

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE:

MALCOLM MCFALL BABB

DEBTOR

CASE NO.:

06-03003-8-JRL

CHAPTER 7

CHAPTER 7 TRUSTEE'S MOTION FOR AN ORDER: (1) APPROVING A PUBLIC SALE AND BIDDING PROCEDURES FOR SALE; (2) AUTHORIZING SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES AND TRANSFERRING LIENS TO PROCEEDS OF SALE; (3) APPROVING STALKING HORSE FEE; AND (4) FOR OTHER RELIEF

(11 U.S.C. § 105, and 363; Bankruptcy Rules 2002 and 6004)

NOW COMES James B. Angell, Chapter 7 Trustee (the "Trustee") for Malcolm McFall Babb (the "Debtor"), and files this motion (the "Motion") for an order (1) approving certain bidding procedures relating to the proposed sale of certain real estate in the name of "M. McFall Babb" and others; (2) authorizing the sale of such assets free and clear of all liens, claims, and encumbrances pursuant to Bankruptcy Code sections 105 and 363 and Bankruptcy Rule 6004; (3) approving a stalking horse fee payable to a buyer meeting certain criteria in the event of successful sale to another party, and (4) for other relief, and represents as follows:

1. This matter is a core proceeding pursuant to 28 U.S.C. § 157, and the Court has jurisdiction pursuant to 28 U.S.C. §§ 151, 157, and 1334. The Court has the authority to hear this matter pursuant to the General Order of Reference entered August 3, 1984, by the United States District Court for the Eastern District of North Carolina. The statutory predicates for the relief requested are Bankruptcy Code Sections 105 and 363 and Bankruptcy Rules 2002 and 6004.
2. The Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on September 22, 2006 and this case was converted to one under Chapter 7 on February 26, 2007.

The Property to be Sold

3. Pursuant to 11 U.S.C. §363(b), Federal Rules of Bankruptcy Procedure 6004, 2002 (a), and 2002 (c) (1), notice is hereby given that James B. Angell, Chapter 7 Trustee in the above referenced case (“Trustee”) proposes to sell the following described property:

Approximately 10.38 acres located on Barrington Drive and Milton Road, Charlotte, North Carolina owned by M. McFall Babb, Susan Shaw, and Cynthia Hattersley less that portion of said lot taken by the City of Charlotte in Case No. 95-CVS-111662, Mecklenburg County, North Carolina; Reference Tax ID Number 09921126 (the “Property”). The legal description of the Property to be included in the deed to be used to effectuate the sale is made part of the Trustee’s Deed attached to the Terms and Conditions of Sale attached hereto as **Exhibit A**.

4. The Property is titled in the names of M. McFall Babb, Cynthia Ann Simpson Hattersley and Susan S. Shaw. The Trustee has the authority to sell the interests of “M. McFall Babb” pursuant to that Order of the Court filed on April 16, 2009 (DE 365) approving a compromise with Mitchell McFall Babb. The Trustee has the authority to sell the interests of Cynthia Ann Simpson Hattersley and Susan S. Shaw pursuant to that consent order filed on August 17, 2009 (DE 412).

Previous Attempts to Sell the Property

5. Previously, the Trustee was party to an “expression of interest” letter dated June 29, 2009, from Sam Williams, P.A., a Charlotte attorney, on behalf of a client, who expressed an interest in buying the Property for \$198,270 with 2009 taxes prorated.
6. After obtaining the consent of the co-owners of the Property to sell the Property, as evidenced by that Consent Order filed on August 17, 2009 (DE 412), the Trustee made attempts to have Mr. Williams’ client present a firm offer. On September 29, 2009, Mr. Williams confirmed that his client was not prepared to make the offer, citing the reputation of the neighborhood for violence as evidenced by an Article in the Charlotte Observer. A copy of the letter and article are attached as **Exhibit B**.
7. The Trustee made attempts to sell the Property through a real estate broker, Joe Yokem, beginning in approximately March, 2010. The initial listing price was \$280,000.00.
8. After the Trustee received no offers, the listing price was reduced to \$230,000.00 in May, 2010 at the advice of Mr. Yochem.
9. In March, 2011, after the Trustee received no offers for the Property, the Trustee engaged the Auctioneer, who recommended the Hybrid Sealed Bid Procedure.
10. In marketing the Property, the Auctioneer:

- a. Sent email notifications to the Charlotte Real Estate Investor's Association which is several hundred investors in Charlotte, NC.
 - b. Sent email notifications to Upstate Creia, Carolina Real Estate Investor's Association, which is 2400 real estate investors in Upstate SC
 - c. Ran ads in Charlotte Observer for 5 weeks prior to auction
 - d. Ran ads on Charlotte Online.com, a division of the Charlotte Observer
 - e. Ran ads in Upstate of South Carolina newspapers, including the Greenville News largest of those
 - f. Mailed flyer/card to every owner of 50-99 units in Georgia, North Carolina, South Carolina & Tennessee.
 - g. Mailed flyer/card to all owners of apartments of 99 units and above in Georgia, North Carolina, South Carolina & Tennessee.
 - h. Mailed flyer/card to every real estate Broker in the state of North Carolina;
 - i. Total cards mailed were 839;
 - j. Added auction flyer and all data to Auctioneer's web page;
 - k. Sent emails to several hundred occupants of Auctioneer's web page address book;
 - l. Placed large sign on property; and
 - m. Called potential investor known to the Auctioneer.
11. In the Auctioneer's opinion, the lack of interest was a direct result of the lack of availability of funding for speculative investments such as multi-family vacant land and the fact that there are literally tens of thousands of opportunities for investors to choose from. Investors tend to purchase income producing property rather than speculating on vacant land.
 12. Another detrimental factor to the value of the Property is the recent trial and conviction of Demetrius Martin, who was sentenced to life in prison without parole in September, 2010 the first-degree murder of two Charlotte police officers at the Timber Ridge apartment complex in 2007 (now, the Barrington Oaks Apartments) on Barrington Drive, Charlotte. The Property surrounds the Barrington Oaks Apartments on two sides, as shown on the map attached as **Exhibit C**. A newspaper article describing the trial is attached as **Exhibit D**.
 13. The tax value of the Property prior to January 1, 2011 was \$220,300. In 2011, the value of the Property was reassessed at \$672,500.00. This reassessment was appealed informally by

the Debtor and formally by the Trustee. These appeals are pending and have not been determined.

Report of “No Sale” regarding Hybrid Sealed Bid Procedure

14. W.M. Hales, Inc. (herein, “Auctioneer”) was approved as auctioneer by order filed on March 24, 2011 (DE 497). This order also approved the Auctioneer’s commission at the rate of ten (10%) per cent of the gross proceeds of the sale.
15. Notice of the auction and the Hybrid Sealed Bid Procedures was served on the creditor matrix in this case in that Notice of Proposed Public Sale and Notice of Compensation of Auctioneer, filed on May 20, 2011 (DE 508). No objections were filed with respect to this Notice.
16. The Auctioneer conducted a public sale of the Property pursuant to a Hybrid Sealed Bid Procedure. The sealed bids were closed at noon on June 14, 2011.
17. At the end of the auction, the high bid was in the amount of \$60,000.00 and was submitted by James Bates with a deposit in the amount of \$10,000.00.
18. Due to discrepancies between the form of the bid and the Notice of Proposed Sale, the sale made pursuant to the Hybrid Sealed Bid Procedures could not be confirmed. Specifically, the Notice of Public Sale indicated that the Property would be sold “as is’ without warranties of title, suitability, use or condition...” although the bid proffered required marketable title. Due to the existence of a judgment lien against Malcolm McFall Babb that might encumber the interest of “M. McFall Babb” in the Property; the high bid could not be confirmed.

Proposed Sales Procedure

19. The Trustee proposes to sell the Property described above pursuant to 11 U.S.C. §§ 363 in accordance with the following terms and conditions (the “Terms of Sale”):
 - a. Time and Place. The Trustee shall sell the Property described below by public auction at _____ on _____ at or shortly after _____ (“Public Sale”) based on the following terms and conditions.
 - b. Advertising for Auction. The Auctioneer shall advertise the sale in the manner set forth in paragraph 10 above. Interested parties are encouraged to notify prospective bidders of the time and place of the sale.
 - c. Description of Property: The property to be sold (the “Property”) consists of the Property described in paragraph 3 above. The legal description of the Property to be included in the deed to be used to effectuate the sale is made part of the Trustee’s Deed attached to the Terms and Conditions of Sale attached hereto as Exhibit A.

- d. Roster of Prospective Bidders. Prior to the Auction, the Auctioneer shall obtain and verify the name, address and telephone number of each of the prospective bidders. The Roster (with redacted telephone numbers) shall be submitted to the Court with any motion to confirm the results of the Auction.
- e. Terms and Conditions. The Terms and Conditions of Sale are attached hereto as Exhibit A. All prospective bidders shall sign a copy of the Terms and Conditions prior to tendering a bid, which shall be incorporated and made a part of any offer made at the sale, and if accepted, shall become part of the contract between the Trustee and the bidder. The Trustee is not required to consider any bid made subject to any additional or conflicting terms with the Terms and Conditions of Sale.
- f. Stalking Horse Bidder: James Bates previously tendered a bid of \$60,000, a copy of which is attached hereto as **Exhibit E**, and will carry this bid forward to the Public Sale as a Stalking Horse Bidder based on the Terms and Conditions of Sale. In the event the final bid at the Public Sale is in excess of the Stalking Horse Bid, at the time of Closing James Bates will receive twenty percent (20%) of the bid amount in excess of the Stalking Horse Bid up to a maximum of \$10,000.
- g. Qualified Bidder. Any Qualified Bidder must agree to the Terms and Conditions in writing, present adequate proof of identity, present adequate proof of the ability to close, which shall be incorporated into the order confirming the sale, and shall be a basis of default in the event the Successful Bidder does not timely comply:
- h. Bidding: The Stalking Horse Bid shall be the initial bid at the sale.

A Qualified Bidder may appear and place a minimum topping bid above the Stalking Horse Bid or any other bid previously made at the Auction for the Property.
- i. Minimum Topping Bids. The initial competing bid by a third-party Qualified Bidder for the Property must exceed the \$60,000.00 bid made by the Stalking Horse Bidder by at least \$5,000.00. Any successive bid following the initial competing bid at the auction shall exceed the immediately preceding bid by an amount of not less than \$5,000.00.
- j. Conditions to Final Bid. Any acceptable final bid from a Qualified Bidder (a) be immediately followed by a signed and written acknowledgement of the amount of the bid on the Terms and Conditions of Sale; (b) be accompanied by demonstration of an ability to close in a prompt fashion; and (c) posting of a good

faith deposit in the amount of at least \$10,000, paid in the form of cash, a certified or cashier's check, unless extended in the discretion of the Trustee.

- k. Auctioneer Records. At the conclusion of the sale, the Auctioneer shall submit to the Trustee (a) the Roster of prospective buyers in attendance at the Auction; (b) a list of the name and address of the acceptable final bid, and of all bidders who wish to submit a “back up” offer; (c) a copy of all pre-sale announcements and a copy of all ads and brochures used by the auctioneer to promote the sale; and (d) the signed Terms and Conditions, containing the amount of the bid of the acceptable final bid, and of all bidders who wish to submit a “back up” offer. The Auctioneer shall disclose whether any bidder whose offer is submitted to the Court is a friend, relative or other insider of the Malcolm McFall Babb or Mitchell McFall Babb, and whether the Bidder holds any interest adverse to Malcolm McFall Babb or Mitchell McFall Babb

- l. Recommendation of High Bid. Upon the conclusion of the bidding process at the Sale, the Trustee shall submit the best bid from a Qualified Bidder (the "Successful Bid") to the Bankruptcy Court for approval in an order confirming sale. In addition, the Trustee may seek approval of one or more unsuccessful bidders making “back up” offer(s) in the event of a default by the Successful Bidder. In recommending the best bid, the Trustee shall use his business judgment, taking into account factors including but not limited to the amount of money to be paid, the timing of monies to be paid, the solvency of the bidder and the risk of nonpayment of deferred amounts.

- m. “Back up” Offer. An unsuccessful bidder wishing to be considered for the sale in the event that the Successful Bidder fails to close within the time frame established by these Terms of Sale may elect in writing to make an irrevocable “back up” offer by having the Auctioneer to hold a good faith deposit in the amount of \$10,000.00 until the closing date for such Successful Bid; if the Successful Bidder fails to close within the established time frame, then if such unsuccessful bidder has been approved by the Court, the Trustee shall close with sale with the approved unsuccessful bidder.

If the Auctioneer holds the good faith deposit of an unsuccessful bidder and closes with the Successful Bidder, then the unsuccessful bidder’s good faith deposit shall be returned by the Auctioneer within three (3) business days after the closing.

- n. Failure to Meet Conditions. In the event that the Successful Bidder does not timely comply with the conditions to final bid, the Trustee may seek sell the Property to the Qualified Bidder making the next highest “back up” offer pursuant

to subparagraph (m) above, and, upon notification thereof, such Qualified Bidder shall be required to honor the Terms and Conditions of Sale with respect to its bid.

- o. Retention of Deposits. The Auctioneer shall retain any good faith deposit made by the Successful Bidder or a Qualified Bidder making a “back up” offer until the closing of the sale of the Property; provided, that the Auctioneer shall continue to hold any deposit made by the Successful Bidder or an unsuccessful bidder whose bid has been approved by the Court after default by such bidder until the rights of the parties to the deposit have been adjudicated. Any deposits posted by a bidder shall be applied to the purchase price at closing to such bidder or to the damages to the estate upon a default by the bidder posting the deposit.
- p. Liability for Breach. The Successful Bidder fails to close within the established time frames, then the Trustee shall retain any deposits, and, in addition, the Successful Bidder shall be liable for breach of contract and/or such other claims and causes of action as may be available under North Carolina law, federal bankruptcy law, and such other law as may apply.
- q. No Credit Bids: Credit bids that operate to relinquish claims against the estate are not permitted.
- r. Approval of Sale: No bid at auction shall be deemed a final sale absent approval from the Bankruptcy Court. The Trustee shall seek to have an order confirming the sale entered by the Court immediately after the auction is completed.
- s. Title; Sale Free and Clear of Certain Liens: The Trustee’s sale of the Property shall be free and clear of all liens for ad valorem taxes (current year ad valorem taxes being prorated to the date of closing) and the judgment lien against Malcolm M. Babb in favor of Carolina First Bank, as successor to Anchor Bank (formerly First Atlantic Bank) based on that action originally filed in the Common Pleas Court of the Fifteenth Judicial Circuit of South Carolina, Horry County, Civil Action No. 95-CP-26-2539, with such liens, claims and encumbrances to attach to the proceeds of such sale. The Property shall be sold free and clear of these liens in accordance with 11 U.S.C. §§ 363(f) and 105, and the sale of the Property will be free and clear of any unsecured claims against the Debtor. The Buyer shall take title to the Property subject to any liens, claims and encumbrances not specified in this paragraph.
- t. Closing Date. The closing shall take place after ten but within fifteen days after the entry of the Order Approving Sale.

20. The Terms of Sale as described herein shall allow the Trustee to maximize the proceeds from the sale of Property for the benefit of the estate. The Trustee believes and represents that the above bidding procedures and terms of sale are fair and reasonable under the present facts and circumstances of the case, and are intended to provide, among other things, an opportunity to generate a greater return for creditors of the Debtor. They are designed to maximize the value of the Property and ensure a fair and orderly auction process.

Stalking Horse Fee.

21. . Bidding protections, including break-up fees or stalking horse fees, encourage bidding and maximize the value of a debtor's assets. Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 659 (S.D.N.Y. 1992). A break-up or stalking horse fee serves at least three functions: (1) to attract or retain a potentially successful bid; (2) to establish a bid standard for other bidders; or (3) to attract additional bidders. *Id.* at 662. Therefore, bidding protections for purchasers of debtors and/or their assets constitute appropriate compensation for the risk and expense involved in preparing and proposing the bid, while enhancing the value of the debtor's estate by attracting additional bids and establishing a minimum standard for competing bids.

22. In considering whether to approve break-up or stalking horse fees, courts typically consider three factors:

- (i) whether the relationship of the parties is tainted by self-dealing or manipulation;
- (ii) whether the protections hamper or encourage bidding; and
- (iii) whether the fee amount is reasonable in relation to the proposed transaction.

Integrated Res. at 658-662. Courts should scrutinize a proposed break-up or stalking fee based on whether it is designed to insure that revenues are maximized and that the best interests of the debtor's estate, creditors, and equity holders are furthered. In re Tiara Motorcoach, Corp., 212 B.R. 133, 137 (Bankr. N.D. Ind. 1997) (denying approval of \$200,000 break-up fee for proposed Section 363 sale in case where no post-petition bidding procedures had been created and no post-petition bids had been solicited).

23. The Trustee submits that the Stalking Horse Fee is essential for the multiple purposes of maximizing the value of any bids and for compensating the Stalking Horse Bidder for the effort entailed in compiling and presenting its offer to the Trustee. The Stalking Horse Fee is payable only if the Trustee receives bids in excess of the Stalking Horse Bid. The fee is intended to cover the estimated fees incurred by the Buyer and its other costs. As such, it falls within the realm of what courts consider reasonable for break-up fees. Accordingly, the Trustee believes that the Stalking Horse Fee is fair and equitable to the estate.

Sale Free and Clear of Liens, Claims and Interests.

24. Pursuant to Bankruptcy Code section 363(f), a trustee may sell property of the bankruptcy estate free and clear of liens, claims, and encumbrances if one of the following conditions is satisfied:
- (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
 - (2) the lienholder or claimholder 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;
 - (4) such interest is in bona fide dispute; or
 - (5) the lienholder or claimholder could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.
25. The property is subject to liens for ad valorem taxes (current year ad valorem taxes being prorated to the date of closing) and the judgment lien against Malcolm M. Babb in favor of Carolina First Bank, as successor to Anchor Bank (formerly First Atlantic Bank). Based on that action originally filed in the Common pleas court of the Fifteenth Judicial Circuit of South Carolina, Horry County, Civil Action No. 95-CP-26-2539 (the “Liens”).
26. Section 105(a) of the Bankruptcy Code permits the Court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.
27. It is appropriate to provide that the purchaser of the Property pursuant to these procedures takes the title to the Property, free and clear of the claims in this case.
28. The price at which the Property will sell is greater than the ad valorem tax liens on the Property.
29. The Debtor disputes that the “M. McFall Babb” who owns an interest in the Property refers to the Debtor. Accordingly, the judgment lien of Carolina First Bank, as successor to Anchor Bank (formerly First Atlantic Bank) is subject to a bona fide dispute.
30. The Trustee seeks an order from the Bankruptcy Court that the sale will be free of free and clear of the claims in this case or the interests of stockholders or investors.

The Proposed Sale and Assignment Is Made in Good Faith

31. . Section 363(m) of the Bankruptcy Code provides, in pertinent part:

The reversal or modification on appeal of an authorization under [section 363(b) or (c)]... of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in

good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal. 11 U.S.C. §363(m).

32. Although the Bankruptcy Code does not define "good faith" purchaser, a court's interpretation section 363(m) have held that "to show lack of good faith [a party] must show fraud, collusion ... or an attempt to take grossly unfair advantage of other bidders." Because there is no bright line test, courts examine the facts of each case by concentrating on the "integrity of [an actor's] conduct during the sale proceedings."
33. The terms of sale and bidding procedures are established to provide all parties with the equal opportunity to purchase the assets without favoritism and without the ability to manipulate the bidding process. The Trustee seeks an order that the sales procedures result in a good faith purchaser in its order confirming the sale.

WHEREFORE, the Trustee prays for the Court to grant the following relief:

- (A) Establishing that all objections to this Motion and the relief requested therein be heard on 11:30 a.m. on August 3, 2010 at the U.S. Bankruptcy Courtroom, 3rd Floor, U.S. Post Office Building, Fayetteville Street Mall, Raleigh, N.C.
- (B) The proposed Bidding Procedures as set forth herein be authorized and approved;
- (C) Approving the sale and assignment of the Property to the Buyer or the Successful Bidder, free and clear of any liens, if any, with transfer of the same to the net sale proceeds, and free and clear of claims, and interests, and in conformance with the attributes and conditions set forth in this Motion;
- (D) Approving the terms of the Stalking Horse Bid and payment to the Stalking Horse in accordance with this Motion;
- (E) Determining that the sale of the Property is made in good faith pursuant to 11 U.S.C. §363(m);
- (F) Authorizing the Trustee to execute such documents as may reasonably be necessary to accomplish the contemplated sale;
- (G) Granting such other and further relief as the Court deems just and proper.

DATED: This the __h day of August, 2011.

/s/James B. Angell
James B. Angell
State Bar No. 12844
Chapter 7 Trustee

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