UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:14-bk-1777-PMG

Marshall Creek Retail
Investors, LLC,

Debtor. Chapter 11

ORDER ON CONFIRMATION OF PLAN OF REORGANIZATION AND OBJECTION BY M. CLAY WINSLETT

THIS CASE came before the Court for hearing to consider confirmation of the Plan of Reorganization filed by the Debtor, Marshall Creek Retail Investors, LLC. (Docs. 53, 71). M. Clay Winslett (Winslett) filed an Objection to the Plan. (Doc. 81).

The Debtor's primary creditor is Acorn Loan Acquisition Venture III (Acorn). The Court finds that the Plan offers a reasonable probability that the Debtor will be able to make the payments proposed by the Plan, including the payments to Acorn, from its future operations and from the Capital Contributions provided by Guarantors of the Acorn debt.

Additionally, the Court finds that the Plan may enjoin Winslett from pursuing his claims against the Guarantors, because the injunction is fair and necessary to the Debtor's reorganization. Accordingly, Winslett's Objection should be overruled, and the Plan should be confirmed.

Background

The Debtor, Marshall Creek Retail Investors, LLC, is a limited liability company that is owned by a separate entity known as Marshall Creek Retail Holdings, LLC (Holdings). The membership

interests in Holdings are owned directly or indirectly by David P. Hill (Hill), Gary J. Davies (Davies), and M. Clay Winslett (Winslett).

The Debtor owns and operates a shopping center in St. Augustine, Florida. The shopping center was built in 2008, and includes an anchor space and eight additional tenant units. (Doc. 54, p. 5).

The Debtor filed a petition under Chapter 11 of the Bankruptcy Code on April 15, 2014.

On its schedule of real property filed in the Chapter 11 case, the Debtor listed the shopping center located on U.S. Highway 1 in St. Augustine (the Property), with a scheduled value of $1,823,148.00 and a scheduled lien in the amount of $5,436,508.38.

On its schedule of liabilities, the Debtor listed Acorn Loan Acquisition Venture III, L.P. (Acorn) as a creditor holding a secured claim on the Property in the amount of $5,436,508.38. Acorn has filed a secured Proof of Claim in the case in the amount of $6,496,960.80. (Claim No. 4).

On its schedule of co-debtors, the Debtor listed Hill, Davies, and Winslett as Guarantors of the debt owed to Acorn.

On August 13, 2014, the Debtor filed a proposed Plan of Reorganization. (Doc. 53). Generally, the Plan provided for the Debtor to continue its business operations, and for the Guarantors to form a new entity (Newco) which would fund a portion of the payments to creditors by making a Capital Contribution to the Reorganized Debtor.

On February 25, 2015, the Debtor filed a Modification to its Plan. (Doc. 71). The Modification is based on an approved settlement agreement between the Debtor, Acorn, Davies, and Hill. (Docs. 69, 77).

Under the Modification, Acorn would receive a Promissory Note "in the principal amount of $4,687,000.00, with monthly payments of principal and interest based on a 30 year amortization and

5% interest rate." The Note would mature in thirty months from the Effective Date of the Plan, with one twelve-month extension of the maturity date.

Under the Modification, the Reorganized Debtor would be owned by Newco, which in turn would be owned by those Guarantors who have consented to and paid their share of the Capital Contribution and other expenses. The Capital Contribution is defined in the Modification as the advances necessary to pay Allowed Administrative Expenses, to fund a Debt Service Account (including an amount sufficient to service the Acorn Note for one year), and to pay the 2014 real estate taxes.

Finally, the Modification provides that the "injunction/releases contained in Article VII shall not apply to Acorn." (Doc. 71, p. 6). Article VII of the Plan generally enjoins all persons or entities who hold impaired claims in the case from pursuing actions against the Guarantors who have paid their share of the Capital Contribution. The injunction extends for as long as the Reorganized Debtor remains in compliance with the Plan.

Discussion

The requirements for confirmation of a Chapter 11 plan are set forth in §1129(a) of the Bankruptcy Code. For a plan to be confirmed, for example, the debtor must show that the plan was proposed in good faith, that each rejecting claimant in an impaired class will receive at least as much as the claimant would receive in liquidation, that each class of claims has accepted the plan or is not impaired by the plan, and that the plan is feasible. 11 U.S.C. §1129(a)(3),(a)(7),(a)(8),(a)(11).

The Debtor's Plan in this case divides claims against the estate into four classes.

The creditor in Class 1 is Acorn. Acorn is the Debtor's primary creditor as the holder of a secured claim on the Debtor's shopping center Property in the approximate amount of $6,496,960.80. (Claim

No. 4). Acorn entered into a settlement agreement with the Debtor, which was approved by the Court and incorporated into the Debtor's Plan. (Docs. 69, 77). Acorn has accepted the Plan. (Doc. 85).

The creditor in Class 2 is the St. Johns County Tax Collector. Under the Plan Modification, the Tax Collector will be paid in full on the Effective Date of the Plan, and the class is therefore not impaired. (Doc. 71, p. 6).

The creditors in Class 3 are the holders of allowed unsecured claims. On its schedule of liabilities, the Debtor listed creditors holding general unsecured claims in the total amount of $13,860.98. (Doc. 30). The Plan provides for unsecured creditors to "receive equal monthly payments over twelve (12) months from the Effective Date, the total amount of which shall equal 100% of each Holder's Allowed Class 3 Claim." (Doc. 53, p. 15). Class 3 is impaired and has accepted the Plan. (Doc. 85).

The creditors in the last Class are the holders of membership interests in the Debtor. The Plan provides that the membership interests will be extinguished on the Effective Date, and that "[e]quity in the Reorganized Debtor will be sold to Newco in exchange for the Capital Contribution." (Doc. 53, p. 16).

The only Objection to confirmation was filed by Winslett as an interested party. (Doc. 81). Winslett primarily asserts that confirmation should be denied because (1) the Plan is not feasible, and because (2) he should not be enjoined from pursuing his contribution or subrogation claims against Hill and Davis.

A. Feasibility

The feasibility requirement is set forth in §1129(a)(11) of the Bankruptcy Code. For a Chapter 11 plan to be confirmed, that section requires the debtor to show that confirmation is not likely to be

followed by the debtor's liquidation or the need for further financial reorganization. 11 U.S.C. §1129(a)(11).

Although a determination of feasibility should be supported by facts, the section does not require a debtor to guarantee the success of its plan. Instead, a plan may be feasible if it offers a reasonable probability of success. In re Berry & Berry Wings, LLC, 2014 WL 6705779, at 6 (Bankr. M.D. Fla.)(quoting In re F.G. Metals, Inc., 390 B.R. 467, 476 (Bankr. M.D. Fla. 2008)). In other words, the debtor must show that it is more likely than not that it will be able to make all payments required by the plan. In re J.C. Householder Land Trust # 1, 501 B.R. 441, 448 (Bankr. M.D. Fla. 2013).

In this case, the Debtor's primary obligation under the Plan is the debt owed to Acorn. The Plan provides for Acorn to receive a Note in the principal amount of $4,687,000.00, and to be paid monthly payments of principal and interest with a scheduled maturity date thirty months from the Effective Date of the Plan.

The Plan proposes to fund payments to Acorn and the Debtor's other creditors from two sources.

First, the Debtor will continue to operate the shopping center and generate revenue from tenant leases. The Debtor is receiving rental income from existing leases of some of its retail spaces. Additionally, Davies states in a Confirmation Affidavit in support of the Plan that the Debtor "has several viable prospects for a long term lease with a new tenant," and that the Debtor "will soon secure a new anchor tenant." (Doc. 86, ¶ 13). At the confirmation hearing, Davies testified that the anchor space is marketable, useable space, and that the Debtor is in active negotiations with several prospective tenants.

Second, the Debtor will receive a Capital Contribution from Davies and Hill. The term Capital Contribution is defined in the Plan Modification to mean deposits from Davies and Hill to "(a) pay

Allowed Administrative Expenses; (b) fund the Debt Service Account; and (c) pay the 2014 real estate taxes." (Doc. 71). The Debt Service Account includes an amount sufficient to fund the monthly payments to Acorn for one year, and Davies and Hill agreed to continue to fund the payments thereafter until an anchor tenant is found for the Property.

According to Davies, "the funds for the Debt Service Account are held in escrow by the Debtor's Counsel." (Doc. 86, Confirmation Affidavit, ¶ 33). At the confirmation hearing, a trust account statement for the law firm was admitted into evidence. (Debtor's Exhibit 1). The statement reflects a balance in the account in the amount of $480,271.98. The Debtor represented at the hearing that the amount is sufficient to fund the attorney's fees for the Debtor's counsel, the Debtor's real property taxes in the approximate amount of $101,000.00, and the Debt Service Account for one year.

In other words, Davies and Hill have fulfilled their commitment to "pre-pay" the Debtor's first-year obligations under the Plan, and the cash to make the payments is in a trust account for that purpose.

In the Confirmation Affidavit in support of the Plan, Davies states that the revenue from the Debtor's tenant income, combined with the Capital Contribution from Davies and Hill, will be sufficient to fund all payments under the Plan. (Doc. 86, ¶ 13).

"In close cases, the better approach is to give the debtor an opportunity to demonstrate feasibility by performance." In re Berry & Berry Wings, 2014 WL 6705779, at 6(citing In re Gelin, 437 B.R. 435, 438 n.9 (Bankr. M.D. Fla. 2010)).

The Court finds that the Plan offers a reasonable probability that the Debtor will be able to make the payments proposed by the Plan, including the payments to Acorn, from its future operations and

from the Capital Contribution provided by Davies and Hill. The Plan satisfies the feasibility requirement of §1129(a)(11) of the Bankruptcy Code, and Winslett's Objection should be overruled.

B. Injunction

Winslett's second objection relates to Article VII of the Plan, which enjoins certain actions against the Guarantors who have paid their share of the Capital Contribution. Winslett asserts that he should not be enjoined from pursuing his claims for contribution or subrogation against Davies and Hill.

In appropriate circumstances, Chapter 11 plans may include injunctions that prohibit actions against non-debtors such as guarantors. In re J.C. Householder Land Trust # 1, 501 B.R. at 457-58. Courts generally have found that such injunctions or third-party releases are permissible in unusual cases, as long as they are fair and necessary to the debtor's reorganization. In re Scrub Island Development Group Limited, 523 B.R. 862, 876 (Bankr. M.D. Fla. 2015)(citing In re Transit Group, 286 B.R. 811, 817-18 (Bankr. M.D. Fla. 2002)). In determining whether an injunction is fair and necessary, courts consider a number of factors involving the particular plan and third party. In re Scrub Island, 523 B.R. at 876.

In this case, section VII.C.2 of the Plan enjoins claimants or interest-holders from "commencing or continuing in any manner any action or proceeding against the Guarantors." By its terms, the injunction extends only "to the Guarantors who contribute to the Capital Contribution." (Doc. 53, § VII.C.2).

The injunction begins on the confirmation date, and is effective "as long as the Reorganized Debtor are [sic] not in default of any obligation under the Plan or any agreements contemplated by the Plan." (Doc. 53, p. 22). See also, Doc. 53, p. 23 (The injunction is effective "for so long as

Reorganized Debtor remain in compliance with the Plan or any agreements contemplated by the Plan.").

The Court finds that the injunction is fair and necessary to the Debtor's reorganization. In re Scrub Island, 523 B.R. at 876.

First, the injunction is fair because the benefitted Guarantors are contributing substantial assets to the reorganization. Hill and Davies signed a Term Sheet with Acorn, the holder of the mortgage on the Debtor's Property, which provided for a Note payable to Acorn in the amount of $4,687,000.00. Paragraph 5 of the Term Sheet provides:

> 5. Upon Effective Date of Plan, Guarantors will cause amount equal to one-year's payment to be placed with Acorn (the "Debt Service Account" or "DS"). Acorn's lien will extend to the Debt Service Account and monthly payments will be drawn directly from such account until tenant lease payments commence. If no anchor tenant is in place, guarantors shall fund the amount again (for 12 months) each November 1, commencing on 11/1/2015 and continuing thereafter (in an amount so the remaining balance equals the amount needed for 12 months of payments).

(Doc.71, Exh. A). Additionally, in paragraph 11 of the Term Sheet, Davies and Hill agreed to advance the amount required to pay the 2014 and 2015 real property taxes for the Debtor's Property. (Doc. 71, Exh. A).

Significantly, Davies and Hill have already contributed more than $500,000.00 under the agreement, as evidenced in part by the sum of $480,271.98 that is currently held in the Debtor's counsel's trust account. (Debtor's Exhibit 1).

Second, the injunction is essential to the Debtor's reorganization. The Debtor's settlement with Acorn is the centerpiece of the reorganization. (Doc. 71). The settlement requires Davies and Hill to fund the Debt Service Account, which includes an amount sufficient to make the monthly payments to Acorn for one year. Accordingly, the injunction is necessary to protect Davies and Hill from the

expense and diversion of future litigation, so that they can make the financial contributions under the Plan.

In addition to the initial funding obligations, Davies testified at the confirmation hearing that any pending litigation against the contributing Guarantors would impair their ability to refinance the Acorn indebtedness before the restructured debt matures. See In re Transit Group, Inc., 286 B.R. 811, 818 (Bankr. M.D. Fla. 2002)(Third-party protection was fair and necessary where the third party agreed to fund the debtor's plan through exit financing.).

The Court finds that the Plan may enjoin Winslett from pursuing his claims against the Guarantors of the debt owed to Acorn, because the injunction is fair and necessary to the Debtor's reorganization.

Conclusion

The matters before the Court are confirmation of the Debtor's Plan of Reorganization, and Winslett's objection to confirmation.

The Debtor's primary creditor is Acorn. The Court finds that the Plan offers a reasonable probability that the Debtor will be able to make the payments proposed by the Plan, including the payments to Acorn, from its future operations and from the Capital Contributions provided by Guarantors of the Acorn debt.

Additionally, the Court finds that the Plan may enjoin Winslett from pursuing his claims against the Guarantors, because the injunction is fair and necessary to the Debtor's reorganization. Accordingly, Winslett's Objection should be overruled, and the Plan should be confirmed.

Accordingly:

IT IS ORDERED that:

1. The Objection to Debtor's Plan of Reorganization filed by M. Clay Winslett is overruled.

2. Counsel for the Debtor is directed to submit a proposed Order Confirming the Debtor's Plan of Reorganization within fourteen (14) days of the date of this Order.

DATED this 18th day of May, 2015.

BY THE COURT

PAUL M. GLENN
United States Bankruptcy Judge