*, 108 Nev. 328, 334 n.3, 832 P.2d

17
18 ⁸Acton's counsel continued his odd behavior throughout trial and following judgment.
19 As one example, at trial, he attempted to prove mismanagement by Fullmer through cross-
20 examination. In this effort, he stopped trial to demand an easel and marker (which he had
21 not requested before trial) and then tried to force Fullmer to recreate, on the fly, his profit and
22 loss for the project. Not only was this irrelevant to the claim of specific performance, it was
23 bungled badly. After giving counsel much latitude, the court stopped the testimony because
24 Acton's counsel persisted in mischaracterizing Fullmer's testimony, and it was rambling.

25 After trial, Acton's counsel filed a brief contending that the ten day stay of Bankruptcy
26 Rule 7065 did not count weekends (which was clearly wrong), and even cited the rule in his
brief (Bankr. R. 9006) that proved him wrong. The court reserves judgment on whether to
sanction Acton's counsel under Rule 9011 for failing to read his own pleadings before signing
them.

1 376, 379 n. 3 (Nev. 1992); *Union Bldg. Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d
2 568, 572 (9th Cir. 1978) (“Extrinsic evidence is properly admitted to help ascertain the
3 intended meaning of ambiguous writings.”).

4 When presented with contracts with ambiguous terms, the Nevada Supreme
5 Court has recently stated:

6 The best approach for interpreting an ambiguous contract is to delve
7 beyond its express terms and “examine the circumstances
8 surrounding the parties’ agreement in order to determine the true
9 mutual intentions of the parties.” This examination includes not
10 only the circumstances surrounding the contract’s execution, but
11 also subsequent acts and declarations of the parties.

12 *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 510 (Nev. 2003). *See also* *Ringle v. Bruton*, 120
13 Nev. 82, 86 P.3d 1032, 1039 (Nev. 2004).

14 Following *Shelton*, this court heard the testimony not only of Acton and
15 Fullmer, but also that of White and each of the other three purchasers (who had virtually
16 identical terms in each of their contracts with Fullmer). This evidence overwhelmingly
17 favored Fullmer’s interpretation. Fullmer testified that completion of a “successful
18 subdivision” meant the recordation of the related subdivision map, which then resulted in
19 the issuance of APN designations, and the potential to convey the individual lots to
20 separate buyers. This understanding was shared by the other three purchasers from
21 Fullmer, who each bought at the same time, in the same manner and under very similar, if
22 not identical, terms. Finally, this was the understanding of White, the real estate broker,
23 who was not only Fullmer’s agent, but also Acton’s agent, and the person who penned the
24 disputed clause in each of the four offers.

25 In addition, there was evidence that Fullmer’s interpretation was standard in
26 the construction industry; that is, that Fullmer’s interpretation was consistent with trade

1 usage. *Warrington v. Empey*, 95 Nev. 136, 139, 590 P.2d 1162, 1163-64 (Nev. 1979) (trade
2 custom admissible to interpret terms used in real estate industry). There was evidence
3 from the other purchasers, two of whom were in the construction business, that
4 “successful subdivision” means in the trade exactly what Fullmer said it meant:
5 recordation of the subdivision map and issuance of APN designations. As Acton was not
6 naive in matters of land sales, and also works in the construction trade, the court finds that
7 he knew, or should have known, that the trade usage was incorporated into the Contract.

8 Finally, all the purchasers but Acton testified that they understood that Fullmer
9 needed the balance of their purchase price to complete the necessary improvements. There
10 was testimony that this need was publicly stated at the auction just preceding the court’s
11 approval of the sale. White confirmed this testimony.

12 The witnesses also testified that such an understanding was somewhat contrary
13 to normal practice. Typically, the contractor uses other funds – his own, or a construction
14 loan – to install such improvements, and the purchase price then either reimburses the
15 contractor or pays off the construction loan. But such practices can vary, and the
16 testimony provided three reasons why it varied in this case. First, the court credits the
17 testimony that all purchasers, including Acton, were told that the balance of their funds
18 was necessary to complete the improvements. Second, the purchasers were compensated
19 for such variance by receiving prices that were somewhat below market; indeed, two of the
20 purchasers have subsequently listed their lots for prices in excess of \$240,000, and there
21 was testimony that before the Addendum was signed, one of the purchasers offered to buy
22 Acton’s parcel for \$200,000. Finally, the court’s order approving the sales explicitly
23 required Fullmer to complete all improvements without regard to timing; that is, the
24 court’s order superseded the normal custom that the developer’s obligations to install
25 improvements ended on the date of conveyance, and required him to complete the
26

1 improvements.⁹

2 Against this background, the court finds that the term “successful subdivision”
3 in the Contract meant the date that the subdivision map was recorded, and that Acton, not
4 Fullmer, was in breach for the actions taken after the Addendum was signed. As a
5 consequence, Fullmer should prevail on the merits. But there is one additional reason that
6 Fullmer should prevail.

7 5. Undue Supervision

8 Finally, even if Acton were to prevail on all of his points, this court would not
9 enter a decree of specific performance. Acting in equity, courts have the discretion to
10 decline to order specific performance when such an order would require undue
11 supervision by the court in ensuring compliance with its order. As stated by the late
12 Professor Farnsworth:

13 A court will not grant specific enforcement or an injunction if this
14 would impose on it burdens of enforcement or supervision that are
15 disproportionate to the advantages to be gained. This limitation is
16 most often invoked in connection with construction contracts. The
17 burdens may be particularly heavy if judging the quality of the
18 performance poses difficult problems or if supervision will be
19 required over an extended period of time.

20 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.7 (2d ed. 2001). *See also* CBL &
21 Assocs. v. McCrory Corp., 761 F. Supp. 807, 809 (M.D. Ga. 1991) (finding that specific
22 performance only appropriate when contract is ““definite, certain and clear, and so precise
23

24 ⁹This clause in the order approving the sale should have, and was meant to, assuage
25 any concerns Acton or any other purchaser may have had regarding Fullmer’s obligations
26 continuing after closing, and thus nullified the result that would have obtained under state
 law. *See Thornton v. Agassiz Constr., Inc.*, 106 Nev. 676, 799 P.2d 1106 (Nev. 1990).

1 in its terms as to the thing or things to be done by the party whose performance is sought
2 to be compelled that neither party can reasonably misunderstand it.”), *quoting* Martin v.
3 Bohn, 227 Ga. 660, 662, 182 S.E.2d 428, 430 (Ga. 1971); Dahlberg Bros., Inc. v. Ford Motor
4 Corp., 272 Minn. 264, 275, 137 N.W.2d 314, 322 (Minn. 1965).

5 This equitable principle appears to have been adopted in Nevada. In *Carcione*
6 v. Clark, 96 Nev. 808, 811, 618 P.2d 346, 348 (Nev. 1980), the question was whether specific
7 performance had been properly ordered when there were certain conditions that had to be
8 supervised. In finding that a trial court could order specific performance when such
9 conditions exist, it stated that specific performance is only appropriate when “the court is
10 willing to order it.” *Id.* Given that the trial court in that case “was willing to supervise
11 performance of the agreement,” the court let the decree stand. *Id.* The case here presents
12 the converse: declining to consider specific performance because of the attendant need to
13 supervise Fullmer’s performance under the construction contract. If *Carcione* grants
14 Nevada courts the discretion to supervise specific performance, then it also means that
15 they have the discretion to decline such supervision.

16 Normally, with a decree of specific performance to convey a piece of property,
17 the act of conveyance is sufficiently simple that it can be ordered without involving the
18 court in the minutiae of the dispute. Here, however, Acton would have had the court
19 supervise whether the land was properly graded, whether the street was adequately
20 paved, and whether utilities were sufficiently available. The court declined to act as a
21 construction monitor, and thus would have denied the requested relief in any event.

22 6. Resolution After Trial on Merits

23 After trial, the court concluded that when Acton signed the Addendum, he
24 simply acknowledged that a condition to his obligation to pay the purchase price had been
25 satisfied; that is, he acknowledged that there had been a successful subdivision, and his
26 obligation to pay the purchase price had matured. This conclusion is true regardless of

1 whether the Addendum is given effect as an amendment to the Contract or not. This court
2 found that the Addendum, whatever its other purposes, served to put parties on notice of
3 closing in a manner anticipated by the original contract, and which was within the court
4 approval that was obtained.

5 The court also found that the notice contained in the Addendum was
6 seasonably provided. There was, in short, a "successful subdivision," thereby entitling
7 Fullmer to set a closing date that triggered Acton's obligation to deliver the remainder of
8 the purchase price. When Acton did not pay the purchase price, and instead elected to file
9 his action for specific performance, he, not Fullmer, breached the Contract. The court thus
10 denied the relief sought by Acton.

11 In addition, the court granted Fullmer his requested relief for a determination
12 that Acton's conduct was a material breach of Contract. Clearly, failure to pay the
13 purchase price when due is a material breach of any contract. *See Young Elec. Sign Co. v.*
14 *Fohrman*, 86 Nev. 185, 188, 466 P.2d 846, 847 (Nev. 1970). Upon material breach, the non-
15 breaching party may elect to suspend performance, may elect to cancel the contract, or
16 may elect to terminate the contract and sue for damages. *Goldston v. AMI Investments,*
17 *Inc.*, 98 Nev. 567, 569, 655 P.2d 521, 523 (Nev. 1982) ("A seller of land pursuant to a
18 contract of sale is justified in cancelling the contract if the purchaser has failed to perform a
19 material part of the contract which is a condition concurrent or precedent to the seller's
20 obligations to perform. . . . Failure to tender timely performance can constitute a material
21 breach of contract."); RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

22 Fullmer chose the middle option: cancellation of the Contract. Accordingly,
23 this court entered its judgment on Fullmer's counterclaim to the effect that the Contract
24 had been canceled, and that Fullmer was thereby free to resell the property. In addition,
25 the court ordered that Acton's lis pendens be expunged.

1 B. *Irreparable Injury*

2 Even though he has little likelihood of success on the merits, Acton argues that
3 the other factors regarding a stay pending appeal favor his case. He is wrong.

4 Initially, Acton claims that land is unique, and that the refusal to issue a stay
5 will irreparably injure him through the loss of the ability to buy the land at issue. He is
6 undoubtedly correct that Nevada law historically has treated land as unique, and thus a
7 breach of an agreement to sell real property cannot be adequately compensated by
8 monetary damages. *See Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d 927, 930 (Nev. 1984);
9 *Carcione v. Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348 (Nev. 1980).¹⁰

10 But Acton did not request specific performance in the form of a simple
11 conveyance of land; instead, his complaint requested that Fullmer be ordered to complete
12 his not-insubstantial duties under the Contract, and then convey the property. As noted
13 above, even had Acton proved his case for breach, the court would not have entered an
14 order for specific performance of the construction contract. *See Carcione*, 96 Nev. at 811,
15 618 P.2d at 348 (specific performance only available when “the court is willing to order
16 it.”). Thus, the denial of a stay at this point would not result in injury to Acton since he
17 would not have received the requested relief even had he prevailed on the merits of his
18 breach claim.

19 In addition, Acton alleges that failure to grant a stay will result in his
20 permanent loss of the ability to acquire the Property, and that any subsequent sale by
21 Fullmer will effectively moot his appeal, thus irreparably injuring him. Although the issue
22 is not free from doubt, the majority of cases that have considered the issue have held that
23 the risk that an appeal may become moot does not by itself constitute irreparable injury. *In*

24
25 ¹⁰This is certainly the accepted wisdom of the common law, although anyone who
26 drives 50 or so miles north, south, east or west into the desert surrounding Las Vegas may
find reasonable grounds to disagree that land is always unique.

1 *re* Convenience USA, Inc., 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003); *In re* Sunflower
2 Racing, Inc., 223 B.R. 222 (D.Kan.1998); *In re* 203 N. LaSalle St. Partnership, 190 B.R. 595
3 (N.D. Ill.1995); *In re* Best Prods. Co., 177 B.R. 791 (S.D.N.Y.1995); *In re* Moreau, 135 B.R. 209
4 (N.D.N.Y.1992); *In re* Asheville Bldg. Assocs., 93 B.R. 920 (W.D.N.C.1988); *In re* Kent, 145
5 B.R. 843 (Bankr. E.D. Va.1991); *In re* The Charter Co., 72 B.R. 70 (Bankr. M.D. Fla.1987); *In*
6 *re* Great Barrington Fair & Amusement, Inc., 53 B.R. 237 (Bankr. D. Mass.1985); *In re*
7 Baldwin United Corp., 45 B.R. 385 (Bankr. S.D. Ohio 1984). *But see In re* Country Squire
8 Assocs. of Carle Place, L.P., 203 B.R. 182 (2d Cir. B.A.P. 1996); *In re* St. Johnsbury Trucking
9 Co., 185 B.R. 687 (S.D.N.Y.1995); *In re* Advanced Mining Sys., Inc., 173 B.R. 467
10 (S.D.N.Y.1994); *In re* Grandview Estates Assocs., Ltd., 89 B.R. 42 (Bankr. W.D. Mo.1988).

11 Here, denial of the stay results only in a potentially moot appeal if Fullmer can
12 make the required showings under Section 363(b) to enable him to resell the property to
13 someone else. Acton will have the status of a party in interest with respect to any such
14 request and will be able to make his arguments then as to why resale would not be in the
15 best interests of the estate. If unsuccessful, however, Acton will have something that most
16 disappointed buyers at common law do not have: the benefit of a court ruling that resale is
17 in the best interests of the seller. In this situation, Acton has more protection and
18 opportunity to be heard than in the normal case of the disappointed buyer; he will have
19 the benefit of notice and a hearing that the land at issue will be sold. Given this increased
20 level of participation and protection, and given this court's view that irreparable injury
21 cannot be shown solely from the possibility that an appeal may be moot, Acton has thus
22 not established that denial of a stay will cause him irreparable injury.

23 C. *Substantial Injury to Fullmer*

24 Fullmer contends that a stay pending appeal will cause him substantial injury in
25 the form of deprivation of the ability to reorganize. In the analogous context of injunctions
26 against creditors' actions against chapter 11 insiders necessary for the debtor's business,

1 courts have found that the loss of the ability to reorganize is essentially irreparable injury.
2 *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 752-53 (Bankr. E.D. Pa. 1986). *See also* North Ala.
3 Anesthesiology Group, P.C. v. Zickler (*In re* North Ala. Anesthesiology Group, P.C.), 154
4 B.R. 752, 764 (N.D. Ala. 1993); *In re* Environmental Waste Control, Inc., 125 B.R. 546, 551
5 (N.D. Ind. 1991); 2 COLLIER ON BANKRUPTCY ¶ 105.02[2] (15th rev. ed. 2005).

6 Here, Fullmer contends that if he is not able to resell the land to another
7 individual, he will be unable to complete the project, and will have large claims come due
8 to his various bonding companies. This contention is consistent with his testimony at trial,
9 and the court credits it. The court also notes that the Office of the United States Trustee
10 has sought to dismiss Fullmer's case, or convert it to a chapter 7, with the main argument
11 being that Fullmer has not been able to show profitable operations. The reason for that, in
12 turn, is that Acton breached his obligations to pay Fullmer.

13 As a consequence, the extension of this litigation, through a stay pending
14 appeal, would substantially harm Fullmer by depriving him of the ability to reorganize.
15 This is injury that is hard to quantify. While the cost of the project may be quantifiable,
16 there is more than just cost at stake. Fullmer's reputation and ability to bid successfully for
17 future jobs is also at issue; that is the essence of his individual chapter 11 reorganization
18 case. In a pending motion to approve entry into a new contract for sale, Fullmer has
19 attempted to demonstrate that such a resale contract is in the best interests of the estate.
20 The intangible and difficult to calculate aspects of these injuries also militate in favor of
21 setting no bond, since the injuries that would flow from Fullmer's loss of the ability to
22 reorganize are injuries that cannot be counted with any certainty.

23 *D. Public Interest*

24 The interest of the public in a stay pending appeal is slight. In the context of
25 preliminary injunctions, from which this factor is borrowed, considerations of the public
26 interest involve testing whether the relief requested would affect the public at large, as

1 opposed to the immediate parties to the appeal. *In re* Richmond Metal Finishers, Inc., 36
2 B.R. 270, 273 (Bankr. E.D. Va. 1984). Examples would include injunctions against labor
3 strife that affected more than just the immediate parties, such as the strike by a municipal
4 bus drivers' union, or an injunction against a polluter of a local river.

5 To the extent that the public interest has been considered in the bankruptcy
6 context, courts have identified the achievement of reorganization as a public interest
7 worthy of protection. *In re* Convenience USA, Inc., 290 B.R. 558, 568 (Bankr. M.D.N.C.
8 2003); *In re* Richmond Metal Finishers, Inc., 36 B.R. at 273; First Pennsylvania Bank NA. v.
9 Internet Realty P' ship (*In re* Internet Realty P' ship), 27 B.R. 938, 940 (Bankr. E.D. Pa. 1983).

10 Here, the public interest favors allowing Fullmer to return to his reorganization
11 effort and try to return the property at issue to productive use.

12 *E. Balancing the Equities*

13 On balance, Fullmer prevails. He is likely to prevail on appeal and will suffer
14 substantial injury if a stay is put in place pending the appeal. While Acton's argument that
15 land is unique has some superficial appeal, it is clear that conveyance of the land is not the
16 only action sought to be specifically performed, and this court has already indicated that it
17 would not supervise Fullmer in the completion of his duties under the Contract. To the
18 extent consideration of the public interest is implicated, it also favors Fullmer in his efforts
19 to reorganize.

20 **III. Conclusion**

21 The relevant factors indicate that Fullmer would suffer more injury and damage
22 by a stay than would Acton, and that Fullmer has a better chance of a positive outcome on
23 appeal. Accordingly, this court will deny Acton's request to stay the proceedings here
24 pending appeal.

25 A separate order under Bankruptcy Rule 9021 will be entered concurrently.
26

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