

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
)  
SHERRY LYNN JADRNAK, ) CASE NO. 01-64026 JPK  
) Chapter 13  
Debtor. )

ORDER REGARDING DEFICIENCIES IN  
MOTION TO SELL REAL ESTATE

On August 10, 2005, the debtor, by counsel, filed a Motion to Sell Real Estate, together with a proposed form of order and a certificate of service with respect to the notice of the motion provided to creditors and parties-in-interest. There are numerous deficiencies with the documentation and procedures utilized by the movant, which are:

1. Buried in paragraph 6 of the motion is a request that the notice period of 20 days provided by N.D.Ind.L.B.R. B-2002-2(a)(16) be shortened to 10 days. This request is neither stated in the title of the document, nor is it included in the prayer for relief stated in the last paragraph of the document. There is no way in the ordinary course of review of paperwork such as this by the Clerk's Office or by the Court that the request to shorten notice would ever be brought to the Court's attention in time to authorize the shortening of notice. This practical consideration is in large part the reason for N.D.Ind.L.B.R. B-9013-1, which requires that every "application, motion, or other request for an order from the Court, including initiating contested matters, shall be filed separately, except that requests for alternative relief may be filed together". That rule continues with the statement that "(a)ll such requests shall be named in the caption . . .". The request to the Court for approval of a sale and the request for shortening notice of the application itself are not "requests for alternative relief" within the definition provided by N.D.Ind.L.B.R. B-9013-1(c): the application to sell itself is subject to the "drop dead" procedures of Rule 2002-2(a); the motion to shorten notice must be specifically brought to the Court's attention and acted upon apart from any hearing or "drop dead" procedure.

Thus, the application should have been filed separately from a motion to shorten notice period.

2. No proposed form of order with respect to the request to shorten notice was provided to the Court, in contravention of N.D.Ind.L.B.R. B-9013-1(d).

3. The application to sell as originally filed drew an objection from a secured creditor, which objection was resolved apparently by the submission of a proposed form of order different from that originally filed contemporaneously with the application itself. This second proposed form of order is prefaced by the term "Amended", which is a misnomer. An order is an amended order only when a subsequent order is entered in amendment of an order previously entered by the Court. If a litigant desires to substitute a new proposed form of order for one previously submitted, the proper procedure is to attach a cover sheet to the subsequent proposed form of order which states "Notice of Filing of Subsequent Proposed Form of Order", followed by a statement of the matter to which the substitute order is addressed and the date upon which the original order which it supplants was filed.

4. The Court's law clerk was advised that a real estate broker is involved in this transaction, and that it was the understanding of the debtor's counsel that it was not necessary to obtain the Court's approval to the employment of the broker if the broker had already been employed prior to the sale, or some such thing. 11 U.S.C. § 327 provides the statutory requirements for the employment of a professional person in a bankruptcy case, and real estate brokers are included within the definition of "professional person". Fed.R.Bankr.P. 2014 states specific requirements concerning an application for employment. In the context of the statute and the rule, a Chapter 13 debtor has standing independently of the Trustee to seek the employment for the purposes evidenced by the application now before the Court. It should also be borne in mind that the compensation to be paid to a professional is subject to the Court's approval under 11 U.S.C. § 328(a) and 11 U.S.C. § 330(a)(1). In its order by which the

application has been approved, the Court has specifically deleted payment of any realtor's or broker's fee from the proceeds of closing, and the Court anticipates and indeed expects that the net balance of the sales proceeds to be remitted to the Chapter 13 Trustee will not include a deduction for any commissions or expenses paid to a person of that nature.

The correct procedure to follow in circumstances such as this is to file an application to employ the broker at the time that the original contract between the debtor/seller and the broker is proposed to be entered into. There is really no rule of the United States Bankruptcy Court for the Northern District of Indiana which applies to employment of professional persons by a debtor – N.D.Ind.L.B.R. B-2014-1 actually applies only to debtors-in-possession in a Chapter 11 case. Be that as it may, the application, including the verified statement of the person to be employed required by Fed.R.Bankr.P. 2014(a) must be filed with the Court and must be served upon the Trustee, the United States Trustee, any attorney who has entered an appearance in the case and any other person or entity which has obtained an order approving a request to provided with notices of matters filed by the debtor in the case, and creditors having "security interests, mortgages, or liens on the property". The application should be accompanied by a proposed form of order by which it can be approved.

If the contract for sale of the property is then entered into, the realtor's/broker's compensation must still be approved by the Court. A convenient mechanism for doing this is to include information concerning the compensation requested, including a copy of the written document evidencing the arrangement between the debtor and the professional for compensation, in the application to sell itself (and to indicate the dual nature of the document in its caption/title). By doing so, the applicant satisfies the requirements of N.D.Ind.L.B.R. B-9013-1(c) because both the requested compensation and the application for authority to sell are subject to the same notice requirements, i.e., N.D.Ind.L.B.R. B-2002-2(a)(7) and (16),

respectively. The notice utilized under the foregoing rule should then specifically designate that the requested relief is both for authority to sell and for approval of compensation of the realtor/broker, and the proposed form of order tendered with that application should include a provision for the compensation of the broker and payment of the broker's compensation at closing – if that arrangement was requested in the motion. If this procedure is not followed, then a separate application for compensation of the broker must be filed and separately noticed out to creditors under N.D.Ind.L.B.R. B-2002-2(a)(7), and a separate form of order must be tendered to the Court with respect to that motion.

In the instant case, the Court has not authorized the employment of a broker with respect to the debtor's requested sale of real estate, and the Court has not approved any compensation to be paid to that broker. It will thus be necessary for the debtor to separately file an application to employ the broker – following the procedures outlined above with respect to that document – and a separate application to compensate the broker pursuant to the contractual arrangements between the debtor and the broker, making certain that a copy of a written agreement between the debtor and the broker with respect to that compensation is attached as an exhibit to the application; that application must then be noticed out pursuant to N.D.Ind.L.B.R. B-2002-2(a)(7), subject to the 20-day notice provision provided by that rule. Upon the filing of those documents in this case by the debtor, the Court will take such action as is appropriate with respect to those requests.

IT IS ORDERED that no commission, compensation, or reimbursement of expenses shall be provided to any person or entity who acted as a "professional person" with respect to the sale of the debtor's real property approved by the Court's order of August 24, 2005 from the proceeds of closing of that sale.

IT IS FURTHER ORDERED that upon proper employment and request for compensation, the Court will consider the extent to which compensation will be paid to any professional person engaged in the sale of the debtor's real property from property of the estate in the possession of the Chapter 13 Trustee.

Dated at Hammond, Indiana on August 26, 2005.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger  
United States Bankruptcy Court

Distribution:  
Debtor, Attorney for Debtor  
Trustee, US Trustee