

ORDERED.

Dated: February 24, 2023



Grace E. Robson
United States Bankruptcy Judge

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

In re)	
)	
Veronica Hernandez,)	Case No. 6:21-bk-03077-GER
)	Chapter 7
Debtor.)	
)	

**ORDER (1) GRANTING TRUSTEE’S MOTION TO
SELL AND (2) OVERRULING THE OBJECTION THERETO**

This matter came on for hearing on February 9, 2023 at 11:00 a.m. for consideration of the Motion to Sell¹ filed by Trustee Marie E. Henkel (the “Trustee”) and the Objection² thereto filed by Interested Party Luz Delia Hernandez (“Mrs. Hernandez”) and her husband, David Hernandez (“Mr. Hernandez”) (collectively, “Mrs. and Mr. Hernandez”). The Court, after consideration of the Motion to Sell, the Objection, and the supplemental authority filed in support of the Objection,³ **FINDS, ORDERS, AND ADJUDGES as follows:**

¹ *Motion for Order Approving Sale of Estate’s Interest in Real Estate in Volusia County, Florida* (the “Motion to Sell”) (Doc. No. 29).

² *Objection to Trustee’s Motion for Order Approving Sale of Estate’s Interest in Real Property in Volusia County, Florida and Order to Invalidate Sale* (the “Objection”) (Doc. No. 30).

³ Doc. No. 49. The Trustee filed *Trustee’s Notice of No Additional Supplemental Authority* (Doc. No. 50).

Background

- A. Veronica Hernandez (the “Debtor”) is the daughter of Mrs. Hernandez.⁴
- B. The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on July 7, 2021 (the “Petition Date”).⁵
- C. Mrs. Hernandez, Mr. Hernandez, and the Debtor are co-owners of real property located at 1154 Swanson Drive, Deltona, Florida 32738 (the “Property”).
- D. The Property is Mrs. and Mr. Hernandez’s homestead; however, the Property is *not* the Debtor’s homestead.
- E. The Debtor did not list her interest in the Property in her bankruptcy schedules.⁶
- F. On October 21, 2022, the Trustee filed a *Report and Notice of Trustee’s Intention to Sell Property of the Estate* (the “Sale Notice”),⁷ describing the property to be sold as the Estate’s one-half interest in the Property (the “Estate Asset”).
- G. The Sale Notice provided notice that the Estate Asset would be advertised and offered for sale to the public by online auction on November 29, 2022.
- H. The Sale Notice indicated the Estate Asset was being sold by the Trustee on an “as is,” “where is,” basis with no warranties of any kind, express, implied, or otherwise.
- I. Mrs. and Mr. Hernandez were not included in the list of creditors and were not served a copy of the Sale Notice. The Trustee does not dispute that Mrs. and Mr. Hernandez did not receive a copy of the Sale Notice.
- J. Mrs. and Mr. Hernandez did not file an objection to the Sale Notice.

⁴ Doc. No. 30 at 2.

⁵ Doc. No. 1.

⁶ Doc. No. 1.

⁷ Doc. No. 22.

K. At the hearing on February 9, 2023, the Trustee's attorney represented to the Court that Mrs. Hernandez contacted the auctioneer before the auction date and participated in the auction.

L. Mrs. Hernandez did not deny participating in the November 2022 online auction, but argued she participated in a "non-meaningful" way.

M. On December 14, 2022, the Trustee filed the Motion to Sell stating that Gator Shores, LLC, who was the successful bidder at the auction, made an earnest money deposit and is ready to complete the purchase of the Estate Asset for the sale price of \$37,800. The Motion to Sell states that the Property is occupied by Mrs. and Mr. Hernandez, who are identified as co-owners of the Property, and the sale is subject to all taxes, assessments, encumbrances and other matters of record or otherwise, including a mortgage held by Network Capital Funding, securing an original principal balance in 2016 of \$129,126.

N. On January 4, 2023, Mrs. and Mr. Hernandez filed the Objection. The Objection states that the sale occurred without notice to Mrs. and Mr. Hernandez, states that the Debtor has no equitable interest in the Property, and argues that Mrs. and Mr. Hernandez should have been granted the right of first refusal. At the February 9, 2023 hearing, Mrs. Hernandez also argued that the sale could not be approved under § 363(h) of the Bankruptcy Code.⁸

O. The Court heard argument at the February 9, 2023 hearing, and entered the *Order Directing Parties to Submit Supplemental Authority*,⁹ directing the parties to provide additional support for their respective positions.

P. On February 16, 2023, Mrs. Hernandez filed supplemental authority.¹⁰

⁸ All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

⁹ Doc. No. 47.

¹⁰ Doc. No. 49. On February 22, 2023, the Trustee notified the Court that she had no additional or supplemental authority. *See* Doc. No. 50.

Discussion

The Trustee proposes to sell the Estate's right, title, and interest to the Property under § 363 of the Bankruptcy Code, on an "as is", "where is" basis, subject to all liens, claims, encumbrances, and interests. Importantly, the Trustee is *not* seeking to sell both the estate's interest and the interest of any co-owner in the Property pursuant to § 363(h). Mrs. and Mr. Hernandez object to the sale. First, they argue there was a lack of due process because they did not receive actual notice and an opportunity to object to the Sale Notice.¹¹ Second, they argue that the Court should apply the factors as if the sale was proposed pursuant to § 363(h).

As to the first argument, there is no dispute that Mrs. and Mr. Hernandez have an interest in the Property and were not mailed a copy of the Sale Notice. Section 363(b)(1) authorizes a trustee to sell property of the estate "after notice and a hearing."¹² Section 102(1)(A) of the Bankruptcy Code defines this phrase as "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances."¹³ Federal Rule of Bankruptcy Procedure 6004(a) provides that "[n]otice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k)."¹⁴ Rule 2002(a)(2) requires notice of a sale to be served upon (1) the debtor, (2) the trustee, (3) all creditors, and (4) others as

¹¹ Doc. No. 30.

¹² 11 U.S.C. § 363(b)(1).

¹³ 11 U.S.C. § 102(1)(A); *accord S. Motor Co. of Dade Cty. v. Carter-Pritchett-Hodes, Inc. (In re MMH Auto. Grp., LLC)*, 385 B.R. 347, 356-57 (Bankr. S.D. Fla. 2008), *as amended* (Mar. 18, 2008).

¹⁴ Fed. R. Bankr. P. 6004(a).

the court may direct.¹⁵ Here, the Sale Notice was provided to the Debtor, the Trustee, and all creditors. The Court did not require the Sale Notice be provided to any other parties.

Mrs. and Mr. Hernandez seek to invoke Rule 6004(c), which requires that any motion seeking “authority to sell property *free and clear of liens or other interests* shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold.”¹⁶ “Rule 9014, in turn, directs that any relief to which the rule applies will be requested by motion ‘and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.’”¹⁷ However, the Trustee was not required to give Mrs. and Mr. Hernandez notice under Rule 6004(c) because the Property is not being sold free and clear of their interests.¹⁸ Furthermore, even if such notice were required, Mrs. and Mr. Hernandez admitted they had actual notice of the November 2022 auction, participated in the auction, and did not raise an objection to the proposed sale until January 4, 2023, over a month after the auction was concluded.

Mrs. and Mr. Hernandez also argue that before approving the sale, the Court must determine whether the benefit to the estate outweighs the detriment to them, as well as allow them to exercise a right of first refusal. However, the determination of benefit versus harm, and the right of first refusal only apply where a trustee is seeking to sell the Property free and clear of the co-owners’ interests pursuant to § 363(h).¹⁹ As stated previously, the Trustee is not seeking to sell the

¹⁵ Fed. R. Bankr. P. 2002(a)(2); *Qadan v. Fla. Prop. Grp. Assocs., Inc.*, 591 B.R. 796, 812 (M.D. Fla. 2018).

¹⁶ Fed. R. Bankr. P. 6004(c) (emphasis added).

¹⁷ *In re MMH Auto. Grp., LLC*, 385 B.R. at 357 (quoting Fed. R. Bankr. P. 9014(a)).

¹⁸ See Fed. R. Bankr. P. 6004(c). The relevant cases cited by Mrs. and Mr. Hernandez are distinguishable as they involved the sale of property free and clear. See *Bakst v. Griffin (In re Griffin)*, 123 B.R. 933 (Bankr. S.D. Fla. 1991); *Magnoni v. Globe Inv. & Loan Co., Inc. (In re Globe Inv. & Loan Co., Inc.)*, 867 F.2d 556 (9th Cir. 1989); *Walker v. Lee (In re Rounds)*, 229 B.R. 758, 761 (Bankr. W.D. Ark. 1999); *TransUnion Risk & Alt. Data Sols., Inc. v. The Best One, Inc. (In re TLFO, LLC)*, 572 B.R. 391 (Bankr. S.D. Fla. 2016); *In re Pielli*, No. 91-4364(CSF), 1991 WL 274225 (D.N.J. Dec. 16, 1991).

¹⁹ See 11 U.S.C. § 363(h)(3), (i).

Estate Asset free and clear of the co-owner interests of Mrs. and Mr. Hernandez – the proposed sale is subject to all liens, claims, encumbrances, and interests.

Finally, Mrs. and Mr. Hernandez argue that the sale should not be approved because the Debtor holds “bare legal title” and has no economic interest in the Property. However, “whether she holds ‘bare legal title’ or has any economic interest is of no relevance to the issue of what is property of the estate.”²⁰ “Property of the estate” is determined by federal law, and property rights are determined by state law.²¹ Here, the Debtor is on the title as a co-owner of the Property. Therefore, the Debtor’s interest in the Property constitutes property of the estate, as determined by federal law.²² The Trustee is seeking to sell the estate’s interest, whatever it may be, subject to all liens, claims, encumbrances, and interests, without representation or warranty.²³ It may be that the Debtor holds bare legal title and that the buyer acquired nothing of value. However, that determination can be decided by state court and does not impact the Trustee’s ability to sell property of the estate.²⁴

For the foregoing reasons, it is

ORDERED:

1. The Motion to Sell (Doc. No. 29) is **GRANTED**. The Trustee is authorized to sell the Estate Asset to Gator Shores, LLC on the terms set forth in the Motion to Sell.

2. The Objection (Doc. No. 30) is **OVERRULED**.

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Trustee Marie E. Henkel 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.

²⁰ *In re Ontiveros*, No. 03-19939-BKC-AJC, 2006 WL 3922114, at *4 (Bankr. S.D. Fla. Dec. 5, 2006).

²¹ *Id.* (first citing *Com. Fed. Mortg. Corp. v. Smith (In re Smith)*, 85 F.3d 1555 (11th Cir. 1996); and then citing *Crews v. Wright (In re Medlock)*, 272 B.R. 360, 363 (Bankr. M.D. Fla. 2001)).

²² Subject to exceptions not applicable here, “property of the estate” includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a).

²³ *In re Ontiveros*, 2006 WL 3922114, at *4.

²⁴ *Id.* (“The learned Florida State Court Circuit Judge has full authority and discretion to determine if the Buyer acquired a 1/3 interest in the property or acquired nothing, or acquired something in between.”).