

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

|                                   |   |                       |
|-----------------------------------|---|-----------------------|
| <b>In Re:</b>                     | : |                       |
|                                   | : |                       |
| CLAUDIO PABLO AVENDANO,           | : | CASE NO. 15-64523-PWB |
|                                   | : |                       |
| <b>Debtor.</b>                    | : | CHAPTER 7             |
|                                   | : |                       |
| _____                             | : |                       |
|                                   | : |                       |
| NEIL C. GORDON, Trustee for the   | : |                       |
| Estate of Claudio Pablo Avendano, | : |                       |
|                                   | : |                       |
| <b>Movant,</b>                    | : |                       |
|                                   | : |                       |
| <b>V.</b>                         | : |                       |
|                                   | : |                       |
| DOUGLAS COUNTY TAX                | : |                       |
| COMMISSIONER,                     | : |                       |
| RENEE TAYLOR, and                 | : |                       |
| CLAUDIO PABLO AVENDANO,           | : |                       |
|                                   | : |                       |
| <b>Respondents.</b>               | : |                       |
| _____                             | : |                       |

**MOTION FOR AUTHORITY TO (I) SELL PROPERTY OF THE ESTATE  
FREE AND CLEAR OF ALL LIENS, INTERESTS AND ENCUMBRANCES AND  
(II) DISBURSE CERTAIN PROCEEDS AT CLOSING**

COMES NOW Neil C. Gordon, as the Chapter 7 Trustee (the “**Trustee**”) of the bankruptcy estate (the “**Estate**”) of Claudio Pablo Avendano (the “**Debtor**”) and files this *Motion for Authority to (I) Sell Property of the Estate Free and Clear of Liens, Interests and Encumbrances and (II) Disburse Certain Proceeds at Closing* (the “**Sale Motion**”), pursuant to 11 U.S.C. §§ 363(b) and (f) and Fed. R. Bankr. P. 2002(a)(2), 6004(a), 6004(c) and 9014, other than in the ordinary course of business, and respectfully shows the Court as follows:

## Jurisdiction

1. This Court has jurisdiction to hear this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This Motion presents a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## Background

2. Debtor filed a voluntary petition for relief under Chapter 7 of Title 11 U.S.C. on August 3, 2015 (the "**Petition Date**"), thereby initiating Case No. 15-64523-PWB (the "**Case**").

3. Also on the Petition Date, Debtor filed under penalty of perjury his *Statement of Financial Affairs* (collectively, the "**Sworn Statements**") and *Schedules "A" through "F"* and *Schedules "I" and "J"* (collectively, the "**Sworn Schedules**").

4. On August 4, 2015, Trustee was appointed to the Case as the interim Chapter 7 trustee, pursuant to 11 U.S.C. § 701(a)(1).

5. The original meeting of creditors was scheduled for September 8, 2015, pursuant to 11 U.S.C. § 341(a) (the "**341 Meeting**"), at which time, Debtor failed to appear, so the 341 Meeting was rescheduled to October 15, 2015.

6. Trustee conducted and concluded the 341 Meeting on October 15, 2015, at which time, he became the permanent Chapter 7 Trustee, pursuant to 11 U.S.C. § 702(d).

7. The duties of Trustee include his obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1).

8. Trustee is the sole representative of the Estate. 11 U.S.C. § 323(a).

9. Trustee filed his *Application to Appoint Attorney for Trustee* [Doc. No. 24]

requesting authorization to employ Arnall Golden Gregory LLP (“AGG”) as attorneys for Trustee.

10. Over the objection of the Trustee and creditors, Debtor’s motion to convert to Chapter 13 was granted by Order entered on December 16, 2015 [Doc. No. 43]. However, the Chapter 13 Plan was not confirmed, the Case was re-converted to Chapter 7 on July 13, 2016 [Doc. No. 91], and Trustee was re-appointed on July 18, 2016 [Doc. No. 93].

11. Trustee filed his *Application for Reappointment of Attorney* [Doc. No. 94] on July 18, 2016, and the Court entered an *Order* [Doc. No. 95] on July 20, 2016, reappointing AGG as attorneys for Trustee.

*a. The Properties*

12. Pursuant to the Sworn Schedules, *Schedule A – Real Property*, Debtor scheduled his sole ownership interest in the following real properties: (i) 8931 Timmons Circle, Villa Rica, Douglas County, Georgia 30180 (“**Timmons Circle**”); and (ii) 3191 Andy Mountain Road, Villa Rica, Douglas County, Georgia 30180 (“**Andy Mountain**,” and collectively with Timmons Circle, the “**Properties**”).

13. Pursuant to the *Amendment* [Doc. No. 37] filed November 15, 2015, Debtor amended *Schedule “C”* of the Sworn Schedules to delete any claim of exemption in the Properties.

14. At the commencement of the Case, the Estate was created under 11 U.S.C. § 541(a), and the Estate includes all Debtor’s legal or equitable interests in property as of the commencement of the Case and any interest in property that the Estate acquires

after commencement of the Case. 11 U.S.C. § 541(a)(1) and (7).

***b. Liens, Interests, and Encumbrances on or against the Properties***

15. Pursuant to the Sworn Schedules, Debtor schedules no liens or encumbrances against the Properties.

16. Trustee obtained a full title examination report on Timmons Circle dated August 5, 2016 and effective July 8, 2016 (the "**Timmons Circle Report**"). Pursuant to the Sworn Schedules and as confirmed by the Timmons Circle Report, there are no liens or encumbrances against Timmons Circle. However, there are outstanding *ad valorem* real property taxes due for 2014 and 2015 in the amounts of \$1,085.38 and \$750.78, respectively.

17. Trustee obtained a full title examination report on Andy Mountain dated August 5, 2016 and effective July 8, 2016 (the "**Andy Mountain Report**"). The Andy Mountain Report reflects a *Security Deed* against Andy Mountain in favor of the former owner who sold it to Debtor, Renee Taylor ("**Ms. Taylor**"), dated August 31, 2009 and recorded September 3, 2009 in the original principal amount of \$20,000.00 (the "**Taylor Deed**"). However, the Taylor Deed states that the final payment on the corresponding *Real Property Note* was due on January 1, 2015, at which time, the Taylor Deed was to be cancelled and surrendered pursuant thereto. Upon information and belief, the Taylor Deed was fully paid and satisfied, but Ms. Taylor failed to cancel the Taylor Deed of record.

18. The Andy Mountain Report further reflects outstanding *ad valorem* real property taxes due for 2014 and 2015 in the amounts of \$705.94 and \$525.21, respectively.

*c. Request for Authority to Sell Property of the Estate Free and Clear of All Liens, Interests, and Encumbrances, pursuant to 11 U.S.C. Sections 363(b) and (f)*

19. Trustee filed *Trustee's Application to Employ Auctioneer* (the "**Auctioneer Application**") [Doc. No. 98] on July 26, 2016, and the Court entered an *Order* [Doc. No. 99] on July 29, 2016, authorizing the employment of Weeks Auction Group, Inc. ("**Weeks**") as his auctioneer to conduct a sale by public auction or private sale, receiving a ten (10%) percent buyer's premium of the gross purchase price for each of the Properties, plus out of pocket expenses not to exceed \$4,500.00. There will be no commission.

20. Trustee proposes to sell the Properties by public auction by Weeks to the highest and best bidder or by private sale should Trustee deem it appropriate. The auction will occur within ninety (90) days of this Court's order approving the sale.

21. Trustee seeks authority from the Court to sell the Properties "as is" and "where is" and free and clear of all liens, interests and encumbrances. The proposed sale of the Properties is not in the ordinary course of business, as provided by 11 U.S.C. §363(b). Any lien to the extent valid, perfected, enforceable and unavoidable will attach to the proceeds of the sale as provided by 11 U.S.C. § 363(f).

*d. Legal Analysis*

22. Section 363(f) of the Bankruptcy Code authorizes a trustee to sell property under Section 363(b) free and clear of any interest in such property if, among other things, the price at which the property is to be sold is greater than the aggregate of the liens on such property. 11 U.S.C. § 363(f) (2015). Specifically, that code section

provides:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

*Id.*

23. The bankruptcy code sets forth five different grounds for selling property free and clear, three of which are applicable to this sale. Trustee shows, as aforesaid, that there are no known liens on Timmons Circle, constituting a solid basis for proceeding with a sale free and clear of liens and interests. See 11 U.S.C. § 363(f)(3). Debtor has indicated that there are no liens or encumbrances against Andy Mountain. It appears likely that the Taylor Deed was paid in full, but was simply never cancelled of record.

24. Sections 363(f)(1) and (5), respectively, provide two additional grounds under which a property may be sold free and clear of a particular lien or interest: where applicable non-bankruptcy law permits sale of such property free and clear of such interest, and where such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Here, the right to sell free and clear is

established under two entirely separate, but applicable legal provisions.

25. Trustee shows that the Court can look to state law as set forth in *Butner v. United States*, 440 U.S. 48 (1979). Under Georgia law, there are two applicable areas of the law that would justify a sale free and clear. The first is Georgia receivership law. Under O.C.G.A. § 9-8-6, a state court Receiver has the express authority to sell free and clear of interests. While many states lack a similar provision, Trustee's ability to look to Georgia state law is sufficient to satisfy the ability to sell free and clear. Moreover, receiverships are grounded in equity, and in such an equitable proceeding, the Receiver can compel an entity to accept a money satisfaction of its interest. Thus, both sections 363(f)(1) and (5) are satisfied by Georgia's receivership laws with respect to senior and junior liens. *See e.g. In re Jolan*, 403 B.R. 866 (Bankr. W. D. Wash. 2009) (applying Washington state's more restrictive receivership laws as the basis for satisfaction of the requirements of section 363(f) and noting that it would apply even to non-consenting first mortgages).

26. A second state law that satisfies these code sections is O.C.G.A. § 14-14-530(b), which provides that where property subject to a lien is sold under judicial process, the lien is divested from the property and attaches to the proceeds of the sale. Georgia courts have applied this same principle to non-judicial foreclosures of security deeds. "We know of no reason why the same rule should not apply to liens against property sold under power of sale contained in a security deed as applies in cases of other types of sales. The sale effectively divests all inferior liens." *East Atlanta Bank v. Limbert*, 191 Ga. 486, 12 S. E.2d 865 (1941).

27. The third statutory basis is derived from federal bankruptcy law. There is authority (not universally accepted) that a cram-down plan under 11 U.S.C. § 1129(b)(2)(A) qualifies as a proceeding that can force the holder of a lien to accept a money satisfaction of its lien. See e.g. *In re Gulf States Steel*, 285 B.R. 497 (N.D. Ala. 2002); *In re Terrace Chalet Apts.*, 159 B.R. 821 (N.D. Ill. 1993). This is perhaps another basis for the ability of Trustee to sell free and clear.

28. Nevertheless, with the exception of *ad valorem* real property taxes, Trustee does not believe that there are any liens or encumbrances against the Properties. Therefore, Trustee should be authorized on the basis of this area of Georgia law to sell free and clear of the all liens and interests as provided by 11 U.S.C. §§ 363(b) and (f).

29. Weeks will require that any purchaser of the Properties be a *bona fide*, good-faith purchaser and not an insider of the Debtor, thereby satisfying 11 U.S.C. §363(m).

*e. Request for Authority to Disburse Certain Proceeds at Closing*

30. Trustee moves for authority to have all gross sale proceeds paid to him at closing and for authority to have paid at closing (a) any outstanding *ad valorem* real estate property taxes on the Properties for 2014 and 2015, and 2016 pro-ration of *ad valorem* real property taxes; (b) any capital gains taxes (none anticipated); and (c) all other customary closings costs or all other costs necessary to close the sale of the Property. All other distributions will be pursuant to further order of this Court.

31. To the extent funds are disbursed at closing by a party other than Trustee, such party shall be treated as Trustee's designated and authorized agent for



disbursements.

*f. Other Relief Requested*

32. In addition, Trustee expressly reserves and does not waive his right to surcharge the Property and the proceeds thereof, to the extent it secures an allowed secured claim, for reasonable, necessary costs of preserving or disposing of the Property to the extent of any benefit to the holders of such secured claims under 11 U.S.C. § 506(c).

33. Trustee requests that the Court waive the stay of the Order approving the proposed sale as authorized under Federal Rule of Bankruptcy Procedure 6004(h).

WHEREFORE, Trustee prays that the Court enter an order (a) granting the Sale Motion; (b) authorizing Trustee (i) to sell the Properties free and clear of liens, with any and all liens attaching to the proceeds of the sale of the Properties, and (ii) to disburse certain proceeds at closing; (c) waiving the fourteen (14)-day stay period pursuant to Rule 6004(h); and (d) granting such other and further relief as is just and proper.

Respectfully submitted,  
ARNALL GOLDEN GREGORY, LLP

/s/ Neil C. Gordon  
By: NEIL C. GORDON / SBN 302387  
Attorneys for Chapter 7 Trustee

Arnall Golden Gregory, LLP  
171 17<sup>th</sup> Street, Suite 2100  
Atlanta, Georgia 30363-1031  
(404) 873-8596  
*Neil.Gordon@agg.com*

**CERTIFICATE SERVICE**

This is to certify that I have mailed a copy of the Trustee's *Motion for Authority to (I) Sell Property of the Estate Free and Clear of Liens, Interests and Encumbrances and (II) Disburse Certain Proceeds at Closing* by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage affixed thereon to assure delivery to:

Office of the United States Trustee  
362 Richard B. Russell Bldg.  
75 Ted Turner Drive, SW  
Atlanta, Georgia 30303

Claudio Pablo Avendano  
P.O. Box 401  
Winston, GA 30187

Richard K. Valldejuli, Jr.  
Valldejuli & Associates, LLC  
Suite A  
2199 Lenox Road, NE  
Atlanta, GA 30324

Renee B. Taylor  
34 Walnut Street  
Aragon, GA 30104-2245

Douglas County Tax Commissioner  
8700 Hospital Drive  
Douglasville, GA 30134

Mark L. Manley, CAI, AARE, MPPA  
Executive Vice President and CEO  
Weeks Auction Group, Inc.  
2186 Sylvester Highway  
Moultrie, GA 31768

This 9th day of August, 2016.

/s/ Neil C. Gordon  
Neil C. Gordon