2002 BNH 038 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 02-12846-MWV
Chapter 11

LCC Financial Corp.,
Debtor

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MEMORANDUM OPINION

The Court has before it LCC Financial Corp.'s ("3 C

ACKGROUND

The Debtor, which is in the business of providing fin ing for the ter 7 (o ode of Septem 8.5 (ber 16, 2002.h, The

Hirshberg. The Debtor's two affiliates, which have not filed bankruptcy, Corvette City USA Corp., located in Manchester, New Hampshire, and Corvette City of Georgia, Inc., located in Atlanta, Georgia, sell and service the motor vehicles.

The Court issued an order approving the emergency use of cash collateral on September 19, 2002. On September 20, 2002, the Court issued an order providing for the payment of certain wages. On September 26, 2002, Citicorp Leasing, Inc. ("CLI"), which finances the Debtor and holds a security interest in all of its assets, filed a motion to (1) vacate the cash collateral order; (2) vacate the wage order; and (3) order relief from the automatic stay. The Court held hearings on CLI's motion and Debtor's motion for continued use of cash collateral on October 10 and November 7, 13, 14 and 18, 2002, and subsequently entered its Memorandum Opinion and Order ("Opinion and Order") on November 21, 2002, denying the Debtor's motion for further use of cash collateral, granting CLI's motion for relief from the automatic stay, and, to the extent that it was not already moot, denying CLI's motion to vacate the wage order. On November 27, 2002, the Debtor filed a "Motion for Reconsideration (of Order dated November 21, 2002)," which the Court denied on December 10, 2002.

It is not disputed that the total amount the Debtor owes to CLI is in excess of $19,000,000. However, the parties have stipulated that the value of the collateral is $13,476,660, subject to reductions for payments made during the case. See Stipulation for Order Establishing Value of CLI Collateral for All Purposes, Court Doc. 76. In its Opinion and Order, the Court determined that since the value of the collateral determines CLI's secured claim, its secured claim is $13,476,660, subject to the reductions mentioned in the Stipulation above.

The Debtor now moves to sell a portion of the CLI active loan portfolio with a face value of $6,806,730.52 at 90% of that value, or $6,126,057.47, to FSB Financial Ltd. ("FSB"), paying to CLI the

sum of $5,347,004.00, and retaining $779,053.47 for its continued operation and to fund its Chapter 11 Plan. The president of the Debtor, Daniel Wilensky, testified that there is no possibility that the FSB offer could increase.

DISCUSSION

There are five alternative conditions for sales free and clear pursuant to section 363(f). Section 363(f) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
>
> > (1) Applicable non-bankruptcy law permits the sale of such property free and clear of such interests;
> >
> > (2) Such entity consents;
> >
> > (3) Such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> >
> > (4) Such interest is in bona fide dispute; or
> >
> > (5) Such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

In the present case, the Debtor has not presented to the Court, and there does not appear to be, any relevant, applicable nonbankruptcy law which would permit the proposed sale under section 363(f)(1). 11 U.S.C. § 363(f)(1). Additionally, in its objection to the Debtor's Motion, CLI unequivocally stated that it does not consent to the sale. See id. § 363(f)(2). The Debtor also did not satisfy the requirement of section 363(f)(4) that the property interest be subject to bona fide dispute by the interested parties based on the stipulation reached by the parties as to the value of the collateral and the findings made by this Court in its Opinion and Order. See id. § 363(f)(4).

Further, the Debtor did not meet its burden under section 363(f)(3). Under section 363(f)(3), a sale is authorized when it will result in proceeds which exceed the aggregate value of all liens on the property. 11 U.S.C. 363(f)(3). However, the question of what constitutes "the aggregate value of all liens" has divided courts. Compare In re Beker Indus. Corp., 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986) (statutory "aggregate value of all liens" means the actual economic value of the lien) with Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1001-02 (E.D.N.C. 1985) (statutory "aggregate value of all liens" means the full amount of all debt secured by the liens).

Although the First Circuit and this Court have not addressed the issue, two other courts within the First Circuit have, taking different approaches to the interpretation of the language in section 363(f)(3). See In re Perroncello, 170 B.R. 189, 191 (Bankr. D. Mass. 1994); Matter of WPRV-TV, Inc., 143 B.R. 315, 320 (D.P.R. 1991), *vacated on other grounds*, 165 B.R. 1 (1992), *rev'd on other grounds*, 983 F.2d 336 (1st Cir. 1993). Following Beker Industries, the District Court of Puerto Rico in the Matter of WPRV-TV, Inc. construed value as the "economic value of the lien." Matter of WPRV-TV, Inc., 143 B.R. at 320. Reaching the same conclusion as the Stroud Court, the Bankruptcy Court for the District of Massachusetts held that "'value' in the context of § 363(f)(3) can only mean face value rather than fair market value." In re Perroncello, 170 B.R. at 191. The Perroncello Court further commented that "[t]o rule that "value" means fair market value in § 363(f)(3) would create a loophole permitting avoidance of the requirements of § 363(f)(5) through the use of § 363(f)(3)." Id. at 191-192.

This Court adopts the reasoning of Perroncello and holds that, in order to satisfy the requirements of section 363(f)(3), the sale price must exceed the face value of all liens. The Court finds that this interpretation of section 363(f)(3) is "consistent with the legislative history and plain language of the statute."[1] 3 Collier on Bankruptcy ¶ 363.06[5] (Lawrence P. King ed., 15th Ed. 2001); see also H.R. Rep.

[1] The legislative reports state "[t]he trustee may sell free and clear if ... the sales price of the property is greater than the amount secured by the lien." 3 Collier on Bankruptcy ¶ 363.06[5] (Lawrence P. King ed., 15th Ed. 2001) (citing H.R. Rep. No. 595, 95th Cong. 1st Sess. 345 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 56 (1978)).

No. 595, 95th Cong. 1st Sess. 345 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 56 (1978). Accordingly, since FSB's sale price does not exceed the face value of CLI's liens on the property, the Debtor does not meet the requirements of section 363(f)(3).

Finally, CLI contends that section 363(f)(5) does not pertain or otherwise apply to liens but only to ownership interests and is, therefore, inapplicable to the Debtor's Motion, while the Debtor notes that, since no evidence was presented that the sale price was inadequate or that CLI would be hurt in some other way by the proposed sale, section 363(f)(5) sanctions the proposed sale. See CLI's Objection to Debtor's Motion Pursuant to Code Section 363 for Permission to Sell a Portion of Its Active Loan Portfolio and Use a Portion of the Proceeds of the Cash Collateral, Court Doc. 148, ¶ 15; Debtor's Memorandum of Law in Support of FSB Sale Motion, Court Doc. 153, 2-3. The Court declines to read section 363(f)(5) as narrowly as CLI suggests. Nonetheless, the Debtor has not demonstrated that (f)(5) is applicable based on the facts of this case. CLI is not getting the full value of its secured claim, as the Debtor proposes to retain a portion of the proceeds from the sale for use as cash collateral. Although the Debtor argued that these funds could be held in escrow if the Court approved its sale motion, it did not agree to waive them. Also, a cramdown would have to provide for the entire secured claim, not only a portion of it. As the sale is only for a portion of the portfolio, the retail sale contracts that are included have a bearing on the remaining portion of the secured claim.

CONCLUSION

For all of the above reasons, the Court finds that the Debtor has not met its burden under section 363(f). Consequently, the Debtor's Motion is denied.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 10th day of December, 2002, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge