IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	Bankruptcy Number 00-28590
MOUNTAINEER DEVELOPMENT CORP. Tax ID: 87-0609825	Chapter 7
Debtor.	

MEMORANDUM DECISION AND ORDER

David R. Williams and Reid W. Lambert, Woodbury & Kesler, P.C., Salt Lake City, Utah appeared representing Elizabeth R. Loveridge, Chapter 7 Trustee.

William A. Meaders and Robert S. Prince, Kirton & McConkie, Salt Lake City, Utah appeared representing Howard Kent Inc.

Thomas J. Finch, Boulder, Colorado, appeared representing Mi Vida Enterprises, Inc.

Before the court are two motions: A Motion to Set Aside Certain Sales of Property filed by Howard Kent, Inc. (Kent), and a Motion to Approve Sale of Estate Property filed by Elizabeth R. Loveridge, the chapter 7 trustee (Trustee). The first motion presents the issue of whether an 11 U.S.C. § 363 auction sale of estate property conducted by the Trustee, pursuant to court order, should be voided because of alleged fraud or misrepresentation, and the successful bidder (Kent) relieved of the obligation to pay the estate the purchase price. The second motion seeks authority to sell the same property which was the subject of the first failed sale to a different buyer.

The facts related to the sale are, to a certain extent, undisputed. But the general consensus as to what transpired just prior to and after the sale belies the complexity of the relationship between the parties and the Ludlum-like events leading to the filing of these two motions.

FACTS

Mountaineer Development, Corp., the chapter 7 debtor (Mountaineer), is allegedly the beneficial interest holder in a $600,000 trust deed note dated August 20, 1998 (Note), executed by Mi Vida Enterprises, Inc. (Mi Vida) in favor of Maxine Boyd (Boyd) and secured by a trust deed dated August 20, 1998 on 2.7 acres of land in Moab. The alleged interest is purportedly the estate's property by virtue of an assignment of the trust deed and Note to Mountaineer, dated October 5, 1998. Mi Vida's principal is Mark Steen (Steen), and Boyd is his elderly aunt. Steen has steadfastly maintained that Mi Vida has no obligation under the Note because Boyd failed to complete the transaction, because of certain transactions in a prior bankruptcy case, because of issues related to other members of Steen's family, and because there was never a delivery or an indorsement of the original Note by Boyd to Mountaineer. Some of these disputes are being litigated by Mi Vida and Boyd in state court, Grand County, Utah. Steen asserts that since Mi Vida has no obligation to Boyd, it has no obligation to Mountaineer and this estate arising from Boyd's alleged assignment to Mountaineer.

Kent is a creditor of Mountaineer, and allegedly holds a security interest in the estate's beneficial interest in the Note. The parties assert that Kent's interest in the Note is unperfected because Kent never obtained possession of the Note. In fact, a significant issue throughout most of this case, and in proceedings between some of the parties in state court, is who has possession

of the Note. For some period of time, Boyd, or her attorney Christopher Edwards (Edwards), was thought to be the holder of the Note as represented in Edwards' affidavit filed in July of 2001. Testimony in this proceeding seems to indicate that, in fact, two Notes may exist. The Note used as collateral for loans which may have been held by Boyd may actually be a duplicate with an original notary seal, but with Steen's photocopied signature. The original Note (signed in brown ink by Steen) apparently has been held by Steen all along in a box in his garage. Kent seeks possession of the Note, and believes that it would be easier to obtain possession from Boyd and her Hurricane attorney, Edwards, than from the fully "lawyered-up" and litigious Steen. The resolution of this drama is not before the court, but it is important to have at least some flavor of the ongoing contentions between the parties in order to place the pending motions and the dispute regarding the sale in context.

The Trustee stepped into this controversy between Mi Vida, Boyd, Kent and others when Mountaineer botched its attempt at chapter 11 reorganization and this case was converted to a chapter 7 case. Various of the parties courted the Trustee to champion their version of who owed what to whom, and to advance their agendas by urging the Trustee to use her powers under the Code to attempt to resolve the various disputes in their favor. The Trustee declined, and instead elected to auction whatever interest the estate held in the Note, as is, where is, if is, to the highest bidder at an auction set for July 17, 2002.

Although not particularly pleased with the Trustee's decision, Mi Vida, Steen and Kent deferred to the Trustee, and the parties attempted to arrive at an agreed motion and order approving the auction sale of the estate's interest in the Note. Drafts of the pleadings relating to an auction sale were circulated between the parties, suggestions offered and changes made.

At this juncture, the tenuous accord between the parties took a turn for the worse as a result of an errant fax apparently sent by a hapless paralegal in the office of Cynthia Kennedy, Mi Vida's attorney. The fax contained four pages of a settlement agreement of the state court action between Mi Vida and Boyd in relation to the Note. As luck would have it, the partial document was mistakenly faxed to William A. Meaders, Kent's attorney (Meaders), on July 11, 2002. Upon receipt of the errant fax, Meaders immediately telephoned the Trustee, leaving a message informing her that he had received the four page fax of what appeared to be Mi Vida's and Boyd's settlement agreement, and indicating that he would immediately fax the partial document to the Trustee. Upon receipt of the fax, the Trustee returned Meaders' telephone call with her attorney, Reid W. Lambert (Lambert), also on the speaker telephone.

Meaders stated that, based upon the terms and provisions contained on the four-page fax, it appeared that Boyd was to deliver possession of the original Note to Mi Vida. Possession of the Note being a critical element of Kent's asserted security interest, Meaders "expressed his concern" that if Mi Vida and Boyd had executed a settlement agreement which required a transfer of the Note to Mi Vida and the Note had, in fact, already been transferred, then this would have a chilling effect on Kent's willingness to bid at the auction sale scheduled for July 17, 2002.

The Trustee was not a party to the state court litigation between Mi Vida and Boyd which the settlement agreement was purportedly settling. The only way she believed she could attempt to stop the Note from being transferred, if it had not already been transferred, was by filing an adversary proceeding for turnover and request a temporary restraining order. The Trustee informed Meaders that she was reluctant to file a turnover action to obtain possession of the Note

because her doing so was one of the items being addressed in the Trustee's Motion to Approve Auction Sale set six days hence.

Meaders, unwilling to contact Kennedy directly because of discord between the attorneys, was able to convince the Trustee to telephone Kennedy to ask her about the alleged settlement agreement, and to indicate that Kent, having seen the errant fax, may decide not bid at the scheduled sale. Attempting to salvage the sale, Lambert and the Trustee then called Kennedy on the speaker phone and "expressed her concern" to Kennedy about the settlement agreement. The Trustee asked Kennedy if the settlement agreement addressed the possession of the Note and Kennedy stated that it did require Boyd to transfer the Note to Mi Vida. Upon the Trustee's assertion that transfer of the Note may violate the automatic stay and may have an adverse effect on the bidding at the July 17th auction sale, Kennedy represented that the settlement agreement had not been finalized and that the Note had not been transferred. Further, Kennedy stated to the Trustee and Lambert that Mi Vida would not finalize the settlement agreement nor would the Note be transferred before the auction sale. We now learn, according to Steen, that he had the Note in his possession all along and had, as early as May, 2002, marked it "VOID."

Immediately after speaking with Kennedy, and having no independent knowledge of the location or status of the Note, the Trustee and Lambert telephoned Meaders and relayed to him the information Kennedy had provided them.

Four days later, on July 15, 2002, David Williams (Williams) another of the Trustee's attorneys, received a letter from Kennedy (July 15th Letter) referencing the July 11th telephone conversation and arguing certain legal positions. The July 15th Letter also stated that Steen had "located the Note." Williams, who was not a party to the July 11th phone conversation between

the Trustee, Lambert and Kennedy, reported to the Trustee that the July 15th Letter did not raise any new issues pertaining to the Note. The Trustee did not read the July 15th Letter at that time, and neither it nor information regarding its contents was forwarded to Meaders.

Having now overcome his reluctance to speak directly to Kennedy rather than through the Trustee, Meaders attempted to contacted Kennedy, but in her absence left a voice mail message. The message proposed that Steen pay Kent not to bid at the upcoming auction. Declining to form this alliance, neither Kennedy nor Steen returned Meaders' call.

The day of the July 17, 2002 sale hearing arrived. No objections to the auction sale had been filed; however, Kennedy did file on behalf of Mi Vida and serve upon Meaders and others, a lengthy response which set forth Mi Vida's reasons as to why it believed the Note was worthless. There being no objections and all parties present, including Meaders, supporting the Trustee's sale motion, the Court entered the previously drafted and agreed to Order Approving the Auction of Property of the Estate Free and Clear of Liens and Interests Pursuant to 11 U.S.C. § 362 (Sale Order).

Certain provision of the sale motion approved by order of the court are critical:

TERMS AND CONDITIONS OF SALE

1. The Property, if any, will be sold as is, where is, if is, and with no warranties or guarantees of any kind.

. . .

4. At the request of the successful bidder, the Trustee will bring an action pursuant to 11 U.S.C. § 542 against Maxine Boyd or other holder of the Trust Deed Note to compel turnover of the Trust Deed Note as property of the estate (the "Turnover Action"). The successful bidder will be required to pay the costs, including attorneys' fees, if any, of the Turnover Action and by requesting commencement of the Turnover Action, agrees to pay the costs, including attorneys' fees, of the Turnover Action. The successful bidder shall have the right to select the attorney who will represent the Trustee in the Turnover Action.

5. The Trustee makes no warranties or representations as to title to the Property, if any, the validity or priority of the lien asserted by Howard Kent, Inc., or the outcome of the Avoidance Action and the Turnover Action.

. . .

8. The minimum bid shall be $15,000.00. Each bidder is required to deposit with the Trustee $15,000.00 cash or certified funds at the beginning of the sale. At the conclusion of the sale, the $15,000.00 deposit will be returned to each unsuccessful bidder. The $15,000.00 deposit of the successful bidder will be credited to the purchase price. The successful bidder must pay the full purchase price to the Trustee in cash or certified funds within 72 hours of the close of the sale. If the successful bidder fails to pay the full purchase price to the Trustee in cash or certified funds within 72 hours of the close of the sale, the $15,000.00 deposit of the successful bidder shall be forfeited to the Trustee, the successful bidder shall be liable to the estate for any damages or losses resulting from such failure to perform and the sale of the Property shall go to the next highest and best offer as determined by the Trustee.

The auction sale, conducted by Williams, was held immediately after the sale hearing. As anticipated, the bidders were Kent and Steen, in his personal capacity and on behalf of certain entities, but not on behalf of Mi Vida. Both bidders tendered the minium bid to the Trustee and agreed to waive the reading of the description of the property being sold. The bidding began at $16,000, progressed, and the last six bids entered were as follows:

Steen	$155,000
Kent	$175,000
Steen	$180,000
Kent	$200,000
Steen	$205,000
Kent	$225,000

The Trustee accepted the highest bid, $225,000 from Kent, and the auction sale was concluded. After Kent and its attorneys left the auction, Steen informed the Trustee and Williams that he had seen the Note and that it was marked "VOID."

Meaders then set about trying to locate the Note by attempting to contact Edwards,

Boyd's attorney. Relying on Edwards' July, 2001 affidavit stating that Boyd had the Note, Meaders, misreading the affidavit, believed that Edwards was holding the Note. Edwards responded in writing denying possession of the Note, and attached a copy of the July 15th Letter, which Meaders then saw for the first time.

On Friday, July 19, 2002, two days after the auction sale, Meaders telephoned the Trustee, and forwarded to her copies of the Edwards Letter and the July 15th Letter. Based on these letters, Meaders alleged that the settlement agreement was already signed by Mi Vida and Boyd, the Note had been transferred to Mi Vida months before the auction sale, that all those who participated in the auction sale knew or had cause to know this fact except for Kent, and that this information was intentionally withheld from Kent in order to make Kent enter a high bid at the auction sale. The Trustee denied any knowledge that the settlement agreement was final, that the Note had been transferred or that the Trustee or her attorney intentionally withheld any information pertaining to these facts from him or Kent. In response to this telephone call, Meaders requested a meeting with the Trustee and her attorneys on July 22, 2002, indicating that Kent might withdraw its bid.

Lambert, Williams and the Trustee met with Meaders on Monday, July 22, 2002, and explained the facts leading up to the auction sale as they knew them. At the end of that meeting, Meaders requested a twenty-four hour extension for Kent to pay its bid price, which the Trustee granted, making the final payment of Kent's bid price due Tuesday, July 23, 2002, at 5:00 p.m. The day the funds were due, at approximately 3:00 p.m., Meaders telephoned the Trustee, told her that Kent would not pay the balance of the bid and demanded that she refund the $15,000 deposit. The Trustee held fast and refused to refund the deposit.

The sale failed and the Trustee was left with only a claim against Kent for beach of contract. In order to liquidate the assets of the estate, and to mitigate the damage claim the estate had against Kent, the Trustee immediately sent a letter to Steen and his attorney, Thomas Finch, stating that Kent had not delivered the balance of its bid and offering the Note for sale to Steen for his last bid amount of $205,000. After the intervening holiday, on the morning of July 25, 2002, Meaders and Price contacted Williams and offered on behalf of Kent to pay the costs and attorney's fees incurred by the bankruptcy estate if the Trustee would sue Mi Vida to enforce the Note.

Later that morning, Kennedy telephoned Williams and the Trustee, indicating that Steen rejected the Trustee's offer to sell the Note for $205,000, but that Mi Vida, through Kennedy, had offered to purchase the Note for $35,000. Williams then sent a letter to Meaders rejecting Kent's offer to pay the costs and fees of a suit to enforce the Note, stating that Mi Vida had made an offer to purchase the Note for "substantially less" than $225,000, and offering to sell the Note to Kent for the full bid amount of $225,000 if Kent responded by 2:00 p.m. on July 25, 2002. Now timing the communications by the minute, at approximately 1:57 p.m., Meaders telephoned the Trustee and, having received the Trustee's offer to sell the Note only a few minutes earlier, requested an extension until 3:00 p.m. for Kent to respond to the Trustee's offer. The Trustee granted the extension. During this conversation, Meaders also asked the Trustee the amount of the offer which she had received for the Note, and she refused to tell him the amount of Mi Vida's offer.

At approximately 2:54 p.m., Meaders left a voice mail message for the Trustee that she did not receive until 4:10 p.m. In that message, Meaders stated that Kent had instructed him to

deposit the $210,000 balance with the Bankruptcy Court and to file a proceeding for the Court to look into the auction sale. Meaders said he intended to make the Court aware of the circumstances surrounding the auction sale and to request damages for Kent. Meaders also stated that if the Court denied Kent's request and determined that under all of the circumstances Kent should be bound by its bid, it would honor that bid.

At approximately 3:30 p.m. on July 25, 2002, Williams notified Kennedy that the Trustee accepted Mi Vida's offer and would sell the Note to Mi Vida for $35,000. He later notified Meaders that Kent was required to pay the balance of the bid to the Trustee, that payment to the Court would not discharge Kent's obligation and that when the Trustee had not received payment, she had accepted another offer.

The following day, Kent filed its Motion to Set Aside Certain Sales of Property of the Bankruptcy Estate and, subsequently, the Trustee filed her Motion to Approve Sale of Estate Property. Both Motions came before the court on October 7, 2002. All parties attended and were represented by counsel. Steen appeared in his individual capacity. After argument, the motions were taken under advisement.

DISCUSSION

MOTION TO SET ASIDE CERTAIN SALES OF PROPERTY

Kent seeks to set aside the sale because he believes he was provided false, or at least misleading information regarding the status of the settlement agreement between Mi Vida and Boyd, and false information as to the whereabouts of the Note. Specifically, Kent asserts that Mi Vida's information regarding the settlement agreement and whereabouts of the Note was fraudulent, and that the Trustee's information, if not fraudulent, was at least misleading. Since

under either scenario the contract for sale of the estate's interest in the Note entered into between the Trustee and Kent should be voided, Kent argues, it should be relieved of its obligation to pay $225,000 to the estate. Also, Kent objects to the sale of the estate's interest in the Note to Mi Vida, arguing that the Trustee should either convey the estate's interest in the Note to Kent upon this court's determination of the propriety of the first sale with payment from the funds escrowed with the court, or the sale should be renoticed as an auction and Kent be allowed to rebid with the knowledge now gained as to the location, and/or possession of the Note. Kent is wrong on both counts.

The standard for setting aside a judicial sale regularly made with notice and in the manner prescribed by law is restated in *Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852 (10th Cir. 1997). The court, quoting *Smith v. Juhan*, 311 F.2d 670, 672 (10th Cir. 1962) stated:

> ... the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids.

Id. at 860-61 (citations omitted). Sound policy reasons underlie this standard, for parties are to be encouraged to bid at judicial sales knowing that, if the sale is fair, the proceedings are ended. *See In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997)(compelling equities must outweigh the policy of finality before a confirmed sale will be overturned).

Fraudulent Misrepresentation

Fraud in the inducement may allow the injured party to avoid a contract. *Berkeley Bank*

for Cooperatives v. Meibos, 607 P. 2d 798, 801-04 (Utah 1980).[1] But Kent's allegation of fraud is immediately dispatched upon conclusion of the evidence, for there simply is no evidence that the Trustee, as seller of the estate's assets, knew any fact or representation that she relayed to Kent to be false.[2] No evidence was present that would support a finding that the Trustee knew that any of the representations regarding the status of the settlement agreement or the location of the Note were not as represented by Kennedy.[3] Kent asserts that the Trustee misrepresented both

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[1] Kent appears to rely on the law of contracts for the fundamental proposition that "any one induced to make a contract by false representations [is] relieved from the burden thereof by a court of equity." *Swanson v. Sims*, 170 P. 774, 778 (Utah 1918). The Restatement (Second) of Contracts provides that

> (1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
> (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). *See also* RESTATEMENT (SECOND) OF TORTS § 525 (1976) ("One who fraudulently makes a misrepresentation of act, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation").

[2] Section 526 of the RESTATEMENT OF TORTS states that:

> A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1976). *Accord*, RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981). To qualify as a fraudulent misrepresentation, the representation must be supported by scienter. "If the maker of the representation knows that matter to be otherwise than as represented, the fraudulent character of the misrepresentation is clear. However, knowledge of falsity is not essential; it is enough that he believes the representation to be false." Comment on Clause (a), RESTATEMENT (SECOND) OF TORTS § 526.

[3] The elements of fraudulent misrepresentations under state law are (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the represent or either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. *Pace v. Parrish*, 247 P.2d 273, 274 (Utah 1952).

the status of the settlement agreement and the location of the Note when she forwarded the information she received from Kennedy, but this assertion is meritless. Meaders, upon receiving the errant fax containing partial terms of the settlement agreement, convinced the Trustee to contact Kennedy to inquire about the status of the settlement agreement and imply that Kent may withdraw from the bidding process. The Trustee's relay of Kennedy's information is a reasonably accurate rendition of what Kennedy recalls she said. It is pointless at this juncture to argue that the Trustee should have asked different questions, should have probed further, should have pinned Kennedy down, or pressed for more binding promises. Had Meaders wanted different questions asked, especially having been put on notice that a settlement was in the wind by the fortuitous receipt of the errant fax, he was certainly free to contact Kennedy directly. The Trustee had no first-hand knowledge of the status of the settlement agreement, and Kent cannot now complain that the second-hand information it received, which it could have ascertained for itself, was not sufficiently accurate for its purposes.

Implicit in Kent's allegation of fraud, although understandably not vigorously argued at the hearing, is that there was collusion between the Trustee and Mi Vida. So there can be no lingering doubt, there is not a scintilla of evidence that the Trustee and Mi Vida acted to shill, manipulate, rig, or falsify the sale. Further, under the terms of the sale, what Mi Vida did or didn't do is immaterial because Mi Vida didn't sell the estate's asset, was not a party to the contract, and no representation of Mi Vida was to be relied upon as a condition of the sale.

Kent next alleges that if the Trustee did not intentionally mislead, she either 1) made a

reckless misrepresentation;[4] or 2) had a duty to disclose the July 15th Letter, such that the breach of that duty would be sufficient to void the contract. This argument is more subtle and requires further analysis. Kent argues that, prior to the sale, the Trustee received the July 15th Letter and had a duty, both as a seller and a fiduciary to Kent as a creditor of the estate, to forward to Kent the information that Steen had "located the Note."

If the Trustee had a duty to disclose the existence of the July 15th Letter and suppressed the truth, and if the nondisclosure related to a material matter known to the Trustee which she had a legal duty to communicate to Kent, then the Trustee's fraud may void the contract.[5] Such a duty could arise if Kent was required to rely upon the Trustee to obtain information about the location of the Note and was powerless to learn of its location himself.[6] Clearly not the case here. A duty could arise if there had been an inequality of bargaining positions with the Trustee in the superior or dominant position, and Kent in an inferior or servient position.[7] Clearly not the case here. A statutory duty[8] could arise under the Code, but noticeably absent from Kent's argument is any reference to any such Code section. The Code provides, at 11 U.S.C. § 704 (7),

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[4] A misrepresentation may be fraudulent if the maker knows the representation to be capable of two interpretations, one of which he knows to be false and the other true if made: (a) with the intention that it be understood in the sense in which it is false, or (b) without any belief or expectation as to how it will be understood, or (c) with reckless indifference as to how it will be understood. RESTATEMENT (SECOND) OF TORTS § 527 (1976). A representation that states the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation. *Id*. at § 529.

[5] *First Security Bank v. Banberry Dev. Corp.*, 786 P.2d 1326, 1328-29 (Utah 1989) (to be held liable for fraudulent nondisclosure, there must have been a duty to disclose, the burden of establishing which is on the party alleging the fraud and the determination of which is a question of law for the court to decide. If the duty exists, the trier of fact resolves whether the duty was breached).

[6] *Id*. at 1330.

[7] *Id*.

[8] *Id. See also* RESTATEMENT (SECOND) OF TORTS § 551.

that unless the court orders otherwise, the trustee shall furnish such information concerning the estate and the estate's administration as is requested by a party in interest. Supplying information regarding Steen's activities does not fall within § 704 (7) because the assertion that Steen had "located the Note" does not concern the estate inasmuch as any rights the estate had were fixed as of the date of filing. What Steen did or didn't do with the Note after the date of filing could not impact the estate's interest, whatever it may be, in the Note.

Kent also asserts that the Trustee owed to him a fiduciary duty because he is a creditor of the estate. In determining whether the trustee has met that duty, "the applicable test is whether the trustee has exercised due care, diligence, and skill as measured by a reasonable person standard, *i.e.*, whether the trustee has acted as an ordinarily prudent person would have acted under similar circumstances and with a similar purpose." *In re Lundborg*, 110 B.R. 106, 109 (Bankr. D.Conn. 1990)(citing *United States of America v. Aldrich (In re Rigden)*, 795 F.2d 727, 731 (9th Cir. 1986). No such heightened duty is owed to a bidder at auction such as Kent. *See Rigden,* 795 F.2d at 731. A trustee's general duty to conserve the assets of the estate and to maximize the distribution to creditors eventually inures to the benefit of unsecured creditors with allowed claims, but no additional fiduciary duty is owed to bidders at a sale. There is no evidence that the Trustee did not fulfill her duty of due care, diligence, and skill as measured by a reasonable person standard, considering all the facts of this case.

Kent's second allegation appears to be that it was reckless of the Trustee, knowing that who had possession of the Note was vital to Kent, not to forward the July 15th Letter to Kent so that he could make his own evaluation of the importance of Steen having "located the Note." The evidence indicates that the Trustee didn't know of the specific contents of the July 15th

Letter, having been told by Williams only that it raised no new matters. To be an actionable misstatement, the Trustee must have known or believed the prior information – that the Note would not be transferred prior to the sale – to be materially misleading because of her failure to state the additional or qualifying matter regarding Steen having "located the Note." No evidence exists that either the Trustee or Williams had that state of mind.

Reliance

Most compelling, however, is that even if the Trustee or her attorneys made an intentional material misstatement about the status of the settlement agreement and the location of the Note, or failed to disclose the July 15th Letter, the elements of fraudulent misrepresentation are not met because Kent has not proved that he either reasonably or justifiably relied upon those statements. The Sale Order is crystal clear. Whatever the estate's interest is in the Note is being sold as is, where is, *if is*, and without any representations or warranties. The language has a purpose. Trustees sell assets under Section 363 in this manner because it allows the prompt sale of assets with troubled title or unknown value in a manner that shifts the burden of ascertaining the value and extent of the estate's interest to interested bidders without the estate incurring unnecessary costs that would arise if extensive warranties were required. The vagaries of the value or extent of the estate's interest is, or may be, reflected in the auction sales price. The rule of *caveat emptor* prevails in such sales. *Governor's Island v. Eways*, No. 90-2489, 1991 WL 161514, at *4 (4th Cir. Aug. 23, 1991) (doctrine of *caveat emptor* applies to judicial sales, and the purchaser cannot afterward refuse to pay the purchase money because of imperfection of title or for errors or irregularities in the proceedings unless the order of sale itself otherwise provides); *Rigden*, 795 F.2d at 732.

A sale such as this one is a classic case in point. This isn't the sale of a Minivan. Kent and Mi Vida understand the disputed nature of the estate's interest in the sale property, and know the validity and interests of parties in the Note have been hotly disputed and are the subject of ongoing litigation. The whereabouts of the Note has been at issue for over a year. It is unreasonable to believe that the Trustee, by some divination, would know who had the Note if the parties didn't know (or disclose) its location, or that she would know the value of the estate's interest. In such circumstances a trustee ought not to be making representations that may influence the bidders. For this reason, the sales order such as this one preclude the Trustee from making representations or warranties that may affect the price bid or paid. The bidders are left to their own agendas, motivations and due diligence as to what price they are willing to bid. The provisions of this Sale Order, approved by Kent, are unambiguous and preclude any argument that Kent could reasonably or justifiably rely upon any representations or warranties made by the Trustee.

Mistake

Kent has not proved that a mutual mistake was made that would justify voiding the sale contract. "A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain." *Despain v. Despain*, 855 P.2d 254, 258 (Utah App.1993) (quoting *Warner v. Sirstins*, 83 P.2d 666, 669 (Utah App. 1992). Although Kent may have purchased the estate's interest in the Note under the belief that the Note would not be transferred to Mi Vida prior to the sale and based his bids upon that information, such information was immaterial to the Trustee in her determination whether to sell or which was the highest bid. Unlike *BCD Corp*, *supra,* in which a court sale was

vacated because of a mistake as to the terms of the sale, no such mistake has occurred here that would warrant relief from the Sale Order under Fed. R. Bankr. P. 9024, tort or contract law.

Kent has failed to prove entitlement to an order to set aside the sale. The contract between the Trustee and Kent arising from the auction is valid and binding.

MOTION TO APPROVE SALE OF ESTATE PROPERTY

The Trustee moves for approval of the sale of the same property sold to Kent on the breached July 17, 2002, sale, to Mi Vida for $35,000. Kent disputes whether the July 17, 2002, Sale Order allows the Trustee to sell without conducting another auction and the court concludes that it does. The parties approved and participated in the wording in paragraph 8 of the Sale Order, which provides that if the successful bidder fails to perform, "the sale of the Property shall go to the next highest and best offer [not bid] as determined by the Trustee." This provision does not require a new auction, but leaves to the Trustee's judgment what is the next highest and best offer.

The Court considers the following factors in whether the sale should be approved.

1) Whether there are facts constituting an emergency or in the absence of a demonstrated emergency, whether there are compelling facts and circumstances which support approval of the sale, be it public or private;
2) If the trustee has not solicited other prospective purchasers, private or public, whether there are facts that justify the trustee not doing so; and
3) Whether the sale, private or public, is in the best interests of the debtor estate when the consideration paid and all other relevant factors are taken into account.

In re Ancor Exploration Co., 30 B.R. 802, 808 (D. N.D. Okla. 1983).

Considering these elements, the court finds the Trustee's second sale appropriate. The evidence indicates there are only a few parties that may be interested in this asset that carries with it so much controversy, uncertain value and ever-escalating drama. Two of the potential buyers

have failed to make cash offers for the Note. Steen would not offer to purchase the Note, and Kent only made a conditional offer to pay the sales price into court. The only interested party left was Mi Vida, who responded to the Trustee's new offer to sell with an offer of $35,000. Is this offer in the best interest of creditors? If allowed, the estate would have cash of $35,000 and a cause of action against Kent for breach of contract, but may incur the costs of suit. If not allowed, the estate runs the risk that no one will bid on the Note now apparently marked "VOID," and the estate will still have the costs of the cause of action against Kent. Therefore, the court finds it is in the best interest of creditors to accept Mi Vida's $35,000 offer. The Trustees motion for approval of the sale is granted.

For the reasons set forth above, it is hereby

ORDERED, that Kent's Motion to Set Aside Certain Sales of Property is hereby Denied, and it is further

ORDERED, that the Trustee's Motion to Approve Sale of Estate Property is hereby Granted.

DATED this _____ day of October, 2002.

JUDITH A. BOULDEN
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that on this _____day of October, 2002, I caused a true and correct copy of the foregoing **MEMORANDUM DECISION AND ORDER** to be mailed, first-class postage prepaid, to the following at the addresses listed below:

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_____
Law Clerk to Judge Judith A. Boulden