

255 Butler Assoc. LLC v 255 Butler, LLC

2023 NY Slip Op 33053(U)

September 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 511560/2015

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8

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255 BUTLER ASSOCIATES LLC,

Plaintiff,

Decision and order

- against -

Index No. 511560/2015

255 BUTLER, LLC,

Defendant,

September 1, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #40

The plaintiff has filed a motion seeking the right to engage in credit bidding at a pending sheriff sale. The defendant has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

Credit bidding is a judicially created right where a lienholder need not bid at a judicially sanctioned sale of assets with actual cash, but rather with credit on the debt. As the court observed in In re Nunez, 630 B.R. 870 [United States Bankruptcy Court, Southern District of Florida, Miami Division 2021] citing earlier authority "this Court has long recognized the principle that no useful purpose could be served in requiring a bondholder or a mortgagor to pay cash to a court officer conducting a judicial sale when he would be entitled to immediately have it paid back to him under the decree authorizing the sale" (id).

In the context of a sheriff sale credit bidding has been utilized (see, Ekstein v. Polito Associates LLC, 2022 WL 783000

[S.D.N.Y. 2022]). Indeed, in a very early New York case of credit bidding the court explained that "it seems to me very clear, that in the mode of conducting the sale under Evertson's execution, and particularly in not exacting the money on bids made by Evertson or his agent, no blame is imputable to the sheriff. It would be unreasonable, and injurious to debtors, as well as creditors, to insist, that the creditor on the execution should advance money on his bid, when the sole object of the sale, is to put money in his pocket, by paying a debt due to him" (see, Nichols v. Ketcham, 19 Johns. 84 [Supreme Court of New York 1821]). Further, cases in other jurisdictions merely confirm this intuitive expedient. Thus, in Titan Loan Investment Fund, L.P. v. Marion Hotel Partners, LLC, 891 NE2d 74 [Court of Appeals of Indiana 2008] the court explained that "where the judgment creditor bids the judgment instead of cash, such a credit bid is 'as effective as payment in actual money would have been...inasmuch as there is no reason for going through the empty form and idle ceremony of handing the money over...and then receiving it back....'" (id). Again, in Jackson v. Halls, 314 P3d 1065, 2013 UT App 254 [Court of Appeals of Utah 2013] the court explained that "allowing the executing creditor to pay its winning bid by credit is merely a convenience to avoid the 'useless ceremony' of payment to the sheriff by the very party which is entitled to receive the proceeds of the sale..." The fact

that the judgment creditor does not tender the cash to the sheriff ...is irrelevant and in no way alters the character of the transaction as a sale of property purchased with cash...' Moreover, payment of the full bid amount by such a credit is predicated on the successful bidder being 'solely entitled to whatever sums may have been bid for the property'" (id). Again, in Holden v. Crib, 561 SE2d 634, 349 SC 132 [Court of Appeals of South Carolina 2002] the court explained that "if the successful bidder is the judgment holder and is solely entitled to whatever sums may have been bid for the property, it would be senseless to require the bidder to pay cash. The following question was put to a predecessor of this court one hundred sixty years ago: '[W]hy do so senseless and nugatory an act as to make the plaintiff in execution pay the amount of his bid by which he purchased the defendant's property ... ?' The answer supplied by the court was 'it would seem to be a self-evident proposition, that if the [bidder] was entitled to the money, he might legally refuse to pay it to the sheriff' Cobb v. Pressly, 27 S.C.L. (2 McMul.) 416, 418 (1842)" (id).

Lastly, in RadLAX Gateway Hotel LLC v. Amalgamated Bank, 566 US 639, 132 S.Ct. 2065 [2012] the Supreme Court affirmed lower court rulings denying the debtors the right to engage in a cramdown plan without permitting the creditors the right to credit bid the assets at a bankruptcy auction. The cramdown plan

proposed the debtors selling their assets at an auction and using the proceeds to pay the creditor bank without permitting the bank to credit bid and offset the purchase price with the debt owed. While that case rested upon statutory interpretations of the Bankruptcy Code not relevant in this context the court noted that "the pros and cons of credit-bidding are for the consideration of Congress, not the courts" (id). Indeed, absent legislative prohibitions on credit-bidding, courts have created and endorsed its common sense utility as noted above.

Thus, "credit bidding is a fact of life, an economic reality, a generally accepted mechanism by which the lender's right to receive the value of its collateral is preserved and protected" (*Pacific Lumber and Philadelphia Newspapers: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(B)(2)(A) of the Bankruptcy Code*, by Jason Brookner, *American Bankruptcy Law Journal*, [Spring 2011]).

This does not mean to that credit bidding is not without its critics. Thus, in Matter of Homestead Partners Ltd., 197 B.R. 706 [Northern District of Georgia 1996] the court noted in a footnote that allowing the creditor Condor "to credit bid its entire claim would undermine substantially the premise upon which the auction finds justification" (id). The court reasoned that the auction "gains its impetus from a desire to introduce

competition, and specifically, a need for some objective reference by which to determine whether old equity is paying market value for its proposed acquisition. Allowing Condor to credit bid would countermand this value-assessing function, since the old shareholders would bid with cash money while their main competitor spent a currency of no consequence" (id). The court concluded that "to prevent such a contravention of the purpose behind this auction, the Court will require Condor to bid on the same terms as the former shareholders, in cash or its equivalent" (id). Further, in In re Philadelphia Newspapers, LLC, 2009 WL 3242292 [Eastern District of Pennsylvania 2009] (reversed in part by In re Philadelphia Newspapers, LLC, 418 B.R. 548 [Eastern District of Pennsylvania 2009]) the court recited arguments presented by debtors against credit bidding. The court noted that "the Debtors argue that as a matter of policy the Lenders should otherwise be precluded the right to credit bid. The Debtors argue that investing the Lenders with the right to credit bid will chill competitive bidding. In this regard the Debtors argue that other bidders will be disincentivized from spending the time and money to engage in the sale process if the Lenders can submit a credit bid, because the Lenders' claim vastly exceeds the fair market value of the assets in question, such that the Lenders have the absolute ability to control the outcome of any auction by simply bidding to the limit of their claim"

(id).

However, these criticisms, to the extent they still exist in the bankruptcy context after RadLAX Gateway Hotel LLC v. Amalgamated Bank (supra) are unpersuasive and are surely the minority view. First, it is inaccurate to assert a credit bid does not exactly match the same results of a cash bid. As some commentators have observed "the value of the secured creditor's credit has a discrete and easily identified cash value. Forbidding credit bidding on the ground that credit is not cash is tantamount to prohibiting cash bidders from bidding with two fifty-dollar bills in lieu of a single, hundred-dollar note (see, Credit Bidding and the Design of Bankruptcy Auctions, by Vincent Buccola and Ashley Keller, George Mason Law Review [Fall 2010]). Further, concerning the argument credit bidding chills competition "there is nothing about the argument specific to credit bidding. Instead, the argument rests on the notion that bidders with deep pockets may deter bidders with limited resources. For instance, if a would-be bidder knows that Warren Buffett plans to attend an auction, she is also surely aware that Buffett can top her reservation price for any or all of the assets on the block. Yet nobody proposes to ban wealthy cash bidders from participating in a bankruptcy auction" (id).

There are situations, not applicable here, where a court can prohibit credit bidding. For example, where there is a need to

obtain money for a bankruptcy estate (see, In re Diebart Bancroft, 1993 WL 21423 [Eastern District of Louisiana 1993]) or where the validity of the lien is in dispute (In re McMullan, 196 B.R. 818 [Western District of Arkansas 1996], *affirmed*, 162 F3d 1164 [8th Cir. 1998]).

Therefore, a survey of credit bidding demonstrates that there is no real basis to forbid its practice.

The defendant argues that credit bidding should be disallowed in this case for two reasons. First, the facts surrounding the plaintiff's obtaining the judgement would chill other parties from bidding. Second, the plaintiff is an 'insider' whereby such credit bidding would not result in obtaining the best price for the asset.

While the two reasons are essentially the same, namely credit bidding in this case may not yield the highest price, the arguments are wholly inapplicable. First, the fact the plaintiff in this position may deter other bidders is really no different than a known wealthy investor similarly scaring away potential bidders. There is no basis to forbid credit bidding to level any playing field where the nature of an auction is already tilted toward the wealthy.

Moreover, there are very few cases that analyze credit bidding in a context other than bankruptcy proceedings. Thus, while similarities exist in the bankruptcy arena their

precedential value only goes so far. This is true because the bankruptcy code itself permits credit bidding unless the court orders otherwise "for cause" (see, Bankruptcy Code §363(k)). The bankruptcy cases that deal with curtailing or declining credit bidding are all based upon whether such 'cause' has been established. Thus, in In re: Aeropostale Inc., 555 B.R. 369 [S.D.N.Y. 2016] the court observed there is scant law supporting a ban on credit bidding because of a chill it may have upon other bidders. The court explained that "cases that cite concerns about chilling a bid almost invariably also feature some other factor that supports a limitation on the creditor. Indeed, the Court is unaware of any cases where the chilling of bidding alone is sufficient to justify a limit on a credit bid" (id). The court cited to In re Fisker Automotive Holdings, Inc., 510 B.R. 55 [Bankruptcy Court District of Delaware 2014]) which did not absolutely forbid credit bidding but rather limited the amount to the price that the creditor paid to purchase the claim. The court in Aeropostale Inc. (supra) explained that Fisker (supra) "relied on other problematic conduct present in that case, observing that the creditor was the proposed sale purchaser insisted on an unfair process, i.e., a hurried process, and the validity of its secured status has not been determined'" (id). Indeed, in In re Empire Generating Co., LLC, 2020 WL 1330285 [S.D.N.Y. 2020] the court explained that "the court in In re

Fisker capped a credit bid where it was unknown how much of a claim was secured" (id). Further, in In re Figueroa Mountain Brewing LLC, 2021 WL 2787880 [Bankruptcy Court, Central District of California 2021] the court declined to forbid credit bidding on the grounds it would chill other bidding. The court explained that "the Court, moreover, is not persuaded that the risk of chilling bids is an independently adequate basis to limit or deny a credit bid. In each of the cited cases, the court identified other reasons why permitting the secured creditor to credit bid the entirety of its claim was not equitable" (id). Thus, the defendant's reliance upon Fisker (supra) is misplaced particularly since "the court in In re Fisker found "cause" existed under §363(k) of the Bankruptcy Code where the secured lender had chilled the bidding process by inequitably pushing the debtor into bankruptcy so that it could short-circuit the bankruptcy process" (see, In the Free-Lance Star Publishing Company of Fredericksburg, VA, 512 B.R. 798 [Bankruptcy Court, Eastern District of Virginia 2014]). There is no comparable "cause" requirement in this context. In addition, the court is not persuaded that any such chill which might affect others is a basis to forbid credit bidding. As the court observed in In re 160 Royal Palm LLC, 2019 WL 989829 [Bankruptcy Court, Southern District of Florida 2019] "The ability of a secured creditor to protect its lien rights by bidding its own claim in a sale of its

collateral is a central component of the rights of a lien holder. The credit bid right should be abrogated only under very unusual circumstances. To suggest that a sale process will be easier, more efficient, or more fruitful without one party bidding is simply not enough" (id).

Thus, there is no basis at all to forbid credit bidding in this case based upon some perceived fears of any chill regarding other potential bidders.

Equally unavailing is the argument credit bidding should not be allowed in this case because the plaintiff is an insider. The cases that forbid or limit credit bidding based on the status of a creditor as an 'insider' are cases where the potential bidder has close ties to the debtor (see, In re Elixseth, 2010 WL 716198 [Bankruptcy Court, District of Montana 2010] "the bidding procedures proposed...as presented to the Court through the Trustee, involve a party that has, or at least had, very close ties with the Debtor" (id) and In re CS Mining LLC, 574 B.R. 259 [Bankruptcy Court, District of Utah 2017] "cause is found to prevent credit bidding because it would benefit WUMI, who has very close ties (other than as a secured creditor) to the Debtor" (id), see, also, Bankruptcy Code §101(31)).

In this case the plaintiff, other than maintaining a judgement against the defendant has no other 'insider' status that could possibly taint the auction. Indeed, the plaintiff is


a creditor. The defendant argues in conclusory fashion that the plaintiff as the tenant "is the ultimate insider and understands that its status as an insider creates pressure on market conditions that would result in a lower sale price for the 255 Property and conversely—a higher sale price for the 255 Property once Tenant (the insider) has taken title to the 255 Property pursuant to the Sheriff's Sale" (see, Memorandum in Opposition, pages 7 and 8 [NYSCEF Doc. No. 1245]). Other than the truism noted, the defendant has failed to present any evidence at all that such knowledge on the part of the plaintiff, if unique and exclusive knowledge even exists, would harm the bidding process. Therefore, the plaintiff is not an "insider" as that term is defined to deny credit bidding. To be sure, there is no other basis to deny credit bidding in this case based upon the plaintiff's status as a tenant or relationship, if any, with the defendants.

Lastly, the court maintains jurisdiction to render this decision and the court hereby concludes that all notice requirements were adequately satisfied. Moreover, there will be no further delay of the sheriff sale. It may proceed as scheduled pursuant to all necessary notice requirements.

So ordered.

ENTER:

DATED: September 5, 2023
Brooklyn N.Y.



Hori. Leon Ruthelsman
JSC