

11 USC § 363(f)(5)
Sale free and clear of liens
Clear Channel v. Knupfer

Pioneer Village Investments, LLC, Case No. 10-62852-fra11

12/3/2010 FRA

Unpublished

The Chapter 11 Debtor proposed to sell a portion of its real property free and clear of liens. All of Debtor's real property is subject to a deed of trust in favor of its major secured creditor. The Debtor operates an "independent living" facility and the portion of the property it sought to sell consists of eleven independent living "cottages." Debtor planned to retain approximately \$160,000 of the net proceeds and pay the balance to the county for property taxes and then to the secured creditor.

Secured creditor objected on a number of grounds: 1) The sale is a component of a sub-rosa reorganization, which should be accomplished through the plan and confirmation procedures; 2) The sale does not qualify under § 363(f)(5); and 3) The sale violates local zoning restrictions.

The court denied Debtor's motion to sell on two grounds:
1) The Debtor relied on § 363(f)(5) as justification for the sale, but could not point to any proceeding under Oregon law that would compel the secured creditor to suffer the sale of a portion of its collateral in return for a portion of the purchase price obtained from the sale. The sale could thus not be approved pursuant to *Clear Channel Outdoor, Inc. v. Knupfer*, 391 BR 25, 42 (9th Cir. BAP 2008); and

2) Sale of a portion of Debtor's real property would violate local zoning ordinances, to which Debtors in Possession are subject.

E10-15(4)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE) Bankruptcy Case
PIONEER VILLAGE INVESTMENTS, LLC,) No. 10-62852-fra11
Debtor.) MEMORANDUM OPINION¹

Pioneer Village Investments, LLC, seeks leave of the Court to sell a portion of its real property in Jackson County, Oregon, free and clear of the liens of creditors, specifically the trust deed of creditor Premier West Bank. Premier West has objected on several grounds. I find that the motion for leave to sell the described property must be denied.

I. BACKGROUND

The debtor-in-possession operates a facility in the city of Jacksonville, Oregon, providing for “independent living” facilities for elderly residents, assisted living for residents who are less able to care for themselves, and other facilities designed to accommodate the needs of elderly residents. A portion of the facility is dedicated to eleven independent-living “cottages.” The debtor-in-possession seeks to sell the independent living cottages to Vintage Hotels, Inc., for a gross sale price of \$1,880,000. In its motion the debtor-in-possession states that it “believes that a total of \$400,000 need not be paid as secured claims

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¹ This decision is not intended for publication.

1 (because the lien is invalid, avoidable, etc., the lien holder consents to less than full payment, or part or all of
2 the underlying debt is not allowable).²

3 Premier West Bank has a claim for \$13,549,490.43 plus post-petition interest, secured by a deed of
4 trust against all of the debtor-in-possession's real property. The deed of trust describes four separate parcels,
5 but neither the deed of trust nor the debtor-in-possession's motion compare the property to be sold, which is
6 described by street address, and the four parcels described in the trust deed, which are described in metes and
7 bounds.

8 It appears from the motion that the debtor-in-possession's intention is to sell the described portion of
9 its property, retain approximately \$160,000 of the net proceeds, and pay the balance to the county for
10 property taxes, and then to Premier West. It is suggested, although there is no evidence on this point, that the
11 remaining property is sufficient to secure the balance of Premier West's loan.

12 Premier West objects on several grounds, including:

- 13 (1) The sale is a component of a sub-rosa reorganization, which should be accomplished through the
14 plan and confirmation procedures set out in Chapter 11 of the Code;
15 (2) The sale does not qualify under § 363(f)(5);
16 (3) The sale violates local zoning restrictions.

17 II. DISCUSSION

18 A. *The proposed sale does not qualify under Code § 363(f)(5).*

19 Code § 363(f) provides that a debtor-in-possession may sell property free and clear of "any interest"
20 in the property of any entity other than the estate, only if:

- 21 (1) applicable non-bankruptcy law permits sale of such property free and clear of such
22 interests;
23 (2) such entity consents;

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26 ² Apart from the dollar figures, the quoted language from the motion is part of the boilerplate included in the Court's form notice of intent to sell real estate, Local Bankruptcy Form 760.5.

(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.

The motion before me states that the debtor-in-possession relies on subsection (5), implicitly noting that the first four subsections are not applicable. Subsection (5) has been construed by the Bankruptcy Appellate Panel for the Ninth Circuit as referring to a “legal and equitable proceeding in which a non-debtor could be compelled to take less than the value of the claim secured by the interest.” Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 42 (9th Cir. BAP 2008).

In Clear Channel the BAP stated that

The question is thus whether there is an available type or form of legal or equitable proceeding in which a court could compel Clear Channel to release its lien for payment of an amount that was less than full value of Clear Channel's claim. Neither the trustee nor [the creditor] has directed us to any such proceeding under non-bankruptcy law, and the bankruptcy court made no such finding.

Clear Channel, at 45-46.

The debtor-in-possession does not point to any proceeding recognized under Oregon law that would permit a court to compel Premier West Bank to suffer the sale of a portion of its collateral in return for a portion of the purchase price obtained by the sale, and I am not aware of any. It follows that I cannot find, on the record before me, that Code § 363(f) has been satisfied.

B. Zoning restrictions

Declarations in support of Premier West's objection establish that the subject property is subject to a covenant granted to the City of Jacksonville that separate parcels of the planned unit development approved for the property will not be sold until appropriate covenants, conditions, and restrictions are promulgated and recorded. This has not been done, and it follows that the proposed sale would constitute an unlawful violation of local zoning ordinances. Debtors-in-possession are subject to such restrictions, and the Court cannot authorize their violation. See, 28 U.S.C. § 959; In re St. Mary Hosp., 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988).

III. CONCLUSION

Given the foregoing findings, I need not determine whether the sale should be denied because it supplants the confirmation process. See e.g., In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983). However, it should be noted that there are now before the Court plans submitted by both the debtor-in-possession and Premier West Bank. The issues raised by the debtor-in-possession's attempt at a partial liquidation to raise funds necessary to pay administrative expenses should be determined in the context of confirmation of a plan, rather than piecemeal sale of assets.

The foregoing constitutes my findings of fact and conclusions of law. A separate order has been entered denying the motion.



FRANK R. ALLEY, III
Chief Bankruptcy Judge