UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

May 15, 2014 at 3:00 p.m.

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1. 12-36419-E-11 KFP-LODI, LLC
SAC-10 Scott A. CoBen

CONTINUED MOTION TO MODIFY CHAPTER 11 PLAN
3-3-14 [388]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, all creditors, and Office of the United States Trustee on March 3, 2014. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Modify has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Modify Chapter 11 Plan without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

KFP-LODI, LLC, the reorganized debtor and plan administrator ("Debtor") moves for an order approving and authorizing the modification to the treatment of the Class 2 Secured Creditor TerraCotta Realty Fund, LLC ("TerraCotta")provided under the Third Amended Plan of Reorganization, dated November 22, 2013.

Debtor asserts that distributions to creditors have not been commenced under the confirmed plan. The confirmed plan provides that the maturity of TerraCotta's loan is reduced from 20 years to 4 years and the Debtor is required to reimburse TerraCotta for a total of $85,000.00 in attorneys fees incurred by TerraCotta as a result of Debtor's bankruptcy. The Plan requires the Debtor to continue monthly payments to TerraCotta at the contract rate, which payments were not interrupted during the Debtor's bankruptcy.

Debtor believes that TerraCotta intends to continue to prosecute the Complaint filed in the Superior Court of California, County of San Joaquin (Case No. 39-2013-00299099), entitled TerraCotta Realty Fund, LLC v. Margaret Kim, et al. (the "State Court Action") despite its support for and

acceptance of the Plan and despite the fact that it continues to receive the contract rate to which it is entitled under the TerraCotta Promissory Note as well as reimbursement for approximately $85,000.00 in legal fees incurred by TerraCotta as a result of the Debtor's bankruptcy proceeding.

Debtor argues that TerraCotta's continuation of the State Court Action jeopardizes the Debtor's ability to perform under the Plan since it would require a significant diversion of time and resources from the Guarantors, in particular, the Debtor's Manager, Kyu Kim.

Debtor states that substantial consummation of the plan has not yet occurred as no distributions have been commenced under the plan. Debtor states the injunction prohibiting TerraCotta from continuing its prosecution of the State Court Action, the Debtor's ability to perform under its plan is jeopardized, as it would create a significant diversion of time and money for the Guarantors.

JOINDER

Secured Creditor SGB1, LLC ("SGB1") joins in KFP-LODI, LLC's ("Debtor") Motion to Modify Confirmed Plan to enjoin TerraCotta Realty Fund, LLC ("TerraCotta"), the first trust deed holder on real and personal property owned by Debtor, generally described as 16855 Old Harlan Road, Lathrop, California and related personal property where Debtor operates a 65-room Quality Inn & Suites Motel ("Motel"). SGB1, as the second trust deed holder in the amount of $3,500,000 on the Motel, desires to see Debtor reorganize and satisfy its obligations as required by Debtor's Third Amended Plan of Reorganization ("Plan"), which was consensually confirmed by this Court's Order Confirming Plan entered February 28, 2014.

SGB1 argues that tremendous effort was made by all parties and the Court to confirm the Plan. Both TerraCotta and SGB1 reached and entered comprehensive forbearance agreements with Debtor and the respective guarantors of the loans. SGB1 was surprised to learn that there was still pending litigation with TerraCotta concerning the Debtor's loan. This was especially true based on Debtor's representations that Debtor is and has been current on all payments to TerraCotta. SGB1 would like to see Debtor survive and make the required payments pursuant to the Plan and Confirmation Order. As the Motion does not seek to modify SGB1's Class 3 Plan treatment, SGB1 supports Debtor's Motion.

OPPOSITION

TerraCotta opposes the modification enjoining them from prosecuting their claims against various nondebtors under a independent written guaranty. TerraCotta argues that the Bankruptcy Court does not have the power or authority to modify a plan when it (I) affects, alters, releases and/or changes the personal obligations of nondebtor guarantors, and/or (ii) contains any injunction enjoining, whether permanently or "temporarily," the exercise of TerraCotta's rights under those written guaranty agreements executed by nondebtors.

TerraCotta argues that the proposed "temporary injunction" against TerraCotta is unlawful under *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985) because it "affect[s] the obligations of" the nondebtor guarantors

under their written guaranties in that the proposed injunction, among other things, releases the guarantors from their present liability and present obligation to pay TerraCotta and changes the timing of these payment obligations to pay TerraCotta under the written guaranties.

TerraCotta also argues that one of Debtor's alleged reasons for the proposed modification is that the "Lathrop Hotel Property" is required to complete a "Property Improvement Project;" however, Debtor never disclosed at all, whether in its approved Disclosure Statement or at any time throughout the plan confirmation process, that the Lathrop Hotel Property was subject to a "Property Improvement Plan." Debtor only disclosed a property improvement plan for the "Stockton Hotel Property."

DEBTOR'S REPLY

Debtor argues that the only basis for TerraCotta's continuation of the state court action is an intent to pressure the principals of the Debtor to consent to foreclosure of the hotel property located at 16855 South Harlan Road, Lathrop, California. Debtor states that since it does not seek anything approaching a discharge or release of guarantor liability, but rather a temporary injunction conditioned upon the Debtor's compliance with the Plan, the proposed plan modification does not run afoul of any binding Ninth Circuit precedent.

Debtor also argues that balancing of the equities weighs strongly in favor of granting the Debtor's motion to modify its Plan because the hardship imposed upon the Debtor, its principals and, potentially, the junior lienholder, by TerraCotta's continuing its state court litigation, far outweighs any hardship imposed upon TerraCotta by a stay of such litigation. Debtor states this is because TerraCotta is already being made whole, including receiving reimbursement for its attorneys fees, by the Debtor under its Plan.

Lastly, Debtor states the reference to a required furniture upgrade as part of a Property Improvement Plan for the Lathrop Hotel Property was a scriveners error, as the Debtor is not presently subject to such a mandatory requirement.

DISCUSSION

Modification of a Chapter 11 Plan is allowed pursuant to 11 U.S.C. § 1127(b), which states,

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Additionally, section 1127(b) provides a narrow window for modification after confirmation; once a plan has been substantially

consummated, modifications are not permitted. *Antiquities of Nevada v. Bala Cynwyd Corp. (In re Antiquities of Nevada)*, 173 B.R. 926, 928 (B.A.P. 9th Cir. 1994).

The bankruptcy court may not confirm a plan of reorganization that does not comply with applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Pursuant to 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts. However, section 524 does not provide for the release of third parties from liability because § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors or guarantors. *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss*), 67 F.3d 1394, 1401 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996).

Courts have disagreed over whether section 524(e) may be overridden by a provision of a confirmed plan under chapter 11. 4 COLLIER ON BANKRUPTCY ¶ 524 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The Ninth Circuit has held that a bankruptcy court lacks jurisdiction and power to enjoin permanently, beyond confirmation of a reorganization plan, a creditor from enforcing a state court judgment against the debtor's guarantors. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621 (9th Cir. 1989). See also in In *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1095 (9th Cir. 2007), the Ninth Circuit Court of Appeals concluded that a debtor could not obtain a permanent injunction post-confirmation which would work as a *de facto* discharge for non-debtor guarantors. It does not appear the Ninth Circuit has addressed the issue as to a temporary injunction.

Terms of Confirmed Plan

The court has qualified the denial of this Motion with "under the facts as presented." The present motion does not seek a preliminary or temporary injunction through an adversary proceeding (Fed. R. Bank. P. 7001), but merely as a modification of the Chapter 11 Plan. It was not presented as part of the proposed Chapter 11 Plan, not vetted by creditors, not voted on, and not considered by the court as part of the proposed Chapter 11 Plan. The Plan "modification" seeks to shortcut the required adversary proceeding process.

It is instructive to consider the factual background is that the Reorganized Debtor owns ands operates hotel property located at 16855 South Harlan Road, Lathrop, California. The Reorganized Debtor owns an 80% interest in the hotel, with a non-affiliated non-debtor, WSJ Enterprises, LLC owing the remaining 20% interest. Approved Third Amended Disclosure Statement, Dckt. 358.

The road to confirmation of a Chapter 11 Plan for this Debtor was long and winding. The Debtor filed a prior Chapter 11 case on February 1, 2011, which was dismissed on April 15, 2011. Bankr. E.D. Cal. 11-22678. The Debtor then filed the present case more than a year later, on September 10, 2012. Initially the Debtor engaged the same counsel that represented it in the first case, ultimately replacing him with their present counsel. May 16, 2013 Order for Substitution of Counsel. By August 9, 2013, the Debtor in Possession had a Second Amended Plan and Second Amended Disclosure Statement on file and was moving the case forward.

The Debtor in Possession was able to resolve various objections of creditors, leading to the Third Amended Chapter 11 Plan and Third Amended Disclosure Statement which were filed on November 22, 2013. As part of the compromises between the parties, the Debtor in Possession, TerraCotta, and WSJ Enterprises, LLC entered into a Loan Modification and Forbearance Agreement. Exhibit 1 to Third Amended Plan of Reorganization, Attached to Order Confirming Plan, Dckt. 385. The Confirmed Plan, Article V, provides that the Class 2 secured claim of TerraCotta Realty Fund, LLC shall be paid in accordance with the terms of the Loan Modification and Forbearance Agreement. The Forbearance Agreement provides that until either "(a) an Event of Default occurs after the Effective Date (a "New Event of Default"), or (b) a default of KFP under the confirmed Plan of Reorganization ("Plan Default") occurs, Lender, without waiving any Claimed Default, agrees to forbear from exercising of any of its rights and remedies against Borrowers only which are available under the Loan Documents on account of the occurrence of any and all Claimed Defaults..."

The Loan Modification and Forbearance provides for TerraCotta to receive monthly payments of $10,503.74, effective as of October 1, 2013. The maturity date for payment of the secured claim is four years from the effective date (defined in Article VII, § 8.01, ¶ 15 of the Third Amended Chapter 13 Plan to be when the confirmation order is final and unappealable).

A separate Reaffirmation and Release by Guarantors is included as Exhibit 1 attached to the Third Amended Chapter 11 Plan. Margaret Kim, Jyu Kim, Beth Kim, KWP Management, Inc., and KFP Gal, LLC, as guarantors, executed the Reaffirmation and Release by Guarantors.

The Third Amended Chapter 11 Plan was confirmed with all classes, including the TerraCotta Class 2 claim, voting to confirm the Plan. Civil Minutes, Dckt. 378.

Ruling

The Reorganized Debtor raises several serious issues concerning whether temporary injunctive relief should properly be ordered to allow the Reorganized Debtor to perform the Chapter 11 Plan voted for by TerraCotta and pay the obligation as provided for in the Loan Modification and Forbearance Agreement. The requested injunctive relief appears not to be a *de facto* discharge for guarantors, but relief requested to provide for the payment of the obligation as provided for in the Loan Modification and Forbearance Agreement and Confirmed Chapter 11 Plan.

After arguing long and hard over whether an injunction may be provided for non-debtors in a Chapter 11 Plan, TerraCotta makes reference to an alleged non-disclosure concerning obligation of the Debtor with respect to the Lathrop Hotel Property.

The court is convinced that an Chapter 11 Plan amendment to impose even limited injunctive relief is improper. Such injunctive relief must be sought by adversary proceeding – Federal Rule of Bankruptcy Procedure 7001.

The court denies the Motion without prejudice. The Reorganized Debtor may file the necessary adversary proceeding and properly seek the

issuance of a temporary and then limited duration injunction. TerraCotta may respond to the complaint and motion, educating the court why the court should not issue the injunctive relief to the extent proper and appropriate to carry out the provisions of Chapter 11, the confirmed Third Amended Chapter 13 Plan (which includes the Loan Modification and Forbearance Agreement) and Order confirming said Plan.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Modify Chapter 11 Plan having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

2. 13-26159-E-11 IVAN RAVLOV — **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 5-3-13 [1]**

Debtor's Atty: Scott A. CoBen

Final Ruling: The court having confirmed the Chapter 11 Plan pursuant to an order filed on April 4, 2014, compensation for counsel for the Debtor in Possession having been ordered (Dckt. 430) and there pending a hearing on a Motion to Close the Chapter 11 case, **the Status Conference is continued to 10:30 a.m. on June 5, 2014.** (Specially set to be heard with Motion to Close Case.) No appearance at the May 15, 2014 Status Conference is required.

Notes:

Continued from 3/13/14 to allow the Plan Administrator and professionals to file and have heard all necessary post-confirmation motions, including a motion to administratively close the case.

Operating Reports filed: 3/14/14, 4/14/14

[SAC-26] First and Final Application for Compensation by Scott A. CoBen & Associates filed 3/25/14 [Dckt 329]; Order granting filed 4/24/14 [Dckt 340]

[SAC-25] Order Confirming Plan filed 4/4/14 [Dckt 334]

3. 13-24415-E-13 ANTONIO/MARIA HERNANDEZ
CAH-1 C. Anthony Hughes
STIPULATION ON MOTION TO VALUE SECOND PRIORITY LOAN
4-22-14 [65]

Notice Provided: The Order Setting Hearing on Stipulation to Value Second Priority Loan was served by the Clerk of the Court through the Bankruptcy Noticing Center on all parties on May 5, 2014. 10 days notice of the hearing was provided.

On May 1, 2013, Antonio Hernandez and Maria Hernandez ("Debtors") filed a Motion to value the secured claim of Tri Counties Bank. Motion, Dckt. 20. On April 22, 2014, the Parties filed a Stipulation which purports to resolve the Motion. Stipulation, Dckt. 65. The Motion sought relief pursuant to 11 U.S.C. § 506(a). The terms of the Stipulation are:

A. The Chapter 13 Plan will be amended to "value the collateral at $40,000.00...."

B. Tri Counties Bank's Chapter 13 Claim for the second priority loan shall be paid "outside the plan" at the contract rate of 6.0 percent and amortized over the remaining term of the Loan through maturity date of March 25, 2031.

C. Debtors shall pay Tri Counties Bank a monthly payment of $307.30 commencing September 25, 2013, and continuing monthly thereafter.

D. If Debtor obtains a Chapter 13 discharge in this case, Debtors shall continue the monthly payment of $307.30 through February 25, 2031, and make a final payment of $296.52.

E. In the event that Debtor [does not identify if both or just one] does not receive a discharge, the Stipulation is null and void.

F. Upon dismissal of the bankruptcy case, the Stipulation shall no longer apply between the parties.

Stipulation, Dckt. 65.

The Parties lodged with the court a proposed order "Approving Stipulation to Value Second Priority Loan." The order states, in toto, the following:

> Upon the stipulation of Tri Counties Bank and the debtors, ANTONIA HERNANDEZ AND MARI HERNANDEZ, by and through their respective counsel, and good cause appearing,
>
> IT IS ORDERED that the stipulation between Tri Counties Bank and the debtors valuing the collateral and modifying the payment terms of the underlying contract is hereby approved.

The language in this proposed order and the terms of the Stipulation

itself cause the court significant concern. The proposed order does nothing more than state that whatever is in the Stipulation is "approved." Does that mean that the court is actually ordering what is in the Stipulation, or merely that it's "ok," but not part of any order of this court.

Further, the Motion requests that the court value the secured claim of Tri Counties Bank. Though attorneys, and some courts, use a shorthand description of an 11 U.S.C. § 506(a) valuation of secured claim as merely "valuing the collateral," the relief granted is to value the secured portion of the creditor's claim. The value of the collateral is important, as the secured claim is computed as the "value of the creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff...and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim." 11 U.S.C. § 506(a)(1).

The Stipulation provided by the Parties states a value of specified real property of the estate, but does not state the amount of the secured claim.

The Stipulation proceeds to state additional agreements as to specific terms of a Chapter 13 Plan. If the Parties are intending to obtain an order from the court which "confirms" these "plan terms," such an order would be improper. Confirmation of a Chapter 13 Plan, and all terms of such Plan, is made pursuant to 11 U.S.C. § 1325 or § 1329. This court does not "approve" or "confirm" plan terms on an *ex parte*, no disclosure to other parties in interest basis.

The court found it is necessary and appropriate for the court to conduct a hearing on this Stipulation and the proposed order lodged with the court. The court will not guess as to what relief was requested, will not assume that merely the value of the property is the amount of the secured claim pursuant to 11 U.S.C. § 506(a), or confirm terms of a plan in piecemeal fashion. Also, the court is not going to sign an order which states, whatever has been agreed to in some unidentified stipulation is "approved" (whatever that may mean).

MAY 15, 2014 HEARING

At the hearing, ...