

UNPUBLISHED OPINION

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re) Bankruptcy Case No. 86C-03606
LAWN CARE CORPORATION,)
Debtor.) MEMORANDUM DECISION

Duane H. Gillman, the duly appointed trustee herein, filed a notice of intent to sell certain assets of the estate free and clear of liens, pursuant to § 363(f) of the Bankruptcy Code. Two objections were filed in response to the trustee's notice of intent to sell. The objecting parties allege that the trustee is attempting to sell assets which are not assets of the estate. A hearing on this matter was held March 24, 1987. At that time the Court took the matter under advisement and instructed the trustee and the objecting parties to submit legal memoranda within 10 days. All of the objecting parties have submitted memoranda. However, the trustee did not submit his memorandum.

Based on the evidence now before the Court, the memoranda, and the pleadings on file, the Court now renders its decision.

Brigham Parley Evans, Sr., the father of Patrick Evans, the president of the debtor, objects to the sale of certain listed

items of personal property¹ which he alleges he "loaned . . . to his son for use in his business." Brigham Parley Evans, Jr., the brother of Patrick Evans, objects to the sale of certain additional items of personal property² which he claims he "loaned . . . to the debtor" in connection with his work with the debtor.

C&S Engineering ("C&S") objects to the sale of a John Deere Crawler-Loader, S/N 271327 (the "tractor"). It alleges that the debtor, through its president, contacted C&S about purchasing the tractor. Mr. Evans was allowed to take the tractor for a one day test. A few days later the parties entered into an agreement whereby C&S agreed to sell the tractor to the debtor for

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This property includes the following:

- Compressor with hoses
- Battery charger
- Metal table with vise with metal cabinet attached
- Aluminum extension ladder
- Acetylene torch with tanks, hoses and gauges
- 1977 1 ton Chevrolet truck with 524 gallon tank, pump, reels, hoses and spray gun

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This property includes the following:

- Miscellaneous wheels, tires and chains
- Miscellaneous automotive parts
- 2 propane tanks
- Oak desk
- Tank vacuum
- Tool box and tools
- Metal two-drawer file
- Executive chair
- 2 side chairs
- Western snowplow with mounts and pumps

\$10,000.00. The agreement provided for the payment of a \$3,000.00 down payment. C&S alleges that Mr. Evans "represented that he would go to the bank and return immediately with a check for \$3,000.00." During this entire period, the tractor was in the possession of the debtor. The down payment was never made and the tractor was never returned. C&S has taken the position that the payment of the \$3,000.00 was a precondition to the transfer of title to the debtor.

The issue presented to the Court is whether the trustee may sell, pursuant to § 363(f) of the Code, assets in the debtor's possession, in the face of an objection that the assets involved are not property of the estate. In Mosier v. Schwenke, et al. (In re Dennis L. Carlson, Inc.), Case No. 86-C-0981-J, memorandum opinion (D. Utah, November 12, 1986), Judge Jenkins held that the trustee was not authorized under § 363(f) to sell assets which were not indisputably "property of the estate" until such time as any disputes as to ownership have been resolved. In that case the trustee argued that § 363(f)(4)³ authorized him to sell property "free and clear" of others interests if that interest is

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11 U.S.C. § 363(f)(4) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

. . .

(4) such interest is in bona fide dispute[.]

in "bona fide dispute." The court rejected that argument as it relates to an ownership dispute between the estate and other competing interests:

This argument ignores the specific limitations on section 363(f). . . . That subsection is limited to sales authorized under subsections 363(b) or (c). Those sections, in turn, are specifically limited to "property of the estate." 11 U.S.C. § 363(b) and (c). The question becomes, then, what is the "property of the estate" that section 363 authorizes the Trustee to sell?

The answer comes easily in section 541, entitled "property of the estate." 11 U.S.C. § 541. That section defines "property of the estate" for purposes of the bankruptcy code.

. . . .

It seems to the court that in order to convey clear title to the purchaser, the Trustee will have to pursue either his quiet title action, an avoidance action or some other proceeding to settle the question of whether the contract for sale to Schwenke is enforceable. . . . Until the Trustee either demonstrates that the contract did not accomplish this or by some action brings the property into the estate, he cannot sell any more than the seller's interest held under the contract subject to the purchaser's interest.

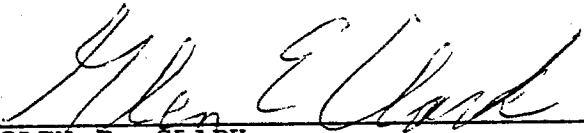
Memorandum opinion pp. 5-7. See also, Missouri v. United States Bankruptcy Court, 647 F.2d 761 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).

This Court feels compelled to follow the district court's ruling in Carlson. Therefore, until the trustee has resolved the ownership dispute, by adversary proceeding or otherwise, the trustee will not be authorized to sell the assets which are the subject of these objections.

Counsel for the objecting parties are instructed to submit orders consistent with this decision.

DATED this 20 day of July, 1987.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE