

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION  
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In re: Case No. 8:19-bk-09946-CED  
Chapter 11

Heritage Hotel Associates, LLC,

Debtor.

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**ORDER DENYING MOTION  
FOR STAY PENDING APPEAL**  
(Doc. No. 317)

THIS CASE came on for hearing on September 11, 2020, to consider the *Motion for Stay Pending Appeal* filed by CCP SP Hotel, LLC (the “Stay Motion”),<sup>1</sup> filed under Federal Rule of Bankruptcy Procedure 8007(a), and the response to the Stay Motion filed by Debtor Heritage Hotel Associates, LLC (“Debtor”).<sup>2</sup>

**History**

A brief history of this case is as follows. Debtor, the owner of an Indigo Inn Hotel in St. Petersburg, Florida (the “Hotel”), filed a voluntary petition under Chapter 11 of the Bankruptcy Code on October 21, 2019. Debtor’s primary secured creditor was Valley National Bank (“Valley”). Valley filed several proofs of claim, including a proof of claim in the amount of \$6,298,573.08, asserting a security interest in the Hotel.<sup>3</sup> The Small Business Administration holds a junior lien on the Hotel and filed its claim in the amount of \$554,636.52.<sup>4</sup>

On January 27, 2020, the Court confirmed Debtor’s Chapter 11 plan (the “Plan”).<sup>5</sup> The Plan provided for the sale of the Hotel to a third party for \$10 million, with the sale to close in February

2020. Under this proposed sale, Valley’s claim would have been paid in full; under Paragraph A of the Court’s order confirming Plan, Valley’s claim for default interest was preserved.

The third-party buyer did not have the funds to close on the sale. Debtor then obtained another purchaser for the Hotel, also for \$10 million. However, in March 2020, due to the impact on the hotel industry of the COVID-19 pandemic, that purchaser backed out.

On February 10, 2020, Valley filed an application for payment of its postpetition interest at the default rate of 24% and for its reasonable attorney’s fees.<sup>6</sup> The Court granted the application, finding that Valley was entitled to default interest but did not calculate the amount of interest due (the “Default Interest Order”).<sup>7</sup>

On June 4, 2020, Debtor timely filed a motion for reconsideration of the Default Interest Order.<sup>8</sup> Several days later, on or about June 9, 2020, CCP SP Hotel LLC (“CCP”) acquired Valley’s loan.<sup>9</sup> CCP filed an objection to the motion for reconsideration of the Default Interest Order.<sup>10</sup>

On August 5, 2020, Debtor filed its *Motion for Order Authorizing the Sale of Substantially All of its Assets to Ally Capital Group, LLC Pursuant to 11 U.S.C. § 363, Free and Clear of All Liens, Claims and Encumbrances, Subject to Higher and Better Offers at Auction* (the “**Sale Motion**”).<sup>11</sup> On July 28, 2020, Debtor filed its *Emergency Motion for Entry of an Order (I) Approving Bidding Procedures in Connection with the Sale of Substantially All of its Assets, (II) Establishing Procedures for the Assumption and/or Assignment by the Debtor of Certain Executory Contracts and Unexpired Leases, (III) Approving a Break-Up Fee and Minimum Overbid Amounts, (IV) Approving Form and Manner of Notice of Bidding Procedures, and (V) Setting Objection Deadlines* (the “**Bid Procedures Motion**”).<sup>12</sup>

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<sup>1</sup> Doc. No. 317.

<sup>2</sup> Doc. No. 327.

<sup>3</sup> Claim No. 27.

<sup>4</sup> Claim No. 32.

<sup>5</sup> Doc. Nos. 66 and 117.

<sup>6</sup> Doc. No. 119.

<sup>7</sup> Doc. No. 171.

<sup>8</sup> Doc. No. 180.

<sup>9</sup> Doc. No. 197.

<sup>10</sup> Doc. No. 196.

<sup>11</sup> Doc. No. 277.

<sup>12</sup> Doc. No. 245.

The Bid Procedures Motion sought approval of Ally Capital Group, LCC (“Ally Capital”) as the “stalking horse bidder” with its offer of \$8 million, procedures for bidding on the Hotel including a deadline for the submission of qualified bids and an auction in the event of bids, a commission to the Debtor’s broker in the amount of \$250,00.00, subject to further approval by the Court on the application of the broker, a breakup fee of \$300,000.00 to Ally Capital if Ally Capital were not the successful bidder, and a minimum initial overbid of \$8,400,000.00 (the \$8,000,000.00 purchase price offer, plus the break-up fee of \$300,000.00, plus \$100,000.00). CCP filed an objection to the Bid Procedures Motion<sup>13</sup> and a supplement to its objection.<sup>14</sup> One of the issues raised in CCP’s objection was its right to credit bid the amount of its outstanding debt.

The Court conducted a hearing on the Bid Procedures Motion and CCPs objection on August 3, 2020. At that hearing, the Court granted the Bid Procedures Motion. The Court ruled that, as authorized by 11 U.S.C. § 363(k), CCP was not entitled to include the disputed default interest—then the subject of Debtor’s motion for reconsideration—in its credit bid and was only entitled to credit bid the undisputed portion of its claim. After a colloquy with Debtor’s counsel, to which CCP’s counsel did not object, the Court determined this amount to be \$5.4 million. In addition, the Court, with Ally Capital’s agreement, reduced the amount of the breakup fee from \$300,000.00 to \$200,000.00, set August 20, 2020, as the deadline for the submission of qualified bids, August 24, 2020, as the date of any necessary auction, and August 25, 2020, for a hearing on the Sale Motion in order to confirm the sale of the Hotel to the successful bidder.

On August 4, 2020, the Court entered its order granting the Bid Procedures Motion (the “**Bid Procedures Order**”).<sup>15</sup>

On August 18, 2020, the Court entered its order granting Debtor’s motion for reconsideration of the Default Interest Order.<sup>16</sup> On August 21, 2020, Debtor filed a notice that, other than Ally Capital’s \$8 million bid, no qualifying bids had been received by the bid deadline and that no auction would be conducted on August 24, 2020.<sup>17</sup>

On August 25, 2020, the Court conducted a hearing on the Sale Motion and confirmed the sale to Ally Capital at \$8 million. The Court then entered its order granting the Sale Motion (“the **Sale Order**”).<sup>18</sup>

On August 28, 2020, CCP filed its Notice of Appeal of the Bid Procedures Order and the Sale Order.<sup>19</sup> On August 31, 2020, CCP filed its Designation of Record and Statement of Issues on Appeal.<sup>20</sup> CCP identified eight issues presented in its appeal. Seven of CCP’s designated issues on appeal relate to whether the Court erred in entering the Bid Procedures Order when the Court, according to CCP:

- (1) limited CCP’s credit bid to its undisputed claim as determined by Debtor;
- (2) denied CCP “the right to credit bid the full amount of its claim, including interest computed at the default rate;”
- (3) allowed Debtor to “pry into the financial and business affairs of any bidder;”
- (4) was ambiguous regarding executory contracts;
- (5) provided Ally Capital (the “stalking horse”) with a \$200,000.00 break-up fee;
- (6) required Ally Capital to receive copies of all incoming bids; and

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<sup>13</sup> Doc. No. 252.

<sup>14</sup> Doc. No. 255.

<sup>15</sup> Doc. No. 270.

<sup>16</sup> Doc. No. 291. The Court entered its order partially in response to CCP’s request for a ruling on CCP’s *Second*

*Supplement to Rehearing Motion Filed by Debtor Regarding § 506(b) Order* (Doc. No. 288).

<sup>17</sup> Doc. No. 295.

<sup>18</sup> Doc. No. 304.

<sup>19</sup> Doc. No. 308.

<sup>20</sup> Doc. No. 314.

(7) provided Berkadia Real Estate Advisors, LLC, with a flat broker's fee of \$250,000.00.

The eighth issue on appeal designated by CCP is whether the Court erred in entering the Sale Order without first ruling on CCP's objections to the Bid Procedures Order.

In the Stay Motion, CCP seeks a stay of the Sale Order and the entry of an order staying the sale of the Hotel. CCP's primary argument is that a secured creditor is entitled to credit bid at a sale of property, and the Court did not have cause to deprive CCP of its full credit bid rights, including the right to include default interest of approximately \$900,000.00 in its credit bid.<sup>21</sup>

In its response to the Stay Motion, Debtor asserts that CCP filed the appeal in its capacity as a disappointed "bidder," not in its capacity as a secured creditor, and that the sale proceeds are more than sufficient to pay CCP's secured claim.<sup>22</sup>

The Court is advised that Ally Capital is scheduled to close on its purchase of the Hotel on September 16, 2020.

### Analysis

The standards applicable to a motion for a stay pending appeal are set forth in *In re F.G. Metals, Inc.*<sup>23</sup> The party seeking the stay must clearly establish that (1) it is likely to prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay or other injunctive relief is not granted; (3) the other parties will suffer no substantial harm if the stay is granted; and (4) the issuance of a stay will serve, rather than disserve, the public interest implicated in the case.

### ***CCP is unlikely to prevail on the merits of the appeal.***

Although CCP complains regarding the details and procedures set forth in the Bid Procedures Order, its primary issue on appeal is whether the Court erred in restricting its right to credit bid the full amount of its claim, including default interest.

However, CCP did not file a timely motion to clarify or reconsider the Bid Procedures Order. And as Debtor points out in its response to the Stay Motion, "CCP never took any action to submit a Bid of any kind, including a Qualified Bid, never provided a Bidder's Agreement, and never submitted a required Bid Deposit."<sup>24</sup> Therefore there is a question as to whether CCP even has standing to challenge the Bid Procedures Order at this stage of the sale proceedings.

In addition, the right to credit bid is created by 11 U.S.C. § 363(k). Sufficient cause to deny or condition a secured creditor's right to credit bid is determined on a case-by-case basis.<sup>25</sup> For example, a court may limit a secured creditor's right to credit bid if a genuine dispute exists regarding the extent or validity of the creditor's lien.<sup>26</sup> Here, paragraph 10 of the Bid Procedures Order provides that CCP was permitted to credit bid "in an amount equal to undisputed amounts owed to CCP under its mortgage." That limitation was an appropriate exercise of the Court's discretion under § 363(k).

Although the likelihood of success on appeal is generally the most important of the four criteria,<sup>27</sup> even if the Court were to find that CCP has a "substantial" chance of success on appeal, the three remaining criteria do not "tend strongly" in CCP's favor.<sup>28</sup>

<sup>21</sup> Doc. No. 317. CCP acquired the secured claim of Valley National Bank, the original creditor in this bankruptcy case, on or about June 9, 2020 (Doc. No. 197), approximately seven months after the bankruptcy case was filed, and files papers as "successor-in-interest to Valley National Bank."

<sup>22</sup> Doc. No. 327.

<sup>23</sup> 390 B.R. 467, 471-72 (Bankr. M.D. Fla. 2008).

<sup>24</sup> Doc. No. 327, ¶ 3.

<sup>25</sup> *In re L.L. Murphrey Company*, 2013 WL 2451368, at \*5 (Bankr. E.D.N.C. June 6, 2013).

<sup>26</sup> See *Ratcliff v. Rancher's Legacy Meat Co.*, 2020 WL 4048509, at \*4 (D. Minn. July 20, 2020).

<sup>27</sup> *In re F.G. Metals, Inc.*, 390 B.R. at 472.

<sup>28</sup> *Id.*

***CCP will not suffer irreparable injury.***

CCP will not suffer irreparable injury if the stay pending appeal is denied. As indicated above, CCP appears to have filed the Stay Motion as a disappointed “bidder,” not as a secured creditor protecting an existing interest, and CCP did not actually submit a bid. The validity of CCP’s secured claim is not affected by the Sale Order, CCP may continue to assert its interest as a secured creditor, and the proceeds of the sale to Ally Capital are sufficient to pay CCP’s claim in full.

In the *Ratliff v. Rancher’s Legacy Meat Co.*<sup>29</sup> case cited by CCP, the district court granted a stay pending appeal of the debtor’s proposed sale. There, the issue was whether the creditor held a security interest in the property to be sold. If the creditor had a security interest in the property, the creditor had credit bid rights. The court found that the creditor would suffer irreparable injury if he was not permitted to exercise his credit bid rights because of his concern that the property would be sold at a depressed price affecting the repayment of his asserted secured claim. That is not the case here. If the Hotel is sold for \$8 million, CCP will be paid in full.

***Debtor and other creditors may suffer irreparable injury.***

Debtor and other creditors may suffer irreparable harm if the stay is granted. Specifically, the SBA, the franchisor, and other secured creditors are scheduled to be paid from the proceeds of the sale. The purchase price of the Hotel has already been depressed as a result of the COVID-19 crisis. The future is uncertain and there is no guaranty that CCP, even if permitted to exercise its credit bid rights, would ultimately close on a purchase of the Hotel. The risk of nonpayment to other creditors, the delay in payment during the appeal, and the potential jeopardy to the closing of the sale are valid matters that weigh against the entry of a stay.

***The issuance of a stay will disserve public policy.***

Fourth, public policy does not support the grant of a stay pending appeal. CCP acquired Valley’s claim after the bankruptcy case was pending and it knew that Debtor’s motion for reconsideration of the Default Interest Order was pending when it acquired the loan. CCP did not seek reconsideration of the Bid Procedures Order and it did not submit a bid. Public policy favors the certainty of the auction process. Ally Capital complied with the procedures set out in the Bid Procedures Order and stands willing to close the sale as the successful bidder.

Accordingly it is

**ORDERED** that CCP’s Motion for Stay Pending Appeal is denied, without prejudice to its seeking a stay in the United States District Court for the Middle District of Florida under Federal Rule of Bankruptcy Procedure 8007(b).

**DATED:** September 11, 2020.

/s/ Caryl E. Delano

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Caryl E. Delano  
Chief United States Bankruptcy Judge

<sup>29</sup> 2020 WL 4048509 (D. Minn. July 20, 2020).