UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5043
Summary Calendar

IN THE MATTER OF: DONALD ADAMS and BETTY WHITE ADAMS,

Debtors,

DONALD ADAMS and BETTY WHITE ADAMS,

Appellants,

versus

EDWARD FERNELL, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana
(91-1350)

(January 22, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Appellants Donald and Betty White Adams (appellants or debtors) appeal from the district court's affirmance of an order of

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the bankruptcy court approving the sale of a four-acre tract of land belonging to the debtors. Because we find that the evidence supports the ruling of the bankruptcy judge, and that he was acting within his discretion in approving the sale, we affirm the judgment of the district court.

Facts and Proceedings Below

In 1987, Donald Adams and his wife, Betty White Adams, filed for bankruptcy relief in a previous action in the United States Bankruptcy Court in the Western District of Louisiana; this action was dismissed without prejudice in September 1988. In this earlier action, a debt owed by appellants to appellee Edward Fernell was determined to be non-dischargeable. This debt, of approximately $127,000, was partially satisfied when the appellants sold two acres of land for $100,000 and paid the proceeds to Fernell.[1] The remaining debt to Fernell was secured by a judicial mortgage on all immovable property owned by debtors in Lafayette Parish, Louisiana, including a second lien on the four-acre tract of unimproved land (the tract) which is at issue here. The first lien on the tract secured a debt of approximately $10,683.01 to the Lafayette Building Association (LBA).[2]

Appellants filed the current action for Chapter 13 bankruptcy relief on February 21, 1989. In March, Fernell filed objections to the debtors' plan and a motion to vacate the automatic stay to

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[1] Interest continues to accrue on the remainder of this debt; at the time of writing their brief to this Court, appellants accepted for argument's sake Fernell's estimate that $51,000 was then due.

[2] The Lafayette Building Association is an appellee here.

permit the sale of the tract. At a hearing held on May 11, 1989, the bankruptcy court denied the motion to vacate and ordered that a new plan be filed increasing the monthly payments on the debt to Fernell and requiring the sale of the tract by May 11, 1990.

In May 1990, the property had not been sold, and Fernell filed a second motion to vacate the automatic stay. At a hearing on June 26, the parties agreed to a public auction of the tract and submitted, as a joint exhibit, an appraisal valuing the tract at $80,000. The debtors failed to comply with this agreement, however, and did not approve the order necessary to allow the sale of the tract. In November 1990, the bankruptcy judge ordered the sale of the tract by public auction, to take place within six months of the hearing date; the sale was subject to the later approval of the amount by the court. The parties stipulated in the agreed order of November 16, 1990, that the appraised value of the tract was $80,000.00.

On February 21, 1991, at an auction conducted by professional auctioneers, the tract was sold for a cash bid of $32,500.00. The debtors filed an opposition to the sale, requesting that the court not approve the sale because the amount bid did not represent a fair value for the property, as it had been appraised at over twice that amount. Appellants also claimed that the sale should be set aside because, after paying the first lien to the LBA, a deficiency would remain on their debt to Fernell, exposing them to further collection proceedings by Fernell, including a possible action against their home. They did not contest the fairness of the auction or the adequacy of the notice given. Fernell requested

that the court approve the sale; neither Fernell nor LBA opposed the sale.

On May 1, 1991, the bankruptcy court held a hearing on the motions regarding the approval of the sale. Appellants called two witnesses, the appraiser, Ray Pardue, and debtor Donald Adams. Neither Fernell nor LBA introduced any evidence in support of the sale.

Pardue testified that, on the basis of his appraisal, $32,500.00 was not a reasonable price for the tract.[3] He stated that he had appraised the tract in March 1989 at a value of 65 cents per square foot, or $113,750.[4] Pardue conceded that his appraisal was based on "comparable" property sales which were either remote in time or of land with better locations and road access than the tract, but he claimed that he took these differences into account in his appraised value of the tract. The comparables included: (1) one acre appraised at $80,000, which was

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[3] At the hearing, Pardue testified as follows:

> "Q: Based on your previous appraisal of the property and your knowledge concerning appraisals of undeveloped land on Johnston Street, would you be of the opinion that $32,000 is a reasonable value for the sale of that property?
>
> A: Absolutely not."

[4] There is some contradiction in the record regarding appraised values of this tract. At the confirmation hearing, Pardue testified to the March 1989 valuation of $113,750; the appraisal submitted jointly by the parties in June 1990 values the tract at $80,000; in his first motion to vacate the automatic stay, Fernell mentions two appraisals of the property, one in April 1987 of $152,000, and one in February 1989 of $70,000. Because we find that the bankruptcy court did not abuse its discretion in affirming the sale for $32,500, the discrepancies between these appraisal values are not controlling.

later improved and leased to Jet 24 for $1200 per month for twenty years; (2) a January 1981 sale of 2.942 acres for $1.84 per square foot; (3) a 1984 purchase of 2.312 acres for $2.00 per square foot; and (4) a 1986 sale of one acre for $100,000. The 1981 and 1984 sales were of nearby property, but the Jet 24 property was about one half mile away and was situated at a stoplight at a highway intersection, a better location than that of the tract; the property sold in 1986 was also about one half mile away from the tract. Pardue admitted that property values in the area had dropped since the mid-1980's, but he claimed that his appraised value of 65 cents per square foot took these changes, as well as differences in location, into account.

Donald Adams testified that he and his wife had listed the tract with a realtor at an initial listing price of $120,000 and later at $90,000. Mr. Adams was aware of only one potential purchaser who had inquired about the tract during the three years it was listed with the realtor; no steps toward a sale of the tract were ever taken.

By order of May 23, 1991, the bankruptcy judge ordered the sale of the property for $32,500 to the purchaser at the auction, a buyer unrelated to the parties. The proceeds of the sale, after compensation to the auctioneer, were to be used to satisfy the liens in order of their preference. Among the reasons given by the bankruptcy judge at the hearing for approving the sale were: (1) the sale was competitive, with more than one bidder; (2) the advertising of the sale was adequate; (3) disapproval of the sale would undermine judicial sales and undercut the finality of the

process; and (4) the appraiser's evidence was remote in time or of property different from the tract at issue. The judge considered the first two reasons most important. He noted that property in that general area sold at other judicial sales had brought less than the appraised values. Although the judge did state that he would have expected the tract to sell for more, he did not think that $32,500 was an unreasonably low price.

Debtors gave notice of their appeal to the district court and moved for a stay of the order of the sale pending appeal. The bankruptcy court allowed the stay on the condition that they post a bond in the amount of $20,000.00.[5] On October 25, 1991, the district court, on the basis of the record and a brief filed by the debtors, affirmed the order of the bankruptcy court allowing the sale of the tract. The debtors pursued their appeal to this Court.

Discussion

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d). We conduct an independent review of the bankruptcy court's decision, applying the "clearly erroneous" standard to findings of fact, and *de novo* review to conclusions of law. *In re Fussell*, 928 F.2d 712, 715 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1203 (1992). The debtors, as the party seeking reversal of the findings of the bankruptcy court, have the burden of showing that these findings are clearly erroneous. *In re Windor Industries, Inc.*, 459 F.Supp. 270, 275 (N.D. Tex. 1978). The bankruptcy court's confirmation of a sale may be overturned only in extreme cases if there has been an

[5] There is no evidence in the record that appellants complied with the bond requirement.

abuse of discretion. *In re Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir. 1985).

The issue before us is whether the bankruptcy court abused its discretion in approving the sale of the tract. The sole ground advanced by the debtors for reversing the action of the bankruptcy court is that the sale price was unreasonably low, based upon the property's appraised value. As inadequacy of price is a question of fact, we review the bankruptcy court's actions for clear error. Debtors do not claim that the notice of the auction was insufficient or that any impropriety occurred during the auction proceedings.

Insufficiency of price cannot be the sole grounds for challenging the bankruptcy court's approval of a sale unless it is extreme.

> "'A court of equity may set aside an order of sale either before or after confirmation when it appears that the same was entered through mistake, inadvertence, or improvidence. While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale.'" *Mason v. Ashback*, 383 F.2d 779, 780 (10th Cir. 1967) (quoting *Webster v. Barnes Banking Co.*, 113 F.2d 1003, 1005 (10th Cir. 1940).

See also Blanks v. Farmers' Loan & Trust Co., 122 F. 849 (5th Cir. 1903) ("It is perfectly well settled that a judicial sale will not be set aside for inadequacy of price unless it be so gross as to shock the conscience, or unless there be additional circumstances which would make it inequitable to allow the sale to stand.").

"[G]ross inadequacy is said to exist when--apart from

> situations involving fraud or unfairness, which is not the case here--there is a substantial disparity between the highest bid and the appraised or fair market value, and `there is a reasonable degree of probability that a substantially better price will be obtained by a resale . . . .'" *Munro Drydock, Inc. v. M/V Heron*, 585 F.2d 13, 15 (1st Cir. 1978) (quoting 4B *Collier on Bankruptcy* ¶ 70.98[17] at 1192 (14th ed. 1978)).

The sale price at issue here does not meet this standard. It is not certain that the sale price for the tract was inadequate under the circumstances. The most recent appraisal was done approximately two years before the auction of the property; at the confirmation hearing, the creditors and the bankruptcy court called into doubt the accuracy of the appraisal, questioning the relevancy of the comparables upon which the appraiser relied. Further, the appraiser himself admitted that property values in the area of the tract had decreased in recent years. Finally, the sale price cannot be described as "grossly inadequate," because there is no evidence that a better price could be obtained upon resale. Debtors had listed the tract with a realtor for three years, without receiving a single offer for it.

The bankruptcy judge, although he found the sale price lower than he would have expected, found that the price was not unreasonably low. We cannot say that this finding is clearly erroneous, given the variances of time and location between the appraisal of the tract in issue and the appraisals or sales upon which that valuation was based.

We note that some courts have held that adequate consideration has been paid if a certain percentage of the appraised value is recovered. "Traditionally, courts have held that `[f]air and

valuable consideration is given in a bankruptcy sale when the purchaser pays 75% of the appraised value of the assets.'" *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149 (3rd Cir. 1986) (quoting *In re Rock Indus. Mach. Corp*., 572 F.2d 1195, 1197 n.1 (1978)); *Smith v. Juhan*, 311 F.2d 670 (10th Cir. 1962) (affirming sale for 75% of appraised value). Clearly, the sale price of $32,500 is less than 75% of the appraised value of $80,000. As this appraisal was contested, however, it cannot serve as a measuring stick for ordering the bankruptcy court to set aside the sale, particularly as the price was reached at a properly noticed and conducted public auction. "Generally speaking, an auction may be sufficient to establish that one has paid `value' for the assets of a bankrupt." *Abbotts Dairies*, 788 F.2d at 149.

Debtors argue that there was insufficient evidence to support the bankruptcy court's findings concerning the adequacy of the bids at the auction and the notice given of the sale. The bankruptcy judge stated at the hearing that the sale was adequately noticed and competitive, with more than one bid. Debtors' contentions here are irrelevant as they do not challenge the propriety of the auction; their sole ground of appeal is the alleged inadequacy of the sale price.

Conclusion

Because we hold that the bankruptcy court's approval of the sale of the tract for $32,500.00 was not an abuse of discretion, the judgment of the district court is

AFFIRMED.