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Impact Of In Re Metaldyne Corp.

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It is undisputed that the Bankruptcy Code allows a lender holding a claim secured by property that is being sold at a sale under section 363 of the Bankruptcy Code to offset the amount of its claim against the purchase price of the property by credit bidding its secured claim. See 11 U.S.C. § 363(k).

As seen in *In re Hickey Properties Ltd.*, 181 B.R. 171, 173 (Bankr. D. Vt. 1995), a creditor has standing to credit bid when its claims are secured by a lien on the property that is being sold by the debtor.

Generally, courts agree that a secured creditor can credit bid the full amount of its claim irrespective of the value of the collateral. See *Cohen v. KB Mezzanine Fund II LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-60 (3d Cir. 2006).

However, only a handful of courts have addressed the issue of whether an agent for a facility can credit bid the entire amount of the outstanding debt without the consent of all of the lenders in the facility.

In *In re Metaldyne Corp.*, Case No. 09-13412 (MG), 2009 Bankr. LEXIS 2131 (Bankr. S.D.N.Y. Aug. 12, 2009), a case of first impression in the Southern District Court of New York, the Honorable Martin Glenn addressed the question of whether an agent for a prepetition lending facility could credit bid at the debtors' sale of substantially all of their assets without the unanimous consent of all of the lenders in the facility.

Before the court was the debtors' motion to sell substantially all of their assets to MD Investors Corporation, a consortium led by The Carlyle Group and Alternative Asset Management LP representing 97 percent of the debtors' prepetition secured term debt, which exceeded \$425 million.

BDC Finance LLC, an owner of approximately \$3.5 million of the prepetition secured term debt, objected to the sale on the grounds that MDI could not direct the agent for the prepetition term lenders to credit bid 100 percent of debt under section 363(k), even though the lenders holding 97 percent of the prepetition term debt were participants in MDI.

BDC also objected on the grounds that MDI could not direct the agent to release BDC's liens on the debtors' collateral without BDC's consent and without distributing the proceeds of the sale pro rata to BDC. See *id.* at **10-11.

In support of its arguments, BDC relied, among other things, on a provision of the credit agreement for the lending facility that stipulated it may not "be waived, amended or modified" unless certain parties agreed, and that, even then, such amendments shall not "release all or

substantially all of the collateral from the Liens of the Security Documents, without the written consent of each Lender[.]” See id. at *11.

BDC argued the credit bidding constituted a waiver, amendment or modification that released its lien on the collateral, and was therefore a violation the credit agreement.

BDC also cited a section of the security agreement that stipulated all proceeds from the sale by the agent of any collateral must be distributed among the lenders “pro rata in accordance with the amount of the obligations owed to them on the date of such distribution.”

BDC argued that the agent’s credit bid in favor of MDI violated this provision by preventing BDC from obtaining a pro rata recovery because BDC did not consent to join MDI. See id.

The debtors argued that the same loan documents gave the agent the authority to credit bid and release collateral on behalf of all of the lenders, including BDC.

First, the debtors cited a section of the credit agreement authorizing the agent, on behalf of all lenders, “to take such actions on its behalf and to exercise such powers as are delegated to the [agent] by the terms of the loan documents, together with such actions and powers as are reasonably incidental thereto.”

Second, the debtors pointed to a section of the security agreement that listed the remedies the agent may undertake in an event of default, including the right to “sell or otherwise dispose of all or any part of the collateral ... for cash, upon credit or future delivery as the [Agent] shall deem appropriate.”

In light of both these provisions in the loan documents, the debtor argued that the agent had the authority to dispose of the collateral by credit bidding on behalf of all of the lenders, including BDC.

The bankruptcy court held that the agent may credit bid under section 363(k) the full amount of the term debt to purchase substantially all of the debtors’ assets in the auction and may release the lien with respect to the remaining collateral that the debtors would retain. See id. at * 23.

In doing so, it rejected BDC’s argument that credit bidding created a waiver, amendment or modification of the loan documents without unanimous consent.

Instead, the bankruptcy court found that BDC, through the loan documents, assigned to the agent the right to credit bid and dispose of the collateral, and that nothing in the loan documents prohibited the agent from exercising rights that are consistent with section 363(k) of the Bankruptcy Code.

The bankruptcy court also rejected BDC’s objection to the sale: that without knowing the corporate structure of MDI and without knowing what consideration, BDC, as a nonmember of MDI, would receive, the court could not approve the sale since it could violate the provisions of the loan documents requiring that the sale proceeds be distributed pro rata among lenders.

It found this argument raised issues concerning a dispute between creditors, or BDC and the agent that were not a matter for the court.

The court did remove provisions in the sales order that would bar or limit BDC's claims against MDI, the agent or the other lenders involving issues other than those involving the sale of the assets being free and clear of all liens and interests.

A provision was also removed from the order that required BDC to sign a stockholder agreement with MDI as a condition to receiving a distribution. See *id.* at * 14 n. 8.

The *In re Metaldyne Corp.* decision is significant. It persuasively rejects a frequently encountered objection to debtors' asset sales by affirming an agent's authority to credit bid the entire amount of the outstanding debt under a lending facility without the unanimous consent of all lenders.

It also removes an incentive for a dissenting lender to raise an objection to a debtor's asset sale when stating that the bankruptcy court is not the proper forum to resolve disputes concerning the allocation of proceeds from or equity in the purchased assets among the lenders, or to resolve disputes over the capital structure and corporate governance of the entity that will hold the purchased assets after the closing of the asset sale.

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