UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-11087-JMD
Chapter 11

Shepherds Hill Development Co., LLC,
Debtor

William S. Gannon, Esq.
WADLEIGH, STARR & PETERS, P.L.L.C.
Attorney for Movants

Edmond J. Ford, Esq.
FORD & WEAVER, P.A.
Chapter 11 Trustee

Geraldine B. Karonis, Esq.
Assistant United States Trustee

Jack S. White, Esq.
WELTS, WHITE & FONTAINE, P.C.
Attorney for Leonard A. Vigeant

Pamela E. Phelan, Esq.
ORR & RENO
Attorney for Pamela Dritt

Andrew W. Serell, Esq.
RATH, YOUNG & PIGNATELLI
Attorney for W.O. Brisben Companies, Inc.

Victor W. Dahar, Esq.
VICTOR W. DAHAR, P.A.
Attorney for Jody Keeler

MEMORANDUM OPINION

I. INTRODUCTION

Before the Court is a motion entitled "Creditors' And Equity Holders' Motion To Vacate Order Authorizing Sale Free And Clear Of Liens (Development Property)," (the "Motion") filed on January 24, 2000, by Anthony Balzotti, Dawn Balzotti, Michael Balzotti, and Platinum Construction Company, Inc. (collectively, the "Movants"). A two-day hearing regarding the Motion ended March 17, 2000, at which

time the Court took the matter under advisement. Because the Movants request that a prior order of this Court be vacated, a brief discussion of the procedural history of the case and the material events leading up to the Motion is necessary.

II. BACKGROUND

Shepherds Hill Development Co., LLC (the "Debtor") filed for bankruptcy under Chapter 11 on April 2, 1999. The Movants, save for Platinum Construction Company, Inc., own the bulk of the Debtor's membership interests. Movant Anthony Balzotti is the managing member of the Debtor and an employee of movant Platinum Construction, Inc. Movant Michael Balzotti owns a membership interest in the Debtor, maintained the Debtor's financial records, and is the cousin of movant Anthony Balzotti. Caesar Balzotti, brother of movant Anthony Balzotti and cousin of movant Michael Balzotti, is a principal of movant Platinum Construction, Inc. Caesar Balzotti does not own any membership interest in the Debtor, but has played a substantial role in the management of the Debtor, both pre-petition and throughout these proceedings. The Debtor's primary asset consists of 68.1 acres of land in Hudson, New Hampshire (the "Property"), a lot that has been approved for the development of 400 housing units. The Debtor's main creditor is Leonard A. Vigeant ("Vigeant"), whose secured claim is estimated by the Debtor's schedules to be in the amount of $3 million.

The Debtor's bankruptcy case has been contentious from the start and has quickly taken on a liquidating character in that the Debtor has continually tried to sell the Property, or the membership interests in the Debtor, to third parties since almost the beginning of the case.[1] On October 1, 1999, the first mortgagee, Vigeant, filed a motion for relief from the automatic stay. See Ct. Doc. No. 29. The Debtor filed an objection to the motion for relief on the basis that there was significant interest in the Debtor's property, a firm purchase and sale agreement was to be executed within a few days, and the mortgagee was

[1] The contentious nature of the case is well illustrated by the chain of combative events and bellicose posturing that eventually led to Steven M. Notinger withdrawing as counsel to the Debtor. Due to the seemingly irreconcilable differences that have developed among the relevant parties in this case and the resulting discord, this Court approved the United States Trustee's motion to appoint a Chapter 11 trustee on February 17, 2000. Edmond J. Ford (the "Trustee") was later appointed as such.

adequately protected. See Ct. Doc. No. 34. A hearing on the motion for relief was held on October 27, 1999. At that hearing, Vigeant and the Debtor agreed to continue the hearing until December 6, 1999, and the Court entered a procedural order directing the Debtor to file a motion to approve a sale and a motion to approve bid procedures by November 8, 1999. See Ct. Doc. No. 37. Hearings on the motions to approve bid procedures and the sale were scheduled for November 10, 1999 and December 3, 1999, respectively. Notwithstanding the Court's procedural order, the Debtor did not file any such motions by November 8, 1999, and the hearing scheduled for November 10, 1999 was canceled.

On November 19, 1999, the United States Trustee filed a motion to appoint a Chapter 11 trustee. See Ct. Doc. No. 38. On December 1, 1999, the Debtor filed motions to sell the Property and to approve bidding procedures. See Ct. Doc. Nos. 40 and 42. A hearing on the United States Trustee's motion to appoint a Chapter 11 trustee was scheduled for December 3, 1999. Immediately prior to that hearing, the Movants filed a motion to dismiss the Chapter 11 case. See Ct. Doc. No. 45. The motion to dismiss was based upon a proposed purchase of all of the membership interests in the Debtor by a third party. The proceeds from the proposed purchase were intended to provide sufficient funds to pay all creditors in full and to preserve some value for the current owners of the Debtor's membership interests. The proposed purchase of membership interests had been negotiated by the Movants and Caesar Balzotti.

At the hearing on December 3, 1999, it appeared that the Debtor was engaging in no business activity other than attempting to sell its assets. Several prospective purchasers for the Property and/or the membership interests in the Debtor had been identified and written offers had been submitted to the Debtor, the Movants, or their respective counsel. The Court approved bidding procedures, scheduled a hearing on the motion to sell on December 21, 1999, and continued the hearings on the motions to lift stay, to appoint a Chapter 11 trustee, and to dismiss the case to the same date. See Ct. Doc. Nos. 50, 59 through 62. On December 15, 1999, the Movants filed an objection to the Debtor's sale motion. See Ct. Doc. No. 58. The Movants had attached as exhibits to their objection to the Debtor's sale motion a copy of an executed purchase and sale agreement for all of the membership interests in the Debtor from RAD Investments, LLC

("RAD") for $19 million and an affidavit from a principal of RAD stating that it was prepared to close on its purchase by December 31, 1999.

At the December 21, 1999 hearing on the sale motion, the Movants indicated that the RAD purchase would require additional time to secure the funding necessary to close the purchase. At the Movants' request, the hearing on their motion to dismiss the case, as required under the terms of the RAD proposal, was continued to January 18, 2000. See Ct. Doc. No. 64. W.O. Brisben Companies, Inc. ("Brisben") was the high bidder for the Property and development rights. On December 23, 1999, this Court entered an order authorizing the sale of the Property and the development rights to Brisben free and clear of liens for $4.15 million (the "Sale Order") pursuant to 11 U.S.C. § 363(f).[2] See Ct. Doc. No. 67. Under the terms of the Sale Order, the Debtor had the right to rescind the purchase and sale agreement with Brisben on or before January 24, 2000, subject to payment to Brisben of a break-up fee, if the obligations of RAD under its purchase and sale agreement became final. The Court denied without prejudice the motion to appoint a Chapter 11 trustee and the motion for relief. See Ct. Doc. Nos. 65 and 66.

On January 18, 2000, the Movants stated that the RAD proposal was not going to close, but that an alternate purchaser had been located. They requested additional time to finalize the new proposal. Brisben objected to any additional time. Brisben argued that the Sale Order only allowed the Debtor until January 24, 2000 to rescind its purchase and sale agreement with Brisben and that the agreement provided that time was of the essence. The Court continued the hearing on the Movants' motion to dismiss to January 24, 2000, the last day available to the Debtor to rescind its agreement with Brisben. See Ct. Doc. No. 69. At the January 24, 1999 hearing, counsel for the Movants indicated that they did not have a binding proposal for the purchase of the Debtor's membership interests and, therefore, could not support their motion to dismiss. The Court denied without prejudice the motion to dismiss. See Ct. Doc. No. 72. Immediately before the hearing on January 24, 2000, the Movants filed the Motion, which essentially requests that this

[2] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

Court vacate the Sale Order with the apparent purpose of allowing the Debtor to pursue more attractive post-sale approval offers. The Motion forms the basis of the instant dispute.

All relevant parties, except the Movants of course, oppose the Motion. Distilled to its essence, the issue before the Court is whether the Sale Order, in light of the relevant surrounding circumstances, should be vacated pursuant to the standard for vacating sale confirmations as enunciated by the Court of Appeals for the First Circuit in In re WPRV-TV, Inc., 983 F.2d 336 (1st Cir. 1993).

The Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

III. DISCUSSION

A. The Standard for Vacating Sale Orders and In re WPRV-TV

With respect to the question of when an order authorizing a sale free and clear of liens pursuant to § 363(f) may be vacated, this Court is bound by precedent established by the Court of Appeals for the First Circuit in In re WPRV-TV. In re WPRV-TV involved a television station ("WPRV") that filed for bankruptcy under Chapter 11. See WPRV-TV, 983 F.2d at 337. By sua sponte order of a bankruptcy judge, the case was converted to Chapter 7. See id. The Chapter 7 trustee conducted a public auction in an effort to sell WPRV. See id. at 338. Ponce Federal Bank, F.S.B. ("Ponce") bid $4.85 million for the television station, an amount that consisted of its $4.8 million secured claim and $50,000 cash. See id. Two other parties also submitted bids, although both were less than Ponce's bid. The Chapter 7 trustee did not recommend the sale of WPRV to Ponce and instead continued to accept offers until the sale confirmation hearing date. See id. The Chapter 7 trustee then sought to sell WPRV to Puerto Rico Family Channel, Inc. ("PRFC") through a private sale for $4.835 million, with $100,000 having already been tendered as a deposit. See id. at 338-39. The lower court approved the sale to PRFC, but later vacated its sale order after a dispute developed between the Chapter 7 trustee and PRFC concerning the terms of the

sale, the identity of PRFC's principals, and PRFC's inability to document its financial capabilities. See id. at 339-40. The issue before the WPRV-TV Court was whether the lower court was correct in vacating its prior sale order.

In affirming the lower court's decision to vacate its sale order, the WPRV-TV Court initially stated that a court has a narrow range of discretion with respect to vacating sale orders. See id. at 340 (citing In re Chung King, Inc., 753 F.2d 547, 549 (7th Cir. 1985)). Moreover, the WPRV-TV Court stated that a court may vacate such an order only in limited circumstances grounded in equity, such as when there has been "fraud, unfairness, or mistake in the conduct of the sale . . . ."[3] Id. (quoting M.R.R. Traders, Inc. v. Cave Atlantique, Inc., 788 F.2d 816, 818 (1st Cir. 1986)). See also In re Furst, 57 B.R. 1013, 1015 (E.D. Pa. 1986) ("The law is clear that a confirmed sale is not to be set aside except under the limited circumstances where fraud, mistake or a similar infirmity is present."). The WPRV-TV Court based its restrictive view regarding the vacating of sale orders on the notion that such orders should be afforded a significant level of finality. See id. at 341. See also In re Cable One CATV, 169 B.R. 488, 497 (Bankr. D.N.H. 1994) ("[T]here is a strong policy of finality in bankruptcy sales."). Finality interests in the context of vacating sale orders are to be sacrificed only when they are outweighed by "compelling equities." See id. See also In re Todem Homes, Inc., 51 B.R. 883, 888 (Bankr. S.D.N.Y. 1985) (stating that a sale should be set aside only when it is "tinged with fraud, error or similar defects which would in equity affect the validity of any private transactions.") (quoting 4A Collier Bankruptcy, ¶ 70.98[16], 1183, 1184-94 (14th ed. 1967)). The WPRV-TV Court found that such compelling equities existed insofar that PRFC possibly misrepresented its financial wherewithal and the identity of its members.

[3] In In re Silver Bros. Co., Inc., Judge Yacos appears to have laid additional gloss on the WPRV-TV standard by allowing the vacating of sale orders when "improvidence" is shown. See In re Silver Bros. Co., Inc., 179 B.R. 986, 1007 (Bankr. D.N.H. 1995) (stating that a sale order may be vacated when it "was entered through mistake, inadvertance or improvidence.") (quoting Mason v. Ashback et al., 383 F.2d 779, 780 (10th Cir. 1967)) (emphasis added). Although the WPRV-TV decision does not appear to attach weight to a showing of improvidence, which may arguably broaden the applicable standard, the Court notes that Judge Yacos clearly viewed the appropriate standard as being of a narrow nature. See id. at 1008 ("[A] court should exercise its discretion to vacate a confirmed order of sale and employ its equitable power to vacate a sale only in extraordinary circumstances.") (emphasis added). Accordingly, the Court finds that the adding of improvidence to the WPRV-TV mix is merely a semantic exercise with little legal import.

See id. The question in the instant matter is whether the circumstances surrounding this Court's order authorizing the sale of the Property to Brisben implicate compelling equities so that the interest of finality may be compromised.

B. In re WPRV-TV as Applied to the Instant Matter

In essence, the Movants argue that the Sale Order should be vacated based upon three alternative factual grounds: (1) lack of adequate marketing efforts in finding bidders for the Property; (2) an inadequate sale price; and (3) unfairness in the approval of the bidding procedures leading to the sale of the Property. The Movants concede that the facts do not lead to an inference of fraud. Instead, they seize upon the WPRV-TV Court's statement that a sale order may be vacated when "unfairness" is shown. More specifically, the Movants allege procedural unfairness (inadequate marketing efforts), substantive unfairness (inadequate sale price), and unfairness in the bidding procedures. These allegations shall be addressed in turn.

1. Procedural Unfairness

On August 5, 1999, this Court authorized the employment of Jody D. Keeler ("Keeler") to act as real estate broker to the Debtor for the purpose of marketing the Property for sale. The Movants argue that Keeler's marketing efforts were inadequate and, as a result, the Sale Order should be vacated. Testimony at the hearing revealed that Keeler's advertisement efforts were primarily limited to an advertisement placed in the Boston Globe that appeared on approximately four different occasions, letters sent to a list of prospective investors, and contacts with other brokers. In addition, Keeler testified that the advertisement disclosed that the sale was connected with an active bankruptcy case. Moreover, the Movants allege that Keeler's marketing efforts were limited in scope, insofar that Keeler did not contact large national and regional developers, parties who would be well-suited to a large development project such as contemplated by the Debtor. The Movants argue that these circumstances indicate that the auction leading to the issuance of the Sale Order was tainted by procedural unfairness.

The Court disagrees with the Movant's position regarding procedural unfairness. Testimony at the hearing clearly shows that the Balzotti family made significant efforts to market the Property at the same

time Keeler was doing so, efforts that were allowed by the nonexclusive nature of Keeler's retention. Caesar Balzotti testified that his efforts in trying to find a buyer for the Property amounted to a "full-time job" for at least eighteen months prior to the sale hearing. Anthony Balzotti echoed this statement by testifying that his brother Caesar worked many hours in trying to sell the Property. As pointed out by the Trustee at the hearing, these efforts did not result in any closed sales.[4] The Balzotti family's marketing efforts appear to have been comprehensive and broad in scope. Caesar Balzotti testified that he contacted numerous "national players" in large scale residential development and had several expressions of interest from those contacts. However, their interest did not ripen into firm offers in a timely manner.

The Court finds that the combined marketing efforts of Keeler, the Movants, and Caesar Balzotti were extensive, comprehensive, and adequate to expose the availability of the Property to the regional and national market. The Movants' own expert, Robert Richard, testified that he had been made aware of the availability of the Property from a broker who had heard about the Property from another broker. The Movants contend that Keeler's marketing efforts were inadequate as evidenced by the fact that only one bidder qualified to bid at the sale hearing. However, the testimony of Caesar Balzotti, Anthony Balzotti, Robert Richard, and Robert Bramley established that the market for the project was limited due to the financial resources necessary to complete construction ($42 million to $55 million) and the fact that the project would be subject to new zoning rules and regulations after October 28, 2000, which could significantly lower the density and increase the cost of the project.

The Court finds that the Movants did not establish marketing deficiencies sufficient to constitute procedural unfairness warranting the vacating of the Sale Order.

2. Substantive Unfairness

The Movants argue that the price obtained by the sale to Brisben – $4.15 million – is inadequate and therefore vacating the Sale Order is appropriate. It is generally accepted that a sale order may be

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[4] At the hearing, Caesar Balzotti testified that his efforts did result in at least one "closed" sale. However, Mr. Balzotti conceded that this closing was not accompanied by a tendering of any cash or financial instruments. The Court agrees with the Trustee's position that a "closing" for present purposes requires the tender of some form of cash or financial instrument by the buyer.

vacated if the sale price is found to be inadequate. See WPRV-TV, 983 F.2d at 341 n.12; Cable One CATV, 169 B.R. at 497; Todem Homes, Inc., 51 B.R. at 888. The issue, however, is what level of inadequacy must be shown to trigger the vacating of a sale order. Some courts articulate the standard as a level of inadequacy that shocks the conscience of the court. See, e.g., Todem Homes, Inc., 51 B.R. at 888. Others state that a showing that the price is reasonable will avoid a sale order being vacated. See, e.g., Cable One CATV, 169 B.R. at 497. The WPRV-TV Court, however, stated that a "grossly inadequate" sale price will allow the vacating of a sale. See WPRV-TV, 983 F.2d at 341 n.12 (citing In re Chung King, Inc., 753 F.2d 547, 550 (7th Cir. 1985)).

The Court finds that the $4.15 million sale price is not grossly inadequate and therefore does not warrant the vacating of the Sale Order. At the hearing, the Movants produced Robert Richard ("Richard"), a real estate developer, to testify as to his expert opinion regarding the value of the Property. Richard testified that, on a cash payment basis, the Property was worth roughly $6.7 million as of the petition date. However, cross-examination revealed that Richard's $6.7 million valuation did not account for the delays or uncertainty arising from a purchase through a bankruptcy proceeding or any uncertainty arising from the October 28, 2000 expiration of the Property's protection from changes in zoning and site plan regulations enacted since the date of its original approval in 1996. Richard declined to estimate what discount he would apply to his $6.7 million valuation for such delays and uncertainties, but that such matters were of significant importance to the valuation of the Property.

The Trustee also offered testimony as to the value of the Property via Robert G. Bramley ("Bramley"), a Certified General Appraiser. Bramley testified that in his expert opinion the value of the Property as of the petition date was $4.1 million. He testified that the basis of his valuation was an initial figure of $8.2 million, discounted by 50 percent due to the risks flowing from the physical nature of the property, certain potential impact fees, uncertainty surrounding certain development permits, and the fact that the Debtor is in bankruptcy. The Court notes that Richard and Bramley used similar methodologies in determining the value of the Property. Before any discount for delay or uncertainty, Richard's appraisal of $6.7 million is 81 percent of Bramley's pre-discount valuation of $8.2 million. After discounting for

uncertainty and risks associated with this particular property, Bramley's opinion of value is essentially equal to the Brisben offer. Brisben's offer is 62 percent of Richard's $6.7 million valuation. Given the importance that Richard attached to risk and delay, and his reluctance, as a developer, to quantify the impact of those factors on value, the Court finds that a price at 62 percent of his full value estimate is not grossly inadequate. Accordingly, the Court finds that the evidence presented at the hearing does not establish that the sale price of $4.15 million is grossly inadequate.

At the hearing, the Movants intimated that they have received at least one offer subsequent to the Sale Order that is significantly greater than the sale price of $4.15 million. The import of such an offer is questionable for present purposes, especially when the efficacy of such an offer is not clear. The existence of a higher post-sale confirmation offer does not generally trigger the narrow standard for vacating sale orders. See Furst, 57 B.R. at 1015 ("A subsequent offer at a higher price does not constitute fraud, mistake or a similar infirmity and therefore does not call for setting aside a confirmed sale.") (citing In re Chun King, Inc., 753 F.2d at 547). Accordingly, the Court finds that the higher post-Sale Order offer received by the Movants does not alter its conclusion that the $4.15 million sale price is not grossly inadequate and therefore does not warrant the vacating of the Sale Order.

3. Unfairness in Bidding Procedures

On December 1, 1999, the Debtor filed an emergency motion establishing bidding procedures for the proposed auction of the Property. The Court found the bidding procedures and the form and manner of notice to be in the best interests of creditors and, therefore, granted the motion on December 3, 1999. The Movants have made general allegations that these procedures and form of notice were somehow unfair and resulted in a less than adequate sale price. The Court, however, notes that the auction and notice procedures approved by the Court were those proposed by the Debtor. The Movants contend that they objected to the auction and sale procedures prior to the December 21, 1999 hearing. While the Movants are technically correct, the Court's review of the history of this proceeding (see section II above) leads it to the conclusion that the purpose of the Movants' objection was to secure additional time to consummate a more favorable sale than the Brisben proposal. See Ct. Doc. No. 58. Although the Movants' objection to the

Brisben sale was denied by the Court's order approving the sale, see Ct. Doc. No. 67, the Sale Order did effectively provide the Movants with the additional time that they requested to consummate a sale with RAD, or any other party, subject only to paying a break-up fee to Brisben. The Movants did not request reconsideration of the Sale Order. The Movants only raised the issues discussed in this opinion once their more favorable sale failed to close. The Movants, together with Caesar Balzotti, controlled the Debtor and authorized or permitted the Debtor's counsel to file the motions to approve a sale of the Property and to establish bid procedures. If the performance of the broker retained by the Debtor was as inadequate as the Movants now suggest, they had a duty to inform their counsel or the Court of those facts at the hearing on the motion to sell. This they did not do.

Anthony Balzotti and Caesar Balzotti testified at the hearing on the Motion. The Court found them to be articulate and savvy businessmen with experience in contracting and real estate development. At all times leading up to the December 21, 1999 hearing on the motion to sell, they had available to them the services of two capable and experienced Chapter 11 attorneys representing their separate responsibilities as managers of the debtor-in-possession and as creditors/equity owners. The Court does not find it credible that the Balzottis did not understand the meaning of the pleadings filed on behalf of the Debtor or the Movants in this Chapter 11 case, or were "pushed" into positions by counsel for the Debtor. Based upon the history of this proceeding, as set forth in section II above, this Court believes that the Movants made a strategic choice to authorize the filing of the motion to sell and motion to establish bid procedures in order to buy time to consummate the RAD transaction. The Debtor was under significant pressure due to Vigeant's motion for relief and the U.S. Trustee's motion to appoint a chapter 11 trustee. The Movants were in fact successful in buying the time that they then believed was necessary to close the RAD deal. It was only when the RAD deal failed to cross the finish line that they filed the Motion. The Movants chose to set in motion the bidding procedures and sale of the Property rather than contest the motion for relief and motion to appoint a trustee directly. They chose to depend on the RAD deal. While their strategy may have been sound, at the end of the process, they were not able to close the RAD deal.

The Court stands by its order of December 3, 1999 and its implicit finding that the bidding procedures and form of notice were in the best interests of creditors and fair to all interested parties. The Court finds that this conclusion is strengthened by the fact that the ultimate sale price of $4.15 million is well-supported by Bramley's valuation of the Property. Accordingly, the Court finds that the bidding procedures and notice approved by this Court do not yield a level of unfairness necessary to vacate the Sale Order.

4. The WPRV-TV Standard is not Satisfied

As discussed above, the Movants have not pointed to any circumstances surrounding the Sale Order that would trigger the narrow standard for vacating sale confirmations as articulated by the WPRV-TV Court. The evidence presented does not show that there was unfairness connected with the marketing of the Property or the bidding procedures. Moreover, the evidence does not indicate that the final sale price of $4.15 million is grossly inadequate. Accordingly, the Court finds that compelling equities do not exist so that the interest of finality with respect to the Sale Order may be sacrificed.

IV. CONCLUSION

For the reasons stated above, the Court finds that the circumstances surrounding the Sale Order do not warrant it being vacated. Accordingly, the Sale Order shall stand. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7051. A separate order in accordance with this opinion shall be entered.

DONE and ORDERED this 24th day of March, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge