



SO ORDERED.

SIGNED this 16 day of December, 2010.

**ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
A-1 PLANK & SCAFFOLD MFG., INC.)	Case No. 10-10379
)	Chapter 11
Debtor.)	Jointly Administered
)	
IN RE:)	
)	
ALLENBAUGH FAMILY LIMITED PARTNERSHIP,)	Case No. 10-10378
)	Chapter 11
Debtor.)	
)	

ORDER ON MOTION TO CLARIFY ORDER ON SALE NO. 9

Sunflower Bank moves for clarification of this Court’s previous orders approving a sale in these contentious cases.¹ The Court received argument from Sunflower Bank and A-1 Scaffold Mfg., Inc., a competing bidder, on October 7, 2010 and, after careful review of the record, is

¹ Dkt. 272.

prepared to rule.²

Factual Background

Allenbaugh Family Limited Partnership and A-1 Plank & Scaffold Mfg., Inc. filed their chapter 11 cases on February 21, 2010. The debtors have sold substantially all of their assets through sales conducted under § 363(f). In many of the sales, the debtors have offered property that is subject to the liens of Sunflower Bank (“Bank”). The Bank has frequently exercised its right to credit bid in these sales pursuant to § 363(k) and has purchased many of the assets offered. Apparent discord among the Allenbaugh principals and the Bank have occasioned numerous interventions in those sales by the Court.

On June 7, 2010, debtors filed their Notice of Sale No. 9 concerning the sale of the following property:

- a. \$100,000 for lumber inventory;
- b. \$125,000 for all TABLA inventory;
- c. \$250,000 for *all other inventory and miscellaneous personal property remaining*.³

The notice provided that the Bank had made a credit bid of \$250,000 for the items listed in line c, including the remaining personal property. Two third parties filed objections to this notice that pertained to the lumber and TABLA inventory but neither has an effect on the immediate

² Sunflower Bank appeared by its attorney Karl Swartz. A-1 Scaffold Mfg., Inc. appeared by its attorney Dan Forker.

³ Dkt. 185, ¶ 7 (emphasis added). At ¶ 6 of the Notice of Sale, the personal property was described as “the lumber inventory, TABLA inventory and all other inventory and miscellaneous personal property remaining *wherever located* except property covered by prior sales.”

controversy.⁴ Several other third parties gave notice of cash bids, including A-1 Scaffold Mfg, Inc. (“Scaffold”) which gave notice of a cash bid of \$260,000 for all other inventory and miscellaneous personal property remaining.⁵ At a hearing on July 8, 2010, this Court ordered that sale of the miscellaneous personal property was to be conducted by telephonic auction on July 12, 2010. The matter was set over to August 12, 2010 for the parties to report on the status of the bid-off. The courtroom minute sheet for that date indicates “[m]atter announced as resolved prior to hearing.”⁶

On July 28, 2010, the Court entered an order that had been approved and signed by counsel for the Bank, the debtors, an objecting party not related to this dispute, and the United States Trustee. Scaffold did not sign the order. That order was intended to memorialize the proceedings on July 8. It provided that Sunflower had credit-bid:

- a. \$100,000 for lumber inventory;
- b. \$125,000 for all TABLA inventory;
- c. \$250,000 for all other inventory and miscellaneous personal property remaining, *including general intangibles, but not including accounts receivable.*⁷

This order contained provisions for a bid-off by telephone as the Court had ordered on July 8. The telephonic auction occurred on July 12, 2010 and, at that time, the Bank was the successful bidder

⁴ Dkt. 204 and 224.

⁵ Dkt. 215.

⁶ Dkt. 264.

⁷ Dkt. 249 (emphasis added). That Order recited that Scaffold had submitted a tender of higher bid for the lumber inventory, *together with other inventory and miscellaneous personal property remaining and miscellaneous general intangibles, but not including accounts receivable. Id.* at ¶ 15.

for the miscellaneous personal property at \$350,000.⁸ Thereafter, on August 11, 2010, the Court entered a further order that approved the Bank's credit bid and provided –

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following described property is approved to Sunflower Bank, N.A. as a credit bid under 11 U.S.C. §363(k) for the sums as set forth below:

- \$120,000 - lumber inventory;
- \$350,000 - all other inventory and *miscellaneous personal property*.⁹

This order was submitted to all parties under D. Kan. LBR 9074.1. Scaffold's approval signature block was included, but when the order was submitted, it reflected that Scaffold had not signed off. As this local rule provides for the entry of such an order that is not met by an objection after 14 days' notice, the Court entered the order.¹⁰

The Bank's motion for clarification ("Motion") comes in the wake of Scaffold's claim that included in the "general intangibles" were dividends on the debtors' workers compensation insurance that, according to Scaffold's counsel, amount to some \$350,000. Scaffold has filed no response of any kind to the Bank's Motion, but did appear at the hearing on that Motion through its counsel. Scaffold argues that because the initial notice of sale did not specify that the general intangibles were included in the property sold, Scaffold did not have the opportunity to factor their availability into its bid. Both Bank and Scaffold agree that the bank officer who was bidding was fully aware of the dividends' existence. Scaffold's principals are Dwight and Jennifer Allenbaugh. They are also the principals of both debtors and were in a position to be aware of the presence of the dividends. This issue matters to the Allenbaughs because they personally guarantied the debts of

⁸ Scaffold's counsel appeared for the telephonic bid-off.

⁹ Dkt. 262 (emphasis added).

¹⁰ As the Order approving the Bank's credit bid was entered on August 11, it was announced at the August 12 hearing that the matter was resolved. Dkt. 264.

the debtors to the Bank and their personal exposure declines as the Bank's bid increases.

Some procedural history concerning the present Motion is also in order.¹¹ The Bank filed its Motion on August 20, 2010 and, as local rules require, filed a notice of hearing setting an objection deadline of August 27, 2010, and a hearing date of September 9, 2010.¹² The certificate of service reflects that notice was mailed to Scaffold's counsel that day. At the September 9 hearing, no one appeared for Scaffold and, in the absence of any written objection, the Court granted the Motion.¹³ Thereafter, the Bank's counsel notified the Clerk that Scaffold had not been given the appropriate notice. On September 13, 2010, the Bank issued an Amended Notice setting the matter for hearing on October 7 and setting an objection deadline of September 27, 2010.¹⁴ Scaffold did not file an objection to the Motion, but did appear at the October hearing.

Analysis

At issue here is whether the language of the notice of sale placed all bidders on notice of the sale of the dividends. For the reasons set out below, the Court concludes that it did.

Section 363 authorizes the debtor in possession to exercise its trustee powers to sell estate property outside the ordinary course of business after notice and a hearing. Fed. R. Bankr. P. 6004(a) requires that notice of the sale be given as required by Fed. R. Bankr. P. 2002. Rule 2002(c)(1) sets out the required content of a notice of proposed sale. The notice is to include the time and place of any public sale, the terms and conditions of any private sale, and the time for filing

¹¹ Dkt. 272.

¹² Dkt. 273.

¹³ Dkt. 288.

¹⁴ Dkt. 287.

objections. The rule states that the notice is sufficient “if it generally describes the property” to be sold.

The Notice of Sale No. 9 under review here meets those requirements.¹⁵ It clearly set out where the sale would take place and upon what terms. It also included a counter-bid procedure to allow other interested parties to bid against the Bank’s offer. It described the property offered as “all personal property remaining.” While this is a broad description, the use of the word “remaining” suggests that it was intended to cover all of the personal property that had not been sold in the previous eight § 363 sales conducted in the case. No one argues that the workers compensation dividends are something other than personal property.

The parties’ arguments centered on the insertion of a reference to “general intangibles” in the July 28 order and whether adding that language somehow altered or rendered unclear the notice’s reference to “all personal property remaining.” There can be no legitimate question that general intangibles are personal property and, as such, they were included in the ambit of the broadly-described class of property offered. “General intangible” is a term of art in commercial law that has been defined in Article 9 of the Uniform Commercial Code for many years. KAN. STAT. ANN. § 9-102(a)(42) (2009 Supp.) defines “general intangible” as –

any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

Scaffold does not argue that the compensation insurance dividends are not intangibles and, in any event, the Court has no basis to reach a conclusion either way. Indeed, the Court makes no finding

¹⁵ Dkt. 185.

about whether these dividends are general intangibles. Whether they are or not, they are undoubtedly personal property and therefore within the ambit of the notice as drawn.

Scaffold does argue that adding the verbiage that included intangibles but excluded accounts in the July 28 order means that the dividends were not sold. Of course, by definition, accounts are not intangibles. They are separately defined in Article 9 at KAN. STAT. ANN. § 84-9-102(a)(2) (2009 Supp.) as a “right to payment of a monetary obligation, whether or not earned by performance. . . .” The UCC lists eight included classes of accounts and six excluded classes. One class that is included is a right to payment “for a policy of insurance issued or to be issued.”¹⁶ It may be that these dividends were accounts, but in the absence of any factual record whatsoever, this Court cannot make that determination. Therefore, the Court reaches no legal conclusion as to the character or classification of the insurance dividends. Moreover, the July 28 order is not the last word on the issue.

The Court concludes that the August 11 order is the final order on the Notice of Sale No. 9. As required by Fed. R. Bankr. P. 6004(f), the order contains an itemized list of what was sold, to whom, and for what amount. Its language mirrors that of the notice of sale except that Scaffold apparently managed to bid the Bank up from \$250,000 to \$350,000. Scaffold’s counsel appeared at the telephonic bid-off and there is no indication that the scope of personal property being sold was questioned. Scaffold had an opportunity to object to the form of the order and did not do so.

Scaffold’s principals are the debtors’ principals. The debtors drafted and filed Notice of Sale No. 9. It is a little late now for them to approach the Court without filing an objection to the Bank’s Motion and without any supporting evidence that they were unaware of what their notice meant.

¹⁶ KAN. STAT. ANN. § 84-9-102(a)(2)(C).

Had they objected to the entry of either the July 28 or August 11 orders or even to the instant Motion, and had they requested an opportunity to present evidence, the Court might be in a better position to assess the credibility of their claim. They have done neither, leaving the Court to interpret what is very clear language in the notice and to conclude that the dividends (however classified) were part of the “personal property remaining” and were sold to the Bank in Sale No. 9. The Bank’s Motion for Clarification is GRANTED and the August 11, 2010 Journal Entry and Order Approving the Bank’s Credit Bid Sale No. 9 shall stand.¹⁷

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¹⁷ Dkt. 262.