UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HOTEL SYRACUSE	CASE NO. 01-64962
Debtors	Chapter 11

APPEARANCES:

HANCOCK & ESTABROOK, LLP Counsel for Debtor 1500 MONY Tower I P.O. Box 4976 Syracuse, New York 13221	STEPHEN A. DONATO, ESQ. Of Counsel SONYA G. BONNEAU, ESQ. Of Counsel
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Hon. Stephen D. Gerling, Chief .S. Bankruptcy Judge

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

Presently before the Court is a motion to approve the sale of certain assets ("Hotel Assets"[1]) of the Hotel Syracuse, Inc. ("Debtor") to First Bank of Oak Park and Titan Management, L.P.(jointly referred to as the "Secured Lender"). The sale was conducted on September 4, 2002, in Utica, New York, and the only bid received was the credit bid of the Secured Lender in the amount of $10,935,000.

The Court received an offer of proof from the Debtor in connection with the sale on September 4, 2002, in support of its assertion that there was a good business reason to approve it. After hearing oral argument from the parties and receiving the offer of proof, the matter was submitted for decision on September 11, 2002.[2]

JURISDICTIONAL STATEMENT

[1] Hotel Assets are comprised of (i) four owned parcels of land, together with building improvements thereon, including The Hotel Syracuse, (ii) the Debtor's rights to the name The Hotel Syracuse; (iii) personal property consisting of the Debtor's inventory, supplies, furnishings, equipment, machinery, fixtures, licenses and permits; (iv) the Debtor's rights as a party to various tenant leases at the hotel premises; and (v) the Debtor's rights as a party to various executory contracts and leases. They do not include cash, accounts receivable, although subject to the Secured Lenders security interest, security deposits, any estate causes of action or claims against third parties, general intangibles, including, but not limited to tax and insurance refunds, deposit accounts and claims under insurance policies . . .

[2] Following the sale, the Debtor requested additional time to determine which executory contracts and/or leases would be assumed or rejected. It was agreed that a conference call would be held with the Court on September 11, 2002, for that purpose.

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (N) and (O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on August 13, 2001. The Debtor operates a 600 room full service hotel in Syracuse, New York, and employs approximately 275 people. According to the Debtor's offer of proof, of its 600 rooms, only 458 are currently available to be rented allegedly due to the fact that the remaining rooms need to be refurbished. Debtor also indicates that it experienced operating losses of $543,000 and a drop of gross revenues of $1.9 million between 2001 and 2002. *See* Debtor's Exhibit 2. The Debtor also lost its franchise with the Radisson Hotel chain. In addition, the Debtor indicates that real property taxes of approximately $518,000 have not been paid since the Debtor filed its petition.[3] *See id.*

Pursuant to a Consolidated Promissory Note, dated March 25, 1999, Debtor borrowed $13,650,000 from Titan Management, L.P. ("Titan")[4]. As security for the loan, the Debtor executed a Consolidation, Modification, Spreader and Extension Agreement, dated March 25,

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[3] On September 11, 2002, the parties had a conference call with the Court to apprize it of which executory contracts and leases would be assumed by the Debtor and assigned to the Secured Lender. In that conversation, counsel for the City of Syracuse indicated that the delinquent real property taxes may actually amount to approximately $1.5 million.

[4] Allegedly at the time the loan was made, Titan and First Bank of Oak Park were partners on the loan. Shortly after the Debtor filed its petition, management shifted to First Bank of Oak Park with it allegedly having a 90% participation and Titan a 10% participation.

1999 ("Consolidation Agreement"), granting Titan a mortgage on certain real property on which the Debtor's hotel is operated and a security interest upon and in substantially all of Debtor's personal property, including, without limitation, rents, account receivables, etc. As of the date of filing of the Debtor's petition, Titan was owed in excess of $15,353,565, according to its proof of claim filed on March 18, 2002.

On July 25, 2002, the Debtor filed a motion requesting an Order (I) authorizing the Debtor to conduct an auction sale of the Hotel Assets, free and clear of liens, claims and encumbrances outside the ordinary course of business; (ii) establishing and approving the Bidding Procedures; (iii) scheduling a date for the auction and the sale hearing; (iv) authorizing the Debtor to assume and assign certain executory contracts and unexpired leases.

Objection to the proposed bid packet and sale terms were filed on behalf of the Official Unsecured Creditors' Committee ("Committee") on August 2, 2002, based on the belief the Court lacked jurisdiction "to conduct a sale under 11 U.S.C. § 363 that generates nothing for the estate" in the event that the sale was only to result in a credit bid by Titan. It contended that the Debtor should not be allowed to circumvent the objections impaired creditors would be able to assert in the context of a plan of reorganization.

An objection was also filed by the U.S. Trustee ("UST") on August 7, 2002, asserting that the sale would result in no discernible benefit to creditors and that it also fails to provide sufficient information to enable creditors to determine whether it is the best means of liquidating the Hotel Assets. The UST expressed concerns that there would be no bona fide purchaser of the hotel under the bidding procedures set forth by the Debtor and, thus, it would be an exercise in futility and not in the best interests of unsecured creditors.

The motion was heard on August 9, 2002, in Utica, New York. Following oral argument by the parties, the Court signed an Order on August 9, 2002, granting the relief sought by the Debtor. In so doing, it made certain revisions to the terms of sale set forth in the original motion. For instance, it provided that any competing offers must be an amount not less than the upset price of $8,500,000 (¶ 3(vi) of the Order, rather than the original amount of $12,500,000.

As noted above, a sale was conducted on September 4, 2002, and the Secured Lender was the only bidder for the Hotel Assets with a credit bid of $10,935,000. On September 11, 2002, the Debtor informed the Court that it would be assuming and assigning to the Secured Lender certain leases and executory contracts, including a lease with the City of Syracuse for the nearby parking garage utilized by hotel guests and two collective bargaining agreements with Local 150 of the Hotel Industry Union and Local 71 of the International Union of Operating Engineers, respectively. The cure amount of $31,794.47 would be funded by the Secured Lender in addition to the amount of its credit bid.

ARGUMENTS

With respect to the marketing of the Hotel Assets, Debtor indicates that through the efforts of its property manager, its principals and their attorneys, discussions with other prospective purchasers over the year since filing of the case have occurred. These discussions have been in the range of $9 - $10 million with no actual offers having been made. Ten entities were given notice of the sale on September 4, 2002, and four others who made inquiry were furnished with information. In addition, a notice of sale of the Hotel Assets was published in the

national edition of *The Wall Street Journal* on August 16, 2002. The Debtor did not retain a broker to market the Hotel Assets.

In support of the sale, the Debtor directs the Court's attention to the fact that it is subject to the payment of the real property taxes. In addition, certain executory contracts and leases will be assumed and assigned to the Secured Lender. Debtor indicates that at least for now the Secured Lender intends to continue operation of the hotel, thereby preserving the jobs of as many as 275 employees. It is the Debtor's position that neither the Committee nor the UST have established that the unsecured creditors would receive more if the sale is not approved. Debtor points out that there is nothing in the Bankruptcy Code, specifically Code § 363, which requires a secured creditor to provide a "carve out" to unsecured creditors from the proceeds of a sale of a debtor's assets outside the ordinary course of business.

The Committee takes the position that Congress, in enacting the Bankruptcy Code, did not envision a sale of substantially all of a debtor's assets without there being some benefit to the unsecured creditors. In this case, the Committee contends that the only benefit of this sale is to the Secured Lender, which could have just as easily been granted relief from the automatic stay and been allowed to foreclose on the property in a state court. The Committee points out that the Secured Lender, by being assigned certain executory contracts and leases following their assumption by the Debtor without having to renegotiate their terms, is receiving a valuable benefit, which it could not otherwise obtain in any foreclosure sale. The Committee takes exception to the fact that it is paying only $31,794.47 in cure payments for "this benefit," which it calculates represents "approximately 27% of the scheduled $118,503.08 needed to cure under

the assumed contracts." *See* Letter of Richard L. Weisz, Esq., date September 12, 2002.[5]

The UST's concerns rest largely on the precedential impact on the integrity of the bankruptcy system if this Court approves a fully secured sale pursuant to Code § 363(f) without requiring a carve out for the unsecured creditors. The UST argues that it will chill any chance a creditors' committee might have to retain legal representation. The UST contends that creditors will be reluctant to become involved in a case if they are unable to get legal representation paid for by the estate.

The Debtor responds that there is nothing in Code § 363 that requires that the unsecured creditors receive a benefit/distribution before the sale of substantially all of the Debtor's assets can be approved by the Court. Debtor's counsel points out that this is not the "garden variety" § 363 sale and should have limited precedential impact on other § 363 sales.

DISCUSSION

> A Chapter 11 debtor may in certain circumstances sell all or substantially all of its assets, or a substantial asset, pursuant to 11 U.S.C. Section 363(b) prior to confirmation of a plan of reorganization. . . . However, before such a sale can be approved the court must . . . "expressly find from the evidence presented before [it] at the hearing a good business reason to grant such an application."

In re Naron & Wagner, Chartered, 88 B.R. 85, 87 (Bankr. D.Md. 1988), quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

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[5] The UST asserts that the "aggregate payment of only $31,794.47 for the assumption of these contracts and leases lacks any credible consideration." *See* Letter of Guy A. Van Baalen, Assistant U.S. Trustee, dated September 13, 2002.

Debtor's counsel indicates that the case was commenced in August 2001 in order to stay the foreclosure action commenced by the Secured Lender. During the past year, there has been no motion to dismiss the case based on an assertion that the petition was filed in bad faith. The Debtor indicates that over the past twelve months it has marketed the property, albeit without a real estate broker, and has had discussions with several prospective buyers. However, it has been unable to obtain a viable offer. Over that same period, the Secured Lender agreed to the use of its cash collateral to continue the Debtor's operations. At the same time, it has also seen its secured position primed by additional real property taxes of at least $500,000.

The Debtor indicates that since filing it has experienced a drop in gross revenues of $1.9 million. *See* Debtor's Exhibit 2. At the same time, the Court notes that the Debtor has also been able to reduce its departmental expenses from approximately $3 million to $1.7 million, a reduction of $1.3 million. The Debtor in its offer of proof also notes operating losses of $543,000. This is actually a reduction in losses from the year previous in which they totaled $1.15 million. However, one factor influencing this reduction was the fact that the payment of debt service decreased from $794,137.50 as of July 2001 to $5,000 as of July 2002.

The Second Circuit Court of Appeals in *Lionel* provided a list of facts for a bankruptcy court to consider when evaluating a sale pursuant to Code § 363(b). *See Lionel*, 722 F.2d at 1071. The Court of Appeals noted that the list was intended to provide some guidance to the bankruptcy court and was not intended to be exclusive. *Id.* Indeed, this Court previously found that some of the factors identified by the court in *Lionel* had no application when considering a sale that would have the effect of total liquidation of a debtor's assets, as is the case herein. *See In re Oneida Lake Development, Inc.,* 114 B.R. 352, 355 (Bankr. N.D.N.Y. 1990).

In *Oneida Lake Development* this Court focused on three factors: (1) amount of time elapsed since filing, (2) the proceeds to be obtained from the sale of the property, and (3) whether the asset was increasing or decreasing in value. As discussed above, it has been approximately a year since the Debtor filed its petition. During that time, it has examined its options and made a determination that liquidation, rather than reorganization, was its best course.

No one appears to dispute that the Debtor's situation, despite its cost cutting efforts and the employment of new management, has worsened over the past year. It lost its franchise with the Radisson chain of hotels. The revenues have decreased and it has not been possible to pay either real estate taxes or debt service.

The main point of controversy centers on the proceeds to be obtained should the sale to the Secured Lender be approved.

Obviously, there is no cash to be generated from the credit bid of $10,935,000. Certain creditors will be receiving payment of approximately $31,794.47 in connection with the assumption and assignment of certain lease agreements and executory contracts. These monies are to be paid by the Secured Lender, in addition to its credit bid. It will also be paying the real property taxes, which have been represented to the Court as being between a half million dollars and one and a half million dollars. Also, counsel for the Secured Lender has represented to the Court that the hotel will not be going dark for the time being, thereby continuing to employ upwards of 275 individuals.

The Committee and the UST, in opposing approval of the sale, have presented the Court with no good business reason not to approve the sale. *See Lionel*, 722 F.2d at 1071 (noting that the court should consider whether those opposing the sale produced evidence that the sale was

not justified). At the hearing on September 4, 2002, the Committee and the UST were unable to demonstrate that the unsecured creditors would be better off if the sale were not approved. The Committee insists that the Secured Lender should be forced to go to state court and foreclose on the real property. The Committee seems intent on making things more difficult and more expensive for the Secured Lender, despite the fact that the Secured Lender has already experienced a year's delay in its foreclosure of the property. The Committee directs the Court to the fact that in some cases the creditors that will be receiving payment in connection with the leases and executory contracts will be receiving less than the cure amount acknowledged by the Debtor to be due and owing. The Court was not a party to those negotiations and can only hypothesize that those creditors may have taken the view that "a bird in the hand is worth two in the bush" for the time being. It is not the Court's role to second guess the negotiations of the Secured Lender. Instead, it must simply consider the fact that some creditors will be getting payment that they might otherwise never see but for the assumption and assignment of those contracts as part of the sale to the Secured Lender.

This Court concurs with an observation made by Bankruptcy Judge Peter J. Walsh in the *Trans World Airlines* case, namely that

> [t]here is nothing in the statute that requires a § 363(b) sale to provide a pro rata distribution to all unsecured creditors or even any distribution to all unsecured creditors. Had Congress intended that result, it could have easily drafted the section to so provide.

In re Trans World Airlines, Inc., 2001 WL 1820326, slip op. at *11 (Bankr. D. Del. 2001). Under the standard set out by the Second Circuit in *Lionel,* all the Debtor need establish is a good business reason for the sale, which in this case the Debtor has done.

The UST has expressed concerns about the precedential impact the Court's decision may have in making it more difficult to obtain the active participation of creditors' committees in chapter 11 cases. Whether or not a court approves a sale of all or substantially all of the assets of an estate pursuant to Code § 363(b) will depend on the facts in each case. In approving the sale of the Hotel Assets, the Court is merely acknowledging such a sale as one option for which there may be good business reasons to approve. The Court is certainly not blind to policy considerations. In this case, one must also consider the interests of the local economy in seeing that the hotel continues to operate in the Syracuse community. Approving the sale will also allow the Debtor to shift its focus to other estate matters, including the possible pursuit of chapter 5 causes of action and the formulation of a plan.

Based on the foregoing, it is hereby

ORDERED that the sale of the Hotel Assets to the Secured Lender for the credit bid of $10,935,000 is hereby approved; it is further

ORDERED that the Debtor's motion seeking authorization to assume and assign certain leases and executory contracts set forth in Exhibits A and B as modified in the correspondence to the Court from Stephen A. Donato, Esq. dated September 11, 2002, to the Secured Lender, is granted.

Dated at Utica, New York

this 19th day of September 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge