SO ORDERED,

Judge Edward Ellington
United States Bankruptcy Judge
Date Signed: May 8, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 7**
FRAZIER DEVELOPMENT, LLC **CASE NO. 1202149EE**

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Edward Ellington, Judge

MEMORANDUM OPINION

THIS MATTER came before the Court on the *Motion for Summary Judgment and Memorandum in Support* (Dkt. #64) filed by Laws Construction Company, Inc., *Ergon, Inc.'s Response to Laws Construction Company, Inc.'s Motion for Summary Judgment and Memorandum in Support (Dkt. #64)* (Dkt. #69), and *Reply to Ergon's Response to Motion for Summary Judgment and Memorandum in Support (Dkt. #69)* (Dkt. #74) filed by Laws Construction Company, Inc. Having considered same, the Court finds that the *Motion for Summary Judgment and Memorandum in Support* (Dkt. #64) filed by Laws Construction Company, Inc. is not well taken and should be denied.

FINDINGS OF FACT

Before addressing the pleadings currently before the Court, a little background is needed to explain how the parties have arrived at their current posture.

On October 8, 2008, Harris Claiborne Frazier (Claiborne) filed a petition for relief under Chapter 7 of the United States Bankruptcy Code (Claiborne's Bankruptcy Case). Derek A. Henderson was appointed the Chapter 7 Trustee in Claiborne's Bankruptcy Case (Claiborne Trustee). In his *Summary of Schedules, Schedule B – Personal Property,* Claiborne lists as one of his assets a "2/3 interest in Frazier Development, LLC."[1]

[1]*Summary of Schedules, Schedule B – Personal Property,* Harris Claiborne Frazier, Case No. 0803051EE (Harris Claiborne Frazier), Dkt. No. 19, question #13, unnumbered p. 5, October 28,

However, according to the *Statement of Financial Affairs* filed by Frazier Development, LLC, the members of Frazier Development, LLC and the percentage of their ownership interest are:

Claiborne Frazier[2] (Manager)	1/3
CE Frazier	1/3
Amy Atwood Frazier	1/3[3]

The records of the Mississippi Secretary of State show that Frazier Development, LLC was created in 1998.

In order for the Claiborne Trustee to liquidate Claiborne's interest in Frazier Development, LLC, he contacted all of the owners of Frazier Development, LLC. A decision was made to put Frazier Development, LLC into bankruptcy.

On July 2, 2012, Frazier Development, LLC filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. The *Voluntary Petition* was signed by Claiborne as the manager.[4]

Derek A. Henderson was appointed the Chapter 7 Trustee (Trustee) for Frazier Development, LLC (Debtor). In its *Summary of Schedules, Schedule B – Personal Property,* the Debtor lists as its only assets the following two items:

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2008.

[2]Also known as Harris Claiborne Frazier.

[3]*Statement of Financial Affairs,* Frazier Development, LLC, Case No. 1202149EE, Dkt. #3, question # 21, unnumbered p. 7-8, July 2, 2012.

[4]*Voluntary Petition,* Frazier Development, LLC, Case No. 1202149EE, Dkt. #1, July 2, 2012.

SCHEDULE B – PERSONAL PROPERTY

	Type of Property	Description and Location of Property	Current Value of Debtor's Interest in Property....
14.	Interests in partnerships or joint ventures. Itemize.	50% interest in Ergon Frazier Development, LLC which owns Colony Crossing in Madison, MS [Will submit to a business appraiser to find value.]	Unknown
35.	Other personal property of any kind not already listed. Itemize.	Management Fee owed by Ergon Frazier Development, LLC.	302,060.38[5]

The Debtor has no secured debts and lists $12,642,238.60 in unsecured nonpriority debts. Laws Construction Company, Inc. (Laws) is included in the list of the Debtor's unsecured creditors. Laws is scheduled as having a claim against the Debtor for a "judgment–charging order"[6] in the amount of $389,238.60.

As noted in the Debtor's schedules, the Debtor and Ergon, Inc. (Ergon) were fifty-fifty partners in a limited liability company, Ergon-Frazier Development, LLC (Ergon-Frazier LLC). Ergon-Frazier LLC developed and built the Colony Crossing shopping center in Madison, Mississippi.

Ergon has been actively involved in both Claiborne's Bankruptcy Case and the Debtor's bankruptcy case. According to Ergon, "Ergon has been forced to cover Frazier Development's portion of the note on the Colony Crossing shopping center which has been operating at a loss. This

[5]*Summary of Schedules, Schedule B – Personal Property*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #3, unnumbered p. 5-6, July 2, 2012.

[6]*Id.* at unnumbered page 11.

costs *(sic)* Ergon an average of roughly $700,000.00 per month."[7]

On May 30, 2013, the Trustee filed a *Motion for Authority to Sell Assets Free and Clear of Liens* (Dkt. #45) (Motion to Sell) pursuant to 11 U.S.C. § 363(f).[8] In the Motion to Sell, the Trustee is seeking permission to sell the Debtor's one-half interest in Ergon-Frazier LLC to Ergon for $35,000.00, plus fees and costs, with all liens attaching to the proceeds. As justification for the sale, the Trustee states in his Motion to Sell that he has determined that the Debtor's interest in Ergon-Frazier LLC has very little value, and if it is marketable at all, Ergon would be the only party to purchase the Debtor's interest because it owns the other one-half interest. The Trustee further states that he has received no other offers for the Debtor's interest in Ergon-Frazier LLC.

Laws filed its *Objection to Motion for Authority to Sell Assets Free and Clear of Liens (Dkt. #45)* (Dkt. #48) (Objection) on June 18, 2013. In its Objection, Laws states that pursuant to a June 7, 2007, Charging Order,[9]

> Laws is entitled to have the Debtor's interest in Ergon-Frazier charged with the unsatisfied amount of certain judgments against the Debtor, which have a combined outstanding balance of more than $486,746.84. The Charging Order affords Laws access to the Debtor's rights to profits and distributions from Ergon-Frazier. The Charging Order constitutes a lien on the Debtor's financial interest in Ergon-Frazier. Laws's lien will attach to the proceeds from any sale of the Debtor's interest in Ergon-Frazier.[10]

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[7]*Ergon, Inc.'s Response to Laws Construction Company, Inc.'s Motion for Summary Judgment and Memorandum in Support (Dkt. #64)*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #69, p. 3, n.2, September 30, 2013.

[8]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[9]The Mississippi Code provides that "[a] charging order constitutes a lien on the judgment debtor's financial interest." *Miss. Code* § 79-29-705(2).

[10]*Objection to Motion for Authority to Sell Assets Free and Clear of Liens (Dkt. #45),* Frazier Development, LLC, Case No. 1202149EE, Dkt. #48, unnumbered page 2, June 18, 2013. (footnotes

Further, Laws states that the Trustee has not met his burden of proof under § 363(b) and § 363(f), and, therefore, the motion should be denied.

On August 20, 2013, Laws filed its *Motion for Summary Judgment and Memorandum in Support* (Dkt. #64) (Motion). Laws contends that because there are no genuine issues of material fact in dispute, summary judgment should be granted in its favor and the Motion to Sell denied.

Ergon filed *Ergon, Inc.'s Response to Laws Construction Company, Inc.'s Motion for Summary Judgment and Memorandum in Support (Dkt. #64)* (Dkt. #69) (Response) on September 30, 2013. In its Response, Ergon submits that the Court should deny the Motion.

The Court then took the matter under advisement.

CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(1) and (2)(N) and (O).

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omitted).

II. Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure,[11] as amended effective December 1, 2010,[12] provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, "the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.' *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2510 (1986)." *Newton v. Bank of America (In re Greene),* 2011 WL 864971, at *4 (Bankr. E.D. Tenn. March 11, 2011).

"The moving party bears the burden of showing the . . . court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)." *Hart v. Hairston,* 343 F.3d 762, 764 (5th Cir. 2003).

Once a motion for summary judgment is pled and properly supported, the burden shifts to the non-moving party to prove that there are genuine disputes as to material facts by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, . . . admissions, interrogatory answers, or other

[11]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

[12]The Notes of Advisory Committee to the 2010 amendments state that the standard for granting a motion for summary judgment has not changed, that is, there must be no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Further, "[t]he amendments will not affect continuing development of the decisional law construing and applying these phrases."

materials."[13] Or the non-moving party may "show[ ] that the materials cited do not establish the absence . . . of a genuine dispute."[14] When proving that there are genuine disputes as to material facts, the non-moving party cannot rely "solely on allegations or denials contained in the pleadings or 'mere scintilla of evidence in support of the nonmoving party will not be sufficient.' *Nye v. CSX Transp., Inc.*, 437 F. 3d 556, 563 (6th Cir. 2006); *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 106 S. Ct. 1348, 1356 (1986)." *Newton*, 2011 WL 864971, at *4. "[T]he nonmovant must submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of the cause of action." *Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 106 S. Ct. at 1356 (citations omitted).

When considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *See also Matshushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538, 553 (1986). The court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct.

[13]Fed. R. Bankr. P. 7056(c)(1)(A).

[14]Fed. R. Bankr. P. 7056(c)(1)(B).

2502, 2512, 91 L. Ed. 2d. 202 (1986).

III. Application to the Case at Bar

As noted, pursuant to § 363, the Trustee is seeking to sell the Debtor's one-half interest in Ergon-Frazier LLC (Debtor's Interest) free and clear of all liens for $35,000.00, plus fees and costs. Section 363 (b) provides for the sale of property of the estate other than in the ordinary course of a debtor's business, and 363(f) provides for the sale of property of the estate free and clear of liens. Section 363 states in pertinent part:

> **11 U.S.C. § 363. Use, sale, or lease of property.**
>
> (b)(1) The trustee, after notice and a hearing, may. . .sell. . .other than in the ordinary course of business, property of the estate. . . .
>
> . . . .
>
> (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.

11 U.S.C. § 363(f).

There is no dispute that the sale contemplated by the Trustee is outside of the ordinary course of the Debtor's business. The dispute arises as to whether the Trustee can sell the Debtor's Interest under § 363(f).

"The language of section 363(f) is in the disjunctive, that is, the sale free of the interest may occur if any one of the conditions of section 363(f) has been met. Case law has construed these standards expansively." 3 *Collier on Bankruptcy* ¶ 363.06 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

The Motion to Sell cites to § 363(f) without identifying the specific subsection the Trustee is proceeding under. It appears to the Court that the only subsection that may be applicable to the case at bar is subsection three. Under § 363(f)(3), "[a] sale may be made free of liens if 'the price at which the property is to be sold is greater than the aggregate value of all liens on such property.'" *Id.* at ¶ 363.06[4]. (footnote omitted).

The term "aggregate value of all liens on such property" has been interpreted by the courts in two separate, and very distinct, ways. The first approach is called the *face value approach.* The *face value approach* was adopted by the Bankruptcy Appellate Panel of the Court of Appeals for the Ninth Circuit in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC),* 391 B.R. 25 (B.A.P. 9th 2008). The *face value approach* limits the applicability of § 363(f)(3) "to cases where the price at which the property is sold exceeds the aggregate amount of all claims secured by liens on the property, i.e., when there remains equity in the property."[15]

Other courts have adopted the *economic value test.* The court in *In re Terrace Gardens Park Partnership,* 96 B.R. 707 (Bankr. W.D. Tex. 1989)[16] adopted the *economic value test.* The *economic value test* "requires only that the purchase price equal the aggregate economic value of all liens, i.e.,

[15]Jacob A. Kling, *Rethinking 363 Sales,* 17 Stan. J.L. Bus. & Fin. 258, 289 (2012).

[16]*Terrace Gardens* appears to be the only published opinion from within the territory of the Court of Appeals for the Fifth Circuit to address the term "aggregate value of all liens" under § 363(f)(3).

the value of the collateral, even if the price does not exceed the aggregate face value of the claims secured by those liens."[17]

Regardless of which approach may be adopted by this Court, "[§ 363(f)(3)] appears to require the court to look not merely to the value of the lien of the objecting creditor, but to whether the estate has any equity in the property."[18] In order to accomplish this, the Court must have some proof as to value.

In the case at bar, the pleadings contain only conclusory statements regarding the value of the Debtor's Interest in Ergon-Frazier LLC. In his Motion, the Trustee states: "the value of this asset is nominal, at best, if at all marketable."[19] In its Objection, Laws states: "all publicaly *(sic)* available information suggests that the Debtor's interest in Ergon-Frazier is worth more than $35,000."[20] In its Response, Ergon states: "$35,000...far exceeds the 'nominal at best' value."[21] None of the parties have presented the Court with a "deposition, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials,"[22] i.e. an appraisal, to support their statements regarding the value of the Debtor's Interest.

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[17]*Id.*

[18]3 *Collier on Bankruptcy* ¶ 363.06[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

[19]*Motion for Authority to Sell Assets Free and Clear of Liens*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #45, unnumbered page 1, May 30, 2013.

[20]*Objection to Motion for Authority to Sell Assets Free and Clear of Liens (Dkt. #45)*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #48, unnumbered page 4, June 18, 2013.

[21]*Ergon, Inc.'s Response to Laws Construction Company, Inc.'s Motion for Summary Judgment and Memorandum in Support (Dkt. #64)*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #69, p. 2, September 30, 2013.

[22]Fed. R. Civ. P. 56(c)(1)(A).

Further, without proof, the Court is also unable to value the liens on the Debtor's Interest in Ergon-Frazier LLC. In its Motion, Laws asserts several times that "the property is fully encumbered by Laws's judgment lien,"[23] however, the Motion does not point the Court to a document, an affidavit, etc. to support these assertions.

In order to determine whether there are disputes as to material facts, the Court must first be presented proof of the undisputed material facts alleged by the movant. In the case at bar, the Court has not been presented proof of any material facts. Rather, the Court has conclusory statements of the parties, which does not rise to the level of presenting material facts. Consequently, the Court finds that the Motion should be denied and that the Motion to Sell should be set for trial, unless the issue can be resolved by other means.

CONCLUSION

The first step in determining whether a motion for summary judgment should be granted or denied is for the court to determine whether a dispute exists as to "a genuine issue of material fact as to each element of the cause of action."[24]

In the case at bar, the Court cannot determine whether there is a dispute as to "a genuine issue of material fact"[25] because it has not been presented with proof as to any of the material facts. Consequently, the Court finds that summary judgment should be denied.

A separate judgment consistent with this Opinion will be entered in accordance with Rules 9014 and 9021 of the Federal Rules of Bankruptcy Procedure.

##END OF ORDER##

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[23]*Motion for Summary Judgment and Memorandum in Support*, Frazier Development, LLC, Case No. 1202149EE, Dkt. #64, p. 4, August 20, 2013.

[24]*Malacara*, 353 F.3d at 404.

[25]*Id.*