

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Division**

IN RE:	:	
	:	
JANET S. COONS,	:	Chapter 7
	:	Case No. 11-51442
	:	Judge Joe Lee
Debtor	:	
_____	:	

**ORDER DENYING APPLICATIONS TO PAY ADMINISTRATIVE EXPENSES
AND FEES TO ATTORNEY FOR TRUSTEE AND SUSTAINING OBJECTION**

This matter is before the Court on an Application to Pay Administrative Expenses (“Auctioneer Application”) (Doc. 30), in which J. James Rogan, the Chapter 7 Trustee (“Trustee”), requests authorization to pay \$3,180.00 in commission and \$3,675.22 in expenses to Paul Playforth of Partners Realty, Inc., and on an Application to Pay Fees to Attorney for Trustee (“Trustee Application”) (Doc. 31) in which the Trustee requests authorization to pay \$355.00 for attorney fees to E. Gregory Goatley. An Objection (Doc. 33) to the Auctioneer Application and the Trustee Application was filed by secured creditor, JPMorgan Chase Bank, National Association (“JPMorgan”), asserting that the Trustee did not have the authority to sell the Real Property for less than the full amount owed. A hearing was held on October 5, 2011, and the matter was taken under submission. Subsequent to the hearing, JPMorgan filed a Supplemental Objection (Doc. 39) and the Trustee filed a Response (Doc. 43).

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

Facts

1. On August 1, 2002, the Debtor, Janet S. Coons, entered into a promissory note in the principal amount of \$71,155.00 (“Note”) payable to Wilson & Muir Bank & Trust Company (“Wilson & Muir”). The Note was secured by real property owned by the Debtor located at 340 Melancholy Lane, Willisburg, Kentucky (“Real Property”) as evidenced by a mortgage from

Debtor to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Wilson & Muir ("Mortgage"). On August 5, 2002, the Mortgage was recorded in the County Clerk's Office of Washington County, Kentucky, at Book 167, Page 188.

2. By an undated endorsement sign by Betty Randy, Vice President, Wilson & Muir, the Note was made payable to Washington Mutual Bank, FA.¹

3. By an Assignment of Mortgage dated July 22, 2011, MERS, as nominee for Wilson & Muir, assigned the Mortgage to JPMorgan. On July 28, 2011, the Assignment of Mortgage was recorded in the County Clerk's Office of Washington County, Kentucky, at Book 329, Page 648. (Supplemental Objection at Ex. B).

4. Ms. Coons, filed her chapter 7 petition on May 18, 2011 ("Petition Date").

5. Debtor's schedules reflect that on the Petition Date, Debtor owned the Real Property as a second home. Debtor valued the Real Property at \$99,000.00 in her schedules. According to the Trustee's Response, the 2011 tax assessed value of the Real Property is \$74,900.00. (Response at 1).

6. The Debtor's schedules further reflect that the Real Property is subject to a mortgage to Chase Mortgage in the amount of \$62,844.82.

7. By Order (Doc. 10) entered June 6, 2011, Mr. Playforth was appointed auctioneer with respect to the sale of the Real Property.

8. On June 10, 2011, the Trustee filed a Motion to Sell Real Estate Free and Clear of all Interests ("Motion to Sell") (Doc. 17) with respect to the Real Property. In the Motion to Sell, the Trustee states:

The trustee submits that the liquidation value of the above described real estate should be sufficient for the sale price to be greater than the amount of the secured interest of Wilson & Muir Bank & Trust Company and its assigns or successors in interest to authorize a sale pursuant to section 363 (f) and (3) of the bankruptcy code.

¹ JPMorgan acquired Washington Mutual Bank FA on September 25, 2008. See Press Release, JPMorgan Chase Acquires Banking Operations of Washington Mutual (Sept. 25, 2008) (on file at <http://www.fdic.gov/news/news/press/2008/pr08085.html>).

(Motion to Sell at ¶ 14). The Motion to Sell was served on JPMorgan Chase Bank, N.A., 3415 Vision Drive, Attn. Dept. OH4-7126, Columbus, OH 43219.

9. By Order (Doc. 21) entered June 27, 2011, Mr. Goatley was appointed as the attorney for the trustee with respect to the sale of the Real Property.

10. By Order (Doc. 26) entered July 7, 2011, the Trustee was authorized to sell the Real Property pursuant to 11 U.S.C. § 363.

11. On July 18, 2011, the Trustee filed and served a Notice of Intent to Sell Property of the Estate (“Notice of Intent”) (Doc. 27) advising that the Real Property would be sold at auction on August 13, 2011, free of all liens, encumbrances and interests. No objections were filed to the Notice of Intent.

12. On August 15, 2011, JPMorgan Chase Bank, National Association/Washington Mutual Bank, filed a proof of claim (Claim No. 8) for a secured claim in the amount of \$62,738.01 (“JPMorgan Claim”), secured by the Real Property. The JPMorgan Claim reflects that JPMorgan is the assignee of Wilson & Muir Bank & Trust Company. The address given for JPMorgan in the Proof of Claim is 3415 Vision Drive, Attn. Dept. OH4-7302, Columbus, OH 43219.

13. On August 18, 2011, Mr. Playforth filed an Auctioneer’s Report (Doc. 29) indicating that the Real Property had been sold at auction on August 13, 2011, for \$53,000.00.

Law & Analysis

The issue is whether the Trustee may recover under 11 U.S.C. § 506(c) the Trustee’s attorney fees and the costs and expenses of the auctioneer conducting the sale when the gross proceeds of the sale are insufficient to pay those claims and the full amount of JPMorgan’s secured claim.

Under the Bankruptcy Code,

The trustee may sell property . . . free and clear of any interest in such property of any entity other than the estate, *only if* – . . .

(2) such entity consents;

(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.

11 U.S.C. § 363(f) (emphasis added). Section 506(c) provides that:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. § 506(c) (emphasis added).

In order for the trustee to recover the costs and expenses incurred in the disposition of a debtor's property securing an allowed secured claim, the Trustee bears the burden of establishing that the costs and expenses were: (1) reasonable, (2) necessary, and (3) of benefit to the secured creditor.

In re Crutcher Concrete Constr., 218 B.R. 376, 380 (Bankr. W.D. Ky. 1998); see also BANKRUPTCY SERVICE § 24:480 (West 2010) (analysis of expenses incurred under § 506(c) requires a three part test "(1) expenditure was necessary; (2) the amounts expended were reasonable; and (3) the creditor benefited from the expenses"); 4 COLLIER ON BANKRUPTCY ¶ 506.05 (16th ed. 2011) (same). "The party seeking recovery bears the burden of proving that Section 506(c) is applicable." *Noland v. Williamson (In re Williamson)*, 94 B.R. 958, 962 (Bankr. S.D. Ohio 1988).

The Trustee asserts that JPMorgan consented to the sale of the Real Property because it did not object to the Motion to Sell or the Notice of Intent.² This argument is not well-taken because the Trustee's Motion to Sell clearly set forth in paragraph 14 that the sale was being made pursuant to § 363(f)(3) which specifically prohibits the sale unless "the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). There was no reason for JPMorgan to object.

The Trustee was aware that the mortgage on the property was in the amount of approximately \$62,000.00. As the Trustee noted in his Response, "Counsel for JP Morgan

² The case cited by the Trustee for this position is not applicable to the situation before the Court in this case. See *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281 (7th Cir. 2002). Rather, in *FutureSource*, the Seventh Circuit was dealing with a situation where the "interest" extinguished by the bankruptcy court's sale order was a license in intellectual property that had not yet been created.

Chase Bank candidly admitted in his presentation to the court that his client did not object to the sale since it was the belief that the property would sell for an amount in excess of its lien.” (Response at 3). The fact that JPMorgan thought the property would sell for a sufficient amount to pay its lien in full does not relieve the Trustee of his obligations. It is the Trustee’s duty, particularly when he moves to sell estate property under § 363(f)(3), to abide by that provision. He did not take the precaution of protecting an estate asset by providing a minimum bid at the auction. He was authorized to sell pursuant to § 363(f)(3) as requested in the Motion to Sell. His authority did not permit a sale that did not comply with that section of the Bankruptcy Code.

Clearly, JPMorgan was not benefited by the sale of the Real Property for a sale price approximately \$10,000 less than its mortgage. Now the Trustee attempts to deduct an additional \$7,210.22 from that sale price.

Conclusion

Based on the foregoing, the Court being sufficient advised,

IT IS, HEREBY, ORDERED that the Objection of JPMorgan is **SUSTAINED** and the Trustee Application and the Auctioneer Application are **DENIED**.

Copies to:

J. James Rogan, Esq., Chapter 7 Trustee
E. Gregory Goatley, Esq., Counsel for Trustee
Nathan L. Swehla, Esq., Counsel for JP Morgan
Ryan R. Atkinson, Esq., Counsel for Debtor
U. S. Trustee

~~~~~  
***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joe Lee**  
**Bankruptcy Judge**  
**Dated: Thursday, December 08, 2011**  
**(jh)**