UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT J. BRADLEY, SR. Case No. 91-13893 K

Debtor

MEMORANDUM OF DECISION

The request seeks leave to sell real estate in Aurora, New York, free and clear of liens.

This request points up the problem presented when clear and unambiguous statutory language sweeps more broadly than the policy it intended to address. The effect of 11 U.S.C. § 363(f) in the precise instance at bar is to leave an individual who is attempting to reorganize millions of dollars worth of assets and millions of dollars in debt with no way to get rid of his interest in a hopelessly encumbered parcel of vacant land, worth only $20,000 and which is incurring real property tax liabilities which the estate must pay, despite the fact that he has a buyer ready, willing and able to pay full fair market value.

11 U.S.C. § 363(f) and its legislative history clearly prevent the Court from empowering the sale of real estate free and clear of liens and encumbrances when the price to be obtained is less than sufficient to satisfy all of those liens and encumbrances, unless the lienors consent or certain other specifically defined circumstances exist.

The difficulty presented in many cases, of which the current instance is typical, is that in a case involving many parcels of real estate or in a case in which a single parcel of real estate is not significant to the reorganization effort, the only way that the estate can stop incurring tax liability or other carrying costs would be to convince all judgment creditors to consent to the sale at fair market price, despite the fact that that price is insufficient to pay them all.[1] Judgment creditors who are well "under water" have no incentive at all for consenting to such a proposal; hence, they possess an absolute veto power, under section 363(f) regardless of the merits of any such sale, and may exercise that veto power simply by refusing to consent.

If the debtor were a corporation, the drain on the assets of the estate could be avoided by abandoning the real estate under section 554 of Title 11. This abandonment could, presumably, be an abandonment "to" the shareholders, and any burdens of ownership thereof could be theirs, but in a Chapter 11, 12, or 13 case involving an individual, any abandonment under 11 U.S.C. § 554 would only be an abandonment "by" the estate, leaving title in the individual debtor. Again, this would not be a problem if the

---

[1]Another way would be to propose the sale in a plan of reorganization, but in a multi-asset case like this, or in a case in which the sale of a single piece of real estate is not significant to the reorganization effort, the case might not be ripe for the proposal of a plan of reorganization at the time that a fair market price buyer has been obtained.

"reorganization" of the individual were in fact simply a "liquidation" of such of his or her assets as constitute "property of the estate;" the liquidation and consequent distribution of value to creditors could occur, and the real estate would continue to be owned by the debtor, free of the claims of unsecured creditors, but subject to the claims of creditors who have liens on that property. But if the reorganization of the individual involves his or her future effort or future income, then it is questionable whether abandonment of the property under 11 U.S.C. § 554 while leaving the burdens of ownership on the individual debtor accomplishes any purpose. It would simply shift the burden of taxes or any other upkeep from the estate to the individual, and any debtor-estate symbiosis necessary to reorganization could be defeated.

Additionally, although 11 U.S.C. § 363(f) was intended to operate for the benefit of creditors having liens on the property to be sold, it in fact operates in instances like that at bar to the detriment of some of the very people it sought to benefit, for it permits judgment creditors who could never hope to realize any value whatsoever from this particular property to tacitly veto a sale which might yield more value than lienors on "the bubble" ever hoped to obtain for the property. Creditors who by rights should be viewed as being fully secured and creditors on "the bubble" would be forced to pass value down to creditors who, by rights, should be viewed as having no genuine interest in the property, to

"buy" the needed consent.

The alternative, of course, is for senior lienors to incur the expense and delay of foreclosing the junior interests, and foreclosure also increases the risk to the estate of unsecured deficiency claims that are higher than necessary.

It is unfortunate that the Bankruptcy Court, during the time that it has jurisdiction of the property and the means to empower conveyance of good title free and clear of liens, is denied the authority to do so and thereby denied (1) the opportunity to assist secured creditors in the liquidation of their claims against the debtor and (2) the opportunity to spare the state courts a foreclosure action.

The inequity of the statutory command is even more compelling in an instance, such as this, where none of those judgment creditors for whose benefit section 363(f) exists have appeared in opposition to the proposal to sell the property free and clear of their interest. The fact that they have not opposed could suggest that they do not view this sale to be to their prejudice; there is simply no incentive to consent to the sale.[2]

Some Bankruptcy Courts, confronted with the inequities resulting from the clear language of the statute, have construed

---

[2]The Court does not treat non-appearance as a tacit or "deemed" Consent. Sec. 363(f) prohibits such sales, and the judgment creditor should not have to appear to so advise the Court.

the statute in a way to avoid the problem.[3] Of these authorities, this Court might be persuaded only by those which argue that "compelling circumstances" could empower the Court to act despite the language of section 363(f).[4] However, the routine circumstances set forth in the case at bar are by no means "compelling."

As to garden variety circumstances like those presented here, the Court would like to be able to agree with Courts that have found ways around the language of 11 U.S.C. § 363(f). However, that is not the role of a Court and the best hope for remedial legislation comes from strict adherence to the current statute, rather than from judicial interpretation.

The debtor's request for authority to sell this real estate must be denied.

SO ORDERED.

Dated: Buffalo, New York
December 22, 1992

U.S.B.J.

---

[3] *In Re Terrace Garden Park Partnership*, 19 B.C.D. 727 (Bkrtcy. W.D. Tex. 1989) and cases cited therein.

[4] *See In Re Beker Industries*, 63 B.R. 474 (Bkrtcy. W.D.N.Y. 1986).