UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 28, 2015 at 10:00 a.m.

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1. 14-30833-A-11 SHASTA ENTERPRISES — STATUS CONFERENCE
10-31-14 [1]

Tentative Ruling: None.

2. 14-30833-A-11 SHASTA ENTERPRISES — MOTION FOR
DL-6 — RELIEF FROM AUTOMATIC STAY
REDDING BANK OF COMMERCE VS. — 11-25-15 [400]

Final Ruling: The motion will be dismissed as moot given that the movant, Redding Bank of Commerce, has entered into a short sale agreement for the sale of the property, and the chapter 11 trustee's motion to sell the property, DCN FWP-19, is being heard on this calendar.

3. 14-30833-A-11 SHASTA ENTERPRISES — MOTION TO
FWP-19 — SELL FREE AND CLEAR OF LIENS
O.S.T.
12-17-15 [409]

Tentative Ruling: The motion will be granted in part.

The chapter 11 trustee requests authority to sell "as is" for $5,575,000 in cash the estate's interest in 250 Hemsted Drive in Redding, California, to Shasta Exchange Corporation for T.M.T. & T. 2009 Trust.

The trustee also seeks:

(1) authority to pay outstanding and prorated prospective property taxes out of escrow, along with the estate's escrow and closing costs and expenses;

(2) approval of his short sale agreement with Redding Bank of Commerce, the only mortgagee on the property, holding a single claim of approximately $5,441,419.28, with an asserted current payoff of $6,036,637.41; although the preliminary title report reflects two deeds of trust held by RBC, securing two loans - a 2005 loan and a 2006 loan, the 2005 loan has been satisfied; the single proof of claim filed by RBC is based on the 2006 loan;

(3) authority to execute the terms of the short sale agreement, including a payment out of escrow of $5 million plus 50% of any net increase in the purchase price from overbids to RBC, in full satisfaction of all RBC claims secured by the property;

(4) the approval of a breakup fee of $50,000 to Shasta Exchange Corporation;

(5) authority to pay a real estate commission to the estate's broker, Kennedy

Wilson; the proposed commission has been reduced to less than the originally-agreed 5% commission;

(6) authority to pay an incentive bonus under a court-approved incentive agreement to Mr. Cretaro in the amount of $7,000, subject to an increase in the event of an overbid;

(7) authority to pay the estate's cure obligations resulting from its assumption and assignment of the three unexpired leases associated with the property;

(8) a waiver of the 14-day period of Fed. R. Bankr. P. 6004(h);

(9) a good faith finding under section 363(m); and

(10) a determination that the sale does not violate section 363(n).

While the property is not subject to any other monetary encumbrances, it is nonetheless subject to non-monetary encumbrances, such as easements, dedications, notices and redevelopments. The sale is subject to such non-monetary encumbrances.

The trustee estimates that the net sales proceeds to the estate will be approximately $142,000.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. The sale will generate some proceeds for the estate, while foreclosure of the property.

Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

The court will approve the short sale agreement with RBC and will approve the $50,000 break-up fee to Shasta Exchange Corporation, in the event it does not purchase the property due to an over-bidding, to compensate EC for its due diligence and investigation efforts with respect to the property.

The court will authorize payment of the real estate commission to the estate's broker and incentive bonus to Mr. Cretaro, consistent with their employment terms approved by the court.

The court will authorize a payment of $0.00 for the estate's cure obligations resulting from its assumption and assignment of the three unexpired leases associated with the property. The movant's related motion on the assumption and assignment of the property's leases, DCN FWP-20, states that the estate's cure obligations are in the amount of $0.00. Docket 414 at 2.

The court will waive the 14-day period of Rule 6004(h) and it will make a good faith determination under section 363(m), subject to receiving and reviewing a declaration from Shasta Exchange Corporation concerning its good faith in purchasing the property. As of the time the motion papers were filed, there was no such declaration from EC, attesting to its good faith in this transaction.

Finally, the court cannot determine that the sale does not violate section 363(n), as such relief requires an adversary proceeding. Fed. R. Bankr. P. 7001(1).

4. 14-30833-A-11 SHASTA ENTERPRISES
FWP-20

MOTION TO
ASSUME AND ASSIGN LEASE OR
EXECUTORY CONTRACT
O.S.T.
12-17-15 [414]

Tentative Ruling: The motion will be conditionally granted in part.

The chapter 11 trustee seeks to assume and assign three unexpired leases involving the estate's 250 Hemsted Drive real property. The estate is the lessor under each of the leases.

The property is being sold by the trustee and he is seeking to assign the leases in connection with the sale. The assignment of the leases is part of and conditioned on the sale of the property. The proposed assignment is to Shasta Exchange Corporation for T.M.T. & T. 2009 Trust, the existing buyer of the property, or any successful overbidder.

The parties to the leases include the State of California (two leases) and Laughlin, Falbo, Levy & Moresi (one lease).

The trustee is also seeking:

- determination of the cure amounts under each of the three leases;

- authority to transfer the security deposits held by the estate as a lessor under the leases;

- waive the 14-day stay for orders authorizing the assignment of unexpired leases, under Fed. R. Bankr. P. 6006(d); and

- declare that the estate has no liability as stated under section 365(k).

11 U.S.C. § 365(a) and (b)(1) provides that:

"*(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.*

"*(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--*

"*(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

"*(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and*

"*(C) provides adequate assurance of future performance under such contract or lease.*"

11 U.S.C. § 365(d)(2) prescribes that "In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease."

11 U.S.C. § 365(f) further provides that:

"*(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.*

"*(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--*

"*(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and*

"*(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.*

"*(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.*"

The standard for determining whether to approve the assumption of unexpired leases and/or executory contracts is a business judgment test. Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U.S. 523 (1943); Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800-01 (B.A.P. 9th Cir. 1982) (holding that the primary issue is whether rejection or assumption would benefit the general unsecured creditors, which may also involve a balancing of interests).

The court "should approve the rejection [or assumption] . . . unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.' [. . . .] Such determinations, clearly, involve questions of fact . . . which we review for clear error." Agarwal v. Pomona Valley Medical Group, Inc. (In re Pomona Valley Medical Group, Inc.), 476 F.3d 665, 670 (9th Cir. 2007).

"The Bankruptcy Court, in evaluating the debtor's decision, 'should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate.' It should approve the decision to reject [or assume] . . . 'unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'" In re Yellowstone Mountain Club, L.L.C., Case Nos. 08-61570-11, 0861571-11, 08-61572-11, 08-61573-11, CV-09-48-BU-SEH, 2010 WL 5071354, at *2 (D. Mont. Dec. 7, 2010) (quoting and citing to Pomona Valley Medical Group at 670).

As there has been no plan confirmation yet in this case and the court has not set an independent deadline for the assumption of unexpired leases in this case, the deadline of section 365(d)(2) does not restrict the proposed assumption by the trustee.

The assumption will benefit the estate substantially as it will allow it to sell one of its substantial real properties and avoid foreclosure on that property by the secured creditor, while generating approximately $142,000 in proceeds for the estate and freeing the estate from substantial ongoing obligations in owning the property.

The court will permit assignment of the leases, subject to receiving and reviewing a declaration from the buyer, establishing adequate assurance of future performance under the leases. There are no cure amounts under the three leases.

The court will authorize the trustee to transfer the security deposits to the buyer of the property, upon assignment of the leases and in connection with the sale. The court will also waive the 14-day stay of Rule 6006(d), given the impending sale of the property.

But, the court will make no declarations about the estate's liability under 11 U.S.C. § 365(k), which states: "Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment."

There is no case or actual controversy for the court to make any declarations under section 365(k). The trustee has not identified any liability based on the breach of a lease, implicating section 365(k).

More, declaratory relief under section 365(k) seems to require an adversary proceeding. See Fed. R. Bankr. P. 7001(1) and (9). The court is unaware of any statutory provision permitting the court to make declarations under section 365(k) on a motion. The motion will be conditionally granted in part.

5.	15-20034-A-11 ET-3	C & N LANDSCAPE MAINTENANCE, INC.	MOTION TO SELL 12-8-15 [100]

Final Ruling: The motion will be dismissed without prejudice because it was set for hearing on 20 days notice in violation of Fed. R. Bankr. P. 2002(a)(2), which requires at least 21 days notice of the hearing on sale motions. The motion was served on December 20, 2015, 20 days prior to the December 28 hearing. While Local Bankruptcy Rule 9014-(f)(2) permits motions to be set on

as little as 14 days of notice, and permits opposition to be made at the hearing, this local rule also provides that this amount of notice is permitted "unless additional notice is required by the Federal Rules of Bankruptcy Procedure. . . ." Because Rule 2002(a)(2) requires a minimum of 21 days of notice of the hearing and because only 20 days' notice was given, notice is insufficient.

6. 15-25781-A-12 GLORIA AVILA — MOTION TO CONFIRM PLAN 10-15-15 [18]
TOG-3

Tentative Ruling: The motion will be denied.

The debtor is seeking confirmation of her chapter 12 plan filed on October 15, 2015. Docket 22. Wilmington Trust National Association (Ocwen Loan Servicing), however, objects to plan confirmation. Docket 29.

The motion will be denied because the plan does not provide for the payment of any pre-petition arrears to Wilmington. Wilmington asserts it is owed approximately $27,906 in pre-petition arrears. The plan does not deny the existence of pre-petition arrears.

Wilmington has also noted that there is a co-borrower on Wilmington's loan, an individual named Roberto Domingo. While Mr. Domingo is not a debtor in this case, this raises a question of whether Mr. Domingo owns an interest in the debtor's real property. There is nothing in the record to clarify this. The debtor's Schedule A says only that the debtor own a fee simple interest in the property. It does not say, however, that the debtor owns 100% interest in the property. This must be clarified by the debtor.

The court will overrule the other objections by Wilmington.

The plan is not attempting to strip down Wilmington's claim to the value of the property without a motion. The plan unequivocally states that Wilmington's "claim is fully secured and will be paid in full by debtor." Docket 22 at 4.

Further, the objection to the proposed 4.75% interest rate will be overruled because Wilmington has produced no evidence in support of its confirmation objection that the proposed 4.75 interest rate is inconsistent with Till.

The Supreme Court decided in Till v. SCS Credit Corp., 541 U.S. 465 (2004), that the appropriate interest rate is determined by the "formula approach." This approach requires the court to take the national prime rate in order to reflect the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate it for the loan's opportunity costs, inflation, and a slight risk of default.

The bankruptcy court is required to adjust this rate for a greater risk of default posed by a bankruptcy debtor. This upward adjustment depends on a variety of factors, including the nature of the security, and the plan's feasibility and duration. Cf. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir. 1990); In re Camino Real Landscape Main. Contrs., Inc., 818 F.2d 1503 (9th Cir. 1987).

To set the appropriate rate, the court is required to conduct an "objective inquiry" into the appropriate rate. The debtor's bankruptcy statements and schedules may be culled for the evidence to support an interest rate.

"Moreover, starting from a concededly *low* estimate and adjusting *upward* places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing. . . ." Till at 479.

But, there is no admissible evidence from Wilmington, in the form of declaration or affidavit in support of its objection, of its assertion that the loan should be repaid at a higher than the proposed 4.75% rate.

The same is true with respect to the contention that a 15-year reamortization of Wilmington's loan is impermissible. There is no evidence from Wilmington that such a loan term is unreasonable. Nor does Wilmington explain why a 15-year reamortization is unreasonable. It only argues that "twelve years [beyond the proposed three-year plan] is too great a time to extend the maturity of the loan." Docket 29 at 2.