ORDERED.

Dated: March 15, 2022

Grace E. Robson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
D.A.B. Constructors, Inc.,	)	Case No. 6:21-bk-04053-GER
	)	Chapter 7
Debtor.	)	
	)	

ORDER DENYING WESTERN SURETY COMPANY'S MOTION TO ALTER, AND AMEND AND FOR RELIEF FROM ORDER AUTHORIZING TRUSTEE'S SALE FREE AND CLEAR OF LIENS SALE

This case came on for consideration of *Western Surety Company's Motion to Alter, and Amend and for Relief from Order Authorizing Trustee's Sale Free and Clear of Liens Sale*[1] (the "Motion to Amend") filed by Western Surety Company (the "Surety") and the Responses[2] thereto filed by Truist Bank and the Trustee. The Surety requests the entry of an order amending, modifying, and granting relief from the Bid Procedures Order.[3] The Court, after consideration of the Motion to Amend and the Responses, **FINDS, ORDERS, AND ADJUDGES as follows:**

[1] Doc. No. 218. All "Doc. No." citations refer to pleadings in this case, No. 6:21-bk-04053-GER, unless otherwise noted.
[2] *Truist Bank's Response in Opposition to Western Surety's Motion to Alter, and Amend and for Relief from Order Authorizing Trustee's Sale Free and Clear of Liens Sale* (Doc. No. 229) and *Trustee's Response in Opposition to Western Surety Company's Motion to Alter, and Amend and for Relief from Order Authorizing Trustee's Sale Free and Clear of Liens* (Doc. No. 232) (collectively, the "Responses").
[3] *Order Granting Motion to Authorize Trustee to Sell Certain Acquired Assets Free and Clear of Liens, Claims, Rights, Encumbrances and Interests, to Establish and Approve of Bidding and Notice Procedures, to Establish and*

Background

A. Prior to this bankruptcy case, the Debtor, D.A.B. Constructors, Inc. (the "Debtor"), operated a construction company that primarily focused on the Florida Department of Transportation ("FDOT") and county road construction projects.

B. The Debtor owns two asphalt plants that contain large stockpiles of raw materials.

C. On September 20, 2016, the Debtor and the Surety entered into a General Agreement of Indemnity ("GAI"), pursuant to which the Surety issued certain bonds for various projects, including the Diamond Interchange Project. In the event of default, the GAI provides, in part:

> Upon the occurrence of an Event of Default: . . . b. the Indemnitors hereby assign, transfer, and set over to the Surety all of their rights under the Bonded Contracts, including . . . ii. all machinery, plant, equipment, tools and materials upon the site of the work or elsewhere for the purposes of the Bonded Contracts, including all material ordered for the Bonded Contracts . . . .

D. On July 1, 2021, the Debtor filed a lawsuit against FDOT in state court for unforeseen additional work it had performed and for additional costs associated with the Diamond Interchange Project.

E. On July 1, 2021, FDOT declared the Debtor in default on the Diamond Interchange Project by written correspondence.

F. On July 20, 2021, the Surety filed its UCC-1 financing statement with the Florida Secured Transaction Registry.

G. On July 28, 2021, the Debtor sent a default notice to FDOT and others stating it was financially unable to perform or complete the work on the projects.

Approve of Assignment and Assumption Procedures, and for Other Related Relief (the "Bid Procedures Order") (Doc. No. 205).

H. FDOT then demanded the Surety perform the Debtor's obligations on the Diamond Interchange Project, as well as other projects.

I. On August 10, 2021, the Surety and FDOT entered into a Takeover Agreement. The Surety agreed to engage a completion contractor in order to complete the Diamond Interchange Project. The Takeover Agreement provided, in part:

> Insofar as [FDOT] has any right, title or interest therein, [FDOT] agrees that the Surety and the Completion Contractor shall have the right to use, without charge by [FDOT], any of the equipment, materials and appurtenances furnished or supplied by D.A.B. which may be stored on or about the premises of the Project site or materials which may have been fabricated for [FDOT] in connection with the Original Contract, whether or not presently upon the Project site.

J. On September 3, 2021, the Debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code.[4]

K. On January 10, 2022, the Court held a continued status conference. The Trustee stated that he intended to file a motion to sell the Debtor's asphalt plants and related assets. The Court set a hearing for February 9, 2022, at which time it would hear and consider the yet-to-be-filed motion to sell and any objections thereto.[5]

L. On January 21, 2022, the Trustee filed the Sale Motion[6] seeking to sell certain assets, including both asphalt plants, the stockpile materials at both asphalt plants, and the Debtor's rights, title, and interest in the unregistered trademark "D.A.B. Constructors" (collectively, the "Acquired Assets") to a stalking horse bidder for a total of $9,771,005.77, subject to higher and better offers. The Sale Motion sought approval of bid and sale procedures

---

[4] Doc. No. 1.
[5] *See* Doc. No. 173.
[6] *Motion to Authorize Trustee to Sell Certain Acquired Assets Free and Clear of Liens, Claims, Rights, Encumbrances and Interest, to Establish and Approve of Bidding and Notice Procedures, to Establish and Approve of Assignment and Assumption Procedures, and for Other Related Relief* (the "Sale Motion") (Doc. No. 180).

to be used in connection with a public auction of the Acquired Assets and requested that the sale be free and clear of all liens, claims, encumbrances, and interests.

M. On January 25, 2022, the Trustee filed a Notice of Preliminary Hearing on the Sale Motion,[7] reflecting that a hearing would be held on February 9, 2022. The Notice of Preliminary Hearing was served via CM/ECF on counsel for the Surety.

N. On February 3, 2022, the Surety filed an Objection to the Sale Motion, arguing that it has an interest in the materials based on equitable subrogation, the assignment provision of the GAI, or its financing statement.[8] The Surety also objected to the proposed break-up fee, the existence of a bona fide dispute, and its ability to make a credit bid under section 363(k) of the Bankruptcy Code.[9] The Trustee filed a Response to the Objection.[10]

O. On February 8, 2022, the Trustee filed a complaint against the Surety, seeking avoidance of preference and declaratory relief regarding the validity, priority, and extent of the Surety's interests in personal property of the Debtor.[11]

P. After a 3-hour hearing on February 9, 2022 (the "Hearing"), wherein the Court heard arguments from both sides, the Court overruled the Surety's objections. The Court found that the Trustee had demonstrated an objective basis in law and fact exists regarding the validity, priority, and extent of the Surety's claims and interests and concluded there was a bona fide dispute sufficient to authorize a sale of the asphalt plants and raw materials pursuant to section 363(f)(4) of the Bankruptcy Code, free and clear of all liens, claims, interests, rights and

[7] Doc. No. 181.
[8] Doc. No. 185. The Surety filed an Amended Objection the same day (Doc. No. 186).
[9] Doc. No. 186, at 5-13. Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.
[10] Doc. No. 192.
[11] Doc. No. 1, Adv. Pro. No. 6:22-ap-00023-GER.

encumbrances. Because of the existence of a bona fide dispute, the Court sustained the objection to the Surety's right to credit bid.

Motion to Amend

The Surety seeks reconsideration of the Bid Procedures Order pursuant to Federal Rules of Civil Procedure 59 and 60.[12] As noted by the Trustee, the order is not a final judgment or order to which those rules apply.[13] However, in reviewing a motion to reconsider an interlocutory order, a court has broad discretion to determine what standards to apply.[14] The Court believes it appropriate to analyze the Surety's request under Rules 59 and 60. "The only grounds for granting [a Rule 59(e)] motion are newly-discovered evidence or manifest errors of law or fact."[15] "Reconsideration under this rule is an 'extraordinary remedy to be employed sparingly' due to interests in finality and conservation of judicial resources. The function of a Rule 59 motion is not to ask the court 'to rethink what it has already thought through—rightly or wrongly.'"[16] A party may also obtain relief from a judgment or order under Federal Rule of Civil Procedure 60 for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence; 3) fraud, misrepresentation, or misconduct by an opposing party; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged; or 6) any other

[12] Federal Rules of Civil Procedure 59 and 60 are made applicable to bankruptcy cases pursuant to Federal Rules of Bankruptcy Procedure 9023 and 9024.
[13] *In re Randell*, No. 21-25175-BEH, 2022 WL 174210, at *1 (Bankr. E.D. Wis. Jan. 19, 2022).
[14] *Id*. at *2 (citing *In re Kinney*, No. 13-27912 EEB, 2019 WL 7938816, at *1 (Bankr. D. Colo. Nov. 22, 2019), *aff'd*, 5 F.4th 1136 (10th Cir. 2021)).
[15] *Lee v. Nat'l R.R. Passenger Corp.*, 772 F. App'x 865, 867 (11th Cir. 2019) (alteration in original) (quoting *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116, 1119 (11th Cir. 1999)).
[16] *In re Thomas*, 618 B.R. 585, 587 (Bankr. M.D. Fla. 2020) (quoting *In re Smith*, 541 B.R. 914, 916 (Bankr. M.D. Fla. 2015)); *accord Mincey v. Head*, 206 F.3d 1106, 1137 n.69 (11th Cir. 2000) (quoting *In re Halko*, 203 B.R. 668, 671-72 (Bankr. N.D. Ill. 1996)) ("The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory or to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment.").

reason that justifies relief.[17] Here, the Surety fails to meet the standard for reconsideration under either Rule 59 or Rule 60.

A Rule 59 or Rule 60 motion cannot be used to relitigate issues already decided or as a substitute for an appeal.[18] The majority of the Surety's arguments are identical to those raised in its Objection to the Sale Motion and at the Hearing—arguments that were ultimately rejected by this Court. The arguments regarding adequate protection,[19] the right to credit bid,[20] equitable subrogation,[21] the Surety's interest in the materials,[22] and whether a bona fide dispute exists[23] are a rehash of previously raised and rejected arguments, and the mere disagreement with the Court's determination does not justify amending the Bid Procedures Order.

The Surety's arguments regarding the Hearing and the wording of the Bid Procedures Order are without merit. First, the Surety raises arguments regarding the demonstrative exhibits proffered by the Trustee at the Hearing, contending they were not shared on the screen and that

---

[17] Fed. R. Civ. P. 60(b).

[18] *See, e.g.*, *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005) ("[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment."); *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) ("[T]he well-recognized rule . . . precludes the use of a Rule 60(b) motion as a substitute for a proper and timely appeal.").

[19] Despite the Surety's argument to the contrary, the Surety's interests are adequately protected through a replacement lien. *See* Bid Procedures Order (Doc. No. 205) ¶ 9 ("The Acquired Assets shall be sold free and clear of all liens, claims, interests, rights and encumbrances . . ., with such alleged liens, interests, claims, rights and encumbrances attaching to the proceeds of the sale of the Acquired Assets to the same extent, validity, and priority as existed pre-petition, to the extent of any such liens, interests, claims, rights and encumbrances."). Adequate protection required under section 363 may be provided by providing the entity a replacement lien to the extent the sale results in a decrease in the value of such entity's interest in such property. 11 U.S.C. § 361(2).

[20] A court may limit the right to credit bid where there is a genuine dispute regarding the extent or validity of a creditor's lien. *In re Heritage Hotel Assocs., LLC*, No. 8:19-bk-09946-CED, 2020 WL 8611083, at *3 (Bankr. M.D. Fla. Sept. 11, 2020) (citing *Ratcliff v. Rancher's Legacy Meat Co.*, No. 20-CV-834 (NEB), 2020 WL 4048509, *4 (D. Minn. July 20, 2020)). Here, the Court determined the existence of a genuine dispute of the validity, priority, and extent of the Surety's claim with respect to the assets to be sold.

[21] The Court did not make any determination of the validity, priority, or extent of the Surety's equitable subrogation or other claims and rights with respect to the assets to be sold.

[22] *See supra* note 21.

[23] A court does not need to resolve the underlying dispute, just determine its existence. *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (quoting *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)) ("[C]ourts must determine 'whether there is an objective basis for either a factual or legal dispute as to the validity of the debt.' Clearly this standard does not require the Court to resolve the underlying dispute, just determine its existence.").

it is uncertain as to what weight the Court gave the exhibits. However, the Surety failed to object to these demonstrative exhibits, counsel for the Surety acknowledged that the demonstrative exhibits were filed the morning of the Hearing and that he had a copy,[24] the demonstrative exhibits were used only to give the Court a visual for what the Sale Motion encompassed, and the Court did not need these exhibits to make its ruling.

Additionally, the Surety argues it was denied procedural due process. However, the Surety was given notice of the Hearing[25] and the opportunity to be heard.[26] The Surety filed its Objection, a notice regarding the case law it intended to rely on,[27] and a notice of demonstrative aids it would use at the Hearing.[28] The Court granted the Surety time to present its arguments and objections, and, after thorough consideration of the written and oral arguments and interests of all parties, the Court granted the Sale Motion, subject to a final hearing. The Court therefore concludes that the Surety, which was given notice of the Hearing and provided ample opportunity to present its position, was not denied due process.[29]

The Surety also argues that it was denied substantive due process because it was unable to present evidence in opposition to the Sale Motion and maintains that "the Court essentially determined both the property rights of the Surety under its established rights of equitable

---

[24] *See* Transcript of Hearing (February 9, 2022) at 41 (Doc. No. 206).

[25] The Surety's counsel was present at the January 10, 2022, hearing when the Court announced a hearing would be held on the Sale Motion on February 9, 2022. The Surety was also served with written notice of the hearing on January 25, 2022 (Doc. No. 181).

[26] *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[27] Doc. No. 187.

[28] Doc. No. 194.

[29] While the Surety appears to argue that its procedural due process rights were violated because the Trustee's counsel attended the Hearing in person and its counsel attended via Zoom, the Court's procedures provide: "Parties are not required to attend in-person for any hearing. However, any party may voluntarily attend hearings before Judge Robson in-person." *Court Appearances before Judge Robson* (Effective December 8, 2021), http://www.flmb.uscourts.gov/orlando/robson/Court_Appearances_before_Judge_Robson.pdf?id=1 (last visited March 15, 2022).

subrogation, and the contractual rights of the FDOT." However, the Court did not make that determination. The Court, after considering the written and oral arguments presented by both parties, concluded that the Trustee had demonstrated the existence of a *bona fide dispute* sufficient to approve the sale free and clear of liens under section 363(f) of the Bankruptcy Code.[30] Furthermore, the Surety was given the opportunity to present its arguments to the Court and shared documents via screen share. The Court concludes an evidentiary hearing was not necessary and the Surety fails to explain what evidence it would have proffered that would have changed the Court's finding that a bona fide dispute exists as to the validity, priority, and extent of the Surety's claims, liens, and interests.

Conclusion

Based on the foregoing, because the Surety fails to provide adequate grounds for relief under the standards for reconsideration under Rule 59 or Rule 60, it is not entitled to reconsideration. While the Surety disagrees with the Court's findings and its application of law, it has failed to demonstrate an intervening change in controlling law, proffer newly available evidence, or demonstrate clear error in the Bid Procedures Order. Accordingly, it is

ORDERED:

1. The Motion to Amend (Doc. No. 218) is **DENIED**.

# # #

Attorney David S. Jennis is directed to serve a copy of this Order on interested parties who do not receive service by CM/ECF and to file a proof of service within 3 days of entry of this Order.

[30] *See In re Collins*, 180 B.R. at 452.