UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA

In re: WINDMILL DURANGO OFFICE, LLC,	)	E-Filed: 12/15/11
	)	
Debtor.	)	Case No. BK-S-10-25594-LBR
	)	Chapter 11

TRANSCRIPT OF PROCEEDINGS
OF
RULING
RE: AMENDED CHAPTER 11 PLAN NO. 1, NO. 134
VOLUME 1
BEFORE THE HONORABLE LINDA B. RIEGLE
UNITED STATES BANKRUPTCY JUDGE

Tuesday, December 13, 2011

2:30 p.m.

Court Recorder: Deborah Hemstreet

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES:

For the Debtor: ZACHARIAH LARSON, ESQ.
Larson & Larson
810 South Casino Center Boulevard
Las Vegas, Nevada 89101

For Beal Bank Nevada: JEFFREY R. SYLVESTER, ESQ.
Sylvester & Polednak, Ltd.
1731 Village Center Circle
Las Vegas, Nevada 89134

(Court convened at 02:33:46 p.m.)

THE COURT: Be seated.

(Colloquy not on the record.)

THE COURT: All right. Windmill Durango. Appearances, please.

(Colloquy not on the record.)

THE COURT: Mr. Larson has the same malady I do. So between the two of us, we'll make like a --

MR. LARSON: We need some wheelchairs.

THE COURT: -- revolutionary war band I guess.

MR. SYLVESTER: I think you should race, frankly.

THE COURT: Yeah. Right.

MR. LARSON: Good afternoon, your Honor. Zach Larson on behalf of Windmill Durango Office.

MR. SYLVESTER: Good afternoon, your Honor. Jeffrey Sylvester on behalf of Beal Bank, secured creditor.

THE COURT: Okay. I'm just going to go ahead. Your briefing was very helpful. I appreciate the fact that you followed up and gave me those various amortization schedules, so what I am going to do is I am going to read into the record my findings and conclusions.

You know, the other way to do it would be to actually do a memorandum of opinion. But since I've delayed this so long, you need answers as quickly as possible, so I'll enter the order which will be my oral findings and conclusions on the

record.

The bottom line is I'm going to confirm the plan at 4.52 percent interest. And in so doing, I find that the plan is feasible, and it's meets all of the requirements of 1129.

Now, let me go through the various findings and legal analysis in that regard. As we know, Beal Bank filed a secured proof of claim for 16,979,353 based upon the purchase of a note from the FDIC which took over the lending institutions that held the note on the property.

Beal claims that it's owed 17,404,669.85, and the debtor asserts it's owed only 16,188,110.62. For purposes of determining the appropriate rate of interest which, in turn, requires an analysis based upon the amount of the debt, I will assume without deciding that the debt is 17,404,669.85.

So, obviously, if you need to object to the claim, you certainly may later, but I'm going to make the assumption that's the debt for purposes of this analysis --

MR. SYLVESTER: I'm sorry. What --

THE COURT: -- of feasibility interest.

MR. SYLVESTER: What was the number again? I'm sorry.

THE COURT: Your number is 17,446- --

MR. SYLVESTER: Okay.

THE COURT: -- 669.85.

As we know, the debtor is in the business of real estate

development, and it's the owner of 4.49 acres of land upon which is a fully completed office building containing a total of 74,149 square feet of gross building area.

Allegiant Air is the largest tenant occupying 87 percent of the building. It uses the building as its corporate headquarters, and the space contains features which are specially required for the unique business of Allegiant which is a national airline.

It took occupancy in April 2008 which I note was a time in which the financial crisis had already started to impact Las Vegas.

The lease extends until April 1st, 2018. The lease also contains an early opt-out provision for Allegiant that it may exercise after a six-month notice on April 1st, 2015.

However, if that option is exercised, it will owe the debtor approximately 1.2 million dollars as a cancellation fee.

The property is worth as all concede at a minimum of $18,990,000; hence, Beal is oversecured. The debtor's plan proposes to pay Beal the full amount of the debt owed over the course of a ten-year plan by making monthly payments equal to the debt amortized over 30 years plus interest.

Beal has voted against the plan. And so in order to confirm the plan, the debtor must satisfy the cramdown provisions under the bankruptcy code. That is Section 1129(b).

Specifically, the debtor must prove that the value of its payments to Beal under the plan as of the effective date of the plan equals or exceeds the value of the creditor's claim pursuant to 1129(b)(2)(A), little I, (2) of the bankruptcy code.

That means that I must determine the appropriate interest rate in order to ensure that the stream of payments meets this test.

The debtor proposed an interest rate of 2.75 percent. Although the debtor has not modified its plan to propose a higher rate, it's clear from the confirmation hearing and supplemental pleadings that the debtor will amend its plan to pay the interest rate this Court's determined it is required to meet the cramdown provisions.

There was no evidence introduced to suggest the property would decline in value during the term of the plan. There is no efficient market for making loans in Clark County, Nevada or in Nevada.

The Court finds that the rate proposed by the debtor's expert, Mr. Funsten (phonetic), is the appropriate cramdown interest rate. The Court finds that a rate of 4.52 percent is the appropriate interest rate paid to Beal under the debtor's plan.

I note that while it may be appropriate to use a rate which is based upon prime as a floating prime, the creditor did

not argue for such an approach, so I won't deal with whether or not such may or may not be permissible.

It seemed to me it would be, but no one argued that, so the rate will be whatever it is now, prime plus, as described for a total of 4.52.

The plan must be feasible pursuant to 1129(a)(11) of the code. I find the plan is feasible. The moneys which are paid in rent are in excess of the amount paid to Beal, and along with the termination damages are sufficient to make the plan feasible.

While Beal suggests Allegiant may elect to terminate early or at the end of its lease because its rent is higher than market rent, other factors such as the cost of relocation for the tenant and the special features of the building weigh against that conclusion.

But in the event that Allegiant does not renew in 2018, the debt would still be reduced to 15,153,193, and that's per the amortization table set forth by the debtor in Document 254.

I also find the debtor will be able to sell or refinance the property at the conclusion of the ten years of payments such that it will be able to make the balloon payment.

While Beal argues there's no evidence to provide on the issue of the feasibility of seller refinance, Mr. Funsten's report opined that refinancing should be possible at page 14 of his report.

Moreover, while, perhaps, any attempts to opine on the market conditions may be pure speculation with respect to the state of the economy and market in Clark County in ten years, there's nothing to suggest the subject property will decline in value.

Hence, the creditor here not only has an equity cushion at the present time, but it will have an even greater one in ten years because the payments will be made.

Based on the foregoing and for the reasons discussed below, I conclude the appropriate methodology to determine the cramdown rate is the formula rate, and that Mr. Funsten's approach is the correct approach.

However, even if I were to adopt the blended rate as the appropriate methodology, I find that Mr. Van Vleet (phonetic) incorrectly applied rates to reach his final rate under the blended-rate approach; thus, his conclusions are correct.

Now, I'll discuss this more, but I adopt the 4.52 rate which Mr. Funsten described as a rate between his blended rate and the Till buildup rate, but I believe that their rate is correct by a slightly different rationale, and that is because he believed the debt to be lower than what the ultimate debt may be, a higher risk factor is appropriate.

So in other words, I'm using the Till approach, but I'm adding a little higher value to get to 4.52, rather than technically taking his blended rate, the Till rate, and sort of

meshing the two together.

As far as the legal analysis goes, as the Supreme Court noted -- and it cited 1129(b)(2)(A), little I, and little 2 in Till versus SCS Credit Corp. (phonetic), the bankruptcy code includes numerous provisions that like the cramdown provision require a Court to, quote, "discount a stream of deferred payments back to their present dollar value to ensure that a creditor receives at least the value of its claim.

We think it likely that congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions.

Moreover, we think congress would favor an approach that is familiar in the financial community and that minimizes the need for expensive evidentiary proceedings," and that's at 541, U.S., 465 at 474 through 75.

Now, as we know, Till involved the value (indiscernible) of finding the cramdown interest of a truck in a Chapter 13. Commentators in some courts have embraced footnote 14 in Till which, perhaps, is even based upon dubious facts in this market ruminates as follows:

"Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce," end of quote. And these Courts and commentators have also criticized the use of Till in Chapter 11 by comparing the

kind of collateral, a $4,000 truck, with the types of collateral involved in Chapter 11.

But I do not believe -- I believe that this doesn't mean the formula rate shouldn't be used in Chapter 11. Conversely, I believe the formula rate should be used in Chapter 11.

The Court must read like provisions in other chapters of the code to mean the same thing in any chapter as the Till Court suggested when it was reaching what a discount rate is.

I also note that the interest rate of real estate will, indeed, be valued in Chapter 13. The only limitation is that the secured debt is less than the debt limitations which is above $750,000, and that it be a nonprincipal residence.

So you're not merely valuing trucks in a Chapter 13 such that somehow this analysis is only applicable to the valuation of trucks. The Court applied this valuation in Chapter 13 which values all kinds of collateral, and, therefore, that approach using the same similar language should be the approach used in a Chapter 11.

I believe that this does not mean -- in other words, I -- I'm sorry. I think that footnote 14 merely means that if there is a market and, thus, a readily-determinable market-rate interest, then the Court need not go any further. Conversely, if there is no market, then the formula rate is the methodology to be used.

And the Sixth Circuit in the American HomePatient,

Inc., 420 F .3d 559, Sixth Circuit, 2005 reached the same result.

While the Ninth Circuit BAP in re Boulders on the River, Inc., 164 B.R. 99, in the Ninth Circuit, 1994, approved the use of an interest rate determined by using the blended rate, that case was decided before Till, and neither party raised the methodology as an issue on appeal.

Rather, the appellant, Pacific First, maintained that the that the rate should be a blended rate, and the panel adopted Pacific's interest-rate analysis.

Pacific agreed with the panel's interest-rate calculation and with the interest rate to be applied. It just disagreed with the property valuation.

So there's nothing in the opinion, and, finally, there's nothing in that opinion that suggests that even if a blended rate is used that the equity tranche is the basis for determining what the second tranche should be.

So I believe that in determining the interest under the formula approach which is the Till approach, the Court should start with the prime rate and not the Treasury rate espoused by Mr. Van Vleet and the Till even said prime rate in its opinion then buildup based on upon risk factors.

Now, these factors would not necessarily be a one- to three-percent buildup. Rather, I recognize that what the Court was saying that that was the most appropriate percentage that

had been applied to account for risk or lack of risk, so I don't think the limitation's three percent. I think the Court was recognizing that that was the general range.

But I you believe that doesn't mean that in determining risk that you don't look at what some commentators or experts refer to the blended rate. Rather, that could be an indicia of pricing the risk.

Now, in this case, I find that Beal's expert failed in several regards. He has despite his contention that he's using a blended-rate approach which meets the Till test, he really is using a coerced-loan rate which was specifically rejected by the Supreme Court.

By looking at what a lender would charge an investor what it -- by looking at what a lender would charge or an investor would expect in return in determining a particular tranche, the expert really is using the coerced-loan approach.

Moreover, Mr. Van Vleet has in determining the tranches double calculated the risk to Beal under the plan. He has not even attempted to examine what rate a mezzanine lender would use.

Rather, he goes straight to an equity-investor rate. And even then, such rates include the risk that the senior debt would wipe out a junior lender or equity investor.

By looking at what a mezzanine lender would require to make a loan fails to consider the fact that a mezzanine lender

has a disadvantage of being a junior lender.

As a mezzanine lender must take into account the cost of funds and the likelihood that will be in default of a senior debt thereby requiring the junior mezzanine lender to either cure the senior secured lender or wiped out and even worse is a position of equity. Here an equity investor is not only behind the secured debt but, also, behind unsecured debt.

And even Courts that have used the blended-rate approach recognize the discount must be made to take that reality into consideration.

So even in North Valley Mall at 432 B.R. 825 and looking at page 834, the Court noted that there was a risk inherent in each tranche which must be deducted, and that was not deducted by Mr. Van Vleet's analysis.

I agree with Mr. Funsten's analysis of the risk factors. I adopt his conclusions based upon the character of the loan, the fact that we have a building that's rented, a stable tenant, and the rent above market and above the amount needed to pay the debt, the collateral which again relates to the building, and the circumstances peculiar to this debtor.

He has appropriately considered the Till risk factors of the circumstances of the estate, the nature of the security, and the duration and feasibility of the plan, and I adopt his findings.

I will adopt the 4.52 percent as I indicated to account

for the high risk if the debt is equal to Beal's current claim. In other words, there will be a higher debt at the end of plaintiff's term than what Mr. -- at the 4.25 percent that Mr. Funsten had to analyze because he was using sixteen-one-million dollars.

I find the plan is feasible as determined by the fact that the debtors have been making payments in an amount equal to or close to the amount required by the revised proposed plan. That they have moneys in the operating account even after paying the -- let me interject here.

I believe the last (indiscernible) report would show that the moneys that that were allowed as your attorneys fees were paid from that?

MR. LARSON: Correct, your Honor.

THE COURT: Okay. So I note that the operating report shows a healthy balance in the bank account even after paying the large fees to the attorney. And by large fees, I don't mean they're not deserved. I just mean they were high fees in this case.

That the rent is higher than the loan payments. There's a cushion for early termination, and that the collateral is going to be sufficient to refinance or sell at the end of the plan.

I don't think there's any dispute -- well, I also find -- I think I previously said this -- that the balance were not -- that the creditors class -- the other class was impaired,

appropriately impaired, appropriately classified, and that Beal may not withdraw its ballot.

And I find that the plan meets all the other requirements of Chapter 11 and should be confirmed at that rate in accordance with the amortization table which you laid out in your exhibit which proves that the funds will be there to meet that rate with the moneys coming in.

Anything I need to add to the findings and conclusions? I don't think so. So I have forgotten. Based upon this, you can go effective in January as you still intended?

MR. LARSON: I believe so. Yes, your Honor.

THE COURT: Okay. All right.

MR. SYLVESTER: I thought the effective date was 90 days following the entry.

THE COURT: I forgot to look, so I assume you just --

MR. SYLVESTER: That was --

THE COURT: You just assume --

MR. SYLVESTER: That was the issue on --

THE COURT: I assume if they wish you'd just as soon have it January 12th I assume to start the payment. Well, you can have payments now, so --

MR. LARSON: I believe we -- I think it was either/or. I think it was earlier. I would choose to go earlier if the time permits, your Honor.

THE COURT: Okay. All right. Whatever. So the

plan's confirmed. Those are my oral findings and conclusions on the record, so you can merely submit an order which indicates the plan's confirmed.

MR. SYLVESTER: Did you say do you intend to actually to --

THE COURT: No.

MR. SYLVESTER: -- render --

THE COURT: This is --

MR. SYLVESTER: -- a decision?

THE COURT: -- my oral findings --

MR. SYLVESTER: I understand.

THE COURT: -- and conclusions on the record, and, certainly, you may get a transcript --

MR. SYLVESTER: Sure.

THE COURT: -- from the clerk. All right?

MR. SYLVESTER: Very good.

THE COURT: Thank you --

MR. SYLVESTER: Thank you --

THE COURT: -- very much.

MR. SYLVESTER: -- your Honor.

MR. LARSON: Thank you, your Honor.

THE CLERK: Thank you, your Honor.

(Colloquy not on the record.)

THE CLERK: All rise.

(Court concluded at 02:50:16 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Jennie Ellis _____ 12/15/11

Jennie Ellis, Transcriptionist Date