

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 11
	)	
	)	
CONTROLLED POWER	)	CASE NO. 05-60383
CORPORATION OF OHIO,	)	(Jointly administered)
	)	
<i>et al.</i> ,	)	JUDGE RUSS KENDIG
	)	
Debtors.	)	
	)	<b>MEMORANDUM DECISION</b>
	)	<b>DENYING MOTION TO SET ASIDE</b>
	)	<b>SALE</b>
	)	

This matter is before the court upon a motion by American Motorist Insurance Company (“AMI”) to set aside the sale of the assets of Controlled Power Corporation of Ohio (“CPC Ohio”) to Controlled Power, LLC (collectively, “CPC”),<sup>1</sup> or in the alternative, for an order compelling CPC to grant AMI access to certain books and records (“Motion to Set Aside”).<sup>2</sup> This court approved the sale pursuant to Section 363 of the Bankruptcy Code<sup>3</sup> by way of an order entered March 1, 2005. AMI contends that it did not receive notice that comports with the requirements of Section 363 and Bankruptcy Rules 2002 and 6004. For reasons that follow, AMI’s motion is **DENIED**.

**I. JURISDICTION AND VENUE**

This court has jurisdiction pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. Venue is proper pursuant to 28 U.S.C. § 1408.

---

<sup>1</sup> Controlled Power Corporation of Ohio is the debtor in this case and substantial portions of its assets were purchased by Controlled Power, LLC, an entity established by Myers Power of California for the sole purpose of buying debtor’s assets. Throughout this case, both entities have responded to AMI’s motion. Because their interests are aligned and because the sale has been completed, the court will use the term “CPC” when referring to arguments made by CPC Ohio and/or CPC LLC, and “CPC LLC” or “CP Ohio” during discussions that deal solely with one entity if it makes a material difference.

<sup>2</sup> This the second time that AMI has sought to compel CPC to grant it access to certain books and records. *See* Dkt. #158. The court entered an order denying AMI’s first motion to compel on September 2, 2005. *See* Dkt. 238. AMI filed a notice of appeal regarding the court’s decision on September 12, 2005. *See* Dkt. #243. Accordingly, this court will not address AMI’s arguments concerning access to books and records.

<sup>3</sup> Unless otherwise stated, references to “the Code” or “the Bankruptcy Code” are to Title 11 of the United States Code. Unless otherwise stated, a reference to a “Section” is a reference to a section within the Bankruptcy Code.

## **II. BACKGROUND**

CPC Ohio filed its Chapter 11 bankruptcy petition on January 28, 2005 and its motion for an order approving the sale of substantially all of its assets pursuant to Sections 363 and 365 the same day (the "Sale Motion").<sup>4</sup> A notice of hearing on the Sale Motion was filed on February 4, 2005, announcing the hearing to be held on February 28, 2005. AMI did not receive a copy of this notice or the Sale Motion because CPC Ohio had failed to list AMI in CPC Ohio's schedules. The court granted the Sale Motion by way of an order entered on March 1, 2005.

On May 27, 2005, AMI filed its motion to compel access to certain books and records ("Motion to Compel").<sup>5</sup> CPC objected, AMI replied, and the matter was set for hearing on June 2, 2005. Thereafter, the parties filed additional memoranda. AMI filed a supplemental brief on June 20, 2005 and, for the first time, raised the issue of notice. After CPC responded AMI filed a second reply on July 22, 2005. See Dkt. #212. In its order denying AMI's motion to compel the court noted that AMI never raised the issue of notice in any of its previous memoranda. Accordingly, the court declined to address the notice issue in its decision denying AMI's motion to compel, but gave AMI leave to file an additional motion. See Dkt. #238. AMI filed the Motion to Set Aside on September 26, 2005 and after several more responses and surreplies, the matter was set for hearing on December 20, 2005.

## **III. PARTIES' ARGUMENTS**

AMI argues that Section 363 and Federal Bankruptcy Rules 2002 and 6004 require that proper notice of a sale be given to certain creditors and interested parties. AMI claims that CPC Ohio did not follow these required procedures with respect to AMI even though AMI was entitled to proper notice because it is an interested party within the meaning of Section 363(f). AMI believes that it holds pecuniary interests which rise to the level of property rights, and that a sale conducted upon defective notice cannot deprive AMI of those property rights.

CPC argues that Civil Rule 60(b) is applicable to bankruptcy proceedings through Bankruptcy Rule 9024, and that AMI has not set forth facts sufficient to afford relief under any of the grounds set forth in Civil Rule 60(b). CPC admits that AMI did not receive notice in the manner contemplated by Bankruptcy Rule 2002, but contends that AMI's Motion to Set Aside is untimely because the order approving the sale was entered on March 1, 2005, and AMI did not raise the issue of notice until June 20, 2005. CPC emphasizes that AMI had actual notice of the sale. Finally, CPC argues that AMI is only an unsecured creditor and not an interested party who has the right to set aside a sale under Section 363(f).

The court will only address issue of notice, as it is dispositive.

---

<sup>4</sup> For the sake of brevity, the court will not reproduce the full title of each motion in its discussion, and will refer to each responsive pleading and reply thereto using the simplest possible language.

<sup>5</sup> CPC manufactures and installs switchgear and related products for, among other things, public transit facilities. AMI is a surety company that issued performance and payment bonds for certain of CPC's sales and installation contracts.

#### IV. LAW AND ANALYSIS

##### A. AMI had Actual Notice of the Sale

Procedural due process is a flexible concept which requires that there be notice and a hearing before a party is deprived of a significant property interest.<sup>6</sup> In re La Sierra Fin. Servs., Inc., 290 B.R. 718, 733 (B.A.P. 9<sup>th</sup> Cir. 2002). The notice must be sufficient to “apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). While each case turns on the merits of its individual facts, actual knowledge has been held to satisfy formal written notice when required under Section 363. See In re LaRowe, 91 F.Supp. 52 (D. Minn. 1950) (secured creditor who admitted actual knowledge of sale but failed to object thereto could not set aside); In re Glinz, 66 B.R. 88 (D. N.D. 1986) (unsecured creditor not entitled to relief from sale where it was represented by attorney who attended sale hearing and failed to object); Pelican Homestead v. Wooten (In re Gabel), 61 B.R. 661 (Bankr. W.D. La. 1985) (creditor who received notice but failed to object not entitled to annul sale). See also Northwestern Nat’l Bank of St. Paul v. Halux, Inc. (In re Halux, Inc.), 665 F.2d 213 (8<sup>th</sup> Cir. 1981) (creditor did not have actual notice of sale and therefore entitled to bring an action for conversion).

AMI presented the testimony of its surety counsel, Sean Kopeny (“Kopeny”). Kopeny is a licensed attorney who works as a claims adjuster. (Transcript of Hearing, hereafter “Tr.” at 9). He investigates and processes claims on payment and performance bonds, and personally received and processed claims filed in late 2004 and early 2005 against two of CPC Ohio’s projects. (Tr. at 11). Kopeny received actual notice of CPC Ohio’s bankruptcy filing on January 28, 2005, during a conversation with an employee of one of the bond payment claimants. (Kopeny deposition transcript, hereafter “Kop. Tr.” at 16, Tr. at 36).

Kopeny prepared and mailed a claim acknowledgment letter to CPC Ohio in early February 2005, and on February 14, 2005, he received a response from counsel for CPC Ohio. (Tr. at 12). The last sentence of the letter referred to the proposed sale of assets. (Tr. at 13). Kopeny spoke with counsel for CPC Ohio on February 14, and during that conversation he asked about the proposed sale. Counsel advised Kopeny to contact the acquiring company directly. (Tr. at 41, Kop. Tr. at 27). Kopeny and CPC Ohio counsel had two additional telephone calls – one on February 21 and another on February 23. The later call was a conference that included representatives of CPC LLC and discussed the bonded projects. Kopeny did not inquire about the sale during the conference call. (Tr. at 15-16). The February 23 conversation consumed approximately forty-five minute, focused on the status of the bonded projects for which AMI was

---

<sup>6</sup> AMI claims that it has an interest in the bonded contracts that comports with the meaning of interest pursuant to Section 363(f). The court has considered that argument in light of the testimony presented during the hearing, the case law concerning notice, and Volvo White Truck Corp. v. Chambersburg Beverage (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987, and finds that the testimony does not compel the conclusion AMI advances. If AMI holds only an unsecured claim it may not avail itself of Section 363(m) to set aside a sale confirmed properly under Section 363(f). See Tr. at 46.

surety, and included representatives from CPC LLC. During the telephone call Kopeny was informed that the acquiring company would likely reject one of the bonded projects. (Tr. at 20).

Kopeny learned that the sale had been confirmed on March 7, 2005 by way of a telephone conversation with Tom Huggins of CPC Ohio. (Tr. at 22, Kop. Tr. at 29). AMI did not receive a copy of the motion for an order approving the sale or a copy of the sales procedures order, (Tr. at 33), and CPC stipulated that AMI was not included in the service list for the order approving sale. (Tr. at 35).

Kopeny testified that he had no idea regarding any repercussions that would result from a bankruptcy (Tr. at 39), and did not check the docket of the case until some time in early March 2005. (Kop. Tr. at 14). AMI did not maintain any protocols for its adjusters to follow if they learned that a company for which AMI had issued a surety bond had filed bankruptcy. (Tr. at 36-37, Kop. Tr. at 19). Kopeny alerted his supervisors to the existence of CPC Ohio's bankruptcy, and on or about March 10, 2005, AMI retained counsel. (Kop. Tr. at 21-22). AMI did not object to the sale procedures order or raise the issue of notice until it filed a surreply brief on July 22, 2005.

Kopeny's testimony proves that AMI had actual notice of CPC Ohio's bankruptcy. AMI received a letter from CPC Ohio's counsel on February 14, 2005 that provided actual notice of the proposed sale, but AMI did nothing to investigate the impact of the proposed sale on potential performance obligations under the bonds, and did not retain outside counsel until March 10, 2005. This was despite being told that some contracts were not likely to be assumed by the purchaser after speaking with the purchaser. AMI was told what was happening and focused solely on claims issues. More importantly, Kopeny admitted that even if he had known of the asset purchase agreement he "wouldn't have known the importance" of it. (Tr. at 42). AMI did not object to the sale, and only complained about defective notice four months after the order confirming the sale was entered, raising the issue for the first time in its second supplemental brief filed on June 2, 2005. Because AMI had actual notice and failed to object, the court has no basis to set aside the sale. In reaching this conclusion, the court has considered all of the evidence, affidavits, exhibits, and pleadings, regardless of whether or not they are specifically referred to in this decision.

Accordingly, AMI's motion is **DENIED**.

An appropriate order shall enter.

**/s/ Russ Kendig**

---

**U.S. Bankruptcy Judge  
Russ Kendig**

**MAR 31 2006**

## SERVICE LIST

### **Controlled Power Corporation of Ohio**

295 Wetmore Ave. S.E.  
Massillon, OH 44646

### **Eric D. Winston**

1901 Avenue of the Stars  
12th Floor  
Los Angeles, CA 90067

### **Joseph F. Hutchinson, Jr.**

Baker & Hostetler  
3200 National City Center  
1900 East Ninth Street  
Cleveland, OH 44114

### **Kate M Bradley**

Brouse McDowell  
388 S. Main Street, Suite 500  
Akron, OH 44311

### **Marc Merklin**

Brouse McDowell, LPA  
388 S. Main Street, Suite 500  
Akron, OH 44311

### **Michael C. Brink**

Brouse McDowel, L.P.A.  
1001 Lakeside Ave.  
Suite 1600  
Cleveland, OH 44114

### **Jeffrey M Levinson**

Margulies & Levinson LLP  
30100 Chagrin Blvd  
Suite 250  
Pepper Pike, OH 44124

### **Leah M. Caplan**

30100 Chagrin Blvd.  
#250  
Cleveland, OH 44124  
(216) 514-2575

**SERVICE LIST (cont'd)**

**Ronald Friedberg**

Meyers, Roman, Friedberg & Lewis  
28601 Chagrin Boulevard, Suite 500  
Cleveland, OH 44122

**Howard Rabb**

Dworken & Bernstein CO., LLP  
60 South Park Place  
Painesville, OH 44077

All creditors and parties in interest