

Clients & Friends Memo

United States Supreme Court Holds that Bankruptcy Code Section 363(m) Does Not Preclude Appellate Jurisdiction on Asset Sale Orders

April 20, 2023

In a ruling issued just yesterday, *MOAC Mall Holdings LLC v. Transform Holdco LLC et al.*, 598 U.S. ----, 2023 WL 2992693 (2023) (“*MOAC*”), the United States Supreme Court (the “**Supreme Court**”) held that Bankruptcy Code section 363(m) is not jurisdictional in terms of appellate review of asset sale orders, but rather, that such section only contains limitations on the relief that may be afforded on appeal. Section 363(m) of the Bankruptcy Code is often relied upon by purchasers of assets in a bankruptcy case as providing finality to any sale order. The section states in relevant part that:

“The reversal or modification on appeal of an authorization under [§363(b) or §363(c)] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.”¹

Aggrieved parties seeking to overturn sale orders have argued that the language in section 363(m) precludes effective appellate review of such orders and controls the appellate court’s jurisdiction with respect thereto. This ruling resolves a split among circuit courts as to whether the language in section 363(m) controls jurisdiction and appellate review.²

Background

MOAC arises in the context of the Sears chapter 11 bankruptcy proceedings, in which the debtor, Sears, Roebuck and Co. (“**Sears**”) agreed to sell most of its assets to purchaser Transform Holdco

¹ 11 U.S.C. §363(m).

² Compare, e.g., *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 247 (2d Cir. 2010), and *In re Walker Cnty. Hosp. Corp.*, 3 F.4th 229, 234 (5th Cir. 2021) (holding that failure to obtain a stay of an order approving a sale or lease is a jurisdictional bar to appellate review); with, *In re Energy Future Holdings Corp.*, 949 F.3d 806, 820 (3d Cir. 2020) (holding that section 363(m) is not jurisdictional and only limits the remedy that an appellate court may fashion that “does not affect the validity of a sale”); *In re Brown*, 851 F.3d 619, 622–23 (6th Cir. 2017); *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 896 n.4 (9th Cir. 2017); and *In re Stanford*, 17 F.4th 116, 122 (11th Cir. 2021).

LLC (“**Transform**”) pursuant to Bankruptcy Code section 363(b)(1). The U.S. Bankruptcy Court for the Southern District of New York issued an order in 2019 approving the sale (the “**Sale Order**”).³ Among the assets conveyed in the sale was the right for Transform to “designate to whom a lease between Sears . . . and some landlord should be assigned.”⁴

One such lease included in the sale was between Sears and landlord MOAC Mall Holdings LLC (“**MOAC**”; and the lease at issue, the “**MOAC Lease**”), which leases spaces to tenants in Minnesota’s Mall of America. After Transform designated the MOAC Lease for assignment pursuant to the Sale Order, MOAC objected to such assignment on the grounds that Sears had failed to provide adequate assurance of future performance under the MOAC Lease, as is required by Bankruptcy Code section 365.⁵ The Bankruptcy Court approved the assignment to Transform over MOAC’s objection (such order, the “**Assignment Order**”), and thereafter denied MOAC’s request for a stay pending appeal.⁶ The Assignment Order thus became effective and the MOAC Lease was assigned to Transform.⁷

MOAC appealed the Bankruptcy Court’s approval of the transfer of the MOAC Lease to the U.S. District Court for the Southern District of New York. The District Court reversed the Bankruptcy Court, holding that Sears had not satisfied the requirements of Bankruptcy Code section 365 concerning a showing of adequate assurance of future performance by Transform. On rehearing of that decision — and despite previously indicating that it would not rely upon section 363(m) — Transform argued that Bankruptcy Code section 363(m) deprived the District Court of jurisdiction to grant MOAC’s requested relief as to the MOAC Lease transfer.⁸ The District Court determined that “Second Circuit precedent bound it to treat section 363(m) as jurisdictional, and thus not subject to “waiver [or] judicial estoppel.”⁹ The U.S. Court of Appeals for the Second Circuit affirmed, also on the basis that section 363(m) is jurisdictional in nature under controlling Second Circuit precedent.¹⁰

On further appeal to the Supreme Court by petitioner MOAC, Transform made two primary arguments: (i) that MOAC’s appeal should be dismissed as moot because the MOAC Lease was

³ *MOAC*, 2023 WL 2992693 at *3 (2023).

⁴ *In re Sears Holdings Corp.*, 616 B. R. 615, 619 (S.D.N.Y. 2020) (“*Sears II*”).

⁵ *MOAC*, 2023 WL 2992693 at *4. Section 365 requires *inter alia* a transferee of a lease to provide assurances that the transferee has a financial condition and operating performance similar to that of the bankruptcy debtor as of the time the debtor entered into the lease.

⁶ *Id.* at *3.

⁷ *Id.* at *4.

⁸ *Id.*

⁹ *Sears II*, 616 B. R. at 624-625.

¹⁰ *MOAC*, 2023 WL 2992693 at *4 (2023).

already transferred out of the Sears bankruptcy estate via the Assignment Order, such that no effective relief was available on appeal, and (ii) that section 363(m) of the Bankruptcy Code deprived the District Court of jurisdiction to review the Sale Order.¹¹

Mootness

Writing for a unanimous Court, Justice Ketanji Brown Jackson addressed Transform's mootness claim, noting that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."¹² The Supreme Court first paraphrased Transform's constitutional mootness argument down to its simplest form: that because the Bankruptcy Court could not undo the transfer from Sears to Transform and reconstitute the MOAC Lease as property of the estate, "any vacatur of the Assignment Order will not matter".¹³ Transform contended that there was no mechanism available under the Bankruptcy Code to transfer the MOAC Lease back into the Sears bankruptcy estate, if MOAC's appeal were to be granted. In addressing this argument, the Supreme Court stated that these kinds of mootness arguments are disfavored, and "decline[d] to act as a court of 'first view' . . . to ascertain ourselves that Transform is correct about its contention that no relief remains legally available."¹⁴ The Supreme Court held that MOAC was seeking typical appellate relief, by asking the District Court to reverse its ruling on adequate assurance and the Assignment Order. Ultimately, the Supreme Court declined to find that no relief was available to MOAC, and remanded the case to the Second Circuit for "further proceedings consistent with this opinion."

Bankruptcy Code 363(m) Is A Non-Jurisdictional Limiting Statute

Bankruptcy Code section 363(m) limits the efficacy of the appeal of a sale order issued by a bankruptcy court pursuant to Bankruptcy Code section 363(b), subject to certain conditions. As Justice Jackson noted, a successful appeal of a section 363 order may not necessarily "impugn the validity of a sale or lease made under [Bankruptcy Code section 363(b) or 363(c)]."¹⁵ Determining whether section 363(m) is jurisdictional, as Transform argued, is significant because jurisdictional statutes "pertain to the power of the court rather than to the rights or obligations of the parties."¹⁶ Given that significance, a statute would only be treated as jurisdictional "if Congress 'clearly states' as much."¹⁷ The Supreme Court indicated that while traditional tools of statutory construction can

¹¹ *Id.*

¹² *Id.* at *5 (2023) (quoting *Chafin v. Chafin*, 568 U. S. 165, 172 (2013) (internal quotation marks omitted)).

¹³ *Id.*

¹⁴ *Id.* at *6, n.4 (suggesting that such a mootness argument would only hold water where the party asserting legally available forms of relief are "wholly insubstantial and frivolous . . . so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit".) (quoting *Steel Co. v. Citizens for A Better Env't*, 523 U. S. 83, 89 (1998)).

¹⁵ *MOAC*, 2023 WL 2992693 at *4.

¹⁶ *Id.* at *6 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 161 (2010)).

¹⁷ *Id.* at *2 (quoting *Boechler v. Comm'r*, 142 S.Ct. 1493, 1494 (2022)).

illuminate a clear statement and “magic words” are not necessary, the statement that a provision is jurisdictional must indeed be clear and not merely “‘plausible’ or ‘better’ than nonjurisdictional alternatives.”¹⁸

After laying out the considerations relevant to determining whether a provision is jurisdictional, the Supreme Court stated that there is “nothing in [section] 363(m)’s limits that purports to ‘gover[n] a court’s adjudicatory capacity.’”¹⁹ Indeed, section 363(m) “plainly contemplates” that appellate courts may reverse or modify authorized sales under section 363, with the following caveat:

“Sometimes, the court’s exercise of power may not accomplish all the appellant wishes, because the reversal or modification of a covered authorization may not “affect the validity of a sale or lease under such authorization” to a good-faith purchaser or lessee under certain prescribed circumstances. §363(m). Thus, the provision consists of a caveated constraint on the effect of a reversal or modification. And the caveat is itself caveated; §363(m)’s constraints are simply inapplicable where the sale or lease was made to a bad-faith purchaser or lessee, or if the sale or lease is stayed pending appeal, or (for that matter) if the court does something other than “revers[e]” or “modif[y]” the authorization.”²⁰

In other words, section 363(m) reads like a statutory limitation that is, under certain conditions, tied to the need for a party to take “certain procedural steps at certain specified times” (here, seeking a stay).²¹ Moreover, the Supreme Court stated that not only is section 363(m)’s “jurisdictional nature” unclear from its own terms, but within its statutory context, “[section] 363(m) does not contain any ‘clear tie’ to the Code’s plainly jurisdictional provisions.”²²

The Supreme Court rejected Transform’s argument that section 363(m) is jurisdictional in nature because it “confirms” that bankruptcy courts exercising *in rem* jurisdiction cannot touch a *res* that is transferred out of the estate (here, the MOAC Lease).²³ The Supreme Court held that the *in rem* argument “teeters on a contorted framing of contested general background principles rather than §363(m)’s text and context.”²⁴ More specifically, the Supreme Court recognized the tension between Transform’s arguments regarding lack of jurisdiction over the *res* and “[section] 363(m)’s

¹⁸ *Id.* (quoting *Boechler*, 142 S.Ct. at 1497).

¹⁹ *MOAC*, 2023 WL 2992693 at *2 (quoting *Henderson v. Shinseki*, 562 U. S. 428, 435 (2011)).

²⁰ *Id.* at *7.

²¹ *Id.*

²² *Id.* at *8.

²³ *Id.* at *9.

²⁴ *Id.* at *8.

express contemplation that courts can touch — and affect the validity of — certain sales or leases (*e.g.*, those made to bad-faith purchasers) due to reversals or modifications of covered authorizations even though the property concerned has left the estate.”²⁵ In rejecting Transform’s argument, the Supreme Court simply stated that it saw “nothing in §363(m)’s limits that purports to gover[n] a court’s adjudicatory capacity.”²⁶

Section 363(m): Use It Or Lose It?

Purchasers of assets under section 363 of the Bankruptcy Code often rely upon section 363(m) for certainty and comfort in the aftermath of a section 363 sale of a debtor’s assets. However, *MOAC*, while not necessarily diminishing the power of section 363(m), does clarify the contours of its use: namely, that purchasers must raise section 363(m) protections promptly, and cannot rely on this provision as a “golden ticket” to conclusively avoid the appeal process. Moreover, purchasers must also be cautious that their post-sale conduct does not result in an intentional or unintentional waiver of their rights under section 363(m) or otherwise open such purchasers up to judicial estoppel or mootness arguments.

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²⁵ *Id.* at *9.

²⁶ *Id.* at *2 (citing *Henderson*, 562 U.S. at 435).