

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MACHIAS SAVINGS BANK,	)	
	)	
Plaintiff	)	
	)	
v.	)	1:24-cv-00027-LEW
	)	
<i>F/V RICH ENDEAVOR</i> (O.N. 1293024)	)	
together with her masts, boilers, cables,	)	
engines, machinery, electronics, fishing	)	
permits, tackle, traps, appurtenances,	)	
etc., <i>in rem</i> ,	)	
	)	
and	)	
	)	
COLYN C. RICH, <i>in personam</i> ,	)	
	)	
Defendants	)	

**RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR  
INTERLOCUTORY SALE AND FOR LEAVE TO CREDIT BID <sup>1</sup>**

In this maritime action, governed by Rule 9(h) of the Federal Rules of Civil Procedure, and in part by Rules C and E of the Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims, Plaintiff seeks to enforce a maritime lien against the *F/V RICH ENDEAVOR* (O.N. 1293024) (the vessel).

The matter is before the Court on Plaintiff’s Motion for Interlocutory Sale and Motion for Leave to Credit Bid. (Motions, ECF No. 20.) Following a review of the motions and after consideration of the relevant issues, I recommend the Court grant the motions.

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<sup>1</sup> Magistrate judges, including in this District, have considered a motion for interlocutory sale as a dispositive motion. *Schoninger v. M/V Three Olives*, O.N., No. 2:10-cv-00069-DBH, 2010 WL 1935855, at \*1 n.1 (D. Me. May 10, 2010) (citing cases).

## PROCEDURAL AND FACTUAL BACKGROUND

On September 10, 2020, Colyn Rich (Rich) borrowed \$94,850 from Plaintiff to purchase the vessel. (Verified Complaint ¶ 11, ECF No. 1.) Rich executed a promissory note payable to Plaintiff in the amount of \$94,850 and granted to Plaintiff a First Preferred Mortgage against the vessel to secure payment of the note. (*Id.* ¶ 13.) Plaintiff and Rich subsequently executed two modification agreements. (*Id.* ¶ 16.)

Plaintiff commenced this action on January 30, 2024, with the filing of a verified complaint, a motion to appoint substitute custodian, a motion for issuance of warrant in rem, and a motion for order of notice. (ECF Nos. 1, 3, 4.) On February 1, 2024, the Court granted Plaintiff's motions (a) to arrest the vessel on warrant (ECF No. 7), (b) to substitute Central Maine Auction Company as the custodian of the vessel upon arrest (ECF No. 10), and (c) to approve notice by publication in *The Ellsworth American* within 45 days of the arrest, and by certified mail, return receipt requested, to parties known to have an interest in the vessel (i.e., the owner or master, any person with an undischarged recorded lien, and any mortgagee of an undischarged mortgage of record). (ECF No. 8.) The Clerk issued the warrant (ECF No. 11), and the Marshals Service thereafter executed the warrant on February 9, 2024. (ECF No. 12.)

On March 12, 2024, Plaintiff's counsel filed an affidavit regarding compliance with the Court's order of notice. (First Affidavit of Aaron P. Burns, ECF No. 16.) In the affidavit, counsel asserted that Plaintiff caused notice of the arrest of the vessel to be published in *The Ellsworth American* on February 29, 2024. (*Id.* ¶ 3.) Plaintiff also attached a copy of the "tear sheet" from *The Ellsworth American*. (Exhibit A, ECF No. 16-

1.) In addition, counsel confirmed that he sent by certified mail and email a copy of the notice of arrest and order of notice to Rich.<sup>2</sup> (First Burns Affidavit ¶¶ 5, 7.) Counsel also asserted that according to the abstract of title for the vessel, there are no junior liens or mortgages against the vessel. (*Id.* ¶ 8.)

Rich filed an answer to the complaint in which he asserted:

I am the defendant in this case. I believe there are good reasons a judgment should not be entered against me on some or all of the claims raised by the plaintiff. I deny at least some of the plaintiff's statements in the complaint. I assert all affirmative defenses that apply to my case.

(Answer to Complaint, ECF No. 14.)

In support of the motion for interlocutory sale, Plaintiff filed an affidavit of its counsel. (Second Affidavit of Aaron P. Burns, ECF No. 20-1.) Through affidavit, counsel asserted that he served Rich with a request for admissions on March 4, 2024, and Rich did not respond to the requests. (Request for Admissions, ECF No. 20-2.) Through the requests, Plaintiff asked Rich to admit that the promissory note, mortgage, and modifications agreements were valid, that he defaulted on the note and mortgage, that Plaintiff provided him with an acceleration notice, that as of January 10, 2024, he owed Plaintiff \$86,838.47, and that the maritime lien against the vessel in the amount of \$86,838.47, plus interest, is unsatisfied.

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<sup>2</sup> Plaintiff emailed the notice of arrest to Rich after Rich failed to sign for the certified mail. (First Burns Affidavit ¶ 7.)

## DISCUSSION

Plaintiff has established its lien on the vessel pursuant to 46 U.S.C. §§ 31341 and 31342. The interlocutory sale of a vessel and its appurtenances may be ordered where one or more of the following justifications is established:

- (A) the attached or arrested property is perishable, or liable to deterioration, decay or injury by being detained in custody pending the action;
- (B) the expense of keeping the property is excessive or disproportionate; or
- (C) there is an unreasonable delay in securing release of the property.

Fed. R. Civ. P. Supp. E(9)(a)(i). *Coastal Marine Mgmt. v. M/V Sea Hunter*, 274 F. Supp. 3d 6 (D. Mass. 2017). “The interlocutory sale of a vessel is not a deprivation of property but rather a necessary substitution of the proceeds of the sale, with all of the constitutional safeguards necessitated by the in rem process.” *Cal. Yacht Marina—Chula Vista, LLC v. S/V OPILY*, No. 14-cv-01215, 2015 WL 1197540, at \*2 (S.D. Cal. Mar. 16, 2015) (quoting *Ferrous Fin. Servs. Co. v. O/S Arctic Producer*, 567 F. Supp. 400, 401 (W.D. Wash. 1983)).

Plaintiff asserts that an interlocutory sale is appropriate in this case because of the condition and likely continued deterioration of the vessel. (See Affidavit of Jason Hillman, ECF No. 20-10.) Additionally, Plaintiff requests that it be permitted to “credit bid up to 86,838.47.” (Motion at 9.)

Plaintiff’s request for an interlocutory sale is reasonable. Although Rich filed an answer to the complaint, he did not specifically deny the material allegations in the verified complaint. Furthermore, because Rich did not respond to Plaintiff’s requests for admission, the matters on which Plaintiff requested Rich’s admission, which matters

included the amount of the indebtedness and Rich's default on the note and mortgage, are admitted. Fed. R. Civ. P. 36(a)(3). Under the circumstances, there appears to be no reasonable basis to delay the sale with the attendant increase in expenses and potential deterioration of the vessel.<sup>3</sup>

Plaintiff's request for authorization to bid by credit is also reasonable. With a credit bid, Plaintiff could bid the amount of its maritime lien, and, if successful, would not be required to deposit funds with the Court. Given that Plaintiff's claim is the only maritime lien asserted in this action, on this record, Plaintiff's lien appears to be the senior lien.

### CONCLUSION

Based on the foregoing analysis, I recommend the Court grant Plaintiff's Motion for Interlocutory Sale and Motion for Leave to Credit Bid. I further recommend the Court find and order:

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<sup>3</sup> "Title 46 U.S.C. § 31326(a) provides that when a vessel is sold pursuant to order of the district court in a civil action to enforce a maritime lien, any claim in the vessel which existed on the date of the sale is terminated so that the vessel is sold free of all liens. With certain exceptions, the terminated claims continue in existence, in the same amounts and with the same priorities, against the proceeds of the sale. 46 U.S.C. § 31326(b)." *Beyel Bros., Inc. v. Barge 35*, 2014 WL 4385582, at \*7 (M.D. Fla. Sept. 4, 2014). Rich has had notice of the action since at least February 8, 2024, when he was served with the complaint and summons. (Return of Service, ECF No. 13.) To date, he has not made any effort to secure release of the vessel. Courts have held that where there has not been any effort to secure the release of a vessel within four months of its arrest, interlocutory sale would be justified based on "unreasonable delay in securing release of the property." Fed. R. Civ. P. Supp. E(9)(a)(i)(C). *Schoninger v. M/V Three Olives*, No. 2:10-cv-00069-DBH, 2010 WL 1935855, at \*3 (D. Me. May 10, 2010) (recommended decision, collecting cases); *Coastal Marine Mgmt.*, 274 F. Supp. 3d 6 (citing *Bank of Rio Vista v. Vessel Captain Pete*, 2004 WL 2330704, at \*2 (N.D. Cal. Oct. 14, 2004)); *Yasi v. M/V Horizon's Edge*, 2014 WL 8484913, at \*4 (D. Mass. Sept. 2, 2014) (citing *Louisiana Int'l Marine, L.L.C. v. Drilling Rig Atlas Century, C.A.*, 2011 WL 7637219, at \*3 (S.D. Tex. Nov. 21, 2011), *adopted* 2012 WL 1067239, at \*2 (S.D. Tex. Mar. 27, 2012)). Given the opportunity and time to file objections to this Recommended Decision, the Court could conceivably have additional grounds upon which to order the sale at the time the Court considers whether to order an interlocutory sale.

1. Prior to the notice of the sale by publication, Plaintiff shall file an affidavit that informs the Court of the proper calculation of his credit bid.
2. Prior to completion of notice of the sale by publication, Plaintiff shall serve a copy of affidavit upon Defendant Rich.
3. Unless an interested party appears in the case and challenges the opinions of Jason Hillman set forth in set forth in the Condition and Value Survey (ECF No. 20-11), an appraisal prior to sale is not required.<sup>4</sup>
4. An order for interlocutory sale be issued in substantially the form attached hereto as Exhibit A.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. Section 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

/s/ John C. Nivison  
U.S. Magistrate Judge

Dated this 17th day of July, 2024.

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<sup>4</sup> “It is common practice to order an independent, confidential appraisal” prior to an interlocutory sale to assist the Court when it determines whether the sale should be confirmed. *Gowen, Inc. v. F/V Quality One*, No. 99-cv-00371, 2000 WL 893402, at \*4 (D. Me. June 14, 2000), *aff'd*, 244 F.3d 64 (1st Cir. 2001). *See also Me. Nat'l Bank v. F/V Explorer*, 663 F. Supp. 462, 470 (D. Me. 1987), *aff'd*, 833 F.2d 375 (1st Cir. 1987); *Coastal Marine Mgmt.*, 274 F. Supp. 3d 6 (D. Mass. 2017). Unless there is an objection to the Condition and Value Survey, an appraisal may not be necessary.

Exhibit A  
UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MACHIAS SAVINGS BANK

Plaintiff,

v.

1:24-cv-00027-LEW

F/V *RICH ENDEAVOR*  
(O.N. 1293024) together with her masts,  
boilers, cables, engines, machinery,  
electronics, fishing permits, tackle, traps,  
appurtenances, etc. *in rem*,

and

COLYN C. RICH, *in personam*

Defendants.

**ORDER FOR INTERLOCUTORY SALE OF VESSEL**

On June 14, 2024, Machias Savings Bank (“Plaintiff”) filed a Motion for Interlocutory Sale and for Leave to Credit Bid (ECF No. 20.) (“Motion”). In the Motion, Plaintiff moves for the Interlocutory Sale of the *in rem* defendant F/V “Rich Endeavor” (O.N. 1293024), together with her masts, boilers, cables, engines, machinery, appurtenances, etc. *in rem* (“Vessel”) pursuant to Fed. R. Civ. P. Supplemental Admiralty & Maritime Rule E. After notice and opportunity for hearing, the motion is GRANTED and the Vessel shall be sold by the United States Marshal as set forth below.

The Marshal arrested the Vessel on February 9, 2024. More than five months have passed and the Vessel has not been released from custody. In addition, there is undisputed evidence that the Vessel is liable to decay or deteriorate by ongoing exposure to the elements due to its poor condition. Based on the record, the Court finds that: (i) the Vessel is liable to deterioration and decay by being detained in custody pending the action; and (ii) there has been an unreasonable delay in securing the release of the Vessel. Accordingly, the Court orders the interlocutory sale of the Vessel pursuant to Supplemental Rule E (9)(a)(i)(A) & (C).

In addition, the Plaintiff has established that it has a first priority maritime lien against the Vessel by virtue of its recorded Ship Mortgage, and that the amount secured by the Ship Mortgage is not less than \$86,838.47, plus interest, and costs, and *in custodia legis*

costs advanced by it. Accordingly, the Plaintiff shall be entitled to credit bid the amount of its secured claim at the sale of the Vessel as set forth below.

THEREFORE, IT IS ORDERED that:

1. The United States Marshal for the District of Maine or any of his deputies (“Marshal”) shall sell the Vessel, including appurtenances, and specifically including without limitation, all fishing permits, *see Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 67-71 (1<sup>st</sup> Cir. 2001), at public auction sale to an “eligible person,” *see 46 U.S.C. § 31329(a)*, for the highest price that can be obtained.

2. The sale of the Vessel shall be scheduled for a date within 60 days of the entry of this Order on the Court’s docket at a date, time, and place selected by the Plaintiff after consultation with the Marshal and confirmation of the Marshal’s availability.

3. The Plaintiff shall give notice of the date, time, and place of said sale by advertising the same for at least once a week for two (2) successive weeks in *The Ellsworth American*, with the first advertisement to be at least fourteen (14) days prior to the date of said sale. A copy of the notice of sale will also be provided to Defendant Colyn C. Rich via U.S. Mail.

4. In consideration of its services provided as substitute custodian of the Vessel, as well as its agreement to provide services to market and advertise the sale of the Vessel, Central Maine Auction Center (“Substitute Custodian”) shall be entitled to receive a 10% commission of the gross sale price of the Vessel, up to a maximum commission of \$5,000, as a cost of sale, plus reimbursement of its out-of-pocket costs up to \$750 as a cost of sale. If the Plaintiff is the ultimate purchaser, Central Maine Auction Center shall receive a fee of \$500, plus reimbursement of its out-of-pocket expenses up to \$750 as a cost of sale.

5. Prospective bidders may arrange with the Substitute Custodian to inspect and/or survey the Vessel at the Substitute Custodian’s facility in Hermon, Maine during business hours at their own risk, provided that any such persons inspecting or surveying the Vessel shall agree to release and hold the United States Marshals Service, the Substitute Custodian, the Plaintiff, and anyone affiliated with them harmless for any personal injuries or harm caused to them during the inspection, even if caused by the negligence of a released party.

6. The Marshal, after consultation with the Plaintiff, has discretion to announce and set terms of sale that are consistent with the provisions of this Order, in form and substance that are customary for secured creditor dispositions in the State of Maine.

7. The minimum bid price will be Five Thousand Dollars (\$5,000). Bidders must provide a deposit of \$5,000 to the Marshal at the time of sale via cashier’s check or other certified funds. The deposit will be non-refundable as to the successful bidder. If the

successful bidder fails to close, the deposit will be forfeited and shall be paid to the Plaintiff to be credited toward costs of sale, advertising, and the costs and attorneys' fees to be incurred by the Plaintiff to reschedule the sale, if any. Any amount remaining shall be used to pay down the Defendant's secured indebtedness to Plaintiff.

8. At the public sale, the Marshal will sell the Vessel to the highest and best eligible bidder, said sale to be subject to the confirmation of this Court. The balance of the purchase price must be paid to the Marshal within five (5) business days of the conclusion of the sale.

9. The highest bidder at the sale shall enter into a Purchase and Sale Agreement with the Marshal for the purchase of the Vessel, subject to the confirmation of this Court. The Plaintiff is exempt from this requirement.

10. The Marshal, after deducting his statutory commission and costs, shall pay the proceeds of the sale to the registry of this Court to be held pending further proceedings.

11. The sale of the Vessel will be free and clear of all liens, claims and encumbrances pursuant to [46 U.S.C. § 31326\(a\)](#). The sale of the Vessel will be "AS IS", "WHERE IS", and "WITH ALL FAULTS." There will be no warranty relating to title, possession, quiet enjoyment or the like in this disposition.

12. The Marshal shall have discretion to: (a) set bid increments, (b) determine eligibility to bid, (c) with the consent of the Plaintiff, adjourn the auction from time to time with no adjournment lasting more than fourteen (14) days by announcement to those present at the auction of the time, date, and location where the public sale will reconvene, and (d) accept bids via telephone or internet provided that suitable arrangements have been made to collect the bid deposit in advance.

13. The Marshal, with the consent of the Plaintiff, shall also have discretion to (a) waive or modify the minimum bid or deposit requirement, and (b) provide the winning bidder with an extension of time to pay the remaining balance of the purchase price without further order of this Court.

14. The Plaintiff is entitled to credit bid at the public sale up to the amount of its secured indebtedness, interest, and costs (but not attorneys' fees) without outlay of funds and it is not required to pay a deposit. Plaintiff is hereby given leave to credit bid up to \$86,838.47 as established by its Verified Complaint, and the Defendant's Rule 36 Admissions.

15. If Plaintiff is the successful high bidder, it will be required to arrange to pay any costs and commissions due to the Marshal prior to receiving a bill of sale for the Vessel. Plaintiff is also responsible for paying the agreed-upon bank purchase fee to the Substitute Custodian.

16. Plaintiff shall file with the Court and serve a report of sale on the Defendant within a reasonable time of the conclusion of the sale. The Plaintiff's report of sale shall be accepted, and the sale will be automatically confirmed unless the Defendant files and serves an objection to the report of sale within 14 days of the date that the Plaintiff files the report of sale with the Court. Plaintiff shall have 21 days to respond to any such objection.

17. Unless an objection to the Report of Sale is filed within 14 days of the filing of the Report of Sale, the Marshal shall be authorized and directed to execute a bill of sale to the successful high bidder, provided that all of the Marshal's statutory commissions and costs have been paid.

So Ordered.

Dated: \_\_\_\_\_

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United States District Judge