


ORDERED.

Dated: July 05, 2016


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

NORTHERN STAR DEVELOPMENT
AND CONSTRUCTION, LLC.,

Case No. 6:15-bk-05898-CCJ
Chapter 7

Debtor.

ORDER RESOLVING DISPUTED CHAPTER 7 TRUSTEE ELECTION

This case came before the Court on February 5, 2016, and again on February 17, 2016, for consideration of Kalamata Capital, LLC's ("Kalamata") Motion for Expedited Hearing to Resolve Trustee Election (Doc. No. 75; the "Motion"). By the Motion, Kalamata asks this Court to resolve the disputed Chapter 7 trustee election and appoint Sharmila Khanorkar as the permanent Chapter 7 Trustee. Knight Capital Funding II, LLC ("Knight") joins in the Motion (Doc. No. 76). Having considered the Motion, argument of the parties, and the record in this case, the Court denies the Motion for the reasons set forth below.

Background

In November 2015, the Debtor's Chapter 11 case was converted to Chapter 7.¹ Dennis Kennedy was appointed as interim Chapter 7 trustee,² and the initial 341 Meeting of Creditors was held on December 22, 2015 (the "Initial Meeting of Creditors"). Because the Debtor's corporate representative was unable to attend, the Initial Meeting of Creditors was continued to January 5, 2016 (the "Continued Meeting of Creditors").

Prior to the Initial Meeting of Creditors, Kalamata notified the United States Trustee ("UST") that it intended to request the election of a trustee at the Continued Meeting of Creditors. The day before the Continued Meeting of Creditors was scheduled to take place, Knight's in-house counsel sent the UST an email indicating that Knight also wished to participate in the election. Knight's in-house counsel advised the UST, however, that she was unable to attend the Continued Meeting of Creditors. Knight's email included: (i) a "Special Power of Attorney," allowing its in-house counsel to vote on Knight's behalf; (ii) a copy of Knight's filed Proof of Claim No. 6, listing a *secured* claim in the amount of \$216,461.58; and (iii) an Election Ballot Form, indicating that Knight, "a secured creditor," nominated Sharmila Khanorkar as the trustee.

At the Continued Meeting of Creditors, Kalamata requested a trustee election under Section 702(a) of the Bankruptcy Code. Kalamata was the only creditor present. Kalamata's counsel presented the UST a proxy titled "Special Power of Attorney," along with a copy of Proof of Claim No. 3, indicating Kalamata's *secured* claim in the amount of \$235,001.95. The UST provided Kalamata a ballot to determine its eligibility to vote as an unsecured creditor. Although Kalamata filed a secured proof of claim for the full amount of its claim, Kalamata's ballot indicated that, for the purposes of voting, it held both a secured and unsecured claim.

¹ Doc. No. 56.

² Doc. No. 57.

Kalamata based the amounts of its claims on the value of outstanding accounts receivables listed on the Debtor's Amended Schedule B,³ concluding that the secured portion of its claim was \$16,963.71, and the unsecured portion was \$218,038.24. Kalamata voted for Sharmila Khanorkar as trustee.

The Debtor objected on two main grounds.⁴ First, the Debtor objected to Kalamata's and Knight's ability to request an election because their proofs of claim were both filed as secured claims. Second, the Debtor objected to Knight's ability to cast a vote based on its non-attendance at the meeting of creditors. As a result, the UST filed the Report of Disputed Election of Chapter 7 Trustee,⁵ designating the alternative outcomes of the trustee election and prompting Kalamata to file the Motion.

The Court held two hearings on the Motion to determine whether Kalamata and Knight (collectively, the "Creditors") were eligible to vote to elect a Chapter 7 trustee. The Creditors argued that, even though their proofs of claim were filed as secured claims on the date of the election, the Court should permit the Creditors to retroactively waive portions of their secured claims and deem them eligible to vote in the election as unsecured creditors. The Creditors further argued that the Court should count Knight's vote, notwithstanding its non-appearance at the Continued Meeting of Creditors, either because (i) Knight's email to the UST of its proxy and ballot constituted a valid vote, or (ii) Knight's appearance at a subsequent continued meeting of creditors remedied its failure to attend the election.

According to the UST's Revised Calculations,⁶ in order to successfully elect a candidate as trustee in this case, the holders of at least \$209,963.09 in eligible unsecured claims must vote

³ Doc. No. 30.

⁴ The Debtor also made a limited objection based upon its lack of information regarding the qualifications of the nominated candidate.

⁵ Doc. No. 71.

⁶ Doc. No. 79.

in favor the candidate. The morning of the second hearing on the Motion, Kalamata amended its secured proof of claim to reflect a secured claim of \$117,500.98 and an unsecured claim of \$117,500.97, effectively waiving half of its security. That same morning, Knight also amended its secured proof of claim, originally filed in the amount of \$216,461.58, to indicate a secured claim of \$108,230.79 and an unsecured claim of “unknown”.

Discussion

Section 702 of the Bankruptcy Code governs the election of a permanent Chapter 7 trustee.⁷ Any such election must take place at the meeting of creditors.⁸ To be eligible to vote, a creditor must (i) hold an allowable, fixed, liquidated, and unsecured claim, (ii) not hold an interest materially adverse to other eligible creditors, and (iii) not be an insider.⁹ An eligible creditor may vote personally or by proxy.¹⁰ “A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner’s attorney in fact in connection with the administration of the estate.”¹¹ Where a creditor is represented by counsel, the creditor’s counsel often serves as its proxy.¹²

Rule 2003 of the Federal Rules of Bankruptcy Procedure provides, in relevant part, that a creditor is entitled to vote at the meeting of creditors if, at or before the meeting, the creditor filed a proof of claim or other writing evidencing a right to vote.¹³ Fully secured creditors are not eligible to vote.¹⁴ Similarly, undersecured creditors that have filed proofs of claim asserting a fully secured claim are not eligible to vote.¹⁵ Permitting such a creditor to vote in the absence

⁷ See 11 U.S.C. § 702.

⁸ See 11 U.S.C. § 702(b); Fed. R. Bankr. P. 2003(b)(3).

⁹ 11 U.S.C. § 702(a).

¹⁰ See Fed. R. Bankr. P. 2006.

¹¹ Fed. R. Bankr. P. 2006(b)(1).

¹² See e.g., *In re TBR USA, Inc.*, 429 B.R. 599, 604 (Bankr. N.D. Ind. 2010) (evidencing ballots cast in a trustee election on behalf of creditors by their attorney-proxies).

¹³ Fed. R. Bankr. P. 2003(b)(3).

¹⁴ *In re Michelex Ltd.*, 195 B.R. 993, 1007 (Bankr. W.D. Mich. 1996).

¹⁵ See *In re TBR USA, Inc.*, 429 B.R. at 617.

of an unsecured proof of claim would require the court to estimate the unsecured portion of the creditor's claim,¹⁶ and the result may not be a "fixed" unsecured claim within the meaning of Section 702.¹⁷

An election is valid only if creditors holding 20% of eligible unsecured claims request an election.¹⁸ A candidate is elected trustee only if creditors holding 20% of the eligible unsecured claims actually vote, and a majority of such claims is voted in favor of the candidate.¹⁹ The universe of claims, which serves as the basis for determining the 20% threshold, is calculated as of the date of the trustee election.²⁰ If a trustee is not successfully elected under Section 702, then the interim trustee becomes the permanent Chapter 7 trustee.²¹

In the present case, neither of the Creditors was eligible to vote in the trustee election because both of their proofs of claim were filed as fully secured as of the date of the election. Even if the Creditors had been eligible to vote as unsecured creditors, however, they still would not have successfully elected their nominated candidate. Neither Knight nor its proxy—Knight's in-house counsel—was present at the Continued Meeting of Creditors, as required by Section 702. Because Knight's email to the UST was not an acceptable substitute for its appearance at the election, the Court would not count Knight's vote as valid.²² To hold otherwise would suggest that it is proper for a creditor to effectively make the UST its proxy, which it most

¹⁶ *Matter of Lindell Drop Forge Co.*, 111 B.R. 137, 146 (Bankr. W.D. Mich. 1990) (rejecting the formula set forth in *Matter of Tartan Const. Co.*, 4 B.R. 655, 659 (Bankr. D. Neb. 1980), because it requires the estimation of the unsecured portion of an undersecured creditor's claim).

¹⁷ *See Matter of NNLC Corp.*, 96 B.R. 7, 11 (Bankr. D. Conn. 1989).

¹⁸ 11 U.S.C. § 702(b).

¹⁹ 11 U.S.C. § 702(c).

²⁰ While there are differing schools of thought on how the universe of claims should be calculated, *see In re Barkany*, 542 B.R. 662, 684 (Bankr. E.D.N.Y. 2015), it is undisputed that the pertinent date for calculating the universe of claims is the date of the election.

²¹ 11 U.S.C. § 702(d).

²² *See* Fed. R. Bankr. P. 2006(f) ("On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other appropriate action.").

certainly is not. Without Knight's vote, Kalamata's unsecured claim of \$117,500.97 falls short of the \$209,963.09 threshold of claims required to elect a trustee in this case.

"A bankruptcy court, within the exercise of its equitable powers, has the authority to reopen a § 341 meeting to permit a creditor to vote [in a trustee election.]"²³ Where a trustee election has been held and concluded, however, this Court does not find it appropriate to reopen the election for the purpose of allowing creditors to remedy disqualifying voting defects.²⁴ The circumstances under which a court should—and should not—reopen a trustee election were aptly described by the court in *Lindell Drop Forge Co.*:

Only when the circumstances warrant should a court order that a § 341 meeting be reconvened to allow another election to take place. Such circumstances must be demonstrated by the moving party under the Bankruptcy Code and Bankruptcy Rules and must be based on *more than the party's desire to achieve a different election result*.²⁵

In the absence of fraud, collusion, adverse interest, creditor misconduct, or any other relevant reason, the Creditors' desire to achieve a different election result is insufficient to support holding another election in this case.²⁶

The Court would consider the voting eligibility of an undersecured creditor that filed a proof of claim reflecting a waiver of some or all of its security in *advance* of a trustee election.²⁷ Those facts, however, are not presently before the Court. Further, the Court acknowledges that, even if an undersecured creditor does waive its security prior to an election, the creditor may still be disqualified from voting for holding an interest materially adverse to other eligible creditors.²⁸

²³ *Matter of Lindell Drop Forge Co.*, 111 B.R. 137, 143-44 (Bankr. W.D. Mich. 1990).

²⁴ *See id.* at 144; but *see Matter of Mission Carpet Mills, Inc.*, 10 B.R. 494 (B.A.P. 9th Cir. 1981).

²⁵ *Lindell Drop Forge Co.*, 111 B.R. at 144 (emphasis added).

²⁶ *See id.*

²⁷ *See id.* at 146 (citing *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 379, 108 S. Ct. 626, 634, 98 L. Ed. 2d 740 (1988)).

²⁸ *See In re Jotan, Inc.*, 236 B.R. 79 (Bankr. M.D. Fla. 1999).

The Court need not reach that issue in this case, as Kalamata and Knight simply were not eligible to vote on the day of the day of the trustee election.

Conclusion

For the reasons set forth above, it is ORDERED that:

1. The Motion is denied.
2. Interim trustee, Dennis Kennedy, shall serve as permanent Chapter 7 trustee.

Attorney Amanda Chazal Smith is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of this order.