

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	No. 06 CR 964
)	
v.)	Judge Ronald Guzman
)	
MICHAEL E. KELLY)	

REDACTED PROPOSED SALE PROCEDURE OF THE SPECIAL MASTER

Douglas A. Doetsch, the court-appointed special master (the “Special Master”) in the case of *United States of America v. Michael E. Kelly*, hereby submits this Proposed Sale Procedure for Real Property of the Special Master dated October 27, 2009 (the “Proposal”), to illustrate to the Court the Special Master’s recommendation for selling the procedure in compliance with applicable law.

This issue has arisen in the context of the first sale overseen by the Special Master in connection with his responsibilities under this Court’s Order dated February 10, 2009, which involves the sale of a real estate parcel located in a residential area in the city of [REDACTED], Mexico (the “[REDACTED] Parcel”). In obtaining the Court’s authorization for the sale of the [REDACTED] Parcel, the Special Master seeks to set forth a sales procedure that may be implemented for disposing of the remaining real property assets of Grupo Kelly (or interests therein) that will be liquidated to make restitution (the “Real Property Assets”).

The discussion that follows includes: (I) a discussion of applicable law and (II) a proposed sales procedure for (a) real property sold by an enterprise engaged in the sale of real property in the ordinary course of business and (b) discrete parcels of real property.

I. Compliance with Section 28 USC §§ 2001, *et seq*, is not required in the context of the Special Master’s oversight of the sale of the Real Property Assets.

a. 28 USC §§ 2001, et seq, only applies to judicial sales.

28 USC § 2001, *et seq* (the “Statute”) provides that:

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

The United States Supreme Court determined that the language of the predecessor statute to 28 USC § 2001(b): “limits its application to judicial sales made under order or decree of the court and requiring confirmation by the court for their validity, and that it does not extend to sales under common law executions which issue by mere praecipe of the judgment creditor on

the judgment without order of the court” *Yazoo & M.V.R. CO. et al. v. City of Clarksdale*, 257 US 10, 19 (1921) (limiting the application of the statute to judicial sales made under an order or decree of a court). In determining whether certain types of sales were included within the reach of the Statute, courts have often cited *Yazoo* and its progeny with approval in their discussions of what constitutes a “judicial sale.” See *Weir v. United States*, 339 F.2d 82, 85 (3d Cir. 1965) (“[The Statute] is clearly made applicable only to judicial sales.”); see, e.g., *United States v. Weigman*, 111 F.3d 74, 77 (3d Cir. 1997) (citing *Yazoo* and *Weir*, supra) and *United States v. Branch Coal Co.*, 390 F.2d 7, 9 (3d Cir. 1968). Moreover, the Second Circuit has explicitly defined the judicial sale requirement cited in the *Yazoo* holding above to exclude the instant circumstances: “[a] judicial sale is one made by the court through a duly appointed and commissioned officer, the essential element being that the court assumes the character of the seller.” *Prudential Ins. Co. of America v. Land Estates, Inc.*, 90 F.2d 457, 458 (2d Cir. 1937).

While the Special Master was appointed to take control of the Real Property Assets and liquidate them for the benefit of the victims, the sales contemplated by the Special Master are not “judicial sales” subject to the limitations of the Statute. This Court will not be called upon to act either in the “character of the seller” or to confirm the validity of a sale. The sale of any such Real Property Asset is governed by the law of the country where the Real Property Asset is located and where the sale is consummated. This Court lacks jurisdiction over real property in Mexico or Panama and accordingly has no authority to confirm or prohibit the sale of the Real Property Assets under Mexican or Panamanian law, as applicable. Thus, the predecessor statute, and by analogy the Statute, is not applicable to the instant circumstances.

Furthermore, this is not a judicial sale scenario where the Statute applies because this Court will not act as the seller to effectuate the transfer of title to the Real Property Assets.

Prudential Ins. Co., supra, involved the State of New York's liquidation of a mortgage/title company. The *Prudential* Court lifted its injunction to allow a state agency to purchase certain property of the mortgage/title company's subsidiary, rather than directly foreclosing upon the property. The *Prudential* Court concluded that such sale was not a "judicial sale" because the power to sell the property was restored to the subsidiary-owner, the sale was not made "by the court" and the court was not the "seller." In the instant case, the Special Master has been appointed by the Court and he serves as the Administrator of a Mexican law-governed trust holding legal title to the Mexican or Panamanian corporate entity (as applicable) that owns the Real Property Assets (among other assets), all of which are located in Mexico or Panama. In the event of a sale of any Real Property Asset, such sale shall be consummated in Mexico or Panama between the purchaser and the relevant Mexican or Panamanian corporate entity and title shall be transferred pursuant to a purchase and sale agreement subject to Mexican or Panamanian law and the jurisdiction of the applicable local courts. Consequently, the Statute does not apply in this case because this Court will not step into the shoes of the seller to consummate the sale of a Real Property Asset.

Finally, judicial sales conducted pursuant to the Statute are designed to effectuate or satisfy a court's judgment or decree finding that a party is entitled to money or other relief relating to mortgage foreclosures, tax lien foreclosures, eminent domain matters, and other forfeiture proceedings concerning real property within such court's jurisdiction. In the published cases applying the Statute, a court entered a judgment in such forfeiture proceedings in favor of a plaintiff that then required a judicial sale to enforce the judgment pursuant to the Statute. In this case, no judgment has yet been entered against the Defendant. Nor is there any property within this Court's U.S. jurisdiction. Accordingly, no argument can be made that the Real Property

Assets are being sold in satisfaction of a judgment, demonstrating that the instant case is distinguishable from the judicial sale context where the Statute applies.

b. The Federal Debt Collection Procedure Act, 28 USC §§ 3001, et seq, is the more appropriate statute to inform the sale of the Real Property Assets.

In this case, the Real Property Assets in Mexico and Panama are being liquidated pursuant to an agreement between the U.S. Attorney's Office and the Defendant in order to make restitution to the victims. While no judgment has been entered at this time, by virtue of the Defendant's agreement with the U.S. Attorney's Office, the Special Master has been informed that a restitution order in this case is on the horizon. In light of this development, the Special Master believes that the Federal Debt Collection Procedure Act ("FDCPA"), 28 USC §§ 3001, *et seq*, is the more appropriate statute to inform the sale of the Real Property Assets.

The FDCPA offers this Court a degree of flexibility that is not available under the Statute to direct that the sale of the Real Property Assets be made in a "commercially reasonable manner" and in accordance with the proposed sales procedures outlined in Section II, which seeks to minimize the cost associated with the sale of the Real Property Assets and maximize the sale proceeds available to benefit the victims. Specifically, 28 USC § 3201(f) provides this Court with the option to choose to sell real property in a judicial sale in accordance with 28 U.S.C. §§ 2001 and 2002 or in an execution sale under § 3203, and broadly defines property to include "[a]ny present or future interest, whether legal or equitable, in real, personal ... or mixed property, tangible or intangible, vested or contingent, wherever located and however held (including community property and property held in trust (including spendthrift and pension trusts)." § 3002(12). Furthermore, Although the United States Marshal is directed to levy upon the property pursuant to § 3102(d), § 3203(e) also vests a court with the authority to appoint a receiver to manage the property pending sale and § 3013 permits the court significant discretion

to modify the terms of the execution sale procedures, thus affording much greater flexibility than the procedures available to this Court under the Statute. Procedurally, the FDCPA also offers this Court significant latitude because it does not curtail or limit the right of the United States to collect restitution arising in the context of a criminal case, to seek appointment of a receiver, or to otherwise take action under any foreign or international law, see 18 USC §§ 3003(b)(2)-(3) and (e). Moreover, §§ 3613(a) and (f) permit the United States to use any federal or state procedure to collect a restitution judgment. Looking to the principles of the FDCPA for guidance would provide the Special Master and this Court with the flexibility necessary to efficiently sell the Real Property Assets, thus allowing the Special Master to maximize the sale proceeds available to make restitution to the victims.

II. Proposed Sales Procedures

Although both the Special Master and the U.S. Attorney's Office understand that strict compliance with the terms of the Statute is not required in connection with the liquidation of real property (or interests therein) in the context of the Special Master's oversight of the sale of the Real Property Assets, the Special Master will seek to comply with the spirit of the Statute to the extent practicable in carrying out the liquidation of discrete parcels of real property (in contrast to the businesses where the sale of real property is in the ordinary course of business) (*see* discussion in Section II.a).

a. Procedure for Ordinary Course Sales of Real Property from Inventory

The two Grupo Kelly enterprises engaged in the ordinary course sale of real property are: (1) the [REDACTED] Project and (2) the [REDACTED] Project. In each case, these enterprises are engaged in the sale of real property parcels (both mixed use, residential and commercial) and condominium units, respectively, from their property inventories. The enterprises engage in

advertising initiatives and retain a sales team¹ to market their property inventories based upon regular list prices per square meter.

To require that the sale of these properties comport with the Statute would overreach the intent of the Statute in the sense that these are not isolated parcels whose sale requires judicial oversight but rather parcels whose disposition (subject to reasonable, market list prices that have been reviewed by FTI Consulting and are attached hereto as Exhibits A and B in the case of the [REDACTED] Project and the [REDACTED] Project, respectively) is made out of inventory in the ordinary course of business, consistent with past practice, and overseen by a sales staff that has been engaged in selling such products for some time. Moreover, though cash discounts to promote quick sales have been discussed with the Special Master, these discounts would amount to no more than 30% of the current fixed list price, a discount level that is within the parameters discussed in the Statute (which permits a sale at two-thirds of the appraised value). To keep the Court apprised of the sales of Real Property Assets, the Special Master plans to submit quarterly status reports to the Court. The Special Master requests that this Court authorize the continuation of such ordinary course sales.

b. Procedure for Sales of Discrete Parcels of Real Property

The Special Master proposes the following procedure to dispose of discrete parcels of real property whose sale is not part of the ordinary course of business (*see* discussion in Section II.a). Although for the reasons stated in Section I above both the Special Master and the U.S. Attorney's Office have concluded that strict compliance with the Statute is not required, the Special Master proposes that, in the interest of promoting a transparent process, the sales of discrete parcels of real property be structured to comply with the spirit of Section (b) of the Statute (which Section outlines the requirements for a "Private Sale" under the Statute).

¹ [REDACTED]

In order to comply with the spirit of the Statute, the Special Master will take the following steps:

Step (1): Identify an appraiser to provide an appraisal of each relevant property (note that “disinterested” is the only requirement per the Statute), which appraiser shall be approved by the Court. In the case of any parcel for which FTI Consulting has previously provided to the Special Master a valuation analysis, such valuation analysis shall serve as the required appraisal. In the case of any parcel for which FTI Consulting has not previously provided an appraisal, the Special Master would have the authority to rely upon an appraisal or valuation provided by a disinterested appraiser of his choice.

Step (2): Publish a notice containing the terms of each sale and the appropriate procedure for placing an offer in a newspaper of general circulation in Panama or Mexico, as the case may be, at least ten (10) days before the sale is confirmed (*i.e.* in the case of a sale of real property in Cancún, the notice might be published in *La Reforma*, *El Universal* or *Excelsior*, each a newspaper of general circulation Mexico City, Mexico).

In addition, the U.S. Attorney’s Office will notify the victims of the sale by publishing an English version of the sale notice on its victim website, www.notify.usdoj.gov, which victims can access with a Victim Identification Number and Personal Identification Number provided to them by the United States Attorney’s Office.

Step (3): Sell the real property in question for at least 2/3 of the appraised value and, to the extent that publication (*see Step (2)* above) yields an offer that exceeds the original offer, accept such higher offer provided that the terms of such offer are in the best interest of the victims, as determined by this Court.

In each case, sales of discrete parcels of real property will be confirmed by this Court's order. Furthermore, if the Special Master determines, in the exercise of his professional business judgment, that the procedures set forth in this Section II.b are inapplicable or are not commercially reasonable as applied to a given discrete parcel of real property, he will contact this Court to discuss possible exceptions to the aforementioned sales procedure.

To illustrate the procedure for the disposition of discrete parcels of real property whose sale is not part of the ordinary course of business, the Special Master proposes the following procedure:

Step (1): The Special Master has already obtained one appraisal dated as of May 12, 2009 from CR Appraisals and Real Property Services (*CR Avaluos y Servicios Inmobiliarios*) that assigns a value of approximately USD1,000,000 (MXN13,507,000) to the [REDACTED] Parcel. The Special Master has requested that FTI Consulting evaluate such appraisal. The Special Master will present such appraisal to the Court for approval and consult the appraised value presented in such Court-approved appraisal to determine the lowest price that he can accept for the sale of the [REDACTED] Parcel. In this case, the Special Master understands that Grupo Kelly has already received an offer from a local real estate investor in the amount of USD1 million for the [REDACTED] Lot (the "Original Sale Terms").

Step (2): The Special Master will publish the Original Sale Terms in *La Reforma*, *El Universal* or *Excelsior*, all newspapers of general circulation in Mexico City, Mexico. The publication clock shall run from the first day of publication and the sale, under the Original Sale Terms, may be consummated immediately following the expiration of the 10-day publication period (provided that the Special Master does not receive a higher offer price than the price

specified in the Original Sale Terms, in which case such higher offer price would be accepted if it is in the best interest of the victims as determined by this Court).

Step (3): In anticipation of the running of the publication clock, the Special Master will request a confirmation hearing for the closing of the sale of the [REDACTED] Parcel on the business day after the publication requirement shall be fulfilled, and competing bids, if any, could be presented at such confirmation hearing.

The Special Master, with the support of the U.S. Attorney's office and counsel to the Defendant, submits to this Court that, though the strictures of the Statute are not applicable to the instant case, compliance with the spirit thereof by implementing the sales procedure set forth above furthers the mutual commitment of this Court and the Special Master to preserving a transparent process that will ultimately best serve the efforts to make restitution to the victims.

RESPECTFULLY SUBMITTED this 27th day of October, 2009.

/s/ Douglas A. Doetsch

Douglas A. Doetsch, Special Master

Exhibit A
[REDACTED]

Exhibit B
[REDACTED]