

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:08-bk-08812-ABB
Chapter 11

SEBASTIAN RIVER HOLDING CORP.,
Debtor.

ORDER DENYING CONFIRMATION

This matter came before the Court on the Debtor's Plan of Reorganization, Motion for Confirmation, Ballot Tabulation, and Confirmation Affidavit (Doc. Nos. 46, 90, 103, 104, 105) filed by Sebastian River Holding Corp., the Debtor-in-Possession herein ("Debtor"), and Theresa Guest's Objection to Confirmation (Doc. No. 85). Evidentiary hearings were held on April 1, 2009 and May 12, 2009 at which Thomas Sebastian ("Sebastian"), the President and sole shareholder of the Debtor, counsel for the Debtor, Theresa Guest, and her counsel appeared.

The Debtor requests confirmation of its Plan pursuant to the cramdown provisions of 11 U.S.C. Section 1129(b). Confirmation is due to be denied for the reasons set forth herein.

Background

The Debtor is a single asset real estate business consisting of 1.3 acres located at 2445 North Courtenay Parkway, Merritt Island, Florida. A car wash, convenience store, and an auto repair shop are situated on the property. Two tenants, Start Car Company and Meineke Car Care, and a sub-tenant, Dunkin Donuts, operate on the property. Rental income is generated from the tenancies and is the Debtor's sole source of income. Sebastian manages the Debtor's affairs.

Theresa Guest is the General Partner of Cocoa Beach Partners (collectively, "Guest"), which holds the mortgage on the Debtor's real property. The contract rate of interest on the underlying Promissory Note is 12 % per annum. Guest obtained a Florida State Court Summary Final Judgment of Foreclosure of \$1,029,571.25 against the Debtor prepetition. Interest accrues on the judgment at the statutory rate of 11% per

annum. The Debtor's bankruptcy filing on September 29, 2008 stayed Guest's foreclosure sale.

Guest, pursuant to the mortgage and foreclosure judgment, holds an allowed secured claim of \$1,034,790.47, Claim No. 11. The Plan provides: (i) Guest will retain her lien; (ii) she will receive deferred cash payments in the amount of her claim together with interest at a rate equal to 2% over the national prime rate as of the Plan's effective date; and (iii) Guest's note will balloon in five years.

The claims of Classes VII, VIII, and Class IX are impaired. Classes VII and VIII consist of the Brevard County Tax Collector's property tax claims for 2006 and 2007. The Brevard County Tax Collector did not vote on the Plan. Class IX consists of Guest's secured claim and she voted to reject the Plan. The confirmation requirements of 11 U.S.C. Section 1129(a)(8) have not been met and the Debtor seeks to cramdown Guest's secured claim and the property tax claims pursuant to 11 U.S.C. Section 1129(b).

The Debtor asserts Guest is entitled to a maximum interest rate of 5.25% on her allowed claim. Guest objects to the proposed interest rate and payment term. She asserts she is entitled to an interest rate of between 11% and 15%. She asserts the five-year payment term is not fair and equitable given the mortgage note, by its terms, is due and payable on March 1, 2009.

An initial confirmation hearing was held on April 1, 2009. The Debtor's primary counsel was not available and the hearing was continued for the parties to discuss options for resolving the cramdown interest rate and repayment term disputes. The parties were directed to explore an earlier purchase offer presented to the Debtor. The Debtor recognizes a sale of its assets or a refinancing of the mortgage are its probable viable options.

They could not reach a resolution and the confirmation hearing recommenced on May 12, 2009. The issue for determination is what interest rate on Guest's claim constitutes fair and equitable treatment pursuant to 11 U.S.C. Section 1129(b).

Cramdown Interest Rate

Section 1129(b)(1) requires, as to impaired non-accepting classes, a plan “does not discriminate unfairly, and is fair and equitable, with respect to each class . . .” 11 U.S.C. § 1129(b)(1). A plan, to be fair and equitable with respect to a class of secured claims, must provide each claimholder retain its lien and:

receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder’s interest in the estate’s interest in such property.

11 U.S.C. § 1129(b)(2)(A)(i)(II).

The Debtor proposes in the Plan to pay interest on Guest’s claim at the cramdown rate of 5.25%, calculated as the prime rate of 3.25% as reported by The Wall Street Journal plus a risk factor rate of 2%. The Debtor proffered at the May 12, 2009 hearing two alternative proposals whereby the Debtor pays Guest prime plus a risk factor rate of 3% and 4% on a claim of \$1,034,790.47 with a thirty-year amortization and a five-year balloon. The annual debt service on Guest’s claim at a two percent risk factor rate is \$99,821.40. The annual debt service at a three percent risk factor rate is \$106,470.36. The annual debt service at four percent risk factor rate is \$113,354.64.¹ An amended Plan has not been presented.

The debt service amounts are calculated from the Debtor’s cash on hand plus rental income less operating expenses. Sebastian testified the debt service cash requirements for increasing the risk factor rates would be met by corresponding reductions of his salary. He testified the rental income projections do not include the rent increases expected from the Debtor’s tenants. The expected rent increases have not been accounted for by the Debtor.

The Debtor bases its interest rate proposals on Till v. SCS Credit Corp., 541 U.S. 465 (2004), in which the Supreme Court of the

United States adopted the “formula rate” or “prime-plus rate” approach in setting the cramdown interest rate on the Chapter 13 debtor’s secured vehicle loan. Factors relevant to the formula rate approach include:

The appropriate size of that risk adjustment depends, of course on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan.

Till, 541 U.S. at 479. The Supreme Court rejected in Till the coerced loan rate, the presumptive contract rate, and cost of funds rate approaches.

The Debtor asserts Till is controlling and the formula rate approach applies and establishes a risk factor upward adjustment range of one to three percent.

The Debtor proffered no financing is available to refinance the mortgage or to determine a market interest rate. Sebastian testified he went to “extreme” efforts to find financing to pay off Guest’s mortgage, but the only specifics he provided is one lender offered an interest rate of 10% and requested a finder’s fee of \$200,000.00. Sebastian testified he had not made any attempt to obtain financing within ninety days of April 1, 2009, the commencement of the confirmation hearing, because he “is not credit-worthy.”

Sebastian testified the maximum monthly amount the Debtor can pay Guest is \$9,000.00, which correlates to a per annum interest rate of approximately 4.0%.

Guest asserts she is entitled to interest at a per annum rate between 11% and 15%. She bases her position on assorted case law and the expert testimony of James Guldi, a bank loan officer who discussed generally lending rates in Central Florida two years ago and provided no specific opinions as to the Debtor. Guest’s position appears to be an amalgamation of the coerced loan rate and presumptive contract rate approaches.

The Till decision involved the cramdown of a secured vehicle debt in a Chapter 13 proceeding and the Supreme Court

¹ Debtor’s May 12, 2009 Exh. Nos. 3-5.

distinguished cramdown in a Chapter 13 proceeding from cramdown in Chapter 11 stating:

Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce. In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.

Till, 541 U.S. at 477 n.14.

The Supreme Court in Till did not set a range for risk adjustment: “We do not decide the proper scale for the risk adjustment, as the issue is not before us.” Id. at 480.

This Court has employed the formula approach in establishing cramdown interest rates in Chapter 13 proceedings and there is no established upward risk adjustment interest rate range. The Court has set an upward risk adjustment of 5% in various cases. *See, e.g., In re Chiodo*, 261 B.R. 499, 503-504 (Bankr. M. D. Fla. 2000) (setting the cramdown interest rate on vehicle lender’s secured claim at 11.750%, calculated by using the interest rate on a five-year treasury bill of 6.75% and adjusting upwards by a “high-risk premium of 5%”).

The Court must rule on the Plan as presented, which provides for a cramdown interest rate of prime plus a risk factor rate of two percent. The Plan has not been amended. The alternative risk factor rate scenarios presented by the Debtor do not constitute amended plans. Such scenarios, even if they were before the Court in the form of an amended plan, do not meet the minimum requirements of 11 U.S.C. Section 1129(b).

Risk factor interest rates of two percent, three percent, and four percent are insufficient to meet the requirement of fair and equitable treatment of Guest’s allowed claim pursuant to 11 U.S.C. Section 1129(b)(2). They do not fairly compensate Guest for her risk and exposure. An interest rate payment of prime plus

two percent, three percent, or four percent does not result in payment of the present value of Guest’s allowed claim.

The requirements of 11 U.S.C. Section 1129(b) have not been met. The Plan is not confirmable. Confirmation is due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Theresa Guest’s Objection to Cramdown (Doc. No. 85) is hereby **SUSTAINED**; and it is further

ORDERED, ADJUDGED and DECREED that the Debtor’s Motion for Confirmation (Doc. No. 90) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that the Debtor’s Plan is not confirmable pursuant to 11 U.S.C. Section 1129(a) or Section 1129(b) and confirmation is hereby **DENIED**.

Dated this 14th day of May, 2009.

/s/Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge