In the United States Bankruptcy Court

for the Northern District of Iowa

4810 BUILDING CORP. INC. *Debtor(s).*	Bankruptcy No. 99-02444-C Chapter 11
Mary Patricia Carroll *Debtor(s).*	Bankruptcy No. 99-02445-C Chapter 11

ORDER RE MOTION FOR PRIVATE SALE OF REAL ESTATE FREE AND CLEAR OF LIENS

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF IOWA

IN RE:	Chapter 11
4810 BUILDING CORP., INC.,	Bankruptcy No. 99-02444-C
Debtor.	
IN RE:	Chapter 11
MARY PATRICIA CARROLL	Bankruptcy No. 99-02445-C
Debtor.	

ORDER RE MOTION FOR PRIVATE SALE OF REAL ESTATE FREE AND CLEAR OF LIENS

On November 2, 1999, the above-captioned matter came on for hearing on Debtor's Motion for the sale of real estate free and clear of liens pursuant to 11 U.S.C. §363(b)(1). Debtor appeared by Attorney Thomas Fiegen. Jim Cofer Properties, Inc. appeared by Attorney John Titler. The Iowa Department of Revenue and Finance was represented by Attorney John Waters. The U.S. Trustee's Office was represented by Assistant U.S. Trustee John Schmillen. Summary evidence was presented and the parties were allowed to present and argue their positions after which the Court took the matter under advisement.

STATEMENT OF THE CASE

Debtors filed voluntary Chapter 11 petitions on September 14, 1999. While they constitute separate Chapter 11's and which are administered separately, the two Chapter 11 cases are interrelated. James Carroll is the President of 4810 Building Corp. and is the husband of Mary Patricia Carroll, Debtor in Chapter 11 case No. 99-02445. Debtor 4810 Building Corp., Inc. owns a parcel of real estate located at 4810 First Avenue NE, Cedar Rapids, Iowa. This parcel is valued at $730,000 and carries an encumbrance of $2.3 million of which Guaranty Bank and Trust Co. is a primary secured creditor. Mr. and Mrs. Carroll are guarantors on the indebtedness in the property located at 4810 First Avenue NE.

Mary Patricia Carroll filed a separate Chapter 11 bankruptcy on September 14, 1999. Among other assets listed in her schedules are two parcels of real estate. The first parcel is located at the corner of Collins Road and First Avenue NE, Cedar Rapids, Iowa. This property is valued at $280,000 with an encumbrance of $2.2 million. The second parcel is denominated 4830 First Avenue NE, Cedar Rapids, Iowa and is listed as having a value of $488,000 with an encumbrance $2.25 million. These two parcels of real estate are located on either side of the real estate known as 4810 First Avenue NE. It is these three parcels of property which Debtors in each respective case seek to sell as a single block.

The respective Debtors apparently entered into negotiations over an extended period of time, with Jim Cofer Properties, Inc. On October 1, 1999, Debtors accepted a purchase agreement in which all three parcels of property would be sold to Jim Cofer Properties, Inc. for approximately $1.8 million. This offer is subject to approval by this Court under §363.

The respective Debtors filed their Motion for approval of this sale on October 8, 1999. The sale was objected to by the Iowa Department of Revenue and by the U.S. Trustee's Office. The Iowa Department of Revenue and Finance objects that the motions do not set forth the potential tax consequences to the respective estates. The Department of Revenue argues that the sale may produce a taxable capital gain event and the Court should not approve a sale unless the tax consequences are fully disclosed. Additionally, the Department of Revenue argues that the sale will not generate funds to satisfy tax liabilities nor will it generate funds to pay unsecured creditors. As such, the Department of Revenue argues that the sale is not in the best interest of creditors and should be denied.

The U.S. Trustee's Office also objects asserting that a compelling business reason must exist to warrant the sale of a substantial part of a Chapter 11 estate outside the ordinary course of business. The U.S. Trustee's Office argues that such compelling reasons have not been established in this case and approval of the sale should be denied.

CONCLUSIONS OF LAW

The sale of the real estate in these cases is sought under the auspices of 11 U.S.C. §363(b) which states in relevant part that: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

As the transactions in question are admittedly not within the ordinary course of Debtors' businesses, Court approval of the sale of these parcels of real estate is required. While §363(b) does not, on its face, contain limitations on sale, case law has established that a good business reason must exist to justify approval of such an application. Because the sale of substantial assets outside the ordinary plan confirmation process jeopardizes substantial rights provided under the Code, the case law has established that a Court must closely scrutinize the sale before approval. Stephens Indust., Inc. v.

McClung, 789 F.2d 386 (6th Cir. 1986). The power to sell property under §363 outside the plan and reorganization process is the exception and not the rule. While the Code envisions the sale of assets for justifiable reasons, these reasons must be compelling. Delay in approval or carrying out of the sale is not ordinarily considered an adequate reason to bypass the safeguards provided in the plan confirmation process. In re Lionel Corp., 722 F.2d 1063, 1071 (2nd Cir. 1983). The Court in Lionel state:

> The court also expressed its concern that a present failure to approve the sale would result in a long delay. As the Supreme Court has noted, it is easy to sympathize with the desire of a bankruptcy court to expedite bankruptcy reorganization proceedings for they are frequently protracted. "The need for expedition, however, is not a justification for abandoning proper standards." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 450, 88 S.Ct. 1157, 1176, 20 L.Ed.2d 1 (1968)

Lionel, 722 F.2d at 1071.

CONCLUSIONS

The Chapter 11 petitions in both 4810 Building Corp. (99-02444-C) and Mary Patricia Carroll (99-02445-C) were filed on the eve of a Sheriff's sale. The only asset in the corporation known as 4810 Building Corp., Inc. is the parcel of real estate which is the subject of the Motion for Private Sale of Real Estate For Appraised Value Free and Clear of Liens. The schedules reflect that there are other assets including other parcels of real estate in the Mary Patricia Carroll estate. The record and the schedules establish that Mary Carroll is a guarantor on the property listed in the bankruptcy petition for 4810 Building Corp. There is a substantial financial interdependence between both Debtors. This is described in Debtors' motion as "each person owns a portion of the whole, but the entire property is subject to common mortgages." Motion for Sale of Real Estate, paragraph 1.

As indicated, Debtors filed their Chapter 11 petitions on the eve of a foreclosure sale. Negotiations had been ongoing for a sale of one or all of these properties for an extended period of time. The petitions have been on file since September 14, 1999. The Motion for Sale of Real Estate was filed on October 8, 1999. The filing of the Motion actually predated the filing of a complete Statement of Affairs and Schedules which was filed on October 12, 1999. The reasons provided for the expedited sale are that there may be financing difficulties, that winter is coming, there are requirements for site planning, and there are tenant issues which may arise with existing tenants at these properties. Counter-balancing this urgency is the concern of the U.S. Trustee's Office that the sale of the only asset in 4810 Building Corp. would leave an empty corporation with no guarantees for payment of administrative costs. Administrative costs will be incurred through realtor commissions, accountant fees, attorney fees, as well as U.S. Trustee's fees. At the close of the hearing, the Court allowed counsel to discuss a carve-out to protect these administrative costs. The Court was advised that a 5% carve-out would be authorized for the payment of administrative fees.

The sale of the property out of the Mary Carroll case, however, involves other issues. There is a great dependence between Debtors in 4810 Building Corp. and Mary Carroll. The consequences of this sale to the Mary Carroll estate are not fully explained to the Court in the record. The Court has reviewed carefully the record in both cases. The philosophy of Chapter 11 is to reorganize a Debtor through the orderly process of filing a plan of reorganization and a disclosure statement so that all creditors, interested parties, and the Court have an opportunity, in detail, to examine the consequences of the entire reorganization process. It is recognized that, under certain circumstances, emergencies require

that a sale occur out of the ordinary course of business. Here, however, in one case, Debtor is seeking to sell all of the assets. In the other case, Debtor seeks to sell a substantial asset of her estate.

The parties appear to have considered, at considerable length, the consequences of the sale as it affects 4810 Building Corp. They have addressed the possibility of the payment of administrative expenses through a carve out. However, the Court is not satisfied that the parties have adequately addressed the potential tax consequences which arise from such a sale. Additionally, the Court is not satisfied that the consequences of the sale in the Mary Carroll estate have been addressed. There is a substantial interlocking of obligations between these two Debtors. The consequences to one or both Debtors over the course of time is undetermined. At this point, the process proposed by Debtors is completely oral and subject to change at any time. None of the commitments, other than the sale, are binding on anyone. The Court is asked to expedite these proceedings and avoid the plan process at this time for the sake of expediency. This is exactly the result which the plan process is designed to avoid.

The Court in Lionel concluded that the need for expedited action at the cost of considered judgment is seldom appropriate. A hurried approval of a sale under such circumstances has the affect of potentially deciding significant issues which may yet arise during the presentation of the plan process and disclosure statement. On balance, the Court does not find that the stated reasons, which are essentially a desire to avoid delay, are sufficient under a balancing of all the factors to warrant the Court's approval of the motion to sell. While some delay can be anticipated, there appears no reason why a plan and disclosure statement could not be presented on an expedited basis. Presented in that context, all interests would be clearly defined and the consequences could be evaluated without the substantial risk of irreparably impairing interests which are intended to be protected under Chapter 11.

WHEREFORE, for all of the reasons set forth herein, Debtors' Motion to Sale Real Estate Free and Clear of Liens under §363 is DENIED.

SO ORDERED this 3rd day of November, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge