

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ONEIDA LAKE DEVELOPMENT, INC.,
d/b/a Wood Pointe Marina

CASE NO. 89-01639

Debtor

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it a motion by Michael J. O'Connor, Esq. ("Trustee") appointed herein pursuant to §1104 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") to settle a controversy and modify an Order of this Court approving the sale of the Wood Pointe Marina ("Marina") owned by the Debtor herein, to one Michael Sacco ("Sacco").

The contested matter appeared on the Court's motion calendar at Syracuse, New York on May 21, 1991 and at that time the parties appearing announced, after brief argument, that an order resolving the controversy and modifying the Order of this Court dated March 22, 1990, which approved the sale of the Marina to Sacco ("Sale Order") had been consented to. The Court was advised that the new order ("Modified Order") would be submitted to the Court forthwith.¹

On May 29, 1991, the Court received the proposed Modified Order from the attorney who represented Sacco in connection with the sale, Lee Woodard, Esq. ("Woodard").

Woodard requested that the Modified Order be held "a couple of days" in the event that any of the parties appearing at the May 21, 1991 hearing might object to it.

On June 6, 1991, the Court notified Woodard that the Modified Order required the affirmative written consent of the parties appearing at the May 21, 1991 hearing, and returned the

¹ The Court notes that no supporting papers were filed with the Trustee's Notice of Motion, but rather the Notice contained the following statement "PLEASE TAKE FURTHER NOTICE that a copy of the supporting application and exhibits can be obtained from Michael Jude O'Connor, Esq., 33 Second Street, P.O. Box 1054, Troy, New York 12181 upon request free of charge". This Court has gleaned the "controversy" and the proposed modifications from the answering papers, oral argument and the Modified Order.

proposed Modified Order to Woodard.

Thereafter, by letter dated July 16, 1991, Woodard notified the Court that he had secured consents to the Modified Order from all parties appearing at the May 21, 1991 hearing with the exception of Thomas K. Crowley ("Crowley"), an alleged judgment creditor of the Debtor, and requested that the Court return the contested matter to its motion calendar to be held in Utica, New York on July 23, 1991 for a further hearing.

At the July 23rd hearing, Woodard offered up written consents to the Modified Order in its entirety from all the parties appearing at the May 21, 1991 hearing except that of Crowley. The Court had previously received correspondence from Crowley's attorney, Edward A. Mervine, Esq. ("Mervine"), dated May 29, 1991, setting forth his objections to the Modified Order.

Following the July 23, 1991 hearing, the Court gave all parties until July 26, 1991 to submit any additional affidavits and has considered herein all affidavits filed by the parties as of July 26, 1991 in connection with the motion to settle the controversy and modify the sale order.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this contested matter pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157(b)(1) and (2)(A) and (N).

FACTS

On March 13, 1991, the parties appearing herein, as well as other parties in interest, appeared before the Court in response to an Order of the Court to Show Cause why the Debtor should not be permitted to sell its "right, title and interest in real estate owned by it, commonly

known as Wood Pointe Marina, together with all physical assets contained therein, in accordance with the terms of certain offers to purchase same," (See Order to Show Cause dated March 6, 1990).

The March 6, 1990 Order further provided that the sale was to be "free and clear of all liens, claims, incumbrances and interests with said liens, claims, incumbrances and interest to attach to the proceeds of sale". Id.

Said Order further indicated that an offer to purchase in the sum of \$625,000 had been received by the Debtor from David Pelland, Esq. ("Pelland") in accordance with a letter of intent, but that the Court would receive other offers on the date of the hearing. It appears that the Pelland offer was made on behalf of a "Tom Faulkner and other principals and investors related to Tri-Bridge Marina, Inc." Id.

At the March 13, 1990 hearing, Debtor's counsel, Harold P. Goldberg, Esq. ("Goldberg") indicated that he had received, that morning, a written offer from Sacco and proceeded to outline on the record the terms of the Sacco offer. Both Sacco and Woodard were present at the hearing.

As the hearing progressed, bidding continued between only two bidders, Sacco and Vaughn Lang, Esq. ("Lang"). Ultimately the final offer of Sacco, at \$750,000, was recommended by Debtor's counsel, and approved by the Court. At the hearing, the Court also approved the appointment of a Trustee to be appointed pursuant to Code §1104.

On March 22, 1990, the Court executed the Sale Order, which had been submitted and presumably drafted by Debtor's counsel Goldberg. The cover letter accompanying the Sale Order indicated that "A draft of this order was forwarded to Attorney Lee Woodard and he has agreed to same." (See letter of Harold P. Goldberg to U.S. Bankruptcy Court dated March 16, 1990).

The Sale Order provided for the sale of the Marina to Michael Sacco for \$750,000,

... by the terms of which the said Michael Sacco shall: Assume the first mortgage outstanding on said real property which will be brought current at the time of closing. Micheal (sic) Sacco shall, in addition, receive a credit towards the purchase price on the outstanding second mortgage held by him; the approximate sum of \$240,000 will be paid in cash to the trustee appointed by this Court and the approximate sum of \$125,000 to be paid by the said Micheal (sic) Sacco tendering a note mortgage to the debtor in the approximate sum of \$125,000, to be amortized over a period of 20 years, with interest at 9% per annum and according to the terms of said mortgage no payments of principal or interest shall be made by the said Michael Sacco for a period of two years from the date of closing nor shall interest accrue during said period, and that the mortgage shall be paid in its entirety between the second year following closing and the sixth year following closing, by equal monthly payments to the trustee appointed by this Court, the said balance of said mortgage being due and payable in its entirety on the 6th anniversary date following closing.

(See Sale Order of March 22, 1990, page 2).

The Sale Order further provided

... that said trustee appointed pursuant to section 1104 upon this court's reconsideration of its order converting this case to chapter 7, shall have full authority to apply to this court for an order authorizing the purchaser to enter into possession prior to closing, subject to such terms and conditions as may be agreed upon between the parties and approved by the trustee, ...

and finally the Sale Order also directed,

that counsel for the debtor and the purchaser shall as expeditiously as possible attend to a closing of this matter subject to the rights of a trustee as set forth herein, ...

(See Sale Order of March 22, 1990, page 3).

Thereafter, Sacco went into possession of the Marina pursuant to a Pre-Closing Agreement which was apparently executed on or about June 1, 1990 by Sacco and or on about July 27, 1990 by the Trustee. (See Exhibit 2 attached to Affidavit of Russell L. Egleston, sworn to May 10, 1991).

No closing of the sale ever thereafter occurred, however, and a dispute between Sacco, the Trustee and Debtor's counsel ensued which has resulted in the instant motion.

The Modified Order purports to resolve that dispute by modifying the Sale Order to provide 1) that Sacco shall receive a further credit against the purchase price of \$5,000 in consideration of waiving an "environmental condition contingency"; 2) that Sacco shall be entitled to a credit for the balance due on a telephone system that was leased by and not owned by the Debtor; 3) that Sacco will assume the telephone lease and pay it off; 4) that real property taxes will be prorated as of July 27, 1990 on closing; 5) that \$125,000 mortgage to be given to the Debtor as part of the purchase price will be subordinated to a \$245,000 mortgage loan made to Sacco by Cayuga Savings Bank; and 6) Sacco's attorney shall be compensated up to \$10,000 by the Trustee from the funds of the Debtor's estate for services rendered by the attorney following entry of a judgment of foreclosure on Sacco's mortgage, which occurred pre-petition in accordance with Code §506 and subject to the approval of the Court.

ARGUMENTS

Crowley, who acknowledges that his judgment may be set aside as a preference, objects to the Modified Order on several grounds as a potential unsecured creditor of the Debtor.

He objects in particular to the fact that Sacco has been in possession of the Marina for approximately one year without the payment of any rent to the Debtor and that Sacco now seeks certain credits against the purchase price as well as its attorneys' fees paid from the Debtor's estate, thus minimizing, if not eliminating altogether any possible distribution to unsecured creditors. (See correspondence from E.Mervine dated May 29, 1991).

While not set forth in Crowley's papers, the Court has been advised by the Trustee that of the approximately \$245,000 in cash to be paid by Sacco at closing, only about \$30,000 would

be available to be distributed to unsecured creditors and the instant credits sought by Sacco by way of the Modified Order will significantly erode that fund.

The Trustee and Woodard contend that they have worked feverishly to save the "deal" and they believe that under the circumstances, the Modified Order is the product of their efforts. Woodard suggests that unless a closing can occur by August 1, 1991, the sale will be off and the estate will be involved in litigation for several years.

DISCUSSION

While the Court can discern no singular cause leading to failure of the parties to consummate the sale of Debtor's Marina pursuant to Sale Order, it is clear that there are many factors attributable to both sides which have resulted in the Trustee now seeking a Modified Order.

It is obvious that the Sale Order did not provide for the credits and contingencies which are presently sought by Sacco. While it is clear that if the proposed Offer to Purchase delivered by Sacco to Goldberg on March 13, 1990, the date of the hearing before this Court, had been made known in its totality to the parties appearing at the hearing, there either would be no need for a Modified Order now or Sacco may not have been the successful bidder.

At the March 13, 1990 hearing Goldberg stated what was purported to be Sacco's offer on the record and his statement was affirmed on the record by Woodard with the exception of price which Woodard corrected to \$625,000.

In fact Goldberg's statement of Sacco's offer omitted significant conditions that were contained in the proposed written Offer to Purchase and those omissions were never supplied at the hearing by Woodard or Sacco. Perhaps the most significant of those omissions was Sacco's written

condition that the mortgage to be given to the Debtor was to be subordinate to a "financing mortgage" granted to Sacco for the construction and reconstruction of improvements. (See Offer to Purchase filed with the Clerk of the Court on March 13, 1990).

It is equally clear that some of the other credits against the purchase price now sought by Sacco, though provided for in the proposed written Offer to Purchase, were never placed upon the record at the March 13, 1990 hearing, nor were they incorporated in the Sale Order which specifically provided that the "debtor, with the consent of the trustee appointed pursuant to Section 1104, shall execute such documents and do such things as are necessary to implement and effect the sale in accordance with the terms of the offer made in open court by the said Michael Sacco." (emphasis supplied) (Sale Order, page 5).

The Court has examined numerous letters sent by and between Goldberg, O'Connor and a Russell L. Egleston, Esq. ("Egleston") who apparently also represented Sacco in connection with the purchase of the Marina, as well as the various affidavits filed by the parties herein. The Court has also examined the Pre-closing Agreement previously referred to, which in fact was never submitted for approval nor approved by the Court despite such a requirement in the Sale Order. There was no provision in that Agreement for the payment of rent by Sacco in the event that a closing did not occur within a specified period, and therefore, the Court finds itself unable to impose that condition on Sacco some sixteen months later.

Crowley does not appear to oppose the subordination of the Debtor's mortgage to Sacco's construction financing, and at the hearing before this Court on July 23, 1991, both the Trustee and Woodard advised the Court, without opposition, that that mortgage remains fully secured in spite of being primed by the construction loan and is not being otherwise affected by the Modified Order.

The "credits" that Crowley apparently objects to in the Modified Order include 1) a

\$5,000 credit for waiving an environmental condition contingency and 2) an unknown credit for Sacco's assumption of a lease of the Marina's phone system, which apparently was represented by Debtor at the time of sale to be owned rather than leased. In addition, Crowley specifically objects to an award of attorneys' fees to Sacco's counsel to be paid from the purchase price pursuant to Code §506(b) for services rendered subsequent to the entry of a judgment of foreclosure in Sacco's favor, not to exceed \$10,000 as approved by this Court.

Clearly, the credits and attorneys' fee sought by way of the Modified Order were not authorized by the Sale Order, nor were they factors made known to the parties or the Court during the bidding process on March 13, 1990, save possibly Goldberg, Woodard and Sacco. Nor were they made known to the parties or the Court by way of the Sale Order which was drafted by Goldberg and approved by Woodard.

Restructure of the Sale Order more than a year later by providing the purchaser with credits and attorneys' fees which were perhaps carelessly overlooked at the time of sale, particularly when such adjustments will impact adversely on the unsecured creditors of the estate, should not be approved by the Court over creditor objection, despite its broad equity powers to vacate its own orders. Wayne United Gas Co. v. Owens-Illinois Gas Co., 300 U.S. 131, 137, 57 S.Ct. 382, 385, 81 L.Ed. 557 (1937).

While it is true the unexecuted proposed Offer to Purchase filed by Sacco with the Clerk of this Court on the date of sale would appear to support his claim to a credit for waiving the environmental condition contingency, subordinating the Trustee's mortgage to construction financing and awarding post-judgment attorneys' fees, that proposed offer was not before the Court or the other bidders during the bidding process, by specific reference, judicial notice or otherwise, and most significantly was not encompassed in the Sale Order.

A judicial sale, particularly one which was consummated more than a year ago, cannot be restructured to the advantage of the successful bidder over the objection of creditors, unless it can be clearly established that the sale was "tinged with fraud, error or a similar defect which would in equity affect the validity of any private transactions." 4A COLLIER ON BANKRUPTCY ¶70.98[16], 1183, 1184-04 (14th ed. 1967); In re Burr Mfg. & Supply Co., 217 F. 16, 19 (2d Cir. 1914); In re General Insecticide Co., Inc., 403 F.2d 629, 630-31 (2d Cir. 1968); see also In re Todem Homes, Inc., 51 B.R. 883 (Bankr. S.D.N.Y. 1985); In re University Avenue Properties, 55 B.R. 986 (Bankr. E.D.Wisc. 1986).

Clearly here there is no allegation of fraud and the only actual error the Court perceives was the representation that the phone system was owned by the Debtor, when in fact it was leased from a third party. The remainder of the credits now sought in the Modified Order simply resulted from inadvertence and regrettable informality in the bidding process on the part of certain participants.²

Based upon the foregoing, the Court will modify the Sale Order as follows:

1) The purchaser shall be entitled to a credit of an amount equal to the remaining balance to Manufacturers and Traders up to a maximum of \$5,000 on a certain phone lease on the phone system located at Trade-A-Yacht, Inc.

2) The purchaser, in consideration for credit on the telephone lease shall agree to hold the Debtor and Debtor's guarantor, Jack Yoffa, harmless from any liability on the remainder

² With regard to Sacco's claim to attorneys' fees up to any amount not to exceed \$10,000, the Court notes that to the extent that Sacco may have a right to such fees to the extent approved by this Court in accordance with Code §506(b), they may properly be included within the credit Sacco is to receive toward the purchase price "on the outstanding second mortgage held by him." (Sale Order, page 2).

of that lease and further agrees that if the lease has been paid off by the guarantor, that the money shall be applied directly to said guarantor.

3) The real property taxes assessed against the premises, both pre-petition and post-petition shall be prorated between the estate and the purchaser as of July 27, 1990, the date upon which purchaser took possession of the premises, and that to the extent that such taxes are assumed and paid at or prior to closing, purchaser shall be entitled to a credit against the purchase price, or if not so assumed and paid by the purchaser, shall be paid from the proceeds of the said closing.

4) The purchase money mortgage of \$125,000 provided by the Debtor as part of the purchase price may be subordinated to a \$245,000 mortgage loan to be made by Cayuga Savings Bank to the purchasers.

IT IS SO ORDERED.

Dated at Utica, New York

this day of July, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge