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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF VERMONT

In re:
HERMITAGE INN REAL ESTATE HOLDING COMPANY, LLC,
Debtor.

Case # 19-10214
Chapter 7 Cases
Substantively Consolidated

ORDER
DETERMINING ALLOCATION OF EXCESS SALE PROCEEDS

On February 20, 2020, this Court entered two orders, which, inter alia, approved bidding procedures, scheduled an auction sale, and declared that if Berkshire Bank ("Berkshire") and Barnstormer Summit Lift, LLC ("Barnstormer") could not agree on the allocation of any excess proceeds generated by the sale of the Barnstormer Lift and the Real Estate,[1] then this Court would determine how those excess proceeds would be allocated (doc. ## 397, 398; see also doc. ## 388, 389, 462).

On August 3, 2020, Berkshire and Barnstormer filed a joint stipulation (i) advising the Court they were unable to agree on the allocation of the sale proceeds above the stalking horse bids in the amount of $93,750 (the "Proceeds"),[2] and (ii) asking the Court to determine the allocation of those funds (doc. # 513). On August 10, 2020, in response to that stipulation, the Court entered an order establishing a briefing schedule for this contested matter and directing the chapter 7 case trustee (the "Trustee") to hold the Proceeds in escrow pending the Court's determination (doc. # 516, the "Scheduling Order"). Barnstormer and Berkshire filed initial, responsive, and reply memoranda of law in compliance with the Scheduling Order (doc. ## 535, 536, 542, 543, 548, 549), and the Court took the matter under advisement on September 22, 2020 (doc. # 552).

Each of the parties sets forth several arguments in support of its preferred allocation and the factors it believes are most important in the Court's exercise of discretion in this matter. They propose allocations ranging from Berkshire's position that it should be awarded 100% of the Proceeds, to Barnstormer's proposal that each party receive 50% of the Proceeds.

[1] Capitalized terms not otherwise defined in this Order shall have the same meaning as in the order approving sale (doc. # 462).
[2] This amount is the $100,000 in excess sale proceeds less the Trustee's 6.25% carve-out (see doc. # 462, ¶ 15).

Barnstormer urges the Court to exercise its discretion, placing the most weight on the source of the Proceeds. It argues that since the Proceeds arise from an overbid of $50,000 on the property that was its collateral, i.e., the Barnstormer Lift, and an identical overbid of $50,000 on the property that was Berkshire's collateral, i.e., the Real Estate, the Proceeds should be divided equally between Berkshire and Barnstormer. In the alternative, Barnstormer posits the "only other logically supportable approach" would be an allocation of 53% of the Proceeds to Berkshire and 47% of the Proceeds to Barnstormer (doc. # 535, p. 3), based on the ratio of the respective values of each party's collateral, with that value being determined by the purchase prices of the collateral.[3] While Barnstormer presents several ways to compute the relative value (using only the stalking horse base price, using the stalking horse base price plus the incremental bid amount, or using the total purchase price at sale), all three methods result in an allocation of approximately 53% of the Proceeds to Berkshire and approximately 47% of the Proceeds to Barnstormer (see doc. # 535, p. 7).

By contrast, Berkshire contends the primary equitable consideration should be the colossal sum it has expended in preserving both its and Barnstormer's collateral. Berkshire contends the Court would award it 100% of the Proceeds, in a proper exercise of discretion, if this were the factor to which the Court assigned the greatest weight. The record affirms Berkshire spent over $5 million preserving all of the collateral, and Berkshire alleges this not only entitles it to all of the Proceeds but necessarily leads to the conclusion that Barnstormer would be unjustly enriched if it received any of these Proceeds. As a corollary, Berkshire argues its preservation expenditures qualify as an administrative expense as an actual and necessary cost of preserving the estate under § 503(b), which the Trustee could recover from Barnstormer's collateral under § 506(c), providing a further equitable basis for the Court to award Berkshire the full amount of the Proceeds. Alternatively, Berkshire posits that if the Court gives greatest weight to the ratio of value to sale price, that would tip the scales heavily in favor of Berkshire and result in the Court awarding it 75–83% of the Proceeds. Contrary to Barnstormer's analysis, however, Berkshire argues the value of each party's collateral should be determined either by the parties' proofs of claim or by the municipality's tax assessment. Berkshire reasons that if the parties' proofs of claim are the starting point, then Barnstormer recovered more than 80% of the value of its collateral, compared to Berkshire's recovery of less than 20% of the value of its collateral.[4] With respect to the tax assessment argument,

[3] The purchaser paid $8,060,000 for the Sale Property (doc. # 498, p. 2), including $4,290,000 for the Real Estate and $3,770,000 for the Barnstormer Lift. This was the minimum qualified bid for the Sale Property, based on a stalking horse bid of $4,000,000, break-up fee of $240,000, and incremental bid of $50,000 for the Real Estate, plus a stalking horse bid of $3,600,000, break-up fee of $120,000, and incremental bid of $50,000 for the Barnstormer Lift (doc. # 397, pp. 11–13; doc. # 398, pp. 12–14).

[4] Barnstormer filed a proof of claim (claim # 18-1) on July 24, 2019, asserting a secured claim of $10,352,582.19, without specifying the value of its collateral. On June 22, 2020, Barnstormer filed an amended proof of claim (claim # 18-2), asserting a total claim of $5,292,178.95, secured in the amount of $3,770,000 and unsecured in the remaining amount of $1,522,178.95,

Berkshire relies on the real property tax forms completed at closing that attribute only 25% of the total purchase price to the Barnstormer Lift.[5]

There is no dispute this Court has discretion to determine the proper allocation of the Proceeds, pursuant to the parties' stipulations, the orders approving bidding procedures, and the order approving sale (see doc. ## 388, 389, 397, 398, 462; see also doc. ## 543 at p. 3 and 548 at p. 1).[6] In exercising its discretion, the Court begins by observing that Barnstormer and Berkshire are both sophisticated commercial entities, which are represented by experienced counsel, participated vigorously in the sale process, and consented to the Trustee's sale motions and allocation of stalking horse bid amounts (see doc. ## 388, 389). Those bids account for all but $100,000 of the over $8 million sale proceeds, and neither Berkshire nor Barnstormer objected to the portion of the bidding procedures setting the same $50,000 bidding increment for the Real Estate and the Barnstormer Lift. Therefore, allocating the Proceeds, which arise from these two $50,000 overbids and represent approximately 1.16% of the total sale proceeds, equally between the two parties, as Barnstormer advocates, does not strike this Court as unreasonable or blatantly unfair. However, that is not sufficient. The Court is charged with exercising its discretion to reach a fair result. Hence, the Court must scrutinize the unique facts and circumstances presented here, as well as the underpinnings of the sale procedure, to discern if equity requires something other than an equal division of the Proceeds.

Upon further scrutiny, the Court finds this foundation for a 50/50 allocation is not entirely solid because of the process that led to the Court's ruling that the incremental bids for the two lots would be identical. Originally, the proposed bidding increments were $50,000 for the Barnstormer Lift and $200,000 for the Real Estate (doc. # 324-2, p. 12). The Court found, however, that the $200,000 bidding increment for the Real Estate was too high and reduced it to $50,000 in its order approving bidding procedures (doc. # 398, p. 12; see also docket entry dated January 31, 2020). If Berkshire had supported – or even specifically consented to – the reduction of the bidding increment for the Real Estate, and embraced the notion of the bidding increment on its collateral being identical to the bidding increment on

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and indicating the value of its collateral was $4,500,000. The purchase price of the Barnstormer Lift, *i.e.*, $3,770,000, is 83.78% of this valuation. Berkshire filed a proof of claim (claim # 12-1) on July 22, 2019, asserting a secured claim of $22,077,000, and stating the value of its collateral was unknown. On July 23, 2019, Berkshire filed a copy of a July 11, 2019 appraisal valuing its collateral at $23,650,000 (doc. # 166-7, p. 3). The purchase price of the Real Estate, *i.e.*, $4,290,000, is 18.14% of this valuation.

[5] Berkshire attaches to its initial memorandum copies of the Vermont property transfer tax returns for the sale (doc. # 536-4) showing a value of $2,853,240 allocated to personal property in the Town of Wilmington, and copies of Town of Wilmington tax bills (doc. # 536-5) assessing the value of the real and personal property in the Town of Wilmington as $29,162,000, of which Berkshire asserts $2,000,000 is attributed to the Barnstormer Lift. This valuation is 24.81% of the $8,060,000 purchase price of the Sale Property.

[6] Since Barnstormer does not challenge the Court's discretion to determine a fair allocation of the Proceeds (see doc. # 548, p. 1), there is no need for the Court to address Berkshire's additional arguments that Barnstormer is bound by their stipulation agreeing to have the Court do so or that Barnstormer has no basis for Rule 60 reconsideration of the Court's final order approving sale.

the Barnstormer Lift, the Court would find Barnstormer's argument compelling. As it is, this increment was reduced without Berkshire's specific consent to both parties' collateral being sold with $50,000 bid increments. In light of these circumstances, the Court finds the fact of equal bid increments, in and of itself, is not sufficient to demonstrate an equal split of the Proceeds is entirely fair.

The factors Berkshire asks the Court to rely upon in exercising its discretion to award Berkshire 75–100% of the Proceeds are even less persuasive. Berkshire's arguments pertaining to its preservation expenses fail because, as Barnstormer points out, Barnstormer and Berkshire negotiated and executed an agreement in 2019 acknowledging neither party was obligated to pay any costs to maintain the Barnstormer Lift, except that Barnstormer would reimburse Berkshire for 2019 taxes on the Barnstormer Lift (see doc. # 542-2). Berkshire does not dispute the terms of their agreement or that Barnstormer reimbursed it as agreed (see doc. # 549). Berkshire received the benefit of its bargain with Barnstormer based on the parties' agreement, and the instant dispute does not reopen the terms of the agreement the parties made with respect to preservation expenses. Berkshire's valuation arguments are likewise unavailing. Berkshire consented to the stalking horse bid of $4,000,000 for the Real Estate, despite its prior appraisal of that property for a much higher amount, and the Proceeds in question flow from the sale premised on that stalking horse bid. The market conditions, type of assets, universe of interested bidders, and estate's circumstances on the date of the sale coalesced to generate the sale price. Similarly, as Barnstormer correctly observes, the tax allocations used on the Vermont Property Transfer Tax Returns do not reflect the "value" actually paid (doc. # 542, p.7). These allocations do not properly figure into this calculation since they may be based on many factors other than actual fair market value.

This leaves the Court with two conclusions under the facts and circumstances presented here that narrow the range of a proper allocation: (1) a 50/50 split is not necessarily fair and (2) an award of 75% or more to Berkshire is not warranted. As Barnstormer acknowledges, an allocation of approximately 53% to Berkshire and 47% to Barnstormer can be justified based on the purchase price of the collateral. Although Berkshire rejects this valuation approach and insists it is neither equitable nor accurate because this was a forced sale, Berkshire's stance on this point is fatally flawed since the sale of both parties' collateral was conducted under the same constraints and Berkshire consented to the terms of sale. Thus, for purposes of this dispute and allocation of the Proceeds, the Court concludes sale price – rather than appraisals or tax documents – most accurately reflects the value of the collateral. The Court also recognizes Berkshire has invested a substantial sum in the maintenance and preservation of the Estate's property and all parties benefitted from that. It is also undeniable that the sale price fell dramatically short of the appraisal on which Berkshire was relying. These realities also tip the scales slightly in Berkshire's favor.

In allocating the Proceeds, the Court finds the primary factors are the terms of sale, the source of the Proceeds from the $100,000 overbid amount, the equal bidding increments, and the pertinent

agreements between the parties. It gives those factors the most weight. Though not the most salient factors, the Court also takes into consideration Berkshire's substantial expenditures to preserve the property of the estate, as well as the disparity in the parties' recoveries at sale relative to their outstanding debts. After balancing all of these factors, with the appropriate weight to each, and with the goal of finding the ratio that best aligns with basic principles of fairness, the outcome is a 53% / 47% allocation in favor of Berkshire.

Accordingly, based on the record in this case, including the thorough memoranda of law Berkshire and Barnstormer have filed, and for the reasons set forth above, THE COURT FINDS it has discretion to determine the allocation of the Proceeds based on the unique facts and circumstances of this case and the agreements between the parties, and both parties are entitled to a portion of the Proceeds; and IT IS HEREBY ORDERED the Trustee shall disburse 53% of the Proceeds ($49,687.50) to Berkshire and 47% of the Proceeds ($44,062.50) to Barnstormer promptly after this Order becomes final and is no longer subject to appeal.

SO ORDERED.

October 15, 2020
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge