IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
CYNTHIA JO PARCHMAN,	§	Case No. 06-40430
	§	(Chapter 13)
Debtor.	§	

ORDER DENYING MOTION FOR NEW TRIAL,
TO AMEND FINDINGS, AND TO VACATE DISMISSAL

Cynthia Jo Parchman (the "Debtor") initiated this case by filing a petition for relief under Chapter 13 of the Bankruptcy Code on April 2, 2006. The Debtor filed her original Chapter 13 Plan on April 14, 2006, which she subsequently amended. Following a hearing on June 21, 2006, the Court entered an order denying confirmation of the Debtor's amended Chapter 13 Plan.

On August 9, 2006, the Court held a hearing to consider confirmation of the Debtor's second amended Chapter 13 Plan. The evidence presented at the hearing established, among other things, that the Debtor was delinquent on her required post-petition payments to her only secured creditors, GenReal Properties, Inc. and Ed and Shelley Lewis (collectively, "GenReal"). *See* 11 U.S.C. §1326(a). At the conclusion of the hearing, the Court denied confirmation in light of the Debtor's admitted failure to comply with the terms and conditions of the existing Chapter 13 Plan. The Court entered an Order Denying Confirmation of Chapter 13 Plan, Setting 30-Day Dismissal Deadline for Filing New Chapter 13 Plan, and Setting Final Dismissal Deadline Pertaining to Plan Confirmation on August 14, 2006 (the "August 14th Order") [Dkt. No. 56].

The Debtor timely filed an amended Chapter 13 Plan on September 13, 2006, as required by the August 14th Order. In addition, on October 9, 2006, the Debtor filed a

Motion to Sell Property of the Estate pursuant to 11 U.S.C. §363(f)(3) (the "Sale Motion"). GenReal objected to confirmation of the Debtor's amended Chapter 13 Plan as well as the Sale Motion.

The Debtor owns a parcel of residential real property made up of 18.58 acres located at 14528 County Road 546, Copeville, Texas (the "Property"). GenReal has a claim against the Debtor in the agreed-upon amount of $76,500, which is secured by the Property pursuant to a Deed of Trust dated April 1, 2005 and a Warranty Deed with Vendor's Lien dated April 29, 2005. In the Sale Motion, the Debtor sought to sell one acre of the 18.58 acre tract to Copeville Water Supply Corporation ("Copeville") for $27,000.[1] Copeville plans to construct a water tower on the purchased property.

The Court heard the Sale Motion and considered confirmation of the Debtor's Chapter 13 Plan, as amended, on October 31, 2006. At the hearing, the Debtor argued that §363(f)(3) of the Bankruptcy Code permits her to carve out one acre from the Property, reduce GenReal's lien on the one acre to approximately $5,649.00 and keep the balance of the sales proceeds. The Debtor argued that, since the proposed sales price exceeded "the amount of the lien attributable to the property being sold," the "plain language" of §363(f)(3) dictates approval of the Sale Motion. *See* Brief in Support of Sale Motion at p. 3.

At the conclusion of the hearing, the Court denied confirmation as well as the Sale Motion. The Court specifically found that the Debtor's Chapter 13 Plan was not feasible and failed to comply with §1325(a)(5) of the Bankruptcy Code. On November 6,

[1] In her schedule of property claimed as exempt (Schedule C), as amended, the Debtor lists a value of $105,000 for her house and the surrounding 18.58 acres. The Debtor claims $36,500 of this amount as her exempt property under Article 16, §§ 50 and 51, of the Texas Constitution and §§ 41.001 and 41.002 of the Texas Civil Practices and Remedies Code.

2006, the Court entered an Order Denying Motion to Sell Property (the "Sale Order") [Dkt. No. 81] and an Order Denying Confirmation of Chapter 13 Plan and Dismissing Chapter 13 Case With Prejudice to Refiling for 120 Days (the "Confirmation Denial and Dismissal Order") [Dkt. No. 82].

This matter is before the Court on the Motion for New Trial, to Amend Findings, and to Vacate Dismissal (the "Reconsideration Motion") filed by the Debtor pursuant to Federal Rules of Civil Procedure 52(b) and 59, as adopted and applied to this case by the Federal Rules of Bankruptcy Procedure. In the Reconsideration Motion, the Debtor argues that the Court "misconstrued" §363(f)(3) in its denial of the Sale Motion. The Debtor also asks this Court to reconsider confirmation of her proposed Chapter 13 Plan and vacate its Confirmation Denial and Dismissal Order.

Motions to alter or amend a judgment under Federal Rule 59(e) "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citations omitted). A Federal Rule 59(e) motion should not be granted unless there is: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *See, e.g., Schiller v. Physicians Resource Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003); *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991). A party seeking to alter or amend a judgment under Federal Rule 59(e) must clearly establish grounds to alter or amend the judgment. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003).

Motion to Reconsider the Sale Order

Section 363(f)(3) permits a sale of property of the estate free and clear of an interest in the property, including a lien or security interest, if "such interest is a lien and the price at which the property is to be sold is greater than the aggregate value of all liens on that property." 11 U.S.C. §363(f)(3). The Debtor cites two cases that have construed the phrase "the aggregate value of all liens" as meaning the "value" of the creditor's lien on a portion of a secured creditor's collateral package. *See In the Matter of WPRV-TV, Inc.*, 143 B.R. 315, 319 (D. P.R. 1991), *judgment aff'd on other grounds*, 983 F.2d 336 (1st Cir. 1993); *In re Terrace Gardens Park Partnership*, 96 B.R. 707, 713 (Bankr. W.D. Tex. 1989). These and other courts have relied on the definition of a secured claim in §506(a) to maintain that a sale price is not required to exceed the amount of all liens on the property being sold, but need only exceed the value of the property. *See In re Terrace Gardens Park Partnership*, 96 B.R. at 712 (collecting authority).

In *Terrace Gardens*, for example, the debtor moved to sell two of six office buildings comprising its commercial complex free and clear of liens. The bank, which had a lien on the entire complex, objected. Although the bank's deed of trust contemplated sales of one or more buildings and included release prices, the bank insisted that the office park should be sold in bulk. The bankruptcy court overruled the bank's objection, finding, among other things, that the sales prices equaled or exceeded the value of the two office buildings. *In re Terrace Gardens Park Partnership*, 96 B.R. at 714. In addition, the bankruptcy court found that additional circumstances justified the proposed sales – specifically, the proposed sales would eliminate one secured creditor and substantially reduce the claim of another, and the sales would aid process of orderly

liquidation contemplated by debtor's plan. *Id. See also In re 18th Ave. Development Corp.*, 14 B.R. 862 (Bankr. Fla., 1981) (in a case involving a bankrupt real estate developer, the court allowed the chapter 7 trustee to sell the debtor's "inventory" (*i.e.*, lots in a subdivision) singly and free and clear of liens).

Here, in attempting to apply the valuation prong of *Terrace Gardens* to the present case, the Debtor miscalculates the value of the lien on the property she seeks to sell. The Debtor argues, as she argued at the hearing on October 31, 2006, that the value of GenReal's lien should be calculated by multiplying $105,000 (which is the amount the Debtor claims the entire 18.58 acre tract is worth) by 5.38% (which is one acre divided by the 18.58 acres contained in the tract). If the court in *Terrace Garden* had used the Debtor's methodology for valuing the secured creditor's lien, that court would have taken the value of all six office buildings and multiplied that number by 33% (which is two office buildings divided by six office buildings) in calculating the amount to be paid to secured creditors.

However, the "starting point" for determining the value of a secured creditor's lien under §363(f)(3) is the language of the statue itself. *See WPRV-TV*, 143 B.R. at 320 (quoting *In re Beker Industries Corp.*, 63 B.R. 474, 475-476 (Bankr. S.D. N.Y. 1986)). The term "value" in §363(f)(3) "is employed in the same context in §506(a)," which equates a secured claim to the value of the collateral securing the claim. *Id. See also Terrace Garden*, 96 B.R. at 712. Section 506(a)(1) specifically provides that:

> An allowed claim of a creditor secured by a lien on property [of the estate] … is a secured claim to the extent of the *value* of such creditor's interest in the estate's interest in such property … and is an unsecured claim to the extent that the *value* of such creditor's interest … is less than the amount of such allowed claim. Such *value* shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such

> property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. §506(a)(1) (emphasis added). Section 506(a) plainly indicates that the term "value" with respect to an interest of a creditor in property means the actual value of the property as determined by the bankruptcy court. *See WPRV-TV*, 143 B.R. at 320. "That indication and the last sentence of §506(a) requiring determination of value upon disposition of an asset standing as collateral strongly support the conclusion that the term 'value', as employed in §363(f) is to be similarly interpreted." *WPRV-TV*, 143 B.R. at 320-321.

In this case, the value of the one acre tract the Debtor seeks to sell to Copeville is the proposed sales price. The Debtor's valuation of the one acre as a percentage of the alleged value of the entire Property misconstrues §506(a) and §363(f)(3). The Debtor's valuation also assumes – falsely – that the value of each acre contained within the Property is identical and will not be affected by the proposed sale to Copeville. The falsity of these assumptions was revealed by the Debtor's admission at the hearing that she will be required to spend more than $11,000 on the retained portion of the Property in order to comply with certain restrictive covenants. Additionally, the construction of a water tower on the acre the Debtor seeks to sell would clearly have an adverse effect on the value of the remainder of the tract as well as other homes in the neighborhood.

Notably, as the bankruptcy court emphasized in *Terrace Gardens,* adequate protection is the touchstone for whether a proposed sale should be approved pursuant to §363(f). *In re Terrace Gardens Park Partnership,* 96 B.R. at 713. It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the

proceeds of the disposition. *See Ray v. Ray v. Norseworthy*, 90 U.S. 128, 134-35 (1874) (court may sell bankrupt's property encumbered by third-party claims as long as third parties retain their respective priorities in the proceeds of the sale); S.Rep. No. 989, 95th Cong., 2d Sess. 56 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5842 (committee report on §363(f)) ("Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."). In this case, inasmuch as the Debtor seeks to retain most of the proceeds of the proposed sale to Copeville, GenReal's interest in the Property is not adequately protected. *See* 11 U.S.C. §363(p). *See also Matter of Wilhoit*, 34 B.R. 14 (Bankr. Fla. 1983) (declining to approve sale of most valuable portion of tract of encumbered property). *See also In re Penniston*, 206 B.R. 948 (Bankr. D. Minn. 1997) (assuming §363(f) applies to exempt property, Chapter 13 debtor did not have the right to sell a homestead encumbered with liens without adequately protecting those liens); *In re Cramer*, 295 B.R. 397 (Bankr. S.D. Fla, 2003) (refusing to allow chapter 7 debtors to sell their home for less than the outstanding mortgage under §363(f)(3) where debtor's only motive was to extract a portion of the sales proceeds for their own benefit).

For all of the foregoing reasons, the Court concludes that the Debtor has failed to establish grounds to correct this Court's prior findings under Federal Rule 52(b) or for relief from the Sale Order under Federal Rule 59(e).

Motion to Reconsider the Confirmation Denial and Dismissal Order

Finally, the Court addresses the Debtor's request that it reconsider denial of confirmation of the Debtor's Chapter 13 Plan. The Debtor argues that "[b]ased on what Debtor contends is an incorrect application of §363(f)(3), Debtor respectfully requests

that this Court grant Debtor a new trial … with respect to … Debtor's attempts at the confirmation of her plan of reorganization." Reconsideration Motion at p. 4. However, as previously discussed, the Debtor failed to articulate any grounds for relief from the Sale Order. Even if the Court had granted the Sale Motion upon reconsideration, the Debtor failed to show that the amount she would retain from the sale to Copeville is sufficient to make necessary repairs to her Property and fund her Chapter 13 Plan.

For all the foregoing reasons, the Court concludes that the Debtor has failed to establish that her proposed Chapter 13 Plan is, in fact, feasible or that grounds exist for relief from the Confirmation Denial and Dismissal Order under Federal Rule 59(e).

IT IS THEREFORE ORDERED that the Reconsideration Motion shall be, and it is hereby, **DENIED**.

Signed on 1/24/2007

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE