

is too low.

This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 157 (b) (2) (N) and 1334 (b) and the standing general order of reference from the District Court for the Southern District of Georgia. Having considered evidence presented at an evidentiary hearing, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In 1999 Debtors purchased a home located at 115 Schooner Drive (“the Property”) at a price of approximately \$300,000.00. Inasmuch as the combined outstanding balance on the first and second mortgages was under \$300,000.00 and it appeared that there was significant equity to be realized from a sale in order to benefit their creditors in bankruptcy, the Trustee made arrangements to sell the Property. He employed Ms. Debra Rauers (“the Realtor”) who had originally sold the Property to Debtors and who was familiar with the Property, to market it. After performing a comparative market analysis, the Realtor recommended a listing price of \$460,000.00, which price the Trustee authorized.

Since December 2002, the Realtor has marketed the Property through direct marketing efforts which included holding an open house and contacting other real estate agents but which did not include listing the Property in the Multi Listing Service. More than 40 potential purchasers have visited the Property. The only offers are a \$335,000.00 offer

from Robert M. Chu and the \$347,000.00 offer from Jason Miller. After obtaining Mr. Chu's offer, the Realtor continued to market the property for an additional 30 days and received no further offer until after the first hearing was held, after which Mr. Miller made his offer.

Before submitting his offer, Mr. Miller examined the Property and determined it needed immediate repairs amounting to approximately \$15,000 to \$20,000 in costs. Aware of the \$335,000.00 contract with Mr. Chu, Mr. Miller made an offer of \$337,000.00. That offer was refused. He then offered \$347,000.00, and that offer was forwarded to this Court.

Both prospective purchasers testified at the April 30 hearing. Mr. Chu testified that he determined that repairs totaling approximately \$100,000.00 need to be made on the Property. After the objection to the sale was filed, he attempted to withdraw his offer to purchase but was informed by the Trustee that he remained bound to honor the contract if the Court approved it. At the second hearing, Mr. Chu testified that he remains willing and able to purchase the Property.

The Property is in a good location on marsh and a small creek and the house contains four bedrooms and three-and-a-half baths with more than 4,000 square feet of living space. It was listed by the Realtor based on her market analysis at \$460,000.00. The Realtor testified at the first hearing, however, that the \$335,000.00 offer is realistic in light of several

site irregularities and construction defects. First, the doors and windows in the house are in need of replacement because the design of the roof and lack of gutters precipitated a chronic moisture problem which in turn caused the doors and windows to rot. Second, the surface of the floors on the second level are uneven apparently because of soil settlement or construction deficiencies. Third, the house—unlike virtually any other house in this neighborhood or price range—has no garage.² Fourth, the large trees on the lot were removed, and the deterioration of the root structures of the trees is causing the earth to sink.

Mr. Hall's counsel produced an expert appraisal rendered by Andrew Capwell ("the Appraiser") showing a fair market value based on comparables in the neighborhood of \$460,000.00. The Appraiser testified, however, that his inspection of the Property was limited to the exterior and that he was unable to determine the true condition of the interior of the Property which he rated as good, but which he conceded after hearing testimony of the Realtor, would have to be reduced given her assessment of the condition of the home.

The Trustee recommends that the Court approve Mr. Chu's offer. The Trustee has reservations about Mr. Miller's financial ability to complete the purchase.

Mr. Hall's position is that the Court should disapprove both offers and that

² A mother-in-law suite is present in the normal "garage" space.

the Trustee should market the Property more extensively and utilize additional advertising procedures. In the alternative, Mr. Hall urges the Court to accept the higher offer of Mr. Miller, since both buyers are similarly able to complete the purchase and that, all things being equal, the Court should not reject the higher contract that provides more benefit to the creditors.

Neither contract contains any contingencies, and both prospective purchasers are aware that the party whose contract is ultimately approved by the Court is bound to complete the purchase as agreed.

I announced at the April 30 hearing that I would overrule Mr. Hall's objection and approve a sale of the Property and left open a brief period of time, until 3:00 p.m. on May 1, 2003, for Mr. Chu and Mr. Miller to submit higher offers to the Clerk of this Court if they so desired. No higher offer was tendered.

CONCLUSIONS OF LAW

11 U.S.C. § 363 empowers a Chapter 7 trustee to sell property of the estate. 11 U.S.C. § 363(b)(1). The task of this Court is to determine that the Trustee exercised sound business judgment, as determined by his articulation of a good-faith basis for recommending the sale for the price offered and by his employment of adequate procedures in procuring the offer and giving notice to all parties in interest. *See, e.g., Comm. of Equity*

Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring express finding that good business reason has been articulated in approving sale pursuant to § 363(b)); In re Gulf States Steel, Inc. of Ala., 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002) (noting that business judgment test has been adopted by vast majority of courts and noting factors to consider, including existence of improper motive, arm's length negotiations or bidding, and adequate procedure).

“The Trustee is responsible for the administration of the estate and his or her judgment on the sale and the procedure for the sale is entitled to respect and deference from the Court, so long as the burden of giving sound business reasons is met.” In re Gulf States Steel, 285 B.R. at 514.

In this case, I find that the Trustee has determined that the Property should be sold and has presented evidence showing that his judgment was based on sound judgment. First, a number of factors demonstrate that the actual sales price should be less than originally anticipated. While \$460,000 was an appropriate starting point in determining the reasonable fair market value of the property, in an active real estate market an asking price is not ordinarily firm, and a discount of five-to-ten percent to arrive at a contract sales price is common. Here, the evidence shows that a larger discount is to be expected. In light of the Realtor's assessment of the condition of the Property, that price reduction clearly would have to be increased. The anticipated cost of repairs between Miller's \$20,000.00 in immediate

needs plus other unquantified long-term needs, and Chu's \$100,000.00 estimate, suggests that the reduction would yield a net sales price between \$315,000.00 and \$390,000.00.

In any sale of real property, the market value is ultimately the price that an interested buyer in a competitive environment is willing to pay. Here, the act of marketing the Property, and its exposure to the market to more than 40 potential purchasers over a period of time in excess of several months, has yielded offers of \$335,000.00 and \$347,000.00. These numbers fall in the middle of the range which the Court finds to be indisputably reasonable, and is still high enough to pay off the first and second mortgages in this case and provide for some distribution to other creditors. The sale will also bring to an end the interest, fees and late charges which are accruing as a result of the Debtors' current inability to service the debt, and the sale would insure that the property does not have to be sold at a later time under more distressed conditions at a potentially lower price. Therefore, I find that the Trustee has articulated good-faith reasons to sell the Property to one of these purchasers.

There are differing views taken by bankruptcy courts as to whether it is appropriate to accept competing higher bids in trustees' sales by parties who did not submit bids or negotiate with the trustee prior to the trustee entering a contract subject to Court approval with a prospective purchaser. On the one hand, allowing such an offer to be approved by the Court provides the late offeror with precise and specific knowledge of the

competing offer which is not usual in the marketplace. It is suggested by many that because of this factor it is more difficult for trustees to conduct business and to reach a willing pool of purchasers for estate property when those purchasers realize that their offers will be advertised and "shopped" among competing purchasers in a sense. On the other hand, however, the trustee and the Court are obligated to sell estate property in a manner which serves the best interest of creditors and this ordinarily requires acceptance of the highest offer. I have adhered to this latter view while recognizing that the Court always reserves the right if the price differential is not material, or statistically significant, to accept a bid from a more qualified purchaser or one whose transaction can be consummated with less expense or delay to the estate.

In this case, Mr. Miller's offer of \$347,000.00 is substantially higher and would yield significant additional benefit to the estate than Mr. Chu's offer of \$335,000.00. I therefore conclude that Mr. Miller's offer should be approved by the Court and Mr. Chu's offer shall be held in abeyance pending the closing of the Miller transaction. A dispute arose at the hearing as to whether the purchaser, Mr. Miller, could insist upon using his personal attorney to close this transaction. Since the contract requires Court approval of the closing attorney and the Trustee has found it beneficial to the administration of estates which he administers to utilize counsel for closing transactions such as this from a group which have previously handled transactions of this type, I direct that the closing attorney employed and paid by Mr. Miller be determined by the Trustee. Understanding, however, that Mr. Miller's

personal counsel is willing to handle the transaction at a substantial discount because of their personal and business relationship, if Mr. Miller continues to object to that designation I will authorize this closing to be handled by his personal counsel, so long as that attorney is a member of the bar of the United States District Court for the Southern District of Georgia, and on the condition that Mr. Miller deposit an additional \$1,500.00 in escrow with the Trustee to cover any additional costs that may result to the estate because Mr. Miller's closing attorney does not render the same scope or quality of service to the Trustee as Trustee's designated counsel would.

ORDER

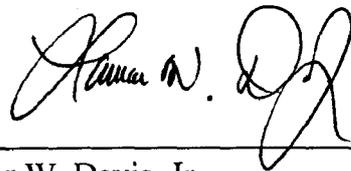
Pursuant to the above discussion, IT IS THE ORDER OF THIS COURT that the property known as 115 Schooner Drive, Savannah, Georgia, be sold to Jason Miller under the following terms and conditions:

- (a) The sales price for said real property will be \$347,000.00, cash at closing;
- (b) The sale will close within fifteen (15) days of Court approval;
- (c) The gross proceeds from the sale will be paid to the Trustee;
- (d) Trustee is authorized to pro-rate at closing all property taxes;
- (e) A total sales commission of 7% will be paid to Lamara Company as the sales agent for the seller by the Trustee at the closing. Said commission will be divided between Lamara Company and Joseph Saturday, Mr. Miller's realtor according to the usual

and customary proration for transactions of this type in the Savannah, Georgia, market.

- (f) Possession of the property will be delivered immediately upon entry of this Order.

IT IS FURTHER ORDERED that the sale of the real property herein described under the terms and conditions set forth above is hereby approved. This sale shall be clear and free of all liens, including but not limited to any judgment or tax liens, with all valid liens attaching to the proceeds of the sale to be paid to the Trustee. A true copy of this Order shall be filed for record in the public records of Chatham County, Georgia, as evidence of the passage of clear title from the Trustee to Jason Miller, and for all other applicable purposes.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of May, 2003.