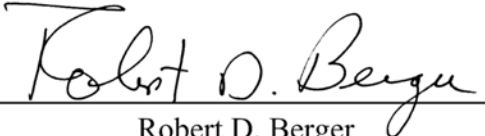


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 21st day of March, 2025.




Robert D. Berger
United States Bankruptcy Judge

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

In re:

**US REAL ESTATE EQUITY
BUILDER DAYTON LLC,**

Debtor.

Case No. 20-21359
Chapter 7

**ORDER DENYING FIG'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT**

Creditor FIG as Custodian for FIG OH18, LLC ("FIG") holds tax certificates on real property sold to creditor Anchor Loans, LP ("Anchor") from USREEB Dayton's¹ Chapter 11 bankruptcy estate in 2021. In 2023, FIG moved for an order

¹ The parties' statements of fact disagree as to USREEB Dayton's legal name. Compare FIG's Facts ¶ 1, ECF 262 (referring to "Real Estate Equity Builder Dayton LLC"); with Trustee's Facts ¶ 1, ECF 293 (referring to "USREEB Dayton, LLC");

compelling either Anchor or the now-Chapter-7 trustee for USREEB Dayton (the “Trustee”) to satisfy those tax certificates.² This matter comes before the Court on cross-motions for summary judgment by FIG and the Trustee.³ For the reasons that follow, the Court will deny summary judgment for FIG and grant summary judgment for the Trustee.

I. Undisputed facts

1. USREEB Dayton filed a voluntary Chapter 11 bankruptcy petition on October 2, 2020. (*See* FIG’s Facts ¶ 1, ECF 262; Trustee’s Facts ¶ 1, ECF 293.)

2. A Chapter 11 trustee was appointed for USREEB Dayton on December 10, 2020. (*See* Trustee’s Facts ¶ 2, ECF 293.)

3. On December 21, 2020, the Court ordered that USREEB Dayton’s case, No. 20-21359, be jointly administered with that of US Real Estate Equity Builder LLC (“USREEB”), No. 20-21358, with pleadings to be filed in the USREEB case. (*See id.* ¶ 3.)

4. FIG filed a claim against USREEB Dayton on October 14, 2020, and amended its claim on January 14, 2021. (*See* FIG’s Facts ¶ 8, ECF 262.)

but see Case No. 20-21359, ECF 1 (listing debtor’s name as “US Real Estate Equity Builder Dayton LLC” on petition).

² ECF 244. USREEB Dayton’s bankruptcy case was converted from Chapter 11 to Chapter 7 in 2022.

³ ECF 262 (FIG); ECF 293 (Trustee).

5. The current dispute involves a former asset of the USREEB Dayton estate: real property located at 1933 1935 Riverside Drive in Dayton, Ohio. (See FIG's Facts ¶¶ 7, 11.)

6. On March 18, 2021, the Chapter 11 trustee moved for approval of bidding and auction procedures for the sale of real property including 1923-1971 Riverside Drive, Dayton, Ohio (the “**Riverside Property**”).⁴ (See Trustee's Facts ¶¶ 4-5.)⁵

7. The proposed bidding procedures allowed lienholders to submit credit bids but provided that “closing costs, senior liens (including real estate, transfer and/or ad valorem taxes), applicable surcharges and real estate taxes, and any agreed upon carve outs associated with [a lienholder's] collateral” must be paid in cash. (See *id.* ¶ 6.)

8. A copy of the bidding procedures motion was mailed to FIG. (See *id.* ¶ 7.)

9. On April 6, 2021, the Court entered an order approving the bidding procedures. (See *id.* ¶ 8.)

10. The order provided that the deadline to object to sale of the real property, including the Riverside Property, was May 4, 2021. (See *id.* ¶ 9.)

⁴ 1923-1971 Riverside Drive presumably includes 1933 1935 Riverside Drive.

⁵ Anchor responds that the trustee's motion “only references that the Trustee may have done due diligence (such as the discovery of liens) and contradicts its Purchase and Settlement Agreement regarding which parties to the transaction have and will exchange due diligence information for the property for which a bid is submitted.” See Anchor's Response ¶ 6, ECF 306. However, Anchor does not explain how due diligence is relevant to FIG's underlying motion.

11. A copy of the order was mailed to FIG. (*See* Trustee’s Facts ¶ 10.)
12. FIG did not object to the sale of the Riverside Property. (*See id.* ¶ 11.)⁶
13. The auction concluded on April 29, 2021. (*See id.* ¶ 12.)
14. JRM Financial, LLC, an affiliate of Anchor Loans, LP, signed the initial sales contract for the Riverside Property. The contract was subsequently amended to clarify that Anchor Loans, LP, and Anchor Assets V, LLC, were exercising their right to credit bid on the Riverside Property and transferring their trustee’s deed to JRM Financial. (*See id.* ¶ 13.)
15. The Purchase and Sale Agreement for the Riverside Property required that “any senior liens, taxes, and closing costs” be paid in cash. (*See id.* ¶ 14.)⁷
16. The Chapter 11 trustee filed a proposed order approving the property sales on May 10, 2021. (*See id.* ¶ 15.)
17. A copy of the proposed order was mailed to FIG. (*See id.* ¶ 16.)
18. On May 19, 2021, the Court entered an order approving the property sales. (*See id.* ¶ 17.)

⁶ FIG responds that it “admits Trustee’s Additional Material Fact #11 in part but asserts that it would have had no reason, especially as a lay entity, to expect the Trustee and/or Anchor to conduct a sale of the parcel in question without satisfaction of any liens.” *See* FIG’s Response at 1, ECF 297. This assertion is not properly supported under Fed. R. Civ. P. 56(c)(1).

⁷ Anchor responds that the quoted language “is not included under the First Amendment to Purchase and Sale Agreement entered into on or about June 7, 2021, indicating some apparent awareness of ‘senior liens’ at that time.” *See* Anchor’s Response ¶ 14, ECF 306. However, § 1.2(b) of that First Amendment provides that “any senior liens, taxes, and closing costs . . . will be payable in U.S. Dollars in certified funds.” *See* First Amendment to Purchase and Sale Agreement § 1.2(b), ECF 294-22 (Page 37 of 40).

19. The order provided that the sales “shall . . . be free and clear of all liens, claims, encumbrances, and other interests in the Assets (except as otherwise provided herein or in the APAs)” and that “[a]ny liens shall attach to the Proceeds to the same extent, priority, and validity as the liens in the respective Asset.” (*See* Trustee’s Facts ¶ 18.)

20. A copy of the order was mailed to FIG. (*See id.* ¶ 19.)

21. However, FIG did not receive a payoff request on 1933 1935 Riverside Drive. (*See* FIG’s Facts ¶ 15.)

22. The sale of the Riverside Property closed on or about June 22, 2021. (*See* Trustee’s Facts ¶ 20.)

23. On April 22, 2021, the Chapter 11 trustee filed a motion for approval of a settlement with certain of the debtors’ lenders, including Anchor Loans, LP, and Anchor Assets V, LLC. (*Id.* ¶ 21.)

24. The settlement provided that the estate would “receive a carve out of fourteen percent (14%) of the gross sale price (not including the buyer’s premium).” (*Id.* ¶ 22.)

25. The settlement provided that the carveout would pay for “United States Trustee fees, the Trustee’s fees and expenses, Bankruptcy Estates’ professional fees (not to include Debtors’ counsel) and expenses, and the Bankruptcy Estates’ income tax liability. All other expenses associated with the sales shall come directly out of the sale proceeds including the Bankruptcy Estates’ share of any Closing Costs and real estate/transfer taxes.” (*Id.* ¶ 23.)

26. The settlement also provided that if one of the lenders exercised a credit bid, “the Lender must tender cash to cover senior liens (to the extent Lender is not the senior lienholder), the Closing Costs, the Buyer’s premium, real estate/transfer taxes, the Estate Carve-Out and the Maintenance Surcharge Funds for the respective property.” (*See* Trustee’s Facts ¶ 24.)

27. A copy of the settlement motion was mailed to FIG. (*See id.* ¶ 25.)

28. FIG did not object to the settlement motion. (*See id.* ¶ 26.)⁸

29. On June 25, 2021, the Court granted the settlement motion. (*See id.* ¶ 27.)

30. A copy of the order was mailed to FIG. (*See id.* ¶ 28.)

31. On October 21, 2021, the Chapter 11 trustee filed a motion for authority to distribute certain proceeds from the real property sales to secured creditors. (*See id.* ¶¶ 29-30.)

32. Because the Riverside Property was sold via credit bid, the only “proceeds” from the sale consisted of the carveout owed under the settlement. (*See id.* ¶ 31.)

⁸ FIG responds that it “admits Trustee’s Additional Material Fact #26 in part, asserting that the processes employed by Anchor and the title insurance company it employed were inadequate to put FIG on notice that its tax liens were to be paid or even that a payoff was to be requested for the tax liens subject to the dispute at hand. Therefore, there would have been no basis or expectation for FIG to object to the Trustee’s Settlement Motion.” *See* FIG’s Response at 1, ECF 297. This assertion is not properly supported under Fed. R. Civ. P. 56(c)(1).

33. The distribution motion sought authority to transfer the carveout amounts to the Chapter 11 trustee's operating account "free and clear of liens." (*See* Trustee's Facts ¶ 31.)

34. A copy of the distribution motion was mailed to FIG. (*See id.* ¶ 32.)

35. FIG did not object to the distribution motion.⁹ (*See id.* ¶ 33.)

36. On November 12, 2021, the Court granted the distribution motion. (*See id.* ¶ 34.)

37. The distribution order provided that the Chapter 11 trustee was authorized to transfer the carveout amount "to the Trustee's general operating account, free and clear of liens, in order to fund the carveout and for the benefit of administrative claims and unsecured creditors." (*See id.* ¶ 35.)

38. A copy of the distribution order was mailed to FIG. (*See id.* ¶ 36.)

39. The bankruptcy cases of USREEB and USREEB Dayton were converted to Chapter 7 on September 12, 2022. (*See* Case No. 20-21358, Order ¶ 11, ECF 700.)

40. USREEB Dayton's bankruptcy estate does not own a title insurance policy for the sale of the property to Anchor or its affiliates. (*See* Trustee's Facts ¶ 37.)

⁹ FIG responds that it "admits Trustee's Additional Material Fact #33 in part, asserting the same bases as its response to AMF #11 and #26." *See* FIG's Response at 1, ECF 297. This assertion is not properly supported under Fed. R. Civ. P. 56(c)(1).

II. Summary judgment standard

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).¹⁰ A movant who does not bear the burden of proof at trial can make that showing by pointing out an absence of evidence to support an essential element of the non-moving party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).¹¹ A party asserting that a fact cannot be genuinely disputed must support the assertion by citing to particular parts of materials in the record. *See* Fed. R. Civ. P. 56(c)(1). A party may object that the material cited to support a fact cannot be presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(2).

III. FIG is not entitled to summary judgment.

FIG's motion for summary judgment relies on two material factual assertions: first, that FIG holds unpaid tax certificates on 1933 1935 Riverside Drive; and second, that First American Title Insurance Company issued a title insurance policy covering that property.¹² However, neither the tax certificates nor

¹⁰ Fed. R. Civ. P. 56 applies to this contested matter via Fed. Rs. Bankr. P. 7056 and 9014(c).

¹¹ If there is no evidence supporting an essential element of the claim, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

¹² *See* FIG's Facts ¶¶ 12, 16, ECF 262.

the insurance policy are part of the record before the Court. FIG's only evidence as to the content of those documents consists of an affidavit from Nate Eichholz, its managing agent.¹³ But tax certificates and insurance policies are "writings" under Fed. R. Evid. 1001(a)¹⁴—and as the Trustee points out, Fed. R. Evid. 1002 requires the original writings (or duplicates thereof, *see* Fed. R. Evid. 1003) in order to prove their contents. Other evidence of the writings' contents, such as Eichholz's testimony, would be inadmissible. And although Fed. R. Evid. 1004 sets out certain circumstances under which such other evidence *would* be admissible (for example, if all originals are lost or destroyed, and not by the proponent acting in bad faith, *see* Fed. R. Evid. 1004(a)), FIG does not argue that any of those circumstances exist here. Nor does FIG explain the admissible form of evidence it anticipates.¹⁵ FIG has thus failed to properly support its material assertions of fact as required by Fed. R. Civ. P. 56(c). Because FIG has not properly supported its factual assertions, it has not met its burden of showing no genuine dispute of material fact.

Furthermore, even if FIG *had* properly supported its factual assertions regarding the tax certificates and title insurance policy, its sole argument is that "an error . . . occur[red], and it was not FIG's fault."¹⁶ That argument does not

¹³ *See* FIG's Facts ¶¶ 8-16, ECF 262; *cf.* Affidavit of Nate Eichholz, ECF 262-1.

¹⁴ A "writing" consists of letters, words, numbers, or their equivalent set down in any form. Fed. R. Evid. 1001(a).

¹⁵ *Cf.* Fed. R. Civ. P. 56(c)(2) advisory committee's note to 2010 amendment ("The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.").

¹⁶ ECF 262 at 5.

establish that FIG is therefore entitled to payment from USREEB Dayton's estate or Anchor. FIG has not only failed to support its factual assertions, it has not established that such assertions would entitle FIG to judgment as a matter of law. For those reasons, FIG is not entitled to summary judgment on its motion to compel.

IV. The Trustee is entitled to summary judgment.

The Trustee points out that “FIG does no more than merely allege it is entitled to payments for the Tax Certificates and does not establish *why* the Estate is responsible for making such payments. FIG alleges *no* facts that establish that the Estate should be responsible for such payment.”¹⁷ Indeed, the Trustee continues, USREEB Dayton's estate received no proceeds from the sale of 1933 1935 Riverside Drive other than the 14% carveout—which is not subject to attachment by secured creditors.¹⁸ The Trustee also argues that FIG still has a lien on the subject property, that the USREEB Dayton estate is not the named beneficiary under a title policy for the transaction, and that “FIG has not articulated any reason why the estate should be compelled to pay a creditor who has a lien on property that is no longer property of the estate.”¹⁹ Finally, the Trustee points out that the bidding and auction procedures for the Riverside Property, the purchase agreement for the

¹⁷ ECF 293 at 9.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

Riverside Property, and Anchor's settlement agreement with USREEB Dayton's Chapter 11 trustee—which were all approved by orders of this Court—all require a lender exercising a credit bid to pay any senior liens or real estate taxes in cash.²⁰ FIG's response, that the Trustee is "accountable for all property received" under 11 U.S.C. § 704, does not establish the existence of a genuine dispute of material fact. Because the record contains no evidence supporting FIG's claim to payment from the Trustee, the Trustee is entitled to summary judgment on FIG's motion to compel.

V. Conclusion

For these reasons, FIG's motion for summary judgment is hereby denied and the Trustee's cross-motion for summary judgment is hereby granted. The undisputed facts listed in this order will be treated as established for purposes of the remaining dispute between USREEB Dayton and Anchor under Fed. R. Civ. P. 56(g).

IT IS SO ORDERED.

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²⁰ ECF 293 at 11.