UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

WELCOME HOSPITALITY, LLC, Case No.: 3:11-bk-4071-JAF
Chapter 11

Debtor.

_____/

ORDER GRANTING EMERGENCY MOTION TO REOPEN CHAPTER 11 CASE AND GRANTING EMERGENCY MOTION TO COMPEL COMPLIANCE WITH COURT ORDERS

This case is before the Court on the Debtor's Emergency Motion to Reopen the Chapter 11 Case (Doc. 179), Emergency Motion to Compel Compliance with Court Orders (Doc. 180), and brief in support thereof (Doc. 186, collectively, the "Motions"). Class II Secured Creditor Ittleson Trust 2010-1 ("Ittleson") filed a response in opposition to the relief sought by the Motions (Doc. 187).[1] The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A).

On November 20, 2012, the Court held an evidentiary hearing on the Motions. At the conclusion of the hearing, the Court took the matter under advisement. For the reasons that follow, the Motions will be granted to the extent set forth herein.

[1] The Debtor moved to strike Ittleson's response as untimely filed (Doc. 188). As the response was only one day late, due in part to a typographical error contained in the Order directing response (*see* Doc. 182), the motion to strike Ittleson's response is denied.

I. Background

Previously, on August 9, 2012, the Court held a hearing on Ittleson's Amended Emergency Motion to Reopen the Chapter 11 Case and for Declaratory Relief (*see* Doc. 174, "Minutes"; *see also* Doc. 169, "Ittleson's Motion"). On August 21, 2012, the Court entered an Order Denying Ittleson's Motion (Doc. 177). The facts and conclusions set forth in the Court's August 21, 2012 Order Denying Ittleson's Motion (Doc. 177) are incorporated herein by reference. For the sake of clarity, however, the Court will reiterate ceratin relevant facts below.[2]

On June 1, 2011, the Debtor filed a voluntary Chapter 11 petition (the "Petition"). Ittleson holds a first mortgage on the Debtor's real property, located at 341 Park Avenue, Orange Park, Florida 32073 (the "Real Property"), by virtue of a note in the amount of $5,230,000.00 and a mortgage and security agreement (Doc. 54-1, the "Mortgage"). Ittleson also has a security interest in the Debtor's business property. On June 22, 2011, Ittleson filed a proof of claim in the amount of $5,770,860.95.

On June 28, 2011, the Debtor filed a Motion to Value Real Property pursuant to 11 U.S.C. § 506 (Doc. 34). In the motion, the Debtor asserted that, based on an appraisal, the "Liquidated, Going Concern" value of the Real Property was $1,370,000.00 (Doc. 34 at 2; *see also* Doc. 34, Exhibit B, "Summary Appraisal Report"). On September 14, 2011, Ittleson filed an amended response in opposition to the Motion to Value Real Property (Doc. 81). In its amended response (Doc. 81), Ittleson asserted that it opposed the Debtor's estimation of the

[2] At the August 9, 2012 hearing, counsel for Ittleson entered into evidence two (2) separate packets of documents (Exhibit A and Exhibit B). This evidence was relied upon by the parties at the November 20, 2012 hearing. Additional evidence was not introduced. Therefore, when necessary, the Court will refer to the evidence submitted at the August 9, 2012 hearing. As such exhibits contain consecutively numbered tab-markers, each exhibit will be referred to by the exhibit letter (A or B) along with the corresponding tab number.

value of its secured claim because, *inter alia*, "the [Debtor's] appraisal does not account for the personal property of the Debtor [*i.e.*, business collateral]" (Doc. 81 at 3). A hearing on the motion was scheduled for May 23, 2012 (Doc. 98).[3]

Previously, on or about August 31, 2011, and subsequent to the Petition Date, the Debtor received from the Florida Department of Transportation (the "FDOT") a document entitled "Notice to Owner" (Ex. A-4 at 1-7). This document advised the Debtor that the Real Property was required for certain road construction improvements and that it was slated to be the subject of eminent domain proceedings (*id*.). On October 14, 2011, the Debtor contacted the FDOT and inquired as to when an offer in settlement for the Real Property might be forthcoming (Ex. A-3 at 14). The Debtor was informed by the FDOT that an offer would likely be made to it either in December 2011 or the first of the year, 2012 (*id*.).

On November 15, 2011, Ittleson filed an Objection to the Debtor's Disclosure Statement and Plan of Reorganization (Doc. 96). Ittleson objected to the Debtor's proposal that the allowed secured claim of Ittleson be limited to $2,500,000.00 (Doc. 96). Ittleson's bases for the objection were: (1) "[t]he property appraisers office in the county where the property is located value[d] the real property alone at $3,000,000.00"; and (2) Ittleson "obtained an appraisal of the property for $2,800,000.00" (*id*. at 2). On December 14, 2011, the Debtor filed an amended Chapter 11 plan of reorganization (Doc. 101, the "Amended Plan"). In the Amended Plan, the Debtor proposed that the allowed secured claim of Ittleson be $2,600,000.00 (Doc. 101 at 3).

Thereafter, on January 13, 2012, the Debtor submitted a proposed order granting the Motion to Value Real Property (Doc. 106). The proposed order provided that, based on "the

[3] A hearing on the Motion to Value Real Property (Doc. 34) was originally scheduled for December 7, 2011; however, it was later continued to May 23, 2012 (Doc. 98).

agreement of the parties," Ittleson's secured claim shall be allowed in the amount of $2,625,000.00, with any remainder of its allowed claim being treated as unsecured debt (Doc. 106 at 1).[4]

On or around January 26, 2012, Ittleson, apparently for the first time, was made aware of the August 31, 2011 Notice to Owner by way of the FDOT's appraiser, John Veasey ("Mr. Veasey"), who contacted counsel for Ittleson, Frank P. Delia ("Mr. Delia"), and informed Mr. Delia of the FDOT's plans for a possible total taking of the Real Property (Doc. 164 at 2). Mr. Veasey advised Mr. Delia to contact the FDOT's Acquisition Administrator, Karen Waite ("Ms. Waite"), if he desired more information (*id.*). On February, 14, 2012, Mr. Delia contacted Ms. Waite, who informed Mr. Delia that the Real Property was "slated to be condemned" and that an "offer would be made shortly" (*id.*). In addition, Mr. Delia was apparently "aware that an appraisal [by the FDOT] was being prepared" (Ex. A-3 at 13).

That same day, February 14, 2012, counsel for Ittleson filed an objection to the Debtor's Amended Plan (Doc. 117, the "Objection"). In the Objection, counsel for Ittleson stated, in pertinent part, the following:

> On February 14, 2012, Karen Waite, the Acquisition Administrator from the Florida Department of Transportation (District 2), informed the undersigned counsel that the property is slated to be condemned and the Debtor will be conveyed an offer within six weeks [*i.e.*, on or about March 27, 2012]. As a result of the foregoing, Secured Creditor [Ittleson] does not believe the Debtor will be able to complete its Plan payments due to the pending matter with the Florida Department of Transportation. Secured Creditor does not waive its rights in the subject property and desires to be protected with language in any Order Confirming the Plan to alleviate the need for Secured Creditor to get approval from this Court to proceed to be compensated by the Florida Department of Transporation [sic] if in fact the property is deemed condemned.

[4] Since a hearing on the Motion to Value Real Property was scheduled to occur on May 23, 2012, the Court did not enter the proposed order at that time.

(Doc. 117 at 3, ¶¶ 7-9).

A continued confirmation hearing was held on March 9, 2012 (*see* Doc. 126). At the hearing, both counsel for the Debtor and counsel for Ittleson (Mr. Delia) appeared. Debtor's counsel stated, with respect to the condemnation/eminent domain matter: (1) the FDOT was planning a five-year roadway improvement program; (2) over twenty (20) businesses in the area would be impacted; (3) an offer in settlement had not yet been made; and (4) the FDOT had not yet filed an eminent domain action (Doc. 171-1 at 4).

Counsel for the Debtor additionally represented that he and Mr. Delia "agreed to go forward with confirmation" (*id*.). Further, counsel for the Debtor stated: "We will put language in the [proposed confirmation] order that Your Honor [the Court] will retain jurisdiction as it relates to any eminent domain action which may occur. But as of right now that's hearsay, speculative. We don't know what's going to - - " (*id*.).[5]

Counsel for the Debtor additionally requested that the agreed proposed order on the Motion to Value Real Property, *supra*, which valued Ittleson's secured claim at $2,625,000.00, be entered by the Court (*id*. at 7). That same day, March 9, 2012, based on the representations of the parties at the continued confirmation hearing, the agreed proposed order on the Motion to Value Real Property was entered by the Court (Doc. 128). The Order set the secured portion of Ittleson's claim at $2,625,000.00, with the remainder of its allowed claim being treated as unsecured debt (Doc. 128 at 1). This Order was neither objected to, nor appealed by Ittleson.

[5] Nothing further was stated by counsel for the Debtor with respect to the status of the eminent domain matter (*see* Doc. 171-1 at 4-8). The evidence presented at both the August 9, 2012 and November 20, 2012 hearings was that, until an eminent domain action is actually filed, it is not a certainty that a taking will occur.

On March 22, 2012, the Court entered the Order Confirming the Debtor's Amended Plan of Reorganization (Doc. 139, the "Confirmation Order"). The Confirmation Order provided, with respect to Ittleson's allowed secured claim, that: (1) Ittleson shall agree to abate all actions to collect against the personal guarantors on the Mortgage to the Real Property; (2) upon an uncured default under the terms of the Confirmed Plan, Ittleson "shall be able to resume any and all collection efforts against any and all of the personal guarantors for the full amount owed under the Original Loan Documents"; (3) the Debtor shall keep Ittleson "duly informed" regarding any progress in any condemnation/eminent domain action; (4) any and all communication(s) regarding the condemnation/eminent domain action "should be forwarded" to Ittleson; (5) the language in Section A.3 of the Mortgage, *Condemnation and Other Awards*, "shall remain in full force and effect"; and (6) the Court retains jurisdiction to enforce and determine the distribution of any funds received pursuant to any condemnation action for a reasonable period of time (Doc. 139 at 3-5; *see also* Doc. 54-1 at 9, the "Condemnation Clause").

The Condemnation Clause of the Mortgage, *supra*, provides, in pertinent part, that any award or settlement payable to the Debtor by virtue of its interest in the Real Property (subject to the lien and security interest of the Mortgage) shall be, and is assigned, to Ittleson to be disbursed at Ittleson's option for either: (1) reconstruction or repair of the mortgaged property; or (2) to be applied to the payment of sums secured by the Mortgage (Doc. 54-1 at 9).

On May 8, 2012, the Debtor received from the FDOT a written offer in settlement for the Real Property in the amount of $3,544,600.00 (Ex. A-4 at 9-12). On July 16, 2012, Mr. Delia wrote counsel for the Debtor, stating that it was Ittleson's position that "all monies derived from the eminent domain matter belongs [sic] to it [Ittleson] as the secured creditor as outlined in the

condemnation clause of the controlling loan documents" (Ex. B-8 at 1). Mr. Delia demanded that "the full award be assigned over to [Ittleson] immediately" (*id*.). On July 27, 2012, Mr. Delia filed the Amended Emergency Motion to Reopen Chapter 11 Case and for Declaratory Relief (Doc. 164), which, as noted above, the Court denied on August 21, 2012 (Doc. 177). One of the reasons the Court denied the motion was because the Court found it was filed prematurely (*see id*. at 10-11).[6]

In the Motions, the Debtor states that an eminent domain action has now been filed by the FDOT and that $3,500,000.00 is to be put in escrow for the state's taking of the Real Property (Doc. 180 at 2). It is the Debtor's position that Ittleson's claim against the condemnation proceeds is limited to Ittleson's allowed secured claim in the amount of approximately $2,625,000.00. Ittleson, on the other hand, maintains it is entitled to the entire eminent domain award of approximately $3,500,000.00.[7] At present, the case is closed due to the entry of a Final Decree (Doc. 159). It should be noted that the Debtor is current with all Plan payments.

II. Analysis

By way of the Motions, the Debtor requests the Court to: (1) reopen the bankruptcy case; (2) require Ittleson to provide the payoff amount of the remaining debt on the Real Property, limited by the amount of Ittleson's secured claim of approximately $2,625,000.00; (3) require Ittleson to apply $100,000.00 in post-petition payments to the Debtor's indebtedness; and (4) require Ittleson to pay the Debtor's attorneys' fees and costs associated with its having to bring the Motions (Doc. 180 at 3).

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[6] At the time, an eminent domain action had not yet been filed by the FDOT.

[7] The ultimate award may end up being more than $3,500,000.00; however, it will not be less.

11 U.S.C. § 350(b) provides: "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." In addition, the reopening of a case is within the sound discretion of the court, "and a case should only be reopened

upon a demonstration of compelling circumstances which justify the reopening." *In re Bearden*, 204 B.R. 73, 74 (Bankr. N.D. Fla. 1996).

Here, the Court finds compelling circumstances exist to justify reopening the case and granting the relief requested in the Motions. To illustrate, in the Confirmation Order, the Court reserved jurisdiction to enforce and determine the distribution of funds received pursuant to any condemnation/eminent domain action "for a reasonable time" (Doc. 139 at 5). At present, the parties dispute the amount of the condemnation award Ittleson is entitled to receive. For its part, Ittleson argues the entire award of $3,500,000.00 should be assigned to it in partial satisfaction of the pre-petition debt, which is in excess of $5,000,000.00 (Doc. 187 at 7, 9-10). The Debtor, on the other hand, argues Ittleson's recovery under the eminent domain action is limited by Ittleson's secured claim of $2,625,000.00 (Doc. 186 at 2-4). For the reasons that follow, the Court agrees with the Debtor.

11 U.S.C. § 1141, entitled "Effect of Confirmation" provides, in part:

> (a) ... [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.
>
> (d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) ... whether or not—
>
> (i) a proof of the claim based on such debt is filed or deemed filed ...;

(ii) such claim is allowed under section 502 of this title; or
(iii) the holder of such claim has accepted the plan.[8]

The Condemnation Clause of the Mortgage provides that any eminent domain award must be assigned and turned over to Ittleson, "subject to the lien and security interest of this Mortgage" (Doc. 54-1 at 9). Ittleson puts great stress upon the word "this" with respect to the Mortgage, inferring that the language in the Confirmed Plan regarding any condemnation award was meant to apply to the mortgage debt as it existed pre-petition (Doc. 187 at 9-10). The Court, however, is not persuaded.

The language of the Confirmation Order is clear on its face. The Confirmed Plan reduced the amount of the debt secured by the Mortgage to the amount of Ittleson's allowed secured claim (*i.e.*, $2,625,000.00). This amount was agreed to by the parties.[9] Although counsel for Ittleson vehemently contends the Debtor deceived both he and the Court with respect to the eminent domain matter, as noted in the Court's August 21, 2012 Order Denying Ittleson's Amended Emergency Motion to Reopen the Chapter 11 Case and for Declaratory Relief (Doc. 177), the Court finds no such deception.

Although it was several months subsequent to the Debtor receiving the Notice to Owner that Ittleson was made aware of the possible eminent domain action, Ittleson nevertheless was aware of the potential for a total taking in time for it to protect its interests in any manner it deemed fit. For instance, Ittleson was advised of a possible eminent domain action prior to entry of the agreed order setting the value of Ittleson's allowed secured claim (Doc. 128). This order was entered on March 9, 2012, and it set the secured portion of Ittleson's allowed claim at

[8] Ittleson accepted the Plan in this instance.

[9] It should be noted that Ittleson's appraiser valued the Real Property at $2,800,000.00 (*see* Doc. 96 at 2).

$2,625,000.00, with the remainder to be treated as unsecured debt (*id*. at 1). This Order was neither objected to, nor appealed by Ittleson.

The testimony at the November 20, 2012 hearing was that counsel for Ittleson played an active role in drafting the language contained in the Confirmation Order regarding the potential for condemnation proceeds. This language makes no mention of any contingencies regarding payment of the Debtor's pre-petition debt should a condemnation award be greater than Ittleson's allowed secured claim (*see* Doc. 139 at 3-5). By contrast, the Court would note that the language regarding the personal guarantors to the Mortgage provides as follows: "All current personal guarantees that relate to the Loan Documents will remain in place, in full force and effect *for the entire pre-petition debt*." (*Id.* at 3) (emphasis added). The language in the Confirmed Plan additionally provides:

> If there is an uncured default under the terms of the Confirmed Plan, *the new debt*, or any term of the Original Loan Documents that are continuing in effect, then Ittleson shall be able to resume any and all collection efforts against any or all of the personal guarantors *for the full amount owed on the Original Loan Documents*.

(*Id*.) (emphasis added).

If Ittleson desired a provision in the Confirmed Plan that the Debtor would assign any condemnation award to Ittleson in satisfaction of either the entire pre-petition debt or the full amount owed on the original loan documents, then it should have included language to this effect.[10] The Court will not find ambiguity regarding contractual language where none exists. The purpose of contractual construction "is to ascertain the intention of all the parties to the contract as

[10] It should be noted that if the condemnation award had been lower than the amount of Ittleson's allowed secured claim, the Debtor would nevertheless have been obligated to repay Ittleson the full amount of the allowed secured claim. As such, the proverbial sword cut both ways in this instance.

expressed by all of the language rather than to put a trick interpretation or twist upon one word." *Langer v. Stegerwald Lumber Co.*, 47 N.W.2d 734, 735 (Wis. 1951). Nor may a court alter a contract "for the benefit of one party and to the detriment of the other." *City of Orange Township v. Empire Mortg. Servs., Inc.*, 775 A.2d 174, 179 (N.J. Super. Ct. App. Div. 2001).

Ittleson's position is additionally belied by statements it made in its February 14, 2012 objection to the Debtor's Amended Plan (Doc. 117). In the Objection, counsel for Ittleson states that, as a result of the possible condemnation action, Ittleson "does not believe the Debtor will be able to complete its Plan payments" (*id*. at 3, ¶¶ 7-9). Ittleson stated that it did not wave its rights to the Real Estate and that it wanted to be protected with language in any order confirming the Plan to alleviate its need to get approval from the Court before proceeding to be compensated by the FDOT if in fact the property were deemed condemned (*id*.). The Court finds the language in the Confirmed Plan conforms to Ittleson's stated intent, *supra*, in that it provides Ittleson the right to be compensated, in advance of other creditors of the Debtor, directly from any eminent domain award (up to the value of its interest in the Real Property). Ittleson's interest in the condemnation proceeds is only as great as its interest in the collateral itself. The record reveals Ittleson was concerned that the total taking of the Real Property would impair the Debtor's ability to make its Plan payments,[11] not that an award would be greater than the value of Ittleson's allowed secured claim.

In Florida, upon an eminent domain award being deposited into the registry of the court, a mortgagee's lien on the property is extinguished—the lien attaches to the award to the extent of the mortgagee's interest in the property. *Seaboard All-Florida RY. v. Leavitt*, 141 So. 886, 888

[11] The Real Property is a hotel operated by the Debtor.

(Fla. 1931). In this instance, by operation of section 506 of the Bankruptcy Code and the Confirmed Plan, Ittleson's interest in the Real Property is limited to the amount of its allowed secured claim, or $2,625,000.00.

In its response, Ittleson alternatively requests that the Court modify the Confirmed Plan pursuant to 11 U.S.C. §1127 based on a change in circumstances (Doc. 187 at 11-12). As an initial matter, section 1127 provides that "the proponent of a plan or the reorganized debtor" may modify the plan after confirmation. 11 U.S.C. §1127(b). Ittleson is neither the proponent of the Plan nor the reorganized debtor; therefore, it does not have standing to make such a motion. Moreover, making such a motion in a response in opposition to a motion is procedurally improper.

The Court reserved jurisdiction to enforce and determine, if necessary, the distribution of any monies received pursuant to any condemnation action for a reasonable period of time (Doc. 139 at 5). In accordance therewith, and based on the foregoing, it is **ORDERED**:

1. The Debtor's Emergency Motion to Reopen the Chapter 11 Case (Doc. 179) is granted for the sole purpose of ruling on the Debtor's Emergency Motion to Compel Compliance with Court Orders (Doc. 180).

2. The Debtor's Emergency Motion to Compel Compliance with Court Orders (Doc. 180) is granted as set forth below:

a) Class II Secured Creditor Ittleson Trust 2010-1's recovery form the eminent domain shall be based on its allowed secured claim of approximately $2,625,000.00;

b) Class II Secured Creditor Ittleson Trust 2010-1 shall apply all of the Debtor's post-petition payments (approximately $100,000.00) toward its allowed secured claim, and provide the Debtor with a total payoff amount taking into account the mandates of this Order, *supra*;

c) Each party shall bear its own fees and costs associated with the instant motions.

3. The case is re-closed.

DATED this 7th day of December, 2012 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

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Timothy S. Laffredi, United States Trustee; and
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