UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:11-bk-18670-CED
Chapter 11

Electric Maintenance and Construction, Inc.,

Debtor.
_____/

ORDER DENYING MOTION TO COMPEL DEBTOR TO MODIFY PLAN AND/OR SEEK COURT APPROVAL OF SETTLEMENT

THIS CASE came on for hearing on May 9, 2016, on the *Motion to Compel Debtor to Modify Plan and/or Seek Court Approval of Settlement* filed by SunTrust Bank ("SunTrust") (Doc. No. 341) (the "Motion"). The questions before the Court are (1) whether a reorganized debtor under a confirmed Chapter 11 plan can be compelled by an unsecured creditor to modify its plan to account for the resolution of a secured creditor's claim that, in theory, frees up cash for distribution to unsecured creditors and (2) whether a reorganized debtor is required to seek court approval of the compromise between the secured creditor and the debtor's principal that resulted in the resolution of the secured creditor's claim.

Section 1141(a)[1] states that the terms of a confirmed Chapter 11 plan are binding upon the debtor and creditors. Under § 1127(b) only the plan proponent or the reorganized debtor may modify a plan after confirmation. Therefore, the Court concludes that unsecured creditors lack standing to modify a corporate debtor's confirmed plan, and neither the plan proponent nor a reorganized debtor can be compelled to modify the plan. And because Federal Rule of Bankruptcy Procedure 9019 applies only to trustees or debtors in possession, and not to reorganized Chapter 11 debtors or to third parties, the Court finds that a reorganized debtor is not required to seek approval of a compromise between its principal and the secured lender.

[1] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

Facts

In 2010, USAmeribank loaned $1,200,000.00 to Electric Maintenance and Construction, Inc. ("Debtor"). The loan was secured by certain property owned by Debtor, as well as non-Debtor collateral, including five parcels of real property owned by Debtor's president, Edward Roseman (the "Waters Property"). Mr. Roseman also guaranteed Debtor's repayment of the loan. In September 2011, Debtor defaulted on payments to USAmeribank; in October 2011, Debtor filed its Chapter 11 petition. USAmeribank filed Claim No. 8-1 for $1,208,285.13. In November 2011, USAmeribank moved for relief from the automatic stay to foreclose on the non-Debtor collateral, including the Waters Property.[2] The Court granted the motion in part and lifted the stay *in rem* as to the Waters Property.[3]

Thereafter, Debtor filed, and served upon creditors, its initial plan of reorganization (the "Plan")[4] and disclosure statement (the "Disclosure Statement").[5] The Disclosure Statement fully disclosed Debtor's relationship with Mr. Roseman and the additional non-Debtor collateral for USAmeribank's claim. They both stated that USAmeribank's claim would be satisfied through the liquidation of non-business (i.e., non-Debtor) collateral, described as the Waters Property, the Falcon Plane, the Learjet Plane, and the Broward Property.[6] The Plan provided that the balance of USAmeribank's claim would be paid with interest over ten years. The Plan treated SunTrust, which also held a security interest in non-Debtor property, as a secured creditor.

When USAmeribank and SunTrust objected to their proposed treatment under the Plan, Debtor filed its *Amended Chapter 11 Plan of*

[2] Doc. No. 70.
[3] Doc. No. 85. *See also* Doc. Nos. 122, 162.
[4] Doc. No. 151 and 166.
[5] Doc. No. 152 and 166.
[6] Doc. No. 151, pp. 3-4; Doc. No. 152, pp. 7-8.

Reorganization (the "Amended Plan") and *Amendment to the Disclosure Statement*.[7] The Amended Plan provided that USAmeribank's claim would be allowed in its entirety and that Debtor would pay USAmeribank $5,900.00 per month for 59 months. The Amended Plan also stated

> USAmeribank's claim is secured by inventory, equipment and receivables of the Debtor and non-Debtor collateral. USAmeribank will retain its pre-petition liens on the Debtor's collateral. The Debtor will not interfere with USAmeribank's collection efforts against non-Debtor obligors or non-Debtor collateral.[8]

In other words, under the Amended Plan, USAmeribank was free to liquidate its non-Debtor collateral and would also receive payments of $5,900.00 per month from Debtor.

Consistent with SunTrust's objection to the original Plan, the Amended Plan no longer classified SunTrust as a secured creditor. The Amended Plan proposed to pay unsecured creditors, including SunTrust, a total of $200,000.00 in equal quarterly installments over five years, with distributions to be made on a *pro rata* basis. In addition, the Amended Plan provided that the existing membership interests in Debtor would be cancelled and Debtor's equity interests would be issued to Roseman Enterprises, LLC, in exchange for its capital contribution of $20,000.00 and the deferral of payment of its administrative claim.[9] The Amended Plan and the Amendment to Disclosure Statement were served upon creditors.[10]

Debtor obtained the votes necessary for confirmation of the Amended Plan,[11] and on June 29, 2012, the Court entered its order confirming the Amended Plan (the "Confirmation Order").[12] After entry of the Confirmation Order, Debtor began making the $5,900.00 monthly payments to USAmeribank as required by the Amended Plan. However, Debtor's payments to USAmeribank were sporadic, prompting USAmeribank to file several motions to dismiss the case or convert it to a Chapter 7 case.[13] After the third such motion, the Court, at the parties' request, entered an order abating the motion pending a determination in state court on the amount of the deficiency owed by Mr. Roseman after the foreclosure of the Waters Property.[14] This would determine the balance of USAmeribank's claim against Debtor. The Court ordered that during the abatement period, Debtor was to make the monthly payments of $5,900.00 to its attorney to be held in escrow and that disbursements were to be made from the escrow account only upon further order of the Court.[15]

In November 2013, Debtor filed its *Motion and Memorandum for Relief from Order Abating USAmeribank's Third Motion to Dismiss or Convert Due to Failure to Make Plan Payments* (the "Motion for Relief").[16] Debtor, contending that USAmeribank's claim had been paid in full due to its recovery of non-Debtor collateral and the payments under the Amended Plan, requested a refund from USAmeribank. USAmeribank objected to the Motion for Relief because its deficiency claim had not yet been determined.[17]

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[7] Doc. Nos. 201 and 202.
[8] Doc. No. 201, p. 4.
[9] Doc. No. 201, p. 4.
[10] Doc. No. 212.
[11] Doc. No. 224. Although SunTrust objected to and cast a ballot rejecting Debtor's initial Plan (Doc. Nos. 183 and 185), it did not object to the Amended Plan and did not cast a ballot either accepting or rejecting the Amended Plan.
[12] Doc. No. 241.
[13] Doc. No. 251 (resolved by Doc. No. 258); Doc. No. 260 (withdrawn at Doc. No. 273); Doc. No. 280.
[14] Doc. No. 288.
[15] The Court notes that although payments from the escrow account held by Debtor's attorney were to be made only upon further Court order (Doc. No. 288), there has been neither a request for disbursement from that account nor entry of a further Court order. However, the funds held in escrow were monies to have been paid by Debtor to USAmeribank under the confirmed Amended Plan. If USAmeribank and Debtor have agreed otherwise, no other parties were affected.
[16] Doc. No. 293.
[17] Doc. No. 296.

SunTrust also filed a limited objection to the Motion for Relief.[18]

The Court scheduled a hearing on the Motion for Relief, but the hearing was continued several times by agreement of Debtor and USAmeribank. On March 4, 2015, Debtor and USAmeribank jointly moved to continue a scheduled hearing on the Motion for Relief; they advised the Court that USAmeribank and non-Debtor parties had reached a confidential settlement agreement on the amount of deficiency claim.[19] As a result of that settlement, USAmeribank's claim was satisfied and it was no longer necessary for Debtor to continue making the $5,900.00 monthly payments to USAmeribank.[20] Ultimately, Debtor and USAmeribank filed a joint motion to cancel the hearing on the Motion for Relief, which the Court granted.[21]

Nearly three and one-half years after the Court confirmed Debtor's Amended Plan, SunTrust now argues that because Debtor is no longer required to pay $5,900.00 per month to USAmeribank, it should be required to modify the Amended Plan to increase the distribution to unsecured creditors. SunTrust also contends that the post-confirmation settlement with USAmeribank results in a compromise and a *de facto* modification of the Amended Plan, both of which require court approval.

Legal Analysis

A. The confirmed plan is binding upon Debtor and its creditors.

Section 1141(a) states, with exceptions not relevant here,

> [T]he provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan.

In *In re Winn-Dixie Stores, Inc.*,[22] the court held that a creditor's treatment under a confirmed plan of reorganization creates a new contractual relationship between the debtor and its creditors. The court stated:

> The creditor's pre-confirmation claim is subsumed in and replaced by the new contract created by the confirmed plan; "each claimant gets a 'new' claim, based on whatever treatment is accorded to it in the plan itself." The initial claim filed by the creditor during the pendency of the case is dead, replaced by the new contractual obligation created by the creditor's treatment under the confirmed plan.[23]

Further, the doctrine of *res judicata* bars creditors from litigating claims or raising issues that could have been addressed prior to confirmation.[24] As discussed below, if SunTrust believed that the distribution to unsecured creditors was subject to increase if USAmeribank's claim was satisfied from another source, it should have raised that issue in the confirmation process.

B. SunTrust lacks standing to compel Debtor to modify its Plan.

It is important to recognize that upon confirmation of a Chapter 11, the debtor and the bankruptcy estate cease to exist. In their place stands the reorganized debtor, a new entity no longer subject to the jurisdiction of the bankruptcy court except as provided in the plan.[25] In this case,

[18] Doc. No. 297.
[19] Doc. No. 318.
[20] Because the settlement agreement is confidential, it is unclear whether the $5,900.00 monthly payment obligation ceased entirely or whether monthly payments are required in a lesser amount.
[21] Doc. Nos. 322 and 323.
[22] 381 B.R. 804 (Bankr. M.D. Fla. 2008).
[23] *Id.* at 807 (citing *In re New River Shipyard, Inc.*, 355 B.R. 894, 912 (Bankr. S.D. Fla. 2006)).
[24] *In re New River Shipyard, Inc.*, at 912.
[25] *In re Nobel Group, Inc.*, 529 B.R. 284, 290 (Bankr. N.D. Cal. 2015) (citing *In re Resorts Intern., Inc.*, 372 F.3d 154, 165 (3d Cir. 2004)); *In re Briscoe Enterprises Ltd., II*, 138 B.R. 795, 809 (N.D. Tex. 1992), *rev'd on other grounds*, 994 F.2d 1160 (5th Cir. 1993).

under the Amended Plan, the "reorganized debtor" is Roseman Enterprises, LLC. Thus, while the parties continue to refer to "Debtor" after confirmation of the Amended Plan, that entity no longer exists. Accordingly, the Court will hereafter refer to the post-confirmation entity as the "Reorganized Debtor."

Under § 1127(b), only the plan proponent or the reorganized debtor may seek modification of a plan after confirmation. A different standard applies to individual (i.e., non-corporate) Chapter 11 debtors. Similar to the provisions of Chapter 13,[26] § 1127(e) allows the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim to seek modification of a confirmed plan to, *inter alia*, increase or reduce the amount of payments to a particular class[27] or alter the amount of the distribution to a particular creditor provided for under the plan to take account of any payments made other than under the plan.[28]

But here, Debtor was not an individual debtor, and the provisions of § 1127(e) do not apply. And because SunTrust is neither the plan proponent nor the reorganized debtor, it lacks standing under § 1127(b) to seek modification of Debtor's confirmed plan. If SunTrust cannot modify the Plan itself, it cannot compel Debtor to do so.

C. Corporate debtors need not commit projected disposable income to the plan.

Even if SunTrust had standing to compel the modification of the Amended Plan, there is no provision of Chapter 11 to support such a request. SunTrust argues that because the financial projections filed in support of confirmation demonstrated that Debtor would be able to make all the payments called for under the Amended Plan, including $5,900.00 per month to USAmeribank, the Amended Plan should be modified to require Reorganized Debtor to make additional distributions to unsecured creditors.

But unlike individual Chapter 11 and Chapter 13 debtors, corporate Chapter 11 debtors are not required to commit projected disposable income to their plans.[29] Although Chapter 11 disclosure statements typically include financial projections, their purpose is not to provide information on projected disposable income, but to demonstrate that the plan is feasible as required by § 1129(a)(11).

The fact that the Reorganized Debtor may now have additional income as a result of Mr. Roseman's settlement with USAmeribank is irrelevant.[30] Here, the Amended Plan expressly contemplated that USAmeribank *would* obtain a recovery from non-Debtor sources. The time for creditors to consider the effect of the satisfaction of USAmeribank's claim from non-Debtor collateral on the Reorganized Debtor's post-confirmation cash flow was *before* they cast their confirmation ballots. As explained above, SunTrust is bound by the terms of the confirmed Amended Plan; the fact that the Reorganized Debtor settled its post-confirmation obligations with one creditor does not mean that other creditors, including SunTrust, are not bound by the terms of the confirmed Amended Plan.

D. Rule 9019 does not apply to post-confirmation reorganized debtors.

Federal Rule of Bankruptcy Procedure 9019(a), entitled "Compromise," states:

> On motion by the *trustee* and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct. (emphasis supplied.)

Although Rule 9019 speaks of the "trustee," Rule 9001(11) defines "trustee" to include a debtor in possession in a Chapter 11 case. Under §

[26] See § 1329(a).
[27] § 1127(e)(1).
[28] § 1127(e)(3).

[29] See §§ 1325(b)(1)(B) and 1129(a)(15)(B).
[30] Likewise, the Reorganized Debtor's current income, expenses, and cash flow are irrelevant to the "new contract" established by the confirmed Amended Plan.

1101(1), the term "debtor in possession" refers to the debtor. The debtor entity continues to exist during the pre-confirmation stage of the Chapter 11, but, as described above, when a Chapter 11 plan is confirmed, the debtor entity ceases to exist. The reorganized debtor may go about its business without further supervision or approval of the court, unless the court specifically retained jurisdiction over a particular matter.[31]

Here, the Confirmation Order retained jurisdiction "to ensure that the provisions and the intent of the Plan are carried out as specified in the Plan."[32] Section 10.01 of the Amended Plan provides for the Court's retention of jurisdiction only "to ensure that the purposes and intent of the Plan are carried out."[33] Article V of the Amended Plan does provide for court approval of the compromise of "disputed claims."[34] But USAmeribank's claim was not "disputed" within the meaning of section 5.01, as Debtor neither objected to the claim nor scheduled USAmeribank as a secured creditor with a disputed, contingent, or unliquidated claim.[35] Therefore, the Reorganized Debtor was not required to seek post-confirmation approval of the compromise between USAmeribank and Mr. Roseman, especially where it was not a party to that compromise.

Conclusion

For the forgoing reasons, the Court concludes (1) that the reorganized debtor under a confirmed Chapter 11 plan cannot be compelled by an unsecured creditor to modify the plan to account for the resolution of a secured creditor's claim that, in theory, frees up cash for distribution to unsecured creditors and (2) that the reorganized debtor is not required to seek court approval of the compromise between its principal and the secured creditor that resulted in the resolution of the secured creditor's claim. Accordingly, it is

ORDERED that the Motion is **DENIED**.

DATED: May 19, 2016.

/s/ Caryl E. Delano
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Caryl E. Delano
United States Bankruptcy Judge

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[31] *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991).
[32] Doc. No. 241, p. 3.
[33] Doc. No. 201, p. 8.
[34] Doc. No. 201, p. 6.
[35] Doc. No. 199, p. 11.