

ORDERED in the Southern District of Florida on JUN 18 2009



A. Jay Cristol

**A. Jay Cristol, Chief Judge Emeritus
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
www.flsb.uscourts.gov**

In re:

DB ISLAMORADA, LLC,

Debtor-in-Possession.

CASE NO. 07-20537-AJC
Chapter 11

**ORDER OVERRULING OBJECTION OF PROSPECTIVE BIDDER WHO DID NOT
BID TO AUCTION OF INDIGO BAY PROPERTY (D.E. 195/196) AND DENYING
MOTION TO WITHDRAW AS COUNSEL AND CANCEL JUNE 4, 2009 HEARING
(D.E. 225)**

This matter came before the Court for evidentiary hearing on June 4, 2009 at 11:00 AM on the Objection of Qualified Bidder David Finnegan to March 19, 2009 Auction of Indigo Bay Property and Motion to Strike Sale to Debtor-in-Possession or its Assigns (D.E. 195/196)(“**Finnegan Objection**”) filed by David Finnegan (“**Finnegan**”); the Motion to Withdraw as Counsel for David Finnegan and Motion to Cancel June 4, 2009 Hearing on Objections of David Finnegan to March 19, 2009 Auction of Indigo Bay (D.E. 225)(“**Kelly Motion**”) filed by William P. Kelly, Jr., Esq. (“**Kelly**”) and Debtor’s Response in Opposition to

the Finnegan Objection and the Kelly Motion (D.E. 223)(“**Debtor Response**”) filed by DB Islamorada, LLC, debtor and a debtor-in-possession (“**Debtor**”).

Finnegan Objection

The Finnegan Objection was filed twenty nine (29) days after the March 19, 2009 auction sale of Debtor’s property (“**Auction**”). It contained allegations of inappropriate conduct by certain parties involved in the Auction. While the allegations were largely immaterial, such as Finnegan overhearing an unnamed attorney in the hallway refer to Finnegan as a “pigeon,” the Court determined that certain allegations merit attention. First, Finnegan asserted that he “feared that he was at a disadvantage and that the auction about to be conducted was somehow ‘fixed,’ a ‘sham,’ not ‘fair and open’ or otherwise biased or unfair.” Finnegan Objection at p. 2, ¶ 6. Further, Finnegan averred that prior to the beginning of the Auction, he requested return of his deposit and declined to bid in the Auction in reliance upon his understanding that if he withdrew his bid, the Auction would not be held. *Id.* at pp. 2-3, ¶¶ 7-9. Finnegan challenged “Debtor’s” right to credit bid at the Auction and that the Auction should not have proceeded absent cash bidders. *Id.* at p. 3, ¶ 11. The Finnegan Objection stated “[t]he Debtor’s actions at auction clearly created the appearance of impropriety and were in violation of the Court’s Orders regarding the conduct of the Auction.” *Id.* at p. 3, ¶ 12. Finally, Finnegan accused Debtor of “self-dealing” and not acting in good faith. *Id.* at p. 3, ¶¶ 13, 14.

Evidentiary Hearing

Because the Finnegan Objection contained allegations of impropriety, the Court set the matter for evidentiary hearing, reserving one half (1/2) hour for Finnegan to appear in person to testify under oath as to the allegations of his objection, providing Finnegan’s counsel fifteen (15) minutes to argue and present authority in support of the Finnegan Objection and, finally, a fifteen minute period of time for the presentation of opposing evidence and positions (D.E.

198)(“**Evidentiary Hearing**”). Upon mutual agreement of Finnegan and Debtor, the Evidentiary Hearing was rescheduled for June 4, 2009 at 11:00 AM (D.E. 207). Approximately thirty-seven (37) days notice was afforded for the Evidentiary Hearing.

Kelly Motion

On June 2, 2009, two (2) days prior to the Evidentiary Hearing, Kelly filed the Kelly Motion. In the Kelly Motion, Kelly sought to: (i) withdraw as counsel for Finnegan in this matter and (ii) cancel the Evidentiary Hearing. Notably, neither Kelly nor Finnegan sought to withdraw the Finnegan Objection.

The Kelly Motion itself did not mention Finnegan’s illness. The only reference to Finnegan’s condition was made in a letter drafted by Kelly, which was attached to the Kelly Motion (“**Kelly Letter**”). The Kelly Letter was dated May 29, 2009, six (6) days before the Evidentiary Hearing.

Debtor Response

Debtor responded to the Kelly Motion and Finnegan Objection by contending that, while it did not oppose accommodating Mr. Finnegan due to his illness, the issues raised in the Finnegan Objection could be resolved as a matter of law and the hearing should proceed. Primarily, Debtor raised three arguments: (i) Finnegan lacked standing to object to the sale; (ii) Debtor must comply with 11 U.S.C. § 363(f) when selling its property; and (iii) MAMC, Inc.’s, the senior secured creditor as to Debtor’s real property, credit bid was proper under 11 U.S.C. § 363(k).

Argument of Counsel at the Hearing

Present at the hearing were Debtor’s counsel, Kelly and the United States Trustee. Finnegan did not personally attend the hearing; however, he briefly appeared telephonically.

Initially, Kelly represented to the Court that Finnegan was ill and had been for several weeks. He asserted that he was unable to reach Finnegan until just prior to filing the Kelly Motion. This representation is contradicted by the letter from Finnegan to Kelly attached to the Kelly Motion showing it was sent by Kelly to Finnegan on May 29, 2009. Thus, Kelly was in touch with Finnegan as early as Friday May 29, 2009 but failed to file his motion until June 2, 2009. Kelly represented that Finnegan desired to move on with his life and had no interest in pursuing the Finnegan Objection any further. Kelly admitted that he personally did not think the Finnegan Objection was timely or that “much would come of it.”

Next, Kelly requested that the Court grant his Motion and allow him to withdraw as counsel in this matter. Debtor did not oppose such request. However, Debtor opposed cancelling the Evidentiary Hearing without withdrawal of the Finnegan Objection with prejudice.

Given Kelly’s representation that Finnegan no longer was interested in pursuing the Finnegan Objection, the Court inquired of Kelly whether Finnegan sought to withdraw the Finnegan Objection with prejudice. Kelly represented that he did not have authority to withdraw the Finnegan Objection. However, Kelly requested time to attempt to contact Finnegan by telephone to ascertain whether he sought to withdraw the Finnegan Objection with prejudice. The Court granted Kelly several adjournments to contact Finnegan by telephone.

Kelly contacted Finnegan and upon Kelly’s request, the Court contacted Finnegan directly by telephone at the hearing. The Court informed Finnegan that he was not permitted to testify via telephone but was required to appear in person to testify.¹ When asked whether Finnegan still agreed for Kelly to withdraw as his counsel, Finnegan replied that he did not and

¹ Testimony by telephone is sometimes permitted but it requires consent by the opposing side and arrangement in advance, as well as a notary public present to swear the witness and preparation and filing of a certificate of the notary public confirming the swearing and identification of the witness testifying by telephone, none of which were prearranged.

wanted Kelly to remain as his counsel, and Finnegan and Kelly proceeded with the Evidentiary Hearing on the Finnegan Objection.

Because Finnegan did not consent to Kelly's withdrawal, did not withdraw the Finnegan Objection and requested that the hearing proceed, the hearing went forward on the merits of the Finnegan Objection. Kelly presented argument on behalf of Finnegan. The material arguments presented by Kelly were as follows: (i) Finnegan was declared a "qualified bidder" in one Court Order and not in another Court Order; (ii) the Court's Orders did not refer to Debtor's secured creditors as qualified bidders by virtue of appearing at the Auction; and (iii) the Auction should not have proceeded in the absence of a "qualified bidder." The Court denied Kelly's request that Finnegan be permitted to testify via telephone. Moreover, the Court repeatedly instructed Finnegan not to interrupt the proceedings or he faced being disconnected. Finnegan did not heed the Court's directions and the Court terminated the telephone connection. Kelly requested a continuance of the Evidentiary Hearing after putting on his presentation and the Court denied his request.

Debtor responded in opposition to Kelly's argument by pointing out that the gravamen of the Finnegan Objection was the issue concerning the secured creditor's credit bid. Debtor argued that the plain language of 11 U.S.C. § 363(k) provides a right for secured creditors to credit bid at the sale of their collateral. Further, that the secured creditors, whose liens on the property totaled in excess of \$25,478,000.00, had made known that any bids lower than \$5,000,000 would not be acceptable and, thus, any bid not exceeding that amount would be overbid by them. Moreover, Debtor averred that secured creditors are not required to "qualify" because their lien serves as their deposit. Finally, Debtor submitted that Finnegan was initially qualified by virtue of his deposit and subsequently became unqualified because he failed to execute the required

asset purchase agreement at the Auction and requested the return of his deposit. In short, though offered the opportunity on the record at the Auction sale, Finnegan declined to bid.

Findings and Conclusions

The Court considered the Finnegan Objection, Kelly Motion and Debtor Response, heard argument from Kelly and Debtor and has reviewed the record in its entirety. For the reasons stated on the record at the hearing, which are incorporated by reference herein, the Court overrules the Finnegan Objection as to the conduct of the § 363 sale. It is apparent to the Court that Kelly, as the attorney for a prospective bidder who did not bid, just does not get it. Because no other third-party qualified bidders appeared, and a major real estate asset sat accruing taxes, insurance, maintenance and interest expenses, what purpose would have been achieved by not going forward with the Auction sale?

Finnegan, by and through Attorney Kelly, filed the objection to the Court going forward with the § 363 sale approximately one (1) month after the sale, alleging misconduct by participants in the Auction. The Court set the Evidentiary Hearing, to provide Finnegan the opportunity to provide factual support for his conclusory allegations and to testify under oath as to the allegations. Finnegan and Kelly were provided approximately thirty-seven (37) days notice of the Evidentiary Hearing.

Finnegan and Kelly, at best, did not understand the seriousness of the court-ordered Evidentiary Hearing. While it was reported by Kelly that Finnegan was unable to attend the hearing due to illness, Kelly, acting as his counsel, stated that he was aware of Finnegan's illness weeks prior to the Evidentiary Hearing. He also stated that he had a problem communicating with Finnegan. However, he failed to promptly file a motion to notify the Court and Debtor of Finnegan's condition or his lack of communication or request a delay or continuance of the hearing. Instead, Kelly waited until two (2) days before the hearing and then filed the motion to

withdraw as counsel and cancel the hearing on June 2, 2009 – less than two (2) full days prior to the Evidentiary Hearing.

A motion for counsel to withdraw is understandable and Debtor had no objection to allowing same. However, a motion to “cancel hearing” with nothing more raises important questions. A motion to continue the hearing on the Finnegan Objection due to illness is understandable. Likewise, a motion to withdraw the objection and cancel the hearing is understandable. But Kelly requested this Court grant the motion to cancel and allow him to withdraw as counsel. Where does that leave the issue of the objection? How does the Debtor conclude the administration of the Chapter 11 case?

Kelly’s request was not justified and the Court concludes that, under the circumstances, he did not act appropriately or reasonably. Counsel for the Debtor served Kelly [and other interested parties] with notice of the continued Evidentiary Hearing on April 29, 2009, and counsel prepared for and appeared in Court at the time and date of the scheduled hearing. Most importantly, Finnegan and Kelly insisted that the hearing proceed; so it did.

After providing a considerable amount of time to allow Kelly to contact Finnegan, at Finnegan and Kelly’s request the Court contacted Finnegan directly by telephone. The Court inquired whether Finnegan was consenting to Kelly’s withdrawal and Finnegan stated that he did not consent. As such, Kelly was not permitted to withdraw as counsel. Moreover, the Court provided Finnegan ample opportunity to withdraw the Finnegan Objection, which he chose not to do.

Finnegan and Kelly presented no evidence to support the Finnegan Objection. Kelly presented verbose argument which was without merit in law or in fact. Conversely, as the Debtor’s response in opposition to both the Finnegan Objection and the Kelly Motion indicates, 11 U.S.C. § 363(k) unequivocally provided MAMC, Inc. with the right to credit bid at the

Auction. Accordingly, the Court finds the Finnegan Objection is patently frivolous. It was filed with no evidentiary basis and is unsupported by applicable law.

The Court determined that Finnegan initially qualified as a bidder; however, whether he was later unqualified was entirely irrelevant because, after having been offered the opportunity to bid at the sale, he chose not to bid. Moreover, Finnegan did not raise issues concerning the sale at the sale. Thus, having failed and refused to bid at the Auction sale, Finnegan lacks standing to now object to the § 363 Auction sale.

The Finnegan Objection contained scandalous conclusory allegations concerning the Auction sale. No evidence or persuasive argument was presented to the Court to support such allegations at the Evidentiary Hearing. Because the scandalous allegations are without evidentiary support, the Court determines they are properly stricken from the Court record, pursuant to Fed. R. Bankr. P. 7012(f).

Lastly, the Finnegan Objection is moot. The Auction sale was concluded, the sale completed and closed and no stay was ever sought.

Curiously, Kelly wrote a letter to the Court, dated March 23, 2009 and filed March 23, 2009 at 9:24 AM (D.E. 183), in which Kelly represented himself as “a licensed Florida Real Estate Agent representing Seth Frohlich, Keith Menin and their affiliated entities.” The letter objected to the § 363 sale on grounds similar to the later-filed Finnegan Objection.

At the time, the Court was not aware that Kelly was an attorney and presumed that he and his clients, Frohlich and Menin, were naïve and were not aware of the law concerning § 363 sales, in particular, that under 11 U.S.C. § 363 the secured lenders have an absolute veto over the sale for any bid less than the \$24,818,000.00 amount of their lien(s) and by law have the right to credit bid up to that amount at any § 363 auction. It is said that a little education is a dangerous

thing; and it appears that Real Estate Agent, and later disclosed lawyer, Kelly has very little education in the area of §363 sales and therefore is very dangerous to his clients and himself.

The Court treated the letter as a motion and denied same for lack of standing, by order dated March 23, 2009 (D.E. 184). The Court overlooked the possible unauthorized practice of law by a "Real Estate Agent" filing papers on behalf of parties he claimed to represent. But Kelly was not finished.

Kelly, now as attorney for Finnegan, filed the Finnegan Objection 29 days after the Auction sale and three (3) days before the order confirming the sale was entered. However, the sale order was issued on April 20, 2009 and became final as no appeal was taken of the sale order and no supersedeas was requested nor any bond posted. The sale having already occurred, the Finnegan Objection is overruled as moot.

If Finnegan has any dissatisfaction about the Evidentiary Hearing not being continued by the Court, it is without merit. If Finnegan's attorney, Kelly, had notified the Court of Mr. Finnegan's illness in adequate time, it is likely that a continuance or other accommodation might have been granted. However, filing a motion without seeking a ruling thereon until all the attorneys stood before the Court at the time of the hearing required opposing counsel to prepare for and appear at the scheduled Evidentiary Hearing. Debtor and counsel for the Debtor having been put to this unnecessary inconvenience and expense, it seems appropriate that sanctions have been requested.

The Eleventh Circuit has made clear, in *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985), that courts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal.

"The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *Flaksa v. Little River Construction Co.*, 389 F.2d 885, 888

(5th Cir.1968); see *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516 (9th Cir.1983); Note, *Civil Procedure-Power of Federal Courts to Discipline Attorneys for Delay in Pre-trial Procedure*, 38 Notre Dame L. 158, 161-66 (1963). A trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without resort to the powers of civil or criminal contempt. (Footnote omitted). *Flaksa*, 389 F.2d at 888 n. 10. The court's power to impose appropriate sanctions on attorneys practicing before it "springs from a different source than does the power to punish for criminal contempt." *Pope & Talbot, Inc.*, 307 F.2d at 735-36 (Biggs, C.J., dissenting); See also *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512, 22 L.Ed. 205 (1873) (discussing the source and scope of a court's power to cite for contempt or disbar attorneys).

The authority of a court over officers of its bar is at least as great as its power over litigants, *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 64 L.Ed.2d 488 (1980) (citing *Flaksa*). Since misconduct by a party courts the risk of outright dismissal, lesser sanctions undoubtedly attend the court's inherent power to discipline intentional attorney misconduct of the sort involved in this case. See *id.* Such sanctions include assessment of attorneys' fees and costs, *id.*; disqualification of counsel, *Flaksa*, 389 F.2d at 887; and monetary penalties payable to the clerk of the court, *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. Unit B 1981); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 & n. 15 (5th Cir.1964).

Equity requires that the estate be made whole for this conduct which was solely in the control of Attorney Kelly. Therefore, any grievance Finnegan may have is with his attorney, Kelly, because Kelly could have prevented the additional expense to the estate by acting weeks before the scheduled Evidentiary Hearing to seek a continuance. This is a matter of potential malpractice which must be decided between Finnegan and his counsel, Kelly.

At the conclusion of the Evidentiary Hearing, the Court directed the parties to negotiate and, if possible, agree upon a sanction that would be appropriate and if they were successful, to include their agreement in this Order. The Court advised that if the parties were unable to agree on liability and amount of a sanction, then the Court would set the matter for further hearing at which time the Court indicated it would consider whether sanctions should be awarded and in what amount. Apparently, the parties have been unable to agree upon liability and amount of a

sanction as no such agreement was included in the proposed order submitted by Debtor's counsel. The Court considered the proposed order submitted by Debtor's counsel and, finding it inadequate, revised it to more clearly reflect the Court's ruling on this frivolous waste of the Court's time. The Court will set a further hearing on the issue of sanctions.

Based upon the foregoing, the Court finds good cause for overruling the Finnegan Objection and denying the Kelly Motion. Accordingly, it is—

ORDERED AND ADJUDGED as follows:

1. The Finnegan Objection is **OVERRULED** with prejudice in all respects.
2. The Kelly Motion is **DENIED** with prejudice in all respects.
3. Paragraphs 4; 5; 6; 12; 13 and 14 are stricken from the Finnegan Objection.
4. A hearing on the sanctions issue is set for July 2, 2009 at 11:00 at AM/PM at the United States Bankruptcy Court, Courtroom 1410, 51 S.W. First

Avenue, Miami, FL 33130.

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Copies furnished to:

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(Attorney Redmond shall immediately serve a conformed copy of this Order upon all interested parties and file a Certificate of Service)