UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	
CLASSIC CARRIERS CORP.,	:	Case No. 90-222-C H
	:	Chapter 7
Debtor.	:	
	:	

- - - - - - - - - - - - - - -

FINDINGS AND CONCLUSIONS--
MOTION TO SET ASIDE SALE AND FOR SANCTION

A hearing was held on June 4, 1990, on the Trustee's Motion to Set Aside Sale and for Sanction and the resistance thereto. Thomas L. Flynn appeared as trustee, and Richard Parker appeared on behalf of Dale Swanson.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(N). The Court, upon review of the motion, resistance, briefs submitted and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On January 26, 1990, the Debtor filed a voluntary Chapter 7 petition.

2. In March 1990, Dale Swanson contacted the trustee and indicated an interest in purchasing some of the Debtor's equipment. An agreement was reached to sell the property for $10,000.00. Swanson gave the trustee a certified check and the trustee turned the equipment over to him.

3. On April 5, 1990, the trustee filed a Notice and Report of Sale of Property. The notice described five pieces of property which the trustee proposed to sell to Dale Swanson

for $10,000.00. The notice specified any objections to the sale had to be served on the trustee and filed with the Clerk of the Bankruptcy Court on or before 4:30 p.m., April 24, 1990. The notice stated if no objections were filed said sale would be deemed approved without further court order.

4. On April 10, 1990, the trustee sent Swanson a letter indicating he had received inquiries about the equipment and it was possible he would be receiving higher bids on it. The letter requested that Swanson no longer use the equipment and make it available for inspection by others interested in it.

5. On April 23, 1990, the trustee received a written bid from Bob Daily offering $12,250.00 for the equipment.

6. As of 4:30 p.m. on April 24, no objections to the sale were filed nor was the trustee's Notice and Report of Sale withdrawn.

7. On April 25, 1990, Swanson's son (Andrew) contacted the trustee's office and was advised of the trustee's receipt of a higher offer and that the trustee intended to withdraw his request for approval of the sale to Swanson. This was the first notice the Swansons had indicating another party had offered more money for the equipment. The trustee informed the Swansons he intended to reopen the bidding and conduct an auction by telephone.

8. On April 26, 1990, the trustee accepted bids by phone. Mr. Swanson increased his offer to $12,350.00; Mr.

Daily increased his bid to $13,000.00; Mr. Swanson increased his bid to $13,100.00; and Mr. Daily increased his bid to $13,500.00. At the end of the bidding, Mr. Daily had made the highest offer for the equipment.

9. Also on April 26, 1990, Andrew Swanson presented the Clerk of the Bankruptcy Court with an affidavit to sign. The affidavit stated no objections to the sale were filed nor was the notice and report of sale of property withdrawn prior to the bar date and that pursuant to the report of sale and notice given, the sale was deemed approved without further court order. The affidavit was signed by the Clerk on April 26, 1990.

10. On April 27, 1990, Dale Swanson contacted the trustee and informed him of the Clerk's affidavit and that he would engage in no further bidding. The trustee then filed an affidavit requesting that the Clerk's affidavit be set aside and that any orders approving the sale of the property to Swanson for $10,000.00 be set aside.

11. On May 3, 1990, the trustee filed a motion to set aside the sale and for sanction.

12. Dale and Andrew Swanson filed an affidavit and resistance to the trustee's motion on the date of hearing.

CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. §363(b)(1), a trustee may sell,

after notice and hearing and other than in the ordinary course of business, property of an estate. "After notice and hearing" is defined at 11 U.S.C. §102(1) and that section authorizes an act without an actual hearing if notice is properly given and a hearing is not timely requested by a party in interest.

Fed.R.Bankr.P. 2002 mandates twenty-day notice for the proposed sale of property of an estate. It also prescribes what information the notice of a proposed sale must include.

Fed.R.Bankr.P. 6004(b) provides that objections to a proposed sale of property are to be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court. Local Administrative Order X-5 provides that objections are to be filed within twenty days of service of a notice of a proposed sale. Any objection to a proposed sale is treated as a contested matter and is governed by Fed.R.Bankr.P. 9014.

The Bankruptcy Code does not envision judicial involvement in the sale of estate property unless an objection is made to the proposed sale. "Unless a written objection to the notice of proposed use, sale or lease of property is timely filed, the notice is an administrative proceeding with no judicial consideration or action being necessary." Norton Bankr. Rules 6004 Editor's Comment (b) (1989-1990 ed.). The requirement of filing and serving objections makes clear that

oral objections are not contemplated. Id.

The manner of sale of estate property is within the discretion of the trustee. In re Alisa Partnership, 15 B.R. 802, 802 (Bankr. D. Del. 1981). Bankruptcy courts are reluctant to set aside sales and will do so only in very limited circumstances. Matter of Chung King, Inc., 753 F.2d 547, 549 (7th Cir. 1985). Once a sale is confirmed, the existence of fraud, mistake, or a like infirmity is necessary to set it aside. Id., at 549-50; see also Matter of Cada Investments, Inc., 664 F.2d 1158, 1162 (9th Cir. 1981); In re Lamont, 453 F.Supp. 608, 609-10 (N.D.N.Y. 1978) aff'd 603 F.2d 213 (2nd Cir. 1979); In re Elliot, 94 B.R. 343, 346 (E.D. Pa. 1988); Matter of Isis Foods, 47 B.R. 14, 15 (Bankr. W.D. Mo. 1984).

In a pre-Code decision, the Eighth Circuit held the sale of bankruptcy estate property should not be disturbed except for "substantial reasons." Currin v. Nourse, 66 F.2d 137, 140 (8th Cir. 1933). In another early decision the Eighth Circuit held a sale of bankruptcy estate property should not be set aside except for reasons for which equity would set aside a sale between individuals. Coulter v. Blieden, 104 F.2d 29, 34 (8th Cir. 1939) cert. denied, 308 U.S. 583, 60 S.Ct. 106, 84 L.Ed. 488 (1939); cf. Morrison v. Burnette, 154 F. 617, 624 (8th Cir. 1907) ("private parties" standard applied to the setting aside of judicial sales) appeal dismissed sub nom.

Laurel Oil & Gas Co. v. Morrison, 212 U.S. 291, 29 S.Ct. 394, 53 L.Ed. 517 (1909).

The "policy of finality" affects judicial decisions to set aside sales. This policy recognizes that if parties are to be encouraged to bid there must be stability in such sales, and a time must come when a fair bid is accepted and proceedings are ended. Chung King, 753 F.2d at 550. This policy of finality protects confirmed sales unless "compelling equities" outweigh the interests in finality. Id., see also, In re Transcontinental Energy Corp., 683 F.2d 326, 328 (9th Cir. 1982) (court hesitant to set aside confirmed sale but will do so when compelling equities outweigh the interests in finality); Cada Investments, 664 F.2d at 1162, (recognition of policy of finality and that policy is not absolute); Lamont, 453 F.Supp. at 609 (policy considerations dictate that some degree of finality be maintained); In re Winstead, 33 B.R. 408, 411 (M.D.N.C. 1983) (emphasis is upon finality in judicial sales, and compelling equities are necessary to set aside a confirmed sale).

One court has recognized that a trustee's filing of a "Notice of Intended Sale" gave the prospective purchaser a legitimate expectation that in the absence of objections to the proposed sale, the property would be sold to him. In re Northern Star Industries, Inc., 38 B.R. 1019, 1022 (E.D.N.Y. 1984). While the court did not mean to imply that a

bankruptcy court could never interfere with a proposed sale in the absence of objections to such sale by parties in interest, it cautioned that equitable considerations require that a bankruptcy court exercise extreme caution in this regard:

> Although it is desirable that a trustee obtain as high a price as possible for property of the estate, a general policy of preventing a trustee's proposed sale whenever a better offer comes along will discourage potential buyers from entering into negotiations with trustees, thereby driving down the market value of bankruptcy estate property in general.

Id.

Because of the great interest in the finality of judicial sales, the standard for setting aside a confirmed sale is stricter than the standard for rejecting a proposed sale. Transcontinental Energy, 683 F.2d at 328. In the latter situation the governing principle is to obtain the best price for the bankruptcy estate whereas in the former there is a greater emphasis upon the need for finality in judicial sales and executed contracts. In re University Avenue Properties, 55 B.R. 986, 989 (Bankr. E.D. Wis. 1986).

The vacating of a confirmed sale solely because the confirmed sale price is lower than a subsequent bid is proper only where the initial confirmed sale price was so grossly inadequate as to shock the conscience of the court. Coulter, 104 F.2d at 33; Chung King, 753 F.2d at 550. A court may set

aside a sale due to a grossly inadequate sale price even if the issue is not pled by the parties. Alisa Partnership, 15 B.R. at 802.

"Gross inadequacy" is said to exist when there is as a substantial disparity between the highest bid and the appraised or fair market value and there is a reasonable degree of probability that a substantially better price would be obtained by a resale. In re Muscongus Bay Co., 597 F.2d 11, 12 (lst Cir. 1979) (citing 4B Collier On Bankruptcy, ¶ 70.98 [17] at 1192 (14th ed. 1978). What is a "grossly inadequate" sales price may depend upon the particluar facts of a case. In a case in which the Eighth Circuit upheld the setting aside of a sale because of inadequate notice, the district court had held the transfer of a $50,000.00 life insurance policy for $1,723.60 was "grossly inadequate" in light of the fact that the insured was terminally ill. Matter of Insulation and Acoustical Specialties Co., 426 F.2d 1189, 1190 (8th Cir. 1970).

This record in this case reveals no objections to the proposed sale were filed by the bar date nor was the trustee's notice and report of sale withdrawn. The need to use and adhere to bar dates has previously been addressed by this court. See Matter of O'Dell, No. 86-0233, slip op. at 4-5 (Bankr. S.D. Iowa March 20, 1987). The conduct of a trustee, like any other party in interest, is regulated by the bar

dates applicable to an action. The trustee in this case could have objected to the sale or withdrawn his notice and report of sale after he received Mr. Daily's bid on the property, but he failed to do so.

Local Administrative Order X-5 (as amended) mandates that if an offer is to be treated as a timely filed objection it must be filed with the Clerk and served upon the trustee. Mr. Daily's counteroffer was never filed with the Clerk prior to the bar date. Absent the filing of any objection or the withdrawal of the trustee's report, court approval was not required and the sale of the property to Dale Swanson was approved without further court order upon expiration of the bar date. See Norton Bankruptcy Rules, 6004 Advisory Committee Note (1983) (1989-1990 ed.).

The trustee now moves to set aside the sale and offers two grounds for doing so. First, the trustee contends Mr. Swanson did not fully inform the Clerk of Court of the bidding process which had occurred when he presented her with the affidavit to sign. Although there is no elaboration in his brief, apparently the trustee's motion for sanction is also premised on Mr. Swanson's alleged failure to advise the court of the trustee's initiation of a bidding process after the bar date. The trustee's second basis for setting aside the sale is premised on his assertion that Mr. Swanson's $10,000.00 bid is grossly inadequate and the best interests of the estate

warrant acceptance of Mr. Daily's $13,500.00 bid.

With regard to the trustee's first argument, this court finds Andrew Swanson did inform the clerk's office about the initiation of an auction by the trustee. Mr. Swanson testified he advised the clerk's office about the auction and no testimony was elicited from staff in the clerk's office to refute this position.

Even if Mr. Swanson had not informed the court of the trustee's attempts to obtain a higher sale price, it would not be particularly relevant to a motion to set aside the sale. The Bankruptcy Code does not envision judicial involvement in the sale of estate property unless an objection is made to the sale. See Fed.R.Bankr.P. 6004; In re Karpe, 84 B.R. 926, 930 (Bankr. M.D. Pa. 1988); In re Robert L. Hallamore Corp., 40 B.R. 181, 182 (Bankr. D. Mass. 1984) (discussion of legislative history which indicates judiciary is to have no role in bankruptcy estate sale absent an objection); In re Hanline, 8 B.R. 449, 450 (Bankr. N.D. Ohio 1981) (same). In this case the property was deemed sold without any further court approval upon expiration of the bar date period.

The Swanson's subsequent effort to obtain an affidavit from the Clerk could not alter the fact that the sale was completed at 4:30 p.m. on April 24th. It is not unusual for parties to seek a clerk's certificate or clerk's affidavit to verify that no objections have been filed and a sale is deemed

approved. See Robert L. Hallamore Corporation, 40 B.R. at 183 (court encouraged parties to seek clerk's certificates rather than "comfort orders" from the court because the purpose of the amended Bankruptcy Code and rules is to minimize judicial involvement in the sales of estate property). The clerk's affidavit in this case correctly reflected the docket entries (or lack thereof) and was appropriately rendered regardless of the trustee's conduct subsequent to the bar date.

The trustee's second argument for setting aside the sale is also rejected. While gross inadequacy of sale price may be a basis for setting aside a sale, this court cannot find Mr. Swanson's $10,000.00 offer is grossly inadequate under the facts of this case.

The trustee consulted with Jim Cossitt the attorney for the Debtor regarding the reasonable value of the property and determined a $10,000.00 purchase price would be reasonable and acceptable. Mr. Swanson's initial offer of $8,500.00 was rejected, and Mr. Swanson was informed the equipment could be purchased for $10,000.00.

The fact that Mr. Daily subsequently indicated a willingness to pay $13,500.00 does not warrant setting aside the sale. While the $3,500.00 difference between Mr. Daily's final bid and Mr. Swanson's offer is significant, it is not so large as to convince this court that Mr. Swanson's bid was grossly inadequate.

Compelling equities do not exist to justify setting aside the sale of the property to Dale Swanson. The record does not support imposition of any sanction as sought by the trustee.

ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes no basis exists for setting aside the sale or for imposing sanctions.

IT IS ACCORDINGLY ORDERED that the trustee's motion to set aside and for sanction is denied. In accordance with Fed.R. Bankr.P. 6004(f)(2), the trustee shall execute any instruments necessary to effectuate the transfer of the property to Dale Swanson.

FURTHER, Trustee's prayer for sanctions against Dale Swanson is denied.

Dated this ___10th_____ day of September, 1990.

_____
RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE