

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

IN RE:

**Case No. 05-30490-BKC-SHF
Chapter 7 Proceeding**

JEFFREY JOHN HUGHES,

Debtor. _____/

ORDER DENYING MOTION TO APPROVE SALE AND FOR SURCHARGE

THIS CAUSE came on to be heard on March 27, 2006 upon the Motion to Approve Sale and for Surcharge (C.P. 33), filed by John P. Barbee, chapter 7 trustee ("trustee"), and upon the Response to Trustee's Motion to Approve Sale and for Surcharge (C.P. 39), filed by Home Federal Savings and Loan Association ("mortgagee"). By way of the Motion, the trustee seeks approval of the sale of certain real property located in Ashland, Kentucky, free and clear of any liens, encumbrances or mortgages against the property, and also seeks to impose a surcharge upon the holder of the first mortgage encumbering the property, for the time expended by the trustee, his counsel, and his real estate broker, in the process of (1) assessing the status of the property, (2) negotiating for its proposed sale, (3) submitting the motion to approve the proposed sale for

consideration, and presenting argument before the Court, and (4) prospectively preparing and submitting additional motions, and closing documents, attendant to the proposed sale. The Court, having carefully considered the trustee's motion and the mortgagee's Response, together with argument thereon, and being otherwise fully advised in the premises, **denies** the Trustee's Motion to Approve Sale and for Surcharge, for the reasons set forth below.

JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding as to which the Court is authorized to hear and determine all matters regarding this case in accordance with 28 U.S.C. § 157(b)(2)(M), and this is a contested matter in accordance with Bankruptcy Rule 9014(a).

PROCEDURAL BACKGROUND

This case was commenced on February 4, 2005, with the debtor's filing of his voluntary chapter 7 petition. Pursuant to 11 U.S.C. § 341, and the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (C.P. 3), the Meeting of Creditors was scheduled for, and conducted on, March 8, 2005. Among the assets listed by the debtor on his Schedule A. is a fee interest in real property located at 1632 Hilton Avenue, Ashland, Kentucky, valued at \$36,000.00. Home Federal Savings and Loan Association of Ashland, Kentucky, is listed as the holder of a first mortgage encumbering the property, securing repayment of an indebtedness of \$12,245.00. South Trust Bank of Birmingham, Alabama, is listed as the holder of a second mortgage encumbering the property, securing repayment of an indebtedness of \$5,052.00.

After retaining Julianne R. Frank as counsel (C.P. 11), the trustee obtained authorization to employ Gina Griffith as his real estate broker on June 7, 2005 (C.P. 17). Thereafter, the trustee

received an offer to sell the property for \$26,000, and served a Notice of Sale upon creditors and interested parties, pursuant to Bankruptcy Rule 6004(a) and Local Rule 6004-1(B), on September 29, 2005 (C.P. 21). No objections to the proposed sale were filed, and on November 9, 2005, the Court entered its Order Approving Sale of Real Property (C.P. 26), whereby the sale of the subject property was approved for \$26,000.00.

On November 21, 2005, mortgagee filed its Motion for Reconsideration/Clarification of Order Approving Sale and in the Alternative Motion to Require Trustee to Satisfy Lien of Home Federal Savings and Loan at Closing (“Motion for Reconsideration”)(C.P. 30). Mortgagee alleged that, through its counsel, Furr & Cohen, P.A., it had timely filed a proof of claim on July 14, 2005, and that proper notice of the proposed sale had not been provided. Thereafter, on December 28, 2005, the Court entered an Agreed Order Granting in Part and Denying in Part Home Savings and Loan’s Motion for Reconsideration/Clarification and in the Alternative Motion to Require Trustee to Satisfy Lien of Home Federal Savings and Loan at Closing (C.P. 30), whereby the mortgagee was deemed to hold a valid first mortgage against the property securing repayment of a balance of \$16,301.91, plus additional expenses incurred by the mortgagee related to the repair and clean-up of the property, together with attorney’s fees incurred by the mortgagee. Pursuant to the December 28, 2005 Agreed Order, the trustee was authorized to conduct a closing on the subject property, subject to payment of the amounts due to the mortgagee.

By way of its Motion to Approve Sale and for Surcharge, the trustee recites that, due to the passage of time, the property deteriorated, and the prospective buyers, Mike and Cheryl Wheeler, refused to close for the contract price of \$26,000.00. Nonetheless, the trustee represents that these same prospective buyers are willing to close on the property for a reduced price of \$20,000.00. In

order to effectuate the sale, the trustee proposes that the proceeds derived from a sale be “surcharged” to compensate for the “substantial and diligent effort that has been exercised by the Trustee, Trustee’s counsel and Trustee’s realtor”. However, mortgagee objects to the proposed “surcharge” against its collateral.

The term “surcharge” is not defined or contained within Title 11. However, it is a term commonly used when a trustee or creditor seeks to invoke 11 U.S.C. § 506(c) in order to be compensated or reimbursed by a secured creditor, either directly, or “indirectly” out of the proceeds generated from the sale of the secured creditor’s collateral. Section 506(c) provides:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

However, “[s]urcharging collateral subject to a security interest is the exception and not the rule for recovering costs and expenses associated with the preservation or disposition of estate property. Ordinarily, the costs and expenses detailed in Section 506(c) are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral.” *In re Smith International Enterprises, Inc.*, 325 B.R. 450, 453 (Bankr. M.D. Fla. 2005). Generally, administrative expenses in bankruptcy cases are charged to the estate and not to the assets or equity belonging to secured creditors. *In re Trim-X, Inc.*, 695 F.2d 296, 301 (7th Cir. 1982). To justify the imposition of costs against a secured creditor, three elements must be established by the trustee: (1) the purpose for the costs and expenses is necessary to preserve or dispose of the creditor’s collateral; (2) the costs and expenses are reasonable as measured against the amount of costs and expenses that would have been incurred by the holder of a secured claim in the property; and (3) the extent of any direct benefit to the holder of the secured claim. *In re Summit Ventures, Inc.*, 135 B.R. 478, 482 (Bankr. D. Vt. 1991); *Accord*,

General Electric Credit Corp. vs. Peltz, 762 F.2d 10, 12 (2d Cir. 1985). “We allow payment of administrative expenses from the proceeds of secured collateral when incurred primarily for the benefit of the secured creditor or when the secured creditor caused or consented to the expense.” *In re Compton Impressions, Ltd.*, 217 F.3d 1260 (9th Cir. 2000), citing *In re Cascade Hydraulics & Utility Serv., Inc.*, 815 F.2d 546, 548 (9th Cir. 1987).

As to the instant controversy, the trustee asserts that he should be allowed to sell mortgagee’s collateral and impose, against the proceeds of sale, his fees and expenses, as well as the fees and expenses of his attorney and his real estate broker. At the March 27 hearing, counsel for the trustee acknowledged that the delay in closing upon the proposed sale was not caused by the mortgagee. Nonetheless, the trustee, and his attorney and real estate broker, urge this Court to approve the proposed sale, notwithstanding that the transaction would yield far less to the mortgagee than the amount owed on its mortgage, and notwithstanding that the mortgagee opposes the sale. It is the trustee, his counsel and his real estate broker, **and not the mortgagee**, who collectively bore the risk that their undertaking in attempting to sell the subject real property might not provide a benefit to creditors or to them. The Court finds that no discernable benefit has been bestowed upon the mortgagee as a result of the efforts of the trustee, his counsel and his real estate broker, and as such, a “surcharge” against mortgagee’s collateral is not warranted. Accordingly, the trustee’s Motion to Approve Sale and for Surcharge is **denied**.

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The Clerk of Court is directed to serve copies of this Order upon all interested parties.