

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
GALLUP AUTO SALES, INC.
Debtor.

No. 7-99-12361SF

**MEMORANDUM OPINION ON TRUSTEE'S
MOTION TO SELL PROPERTY OF THE ESTATE
BY PRIVATE SALE, FREE AND CLEAR OF LIENS**

This matter is before the Court on the Trustee's Motion to Sell Property of the Estate by Private Sale, Free and Clear of Liens (doc 196), and the objection thereto filed by Jerry Egeland (doc 178). Having considered the briefs submitted¹, the Court finds that the Motion to Sell is well taken and should be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(M).

The facts are not in dispute. The Trustee Mr. Finch obtained judgments in two adversary proceedings, Trustee v. Desert Mobile Homes, Adv. 99-1197S and Trustee v. Jerry Egeland, Adv. 01-1030S. The Trustee has liquidated all other assets of the estate and now seeks to sell the judgments in these two adversaries to the highest bidder. He established an auction procedure; two persons submitted bids, and the highest bid was from Attorney Richard Feferman acting in his

¹ The parties agreed at the September 10, 2003 hearing that this matter could be decided on briefs; the briefs and the record reflect sufficient agreement on the predicate facts.

individual capacity. The judgments are for \$35,000 and \$90,000 respectively, for which Mr. Feferman bid a total of \$14,000. Mr. Egeland, according to his attorney Mr. Kulikowski, appears to have few if any unencumbered assets, is 76 years old, and is in declining health. It is also not clear that Desert Mobile Homes has any recoverable assets.

Richard Feferman appeared in the bankruptcy case solely as attorney for a class or group of creditors that had sued Debtor prepetition.² Mr. Egeland objected to the sale of the judgments to Mr. Feferman on the grounds that the sale to Mr. Feferman would violate Rules of Professional Conduct 16-107 and 16-108.³

Rule 16-107 provides, in part:

- A. A lawyer shall not represent a client if the representation of that client will be directly or substantially adverse to another client...
- B. ... [A] lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interests...

² At no point has Mr. Feferman represented the trustee or the estate.

³ "The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order...." D.N.M.LR-Civ. 83.9 (eff. January 1, 1996). NM LBR 2090-1(a) (eff. October 1, 1996) makes the district court rules applicable to admission to practice before the bankruptcy court. The Court construes NM LBR 2090-1(a) to make the Rules of Professional Conduct applicable to the practice of law in this court.

Subsection A does not apply, because Mr. Feferman represents in this case no client other than this group. Subsection B also does not apply. Mr. Feferman's representation of this group of clients is substantially over; he has filed proofs of claim in the bankruptcy case and the Trustee, with this sale completed, is ready to file his final report and distribute the estate's funds. Mr. Feferman's acquisition of the judgments will have no impact on his representation of the clients.

Rule 16-108(J) provides, in part:

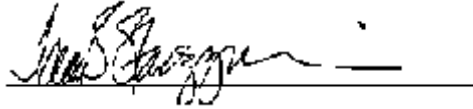
A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client...

Mr. Feferman is not attempting to acquire a proprietary interest in the subject matter of the litigation. The asset he is proposing to acquire are judgments obtained by the trustee in adversary proceedings in which Mr. Feferman took no part. To the extent that the consideration he pays for the judgments become part of the fund available for distribution to creditors, that connection is too tenuous to prevent the sale. (To the extent that the amount of Mr. Feferman's payment to the estate is material to the issue, a rejection of Mr. Feferman's bid for the lower bid would adversely affect

Mr. Feferman's clients, who will be most of the distributees of the estate.)

Furthermore, the Court and parties have located no reported bankruptcy cases that prevent this type of sale. It is clear that trustees and their agents may not purchase estate assets. See Salazar v. McCormick (In re Crestview Funeral Home, Inc.), 287 B.R. 832, 838 (Bankr. D. N.M. 2002). Similarly, a Chapter 11 Debtor's attorney (or former attorney) may not purchase estate assets. See Karbach Enterprises v. Exennium, Inc. (In re Exennium, Inc.), 23 B.R. 782, 786-8 (9th Cir. B.A.P. 1982) rev'd on other grounds, 715 F.2d 1401 (9th Cir. 1983). These cases focus on the fiduciary relationship between the attempted purchasers and the estate and deny the sale on public policy grounds. "The only persons directly prohibited from purchasing assets from a bankruptcy estate are the trustee and other officers of the court." T. N. Ambrose, The Sale of Assets from a Bankruptcy Estate, 21 Idaho L. Rev. 583, 585 (1985). (Footnote omitted.) In the case before the Court Mr. Feferman has no fiduciary relationship to the estate. Therefore, he should not be prevented from acquiring the judgments.

The Court will enter an order granting the Trustee's Motion to Sell Property of the Estate by Private Sale, Free and Clear of Liens.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on December 29, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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