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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
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U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Remington Forest, a South Carolina
partnership,

Debtor.

C/A No. 95-76069

JUDGMENT

Chapter 11

ENTERED

JUN 11 8 1996

R. J. J.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order
of the Court, confirmation of the Debtor's Amended Plan of Reorganization is denied.

John E. Waite
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 17, 1996.

96-141
120

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ORDER

Chapter 11

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THIS MATTER comes before the Court for a confirmation hearing of the Debtor's amended plan of reorganization dated January 23, 1996. After consideration of the pleadings, the prior orders of this Court and the evidence that has been presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On November 1, 1995, Remington Forest, a S.C. Partnership ("Remington Forest" or "Debtor"), commenced the above-captioned case under Chapter 11 of the United States Bankruptcy Code and has remained a debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.¹
2. Remington Forest is a South Carolina partnership which was formed in 1984, and has its principal place of business in Mount Pleasant, South Carolina. Remington Forest's primary asset is the real property, improvements and personal property which is now comprised of 61 units of a horizontal property regime known as Remington Forest

¹ Further references to the Bankruptcy Code, 11 U.S.C. §101, et seq., shall be by section number only.

JW-1-

119

Condominium Complex (the "Complex") located in Mount Pleasant, South Carolina.

The Complex has historically been rented as apartments which provides the only income for the Debtor.

3. The two equal partners of Remington Forest are Mulherin-Howell, a South Carolina partnership, and Real Venture Partnership.
4. The Debtor's Schedules filed on November 1, 1995 listed only four creditors: Summatyme Corporation ("Summatyme"), All American Pest Control, Atkinson Pool Company, and Corporate Center, a South Carolina partnership. The Debtor's First Amended Disclosure Statement indicates additional unsecured claims of East Cooper Lock & Safe in the amount of \$39.28 and Bair's Landscaping Service in the amount of \$312.00. The debts listed to All American Pest Control in the amount of \$125.00 and Atkinson Pool Company in the amount of \$335.00 for services rendered in August of 1995 have been paid by the Debtor or the manager of the Complex in the ordinary course of business. The debt to Corporate Center, a South Carolina partnership controlled by Allen Howell, a controlling partner in the partnerships which comprise the Debtor, is listed in the amount of \$6,650.00.
5. Summatyme is a North Carolina corporation. Summatyme is the Debtor's sole secured creditor and the holder of 61 separate notes (the "Notes") which are all secured by 61 mortgages on the Complex.
6. On February 29, 1996, Summatyme filed a "Petition to Establish Fees and Costs" in association with their proof of claim. Pursuant to Consent Order of this Court of June 10, 1996, the parties stipulated that the debt to Summatyme on the remaining 61 units

JW -2-

(pursuant to this Court's Order of December 28, 1995, Remington Forest sold one of the units to Summatyme) as of the petition date is in the amount of \$3,603,841.68. This amount is comprised of ten two bedroom units with principal and interest in the amount of \$49,803.18 per unit and \$1,392.95 in attorney's fees and fifty-one three bedroom units with principal and interest in the amount of \$59,232.16 per unit and attorney's fees in the amount of \$1,392.95. This amount also does not include any attorney's fees, costs, interest, default rate of interest or other penalties that may have arisen or been incurred by Summatyme post-petition.

7. The day after the filing of the Chapter 11 petition, on November 2, 1995, Summatyme filed its motion for relief from the automatic stay to allow the completion of foreclosure proceedings commenced on October 5, 1995 before the Master-in-Equity for Charleston County.
8. On December 6, 1995, the Debtor filed its Disclosure Statement and Plan of Reorganization. The Disclosure Statement expresses the Debtor's belief that the Complex is worth in excess of \$4,000,000.00 and that the outstanding obligation to Summatyme is less than \$3,400,000.00. While reserving the Debtor's rights to object to proofs of claims for a period of thirty (30) days post-confirmation, it did not expressly state an intention to object to Summatyme's claim as Summatyme had not filed a proof of claim at that time.
9. On December 28, 1995, this Court issued an Order granting Summatyme relief from the §362 automatic stay. The December 28, 1995 Order found in part as follows:

Based on the Debtor's Schedules, Disclosure Statement and the testimony at the hearing, it is evident that there exists no truly impaired class of claims in this case that would vote to accept any

Ju-3-

Plan put forth by the Debtor and therefore such a Plan is unconfirmable. The only means by which the Debtor has to obtain an accepting impaired class is to artificially impair or create a class of claims or to use a separate classification of similar claims to secure the vote of an accepting impaired class of claims under § 1129(a)(10). The Fourth Circuit Court of Appeals, as well as the Bankruptcy Court in this district, have rejected such attempts by debtors to obtain confirmation of a plan by manipulation of the chapter 11 process as a violation of the §1129(a) requirements, including a lack of good faith. See In re Bryson Properties XVIII, 961 F.2d 496, 503 (4th Cir. 1992), cert. denied, U.S.C., 113 S.Ct. 191 (1992); In re W.C. Peeler, Co., Inc., 182 B.R. 435 (Bankr. D.S.C. 1995) (Bishop, J.) and this Court's opinion dated September 20, 1995 in the case of In re Dunes Hotel Associates, 188 B.R. 174 (Bkrcty. D.S.C. 1995).

10. On January 24, 1996, the Debtor filed its First Amended Plan of Reorganization ("Amended Plan"), which supplements the provisions of the original plan which was filed at the hearing on the § 362 motion by adding a new class of claimants denominated as Class V: Allowed Contingent Claims of Tenants. The other classes include Class I, administrative claims; Class II, the allowed secured claim of Summatyme; Class III, priority tax claims; Class IV, unsecured claims and Class VI; allowed interests of the general and limited partners of the Debtor.
11. On January 24, 1996, the Debtor also filed its First Amended Plan Disclosure Statement ("Amended Disclosure Statement") which again reserves the Debtor's rights to object to proofs of claims but does not expressly state an intention to object to Summatyme's claim.
12. The Amended Plan proposes three alternative treatments for the funding of the plan: (a) sale of the entire property; (b) sale of the remaining 61 units separately; and (c)

JW 4-

consensual long term financing by Summatyme. At the initial confirmation hearing on March 26, 1996, the Debtor chose to proceed under the second option of selling the remaining units separately over the next three years.

13. Paragraph 7.2 of the Amended Plan states that "[a]ny written or oral executory contract not otherwise dealt with in this Plan and not previously rejected by the Debtor which exists between the Debtor and any individual or entity is hereby assumed pursuant to 11 U.S.C. § 1123(b)(2)". There is no specific provision of the Amended Plan that otherwise effectuates the Debtor's assumption or rejection of the leases of the present tenants.
14. Summatyme filed its ballot rejecting the Amended Plan on February 29, 1996, as a secured creditor in Class II in the amount of \$2,700,000.00 and an unsecured creditor in Class IV in the amount of \$955,414.91.
15. Thirteen claimants filed ballots categorizing their claims as unsecured Class IV claims but eleven of these ballots represent what appears to be contingent claims as tenants of Remington Forest and therefore may be properly categorized as Class V claimants. Of the two remaining Class IV ballots, Bair's Landscape Maintenance, Inc.'s ballot representing an unsecured claim in the amount of \$312.00 voted in favor of the Amended Plan while the ballot representing the unsecured claim of Summatyme in the amount of \$955,414.91 rejected the Amended Plan.
16. The Debtor filed an objection to Summatyme's proof of claim on March 22, 1996, four days prior to the confirmation hearing. The objection states three grounds: 1) Summatyme's claim should be in the amount of \$2,200,000., the amount that Summatyme actually paid for the notes and mortgages; 2) in the alternative,

JW-5-

Summatyme's claim should be in the amount of \$2,950,000, the amount alleged agreed upon by the parties in a pre-petition settlement agreement; and 3) Summatyme is fully secured and is therefore improperly filed as partially secured. The objection further states that:

Remington Forest would respectfully show that Summatyme filed a proof of claim for \$3,655,414.91. Subsequent to filing this proof of claim, Summatyme filed a motion [the Petition to Establish Fees and Costs filed on February 29, 1996] that places this amount in question.

As stated previously, the issue of the correct amount of that claim has now been settled between the parties by a consent order which establishes the debt to Summatyme in the total amount of \$3,603,841.68 with a particular breakdown for each type of floorplan of the units.

17. On March 26, 1996, the Court held the first confirmation hearing. The Debtor elicited the testimony of Michael C. Robinson ("Mr. Robinson") of Charleston Appraisal Services, Inc. as an expert in the field of real estate appraisals and the same witness used by the Debtor at the § 362 hearing. At the conclusion of the direct examination of Mr. Robinson, the Debtor consented to a continuance to allow Summatyme an opportunity to prepare a cross examination and to review Mr. Robinson's appraisal which was introduced into evidence as Exhibit 1. The Court held a continued confirmation hearing on April 24, 1996, at which time Mr. Robinson was cross examined by Summatyme and Summatyme was allowed an opportunity to present its own evidence as to the value of the Complex.

JW-6-

18. As of the conclusion of the confirmation hearing, an order of foreclosure sale of the Complex had not been issued by the Charleston County Master-in-Equity.

CONCLUSIONS OF LAW

A. Introduction

Within two months of the filing of this single asset reorganization case, the Court, by order dated December 28, 1995, granted the sole secured creditor, Summatyme Corporation, relief from the §362 automatic stay on the basis that the Debtor had failed to meet its burden of proof of showing that the Complex property was necessary to an effective reorganization in so far as it appeared that there was no reasonable possibility of the Debtor confirming the Plan of Reorganization filed on December 6, 1995 without the consent of Summatyme, which had and has continued to oppose the Debtor's reorganization efforts.

However, since the granting of the § 362 relief, the Debtor has amended its plan of reorganization and added a new class of claimants, denominated as Class V and designated as an impaired class, which are the allowed contingent claims of the tenants of the Debtor. Additionally, based upon its objection to the claim of Summatyme filed on March 23, 1996, the Debtor takes the position that pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure and § 1126, Summatyme's ballot filed on February 29, 1996 rejecting the Amended Plan can not be counted for confirmation purposes and therefore, because the single remaining unsecured claim in that class voted in favor of the Amended Plan, the Amended Plan should be confirmed.

B. Property of the Estate

As an initial matter, Summatyme takes the position that the Debtor can not put forth an

JW-7-

effective reorganization based upon a sale of the Complex due to this Court's December 28, 1995 Order which granted Summatyme relief from the §362 automatic stay because §363, as operative under the Amended Plan, does not allow for the sale of property that is inconsistent with §362(d). Summatyme takes the position that when this Court granted it relief from the automatic stay to proceed with the foreclosure proceeding before the Master-in-Equity, the Debtor lost its ability to use, sell or lease the Complex. The Court disagrees.

In some early cases which addressed similar situations, some courts held that the granting of relief from the automatic stay was akin to an abandonment of the estate's interest in that property and therefore the subject property was no longer within the jurisdiction of the bankruptcy court to administer.

The Bankruptcy Code also allows the Bankruptcy Court to release property from its jurisdiction pursuant to an abandonment, relief from the automatic stay and/or the removal or remand to another court's jurisdiction, or to refuse to exercise jurisdiction under the abstention provisions provided for in section 1471(d)...The underlying theme in the authority cited above indicates that although the Bankruptcy Court has broad jurisdiction to hear almost any civil case and has exclusive jurisdiction over the property of the debtor, this exclusive jurisdiction does not limit the Bankruptcy Court's power to lift the automatic stay and allow another court of competent jurisdiction to decide finally issues affecting property of the debtor. In re Wallace, 33 B.R. 29 (Bankr.D.Mi.1983)

Matter of Fisher, 80 B.R. 58 (Bkrcty.M.D.N.C. 1987). Also see In re Hood, 92 B.R. 648 (Bkrcty.E.D.Va. 1988) ("After the bankruptcy court has entered an order granting relief from the automatic stay, the subject property is generally considered to be removed from the estate even though it may technically and temporarily remain property of the estate under Section 541") and even this Court in the original decision of In re Byrd, 89-03822 (Bkrcty.D.S.C. January 16, 1992)

Jw 8-

("This conclusion that the order modifying the stay removed the property from the bankruptcy estate is further supported by the fact that the trustee's consent to the order modifying the stay has the same effect as abandonment of the property under 11 U.S.C. § 554(a)").

However, this Court's In re Byrd decision was expressly overruled by Judge Bishop's later decision of In re H.J. Motels - Greenville, Inc., 92-73399 (Bkrtcy.D.S.C. Nov. 15, 1993), which held:

[t]he granting of relief from the automatic stay does not constitute an abandonment of the estate's interest in property. In re Angel, 142 B.R. 194 (Bankr. S.D. Ohio 1992). This Court specifically overrules the Byrd case to the extent that it holds that relief from the automatic stay abandons property from a bankruptcy estate."

In re H.J. Motels - Greenville, Inc., no. 92-73399, slip. op. at p. 5. The reasoning for this finding that property remains property of the estate and therefore within the jurisdiction of the Court for administration after the lifting of the automatic stay has recently been reiterated by the United States District Court for the District of New Jersey in In re B. S. Livingston & Co., Inc., 186 B.R. 841 (D.N.J. 1995). In In re B. S. Livingston & Co., Inc., the Court conducted a thorough analysis of the issue including a recognition of the split in the case law concentrating on two leading cases, Maislin Industries, U.S., Inc. v. A.J. Hollander, 69 B.R. 771 (E.D. Mich. 1986) (holding that lifting of the automatic stay did not remove receivables from property of the estate) and In re Incor, 100 B.R. 890 (Bankr. D.Md. 1989), aff'd 113 B.R. 212 (D.Md. 1990) (holding that the modification of the stay extinguishes any interest of the bankruptcy estate in the property).

According to In re B. S. Livingston & Co., Inc., the majority of cases published after Maislin Industries, U.S., Inc. v. A.J. Hollander and In re Incor supported the proposition that the

act of lifting the automatic stay is not analogous to an abandonment of the property by the estate, thereby not removing the subject property from property of the estate or the jurisdiction of the Bankruptcy Court. Matter of Nebel, 175 B.R. 306 (Bankr. D.Neb. 1994), In re M.J. Cordry, 149 B.R. 970 (D.Kan. 1993), In re Oakes, 129 B.R. 477 (Bankr. N.D. Ohio 1991), In re Fricker, 113 B.R. 856 (Bankr. E.D. Pa. 1990).

The courts which have agreed with this majority rule have based their reasoning on the observation that if the lifting of the automatic stay effected an abandonment of property of the estate, then § 554 of the Bankruptcy Code (which provides for abandonment) would be superfluous. As the court states in Nebel:

[T]he better rule is that the act of lifting the automatic stay is not analogous to an abandonment of the property. In re Ridgemont Apartment Assocs., 105 B.R. 738, 741 (N.D.Ga. 1989). If the two provisions were analogous, Section 554 [which governs abandonment] would be superfluous in any case in which relief from the stay was granted. This result would conflict with the principle that the Court should read and apply the plain language of the Bankruptcy Code. Patterson v. Shumate, 112 S.Ct. 2242 (1992)...“The effect of abandonment by a trustee . . . is to divest the trustee of control over the property because once abandoned, property is no longer a part of the bankruptcy estate.” [citations omitted]. Relief from the automatic stay entitles the creditor to realize its security interest or other interest in the property, but all proceeds in excess of the creditor’s interest must be returned to the trustee. Killebrew v. Brewer (In re Killebrew), 888 F.2d 1516, 1520 (5th Cir. 1989). Abandonments are irrevocable, and to treat an abandonment as identical to relief from the automatic stay is inconsistent with the principal that property once abandoned may not be recovered by the bankruptcy estate. Id.; accord Jones v. Star Bank (In re Angel), 142 B.R. 194, 198 (Bankr. S.D. Ohio 1992) (“Relief from the stay did not effectuate an abandonment . . . In a bankruptcy context, only abandonment constitutes a waiver of a trustee’s interest.”)

Nebel, 175 B.R. at 311-312.

gw - 10 -

The majority of the courts appear to agree that granting relief from the automatic stay as to certain property does not remove that property from property of the estate. Rather, the relief from the stay removes the restraints imposed under § 362 on the creditor's right to pursue contractual and non-bankruptcy legal remedies. Jurisdiction of the bankruptcy court continues over this property until the creditor achieves a sale or other means of transfer or termination of the debtor's ownership interest in the property.

One of the concerns expressed in the opinions finding relief from the automatic stay resulted in an abandonment of the property from the estate was the issue of finality. In Matter of Fisher and in In re Hood, the courts were concerned with exercising jurisdiction to invalidate foreclosure sales that had occurred after the granting of relief from the stay which is not the situation presently before the Court.

This Court generally agrees that once relief from the automatic stay has been granted, the Court should closely examine the reasons before continuing to actively administer the property through the bankruptcy case. However, up and until the point a debtor loses all rights in property, either through a foreclosure sale or the expiration of a right of redemption or as otherwise determined by state law, the bankruptcy court retains jurisdiction over the property after the granting of relief from the automatic stay pursuant to § 362. The appropriateness of a further exercise of that jurisdiction depends on the facts and circumstances of the specific case before the Court and such a standard is reflected by the broad language of § 363(d). While the Court has the jurisdiction to continue to administer property on which the stay has been previously relieved, whether the Court should exercise that jurisdiction depends upon the proposed disposition of the property through the bankruptcy case and the benefit of such to

creditors and other parties.

In this case, the Debtor proposes a sale of individual units of the Complex over a series of years, possibly without further Court authorization, while ostensibly at the same time the secured mortgage holder proceeds to foreclosure sale of all of the units. It is reasonable to expect that the foreclosure process in state court will conclude within the three years the plan projects for the sales and therefore deprive the Debtor of its ownership rights before the sales process under the Amended Plan is complete. Absent a reinstatement of the automatic stay or reversal on appeal of the § 362 Order, such a series of sales over time under the Amended Plan are inconsistent with this Court's § 362 Order. The Debtor's proposal is very different than a proposed imminent sale of the entire Complex which would generate proceeds beyond the mortgages. In addition, the Amended Plan provides that all net proceeds of each and every sale shall be paid to Summatyme until its claim is fully satisfied. The Debtor and the other creditors do not therefore benefit from such sales until Summatyme is fully paid, which will likely take a number of years, if ever. The Court questions the benefit of such a sales procedure especially considering that until the Summatyme debt is paid off, any other income received by the Debtor from leasing the units will be needed to maintain the Complex, generate sales, adequately protect Summatyme's secured debt and address administrative expenses. Therefore, for these reasons alone, the Court is not inclined to allow the sale of units as proposed under the Amended Plan because such is inconsistent with the relief from stay previously provided in this case.

C. Confirmation of the Amended Plan of Reorganization

Section 1129 of the Bankruptcy Code sets forth the conditions for confirming a plan of reorganization. In determining whether to confirm the Amended Plan, the burden of showing

JW -12-

that the Amended Plan satisfies the provisions of §1129 is on the Debtor as the proponent of the plan. The burden of proof standard for §1129(e) is a preponderance of the evidence and the evidentiary standard for §1129(b) is a clear and convincing benchmark. See, e.g., In re Agawam Creative Marketing Associates, Inc., 63 B.R. at 618-19; In re Capitol Center Associates, Limited Partnership, 94-73266-B (Bkrcty. D.S.C. Dec. 9, 1994).

Section 1129(a) includes thirteen conditions, as represented by its subsections (1) through (13), that must be satisfied before a Court may enter an order confirming any proposed plan. See, e.g., In re Rusty Jones, Inc., 110 B.R. 362 (Bkrcty. N.D. Ill. 1995); In re Agawam Creative Marketing Associates, Inc., 63 B.R. 612 (Bkrcty. D.Mass. 1986). If any one of these conditions are not satisfied (save for §1129(a)(8)), a proposed plan may not be confirmed and this Court may not even consider whether the "cram down" provisions of § 1129(b) come into consideration. Coones v. Mutual Life Ins. Co. of N.Y., 168 B.R. 247 (Bkrcty. D.Wyo. 1994). The Debtor has classified claims into six categories: 1) administrative claims, 2) the secured claim of Summatyme, 3) priority tax claims, 4) unsecured claims, 5) contingent claims of the tenants of Remington Forest, and 6) the partner's claims. The initial determination this Court chooses to make is whether one of these categories includes an impaired class that has voted to accept the plan as required by §1129(a)(10).

1. Class I - Administrative Claims

Class I is comprised of all allowed administrative claims which will be paid in cash on the effective date of the plan or within ten days of when such claims are allowed. It is anticipated that these claims will include the Debtor's attorney's fees and remaining court and United States Trustee fees pursuant to 28 U.S.C. § 1930. This class is not designated as

impaired.

2. Class II - Summatyme's Claim

Class II is comprised of the allowed secured claim of Summatyme and is designated as an impaired class. According to the Amended Plan, Summatyme is classified as a fully secured impaired claim in Class II only, without any deficiency for voting in Class IV, the unsecured class that is also impaired. The Debtor filed an objection to the claim of Summatyme four days prior to the confirmation hearing and takes the position that Summatyme's ballot therefore can not be counted for confirmation purposes. Summatyme, who filed their ballot twenty-two days before the objection by the Debtor, disagrees.

a. Ability to Vote Summatyme's Claim

Debtor's counsel cites §1126(a), which states "[t]he holder of a claim or interest allowed under §502 of this title may accept or reject a plan," as the basis for not counting Summatyme's vote rejecting the Amended Plan because the claim objection has not been resolved. The logic of the operation of this statute is apparent; if there are substantive grounds for claim objection which have not been ruled upon or at least addressed by an estimation of the claim for voting, then a court could not calculate the vote of that claimant for confirmation purposes.

In support of its contention that pursuant to §502(a), §1126(a) and Bankruptcy Rule 3018(a), Summatyme's vote on the Amended Plan should not be counted, Debtor's counsel cites the 9th Circuit Bankruptcy Appellate Panel's In re M. Long Arabians, 103 B.R. 211 (9th Cir. BAP 1989) opinion. The facts of the In re M. Long Arabians case are not parallel to those of the instant case. Specifically, the facts in In re M. Long Arabians involved the Court fixing March 25, 1988 as the last day for filing written acceptances or rejections of the Debtor's plan. The

JW - 14 -

effected creditor, Bell Road, filed its objection to confirmation on March 28, 1988 (three days late) and the confirmation hearing was held on April 1, 1988. Although no specific date is cited by the Court, it is logical to assume based on the date that Bell Road filed its objection to the Debtor's plan that the Debtor's adversary proceeding objecting to Bell Road's claim was filed prior to the Bell Road objection. It is also apparent in the In re M. Long Arabians case that the effected creditor sat on its rights to have the Court estimate its claim for voting purposes pursuant to Bankruptcy Rule 3018(a).

One court has apparently read 11 U.S.C. § 502(a) and B.Rule 3018(a) as the Debtor proposes they should be. See In re M. Long Arabians, 103 B.R. 211, 215-16 (Bankr. 9th Cir.1989). However, while affirming the decision of the trial court disallowing the claimant's vote, the Bankruptcy Appellate Panel ("the BAP") in Long Arabians reversed a bankruptcy court decision disallowing that same claimant's objections to confirmation on their merits. Thus, the Long Arabians court was apparently influenced by the fact that the claimant, while disenfranchised, was not silenced. Here, because (the creditor's) objections to confirmation were not properly filed, disenfranchising (the creditor) will silence it. While a creditor who fails to meet time deadlines may properly be silenced, this disposition seems very harsh here, given (the creditor's) diligence in monitoring the Debtor's case.

In re Goldstein, 114 B.R. 430 (Bkrcty.E.D.Pa. 1990).

In the instant case, creditor Summatyme timely filed its proof of claim using this Court's determination of the collateral's value and the stipulated claim amount from the §362 hearing. Additionally, Summatyme filed its ballot rejecting the Debtor's Amended Plan a full twenty-seven days in advance of the scheduled confirmation hearing and twenty-two days in advance of the Debtor's objection to its claim. At the time Summatyme filed its ballot and written objections, its claim was unopposed and thus deemed allowed as filed pursuant to the terms of

Jw-15 -

§502(a). The In re Goldstein opinion elaborated on why in situations like this, such a claim should be allowed to vote.

Our skepticism of the correctness of the Debtor's position arises for several reasons. Firstly, it seems unfair to allow a debtor to disenfranchise even a large creditor from voting on a plan merely by its unilateral act of filing an objection to the creditor's proof of claim. Secondly, the pertinent statute and rules do not directly support the reading urged by the Debtor. To reach this result, we would be obliged to interpret 11 U.S.C. § 502(a) as stating that, if a party objects to a claim, then it must be deemed disallowed. This Code section does not say that. It merely states that if a claim is not objected to, then it must be deemed allowed. We would also be obliged to read the last sentence of B.Rule 3018(a) as precluding allowance of a claim subject to objection unless the claimant files a motion to obtain temporary allowance of the claim. The Rule does not say that. It merely provides that if, for any reason, any party or the court wishes to determine whether a claim subject to objection should be temporarily allowed for purposes of voting, a notice and hearing is first required.

In re Goldstein, 114 B.R. at 432, 433. Furthermore, the Court must use its own discretion when deciding whether or not to allow the vote of a creditor whose claim has been objected to. In In re Goldstein, the court referring to In re Oroscio, 77 B.R. 246 (Bankr.N.D.Cal. 1987) and In re Gardinier, Inc., 55 B.R. 601 (Bankr.M.D.Fla. 1985), stated that "both decisions provide that the bankruptcy court must exercise its discretion, considering all relevant substantive factors, in determining whether it will allow a creditor to vote." In re Goldstein, 113 B.R. at 433. See also, In re General Homes Corp., 134 B.R. 853, 860 (Bkrtcy.S.D.Tex. 1991) (recognizing In re M. Long Arabians, but stating that "[t]here is no provision of the Bankruptcy Code or Rules determining which ballots are to be counted for the purposes of acceptance or rejection of a plan", and that the best approach is to leave the matter "to the discretion of the court.") and In re Amarex, 61 B.R. 301, 302 (Bkrtcy.W.D.Okl. 1985) (allowing several creditors to vote after

stating that the “court must exercise its equitable powers concerning allowance or disallowance of claims at various stages of a case.”).

As stated in the Findings of Fact, the Debtor's objection to Summatyme's proof of claim states three grounds: 1) Summatyme's claim should be in the amount of \$2,200,000., the amount that Summatyme actually paid for the notes and mortgages; 2) in the alternative, Summatyme's claim should be in the amount of \$2,950,000, the amount alleged agreed upon by the parties in a pre-petition settlement agreement; and 3) Summatyme is fully secured and is therefore improperly filed as partially secured. Two of these grounds involve the determination of the actual amount owing to Summatyme on the debt, a controversy which was settled between the parties as evidenced by this Court's Order of June 10, 1996 on Summatyme's Petition to Establish Fees and Costs, a consent order, which established the total pre-petition debt of Summatyme in this case at \$3,603,841.68. Based upon the parties' agreement, the first two grounds of the objection would appear to be moot. The third ground for objection is based upon the Debtor's assertion that Summatyme is fully secured for purposes of confirmation of the Amended Plan based upon the valuation of the Complex. This issue of the extent Summatyme's claim is secured is fully joined before this Court at confirmation as raised by the Debtor's Amended Plan. Since this issue is determined by this Court herein, there is no sufficient reason to allow its assertion, by way of the Debtor's claims objection, to serve as the sole remaining substantive grounds for disallowance of Summatyme's right to vote.

Overall, this Court agrees with the In re Goldstein analysis in this factual scenario and finds that at the time Summatyme voted its claim, it met the requirements of both §502(a) and §1126(a) and Summatyme's vote rejecting the Debtor's Amended Plan is entitled to be counted.

JW -17 -

Furthermore, if any question remained, this Court believes the Debtor's request for determination of value in the confirmation context, after the only other grounds of the claim objection have been settled, constitutes a waiver of any right to block Summatyme's vote on the basis of the filed objection to Summatyme's claim.

b. Due Process of Valuation

Initially, Summatyme questions whether it is appropriate to re-value the property (already valued by this Court in the § 362 Order) for confirmation purposes and then questions the use of the investment value of the Complex for determining the confirmation of the Amended Plan. As to whether it is appropriate to value the property, Summatyme argues that Rule 3012 of the Federal Rules of Bankruptcy Procedure requires that notice be provided to a secured creditor if the Court intends to have a hearing on valuations. Since no separate Rule 3012 notice was provided, Summatyme argues that it is improper for the court to establish a valuation for confirmation purposes and relies upon the Fourth Circuit's In re Linkous, 990 F.2d 160 (4th Cir. 1993) decision.

In re Linkous is a chapter 13 case involving a notice to a creditor with a security interest in a car. In that case, the only notice of the valuation process as it would effect the creditor's lien was provided in the summary of the plan of reorganization which did not "mention the car loan nor did it explicitly state that the secured loans would be treated only partially secured." In re Linkous, 990 F.2d at 161. In this case, Remington Forest provided a full disclosure statement, approved by this Court and by Summatyme, and served on all parties in interest. The Disclosure Statement and the Amended Plan clearly provide notice that Remington Forest believes that Summatyme is fully secured and clearly provides notice that

the issue of the value of the collateral is an issue for determination at the confirmation hearing.

As stated in In re Linkous:

In order to satisfy due process requirements, "the notice [of the proceedings] must be of such a nature as reasonably convey the required information ..." ... In Order to "reasonably convey the required information," Linkous' notice to creditors must state that such a hearing will be held. Consequently, the notice to Piedmont was inadequate as it did not make reference to an intent to reevaluate the secured claims pursuant to § 506(a).

In re Linkous, 990 F.2d at 162, 163. Here, the Disclosure Statement and the Amended Disclosure Statement were clearly adequate. Additionally, at the conclusion of the direct examination of Mr. Robinson at the first confirmation hearing on March 26, 1996, upon agreement of the Debtor, the confirmation hearing was continued until April 24, 1996 which gave Summatyme additional time to prepare for its cross examination of Mr. Robinson and to prepare its own valuation argument. For all of these reasons, the Court finds that the Debtor has satisfied the due process requirements and it is appropriate for this Court to consider the value of the property for the purpose of deciding confirmation.

c. Valuation of Summatyme's Collateral

Summatyme's ballots were based upon its proof of claim asserting a secured claim in the amount of \$2,700,000.00 and an unsecured claim in the amount of \$955,415.00. These values were apparently based upon the determination of the value of the Complex made for the purposes of the § 362 hearing. The parties have now stipulated that the debt to Summatyme as of the petition date is in the amount of \$3,603,841.68. Therefore, in order for Summatyme to have an unsecured Class IV claim, the value of the Complex must be in an amount less than \$3,603,841.68.

JW-19

In the December 29, 1995 Order, this Court determined the value of the Complex for §362 purposes as falling between \$2,670,000.00 and \$3,175,956.00 depending on the length of the proposed sellout of the units. However, the Debtor has attempted to offer new evidence "to value this property for purposes of the Chapter 11 Plan that is presently before the Court [per §506(a)]" in the form of a new 20-month sellout analysis. Since this Court's §362 valuation was determined from a sellout analysis of the units, value could be considered "binding in determining the value" under §506(a). Colliers Bankruptcy Manual at 506-13. However, as the Debtor has presented new evidence, the Court will consider the issue.

Section 506 does not specify the time or date as of which the valuation is to be made and courts have applied varying dates. In this matter, the evidence before the Court sets values for the property as of November 17, 1995 (Debtor) and December 6, 1995 (Summatyme). The Court will rely on the values presented by both parties.

Summatyme's §506 valuation evidence for confirmation purposes is the same fair market value analysis of a 21-month sellout which was offered at the §362 hearing and upon which this Court based its §362 valuation. The Debtor introduced an "investment value" appraisal with a 20-month discounted analysis. According to the appraisal by Michael Robinson of Charleston Appraisal Services, Inc. dated March 19, 1996, the value of the Complex is \$3,560,747.00. This value alone is lower than the stipulated amount of the Summatyme pre-petition debt by \$43,094.68. Taken alone, this value would give Summatyme an unsecured deficiency claim which would control the Class IV voting. However, the Debtor's "investment value" appraisal includes the addition of \$150,000.00 to value from an "equity payment" to be made by the Debtor's partners in the future. Even the Debtor admits the problems associated with collecting

Jw-20 -

this amount by stating "Remington Forest's plan is to collect this \$150,000 during the first 60 days following confirmation of the Plan. The amount to be collected is a significant amount of money and the partners from who Remington Forest is to collect this \$150,000 are (1) dead and (2) presently in a Chapter 11 reorganization of his own." (Debtor's proposed order at page 14).

On the face of the facts of this case, this Court doubts whether the \$150,000 equity payment is feasible, and in any respect, the Debtor has failed to satisfy its burden of convincing the Court that such a payment should be included in the valuation of the collateral for confirmation purposes.

In its argument, the Debtor asserts that the Court should also add to the appraisal of Charleston Appraisal Services, Inc., the \$150,000 owed to the Debtor partnership as a note receivable by Allen Howell individually. Mr. Howell is also a Chapter 11 debtor in a separate case in which no Chapter 11 plan has yet been confirmed and is the controlling partner in the partnerships that control this Debtor. While this Court agrees that any such receivable is an asset of the bankruptcy estate, it should not be considered as part of the valuation of the Complex before the Court. Likewise, this Court has significant doubt regarding the feasibility of such a payment and it is clear that the Debtor has failed to meet its burden of proof regarding the inclusion of that amount in the valuation process for confirmation purposes.

Without going further, it is apparent that if the value of the Complex is \$3,410,747; that is, the Debtor's experts valuation less the \$150,000 equity payment and without any addition for the \$150,000 note receivable from Mr. Howell. Summatyme would not only be fully secured and able to vote its secured claim in Class II in the amount of \$3,410,747 but also vote its unsecured claim in Class IV in the amount of \$193,094.68. Such an unsecured claim is sufficient in amount

JW-21-

to control the vote in Class IV.²

For all of these reasons, the Court holds the \$3,410,747 is the value of Summatyme's interest in the Complex and that this value has been determined in light of the purpose of the valuation (confirmation of the Amended Plan) and of the proposed disposition of the property (a 20-month sellout) as required by §506(a). Therefore, Summatyme has both a Class II and a Class IV impaired claim.

3. Class III - Priority Tax Claims

Class III is comprised of all priority tax claims. Pursuant to § 1129(a)(9), these claims shall be paid in full by making seventy-two equal monthly payments which total the sum of those claims, together with interest, at the "underpayment rate" as determined by 26 U.S.C. § 6621. While not designated as impaired or unimpaired in the Amended Plan, it is well established in the Fourth Circuit that a class of priority tax claims cannot constitute an impaired accepting class.

In Bryson Properties (Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII), 961 F.2d 496, 501, n. 7 (4th Cir.1992)), the court noted that priority tax claims "are not designated as a 'class' within the definition of § 1123(a)" and that other courts had held, on that basis, that "acceptance of a plan by priority tax claimants is not acceptance by a 'class' of impaired claims under § 1129(a)(10) for the purpose of cram down." *Id.* The court concluded, "We agree that priority tax claimants, which receive preferential treatment under the Code (see 11 U.S.C. § 1129(a)(9)(C)), are not an impaired class that can accept a plan and

²The Court considered Summatyme's other arguments regarding the reduction of value for profit incentive, sales commissions, cash collateral payments, the number of units to be sold, the presence of a sales model unit and the use of a unit as a manager's office, and finds such arguments more convincing that the Debtor's positions on these issues, however, because of the Court's other findings within, it need not formally address these other issues at this time.

bind other truly impaired creditors to a cram down." Id. Bryson is controlling, and the debtor therefore cannot rely on acceptance by the Class 2 claim as satisfying the requirement of § 1129(a)(10) for acceptance by a non-insider impaired class.

In re Deluca, 194 B.R. 797 (Bkrctcy.E.D.Va. 1996).

4. Class IV - Unsecured Claims

Class IV is comprised of the allowed unsecured creditors. This class is designated as impaired by the Debtor in the Amended Plan. As stated previously, certain tenant ballots were filed which asserted Class IV status but which apparently chose Class V treatment. Such tenants may have an unsecured claim in Class IV if their leases were rejected by the Amended Plan and they asserted a claim under § 365(h). However, based upon their ballots, that does not appear to be the situation. Of the remaining Class IV claimants, the sole vote in favor of the Amended Plan was in the amount of \$312.00, filed by Bair's Landscape Maintenance, Inc.

Based upon the unsecured claim of Summatyme in the amount of \$193,094.68, this class has not accepted the Amended Plan regardless of whether the tenants ballots are included in Class IV or not.

5. Class V - Contingent Claim's of the Tenants

Class V is comprised of contingent claims of the tenants of the Debtor that may arise from possible rejections of leases in the event the individual units are sold over time as provided for in the Amended Plan. This class is designated as impaired. Summatyme objects to the inclusion of this class and takes the position that the contingent claims of the tenants were artificially created for the sole purpose of having an impaired class voting for the Amended Plan and therefore can not be included for § 1129 purposes. The Court will not base its findings upon

Jw - 23 -

the mere categorization of the class as impaired but will look to other factors as will be more fully developed below.

a. Impaired Claims

The first issue before the Court is whether this newly created class of claims is in fact impaired. In a recent decision from the Eastern District of Pennsylvania, the Bankruptcy Court, when confronted with a similar factual scenario involving the impairment of rent deposits in a single asset apartment complex, while not finding that artificial impairment was prohibited by § 1129, did note as follows:

The interesting question of enhancement as impairment can be left aside in this instance, as the confirmation hearing testimony...made clear that notwithstanding the language of the plan the Debtor does not intend to refund tenant security deposits in full, in advance. Rather, the Debtor intends to return deposits individually at such time as tenants actually vacate premises, albeit in two installments. This clearly is not an enhancement of the tenants rights under the Landlord and Tenant Code (assuming no damage to the tenant's apartment), yet it is perhaps the barest imaginable degree of impairment... Added to this scenario is the reality that the tenant class is not expected to remove itself en masse. Rather, departures and deposit returns will undoubtedly be few in number at any particular point in time. Consistent with this, Young testified that at present only approximately 7 or 8 tenants are awaiting return of their deposits. Given that the typical monthly rentals at the property are in the \$500 to \$600 range, it can easily be seen that there is little economic impetus underlying the decision to impair the rights of vacating tenants by bifurcating the return of their deposits into two installments. On the contrary, the nominal impairment of the Class is obviously designed specifically to achieve compliance with the requirements of 11 U.S.C. § 1129(a)(10).

In re Duval Manor Associates, 191 B.R. 622, 627 (Bkrcty.E.D. Pa. 1996) (emphasis added).

The Second Circuit Court of Appeals was also confronted with a debtor who attempted to

JW-24-

classify the residential tenants whose security deposits were being held by the debtor as a separate and "impaired" class. The Second Circuit held:

In this case, the Class 3 tenant security depositors could not constitute a voting class of creditors for purposes of effecting cramdown. Any claim for return of tenant security deposits would arise from the lease between the debtor and the tenant. Under the Bankruptcy Code, unexpired leases must be assumed or rejected by the Debtor. 11 U.S.C. § 365. When, as in the instant case, the Debtor does neither, the leases continue in effect and the lessees have no provable claim against the bankruptcy estate. Greystone III, 995 F.2d at 1281.

In re Boston Post Road Ltd. Partnership, 21 F.3d 477 (2nd Cir. 1994). In the Amended Plan, the Debtor attempts to assume all leases and at the same time count votes from the tenants based upon the contingent claims for possible rejection damages. The Bankruptcy Court for the Eastern District of Pennsylvania has stated the inherent problems with this procedure.

Assumption of an executory contract under 11 U.S.C. § 365... requires a curing of all defaults. In this respect, (the secured creditor) cites In re Boston Post Road Ltd. Partnership, 21 F.3d 477, 483 (2d Cir.1994) and Matter of Greystone III Joint Venture, supra for the propositions, respectively that tenants whose leases are not assumed or rejected have no provable claims against a Chapter 11 Debtor, while tenants whose leases are assumed must have defaults cured and are entitled to a non-voting administrative expense.

In re Curtis Center Ltd. Partnership, 192 B.R. 648 (Bkrcty.E.D.Pa. 1996). This Court is faced with a very similar dilemma. The claims in Class V are filed as contingent claims based upon possible rejection damages in the event their leases are rejected. Paragraph 7.2 of the Amended Plan states that "[a]ny written or oral executory contract not otherwise dealt with in this Plan and not previously rejected by the Debtor which exists between the Debtor and any individual or entity is hereby assumed pursuant to 11 U.S.C. § 1123(b)(2)". If it appears that the Debtor is

attempting to assume the tenant's leases, any damages for defaults would have to be cured and would be entitled to administrative expense treatment on confirmation, a class which would not be counted for voting purposes. Likewise, any assertion of breach after assumption would give rise to damages to be treated as administrative expenses.

To complicate matters, the leases themselves were not presented into evidence before the Court and therefore there is nothing to indicate the terms of the leases of the tenants which the Debtor may seek to displace by the possible sale of the individual units. A sufficient number of leases may expire upon their own without a breach or rejection or certain tenants may have only month to month rental agreements that could be terminated by either side with thirty days notice. Additionally, this information is critical because, even upon rejection, a tenant would have a choice of remedies as provided for in § 365(h). The Debtor's proposed treatment of tenants under the Amended Plan is inconsistent and uncertain and the Court finds that the Debtor has failed to establish that this is a properly impaired class.

b. Artificially Created Claims

Even if the Court were to find that the contingent claims class of the tenants was an impaired class, Summatyme takes the position that it was artificially created for the sole purpose of confirmation. As this Court previously held in the December 28, 1995 Order, attempts by Debtors to obtain confirmation of a plan by manipulation of the Chapter 11 process is a violation of the §1129(a) requirements, including a lack of good faith. See, In re Bryson Properties XVIII, 961 F.2d 496, 503 (4th Cir. 1992), cert. denied, 506 U.S. 866, 113 S.Ct. 191 (1992); In re W.C. Peeler Co., Inc., 182 B.R. 435 (Bkrtcy. D.S.C. 1995) and In re Dunes Hotel Associates, 188 B.R. 174 (Bkrtcy. D.S.C. 1995).

JW-26-

Bankruptcy Code § 1129(a)(10) is designed to prevent a plan from being confirmed unless a class of creditors truly impaired by such plan support it. Windsor on the River, 7 F.3d at 131 ("The purpose of [Bankruptcy Code s 1129(a)(10)] 'is to provide some indicia of support [for a plan] by affected creditors and prevent confirmation where such support is lacking.' ") (quoting In re Lettick Typographic, Inc., 103 B.R. 32, 38 (Bankr.D.Conn.1989)) (emphasis added). Accordingly, an attempt to manipulate the Chapter 11 process by engineering technical and literal compliance with § 1129(a)(10) by artificially impairing a class of claims in the face of overwhelming opposition by truly impaired creditors constitutes a perversion of Chapter 11. Windsor on the River, 7 F.3d at 132 ("Confirmation of a plan where the debtor engineers the impairment of the only approving impaired class 'so distorts the meaning and purpose of Section 1129(a)(10) that to permit it would reduce (a)(10) to a nullity.' ") (citations omitted). Thus, under § 1129(a)(10), a reorganization plan that does not have support from creditors truly impaired by the plan cannot be confirmed.

In re Dunes Hotel Associates, 188 B.R. at 185. When previously faced with accusations of artificial impairment in this case, the Court expressed its concerns in the December 28, 1995 Order granting Summatyme relief from the §362 automatic stay. The December 28, 1995 Order found in part as follows:

Based on the Debtor's Schedules, Disclosure Statement and the testimony at the hearing, it is evident that there exists no truly impaired class of claims in this case that would vote to accept any Plan put forth by the Debtor and therefore such a Plan is unconfirmable. The only means by which the Debtor has to obtain an accepting impaired class is to artificially impair or create a class of claims or to use a separate classification of similar claims to secure the vote of an accepting impaired class of claims under § 1129(a)(10). The Fourth Circuit Court of Appeals, as well as the Bankruptcy Court in this district, have rejected such attempts by debtors to obtain confirmation of a plan by manipulation of the chapter 11 process as a violation of the §1129(a) requirements, including a lack of good faith. See In re Bryson Properties XVIII, 961 F.2d 496, 503 (4th Cir. 1992), cert. denied, U.S.C., 113 S.Ct. 191 (1992); In re W.C. Peeler, Co., Inc., 182 B.R. 435

JW-27-

(Bankr. D.S.C. 1995) (Bishop, J.) and this Court's opinion dated September 20, 1995 in the case of In re Dunes Hotel Associates, 188 B.R. 174 (Bkrcty. D.S.C. 1995).

In re Remington Forest, 194 B.R. 384, 387 (Bkrcty.D.S.C. 1995). The Court has previously stated its intrepidation in allowing a "cramdown" of a Chapter 11 plan based upon an artificially created class of claims.

Cramdown is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying § 1129(a)(10) is that before embarking upon the tortuous path of cramdown in compelling the target of cramdown to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan. In re 266 Washington Associates, 141 B.R. 275, 287 (Bankr.E.D.N.Y. 1992). 148 B.R. at 1020.

In re W.C. Peeler Co., Inc., 182 B.R. at 436, 437. The In re W.C. Peeler Co., Inc. opinion held that for a "claim to be considered 'impaired' under § 1129(a)(10) so as to cause 'cramdown' of another creditor's claim, it is incumbent upon the debtor to show to the satisfaction of the court that it is necessary to impair the accepting class for economical or other justifiable reasons." In this case, apart from the obvious effect of having its Amended Plan confirmed, the Debtor has not shown an economical, justifiable, or legitimate business reason to have this separate class of claims and the Court will not allow its vote on confirmation.

6. Class VI - Partner's Claims

Class VI is comprised of the allowed interest of the partners and general partners of the Debtor. This class is also designated as impaired. The Amended Plan proposes an equity payment of \$150,000.00 from the partners and general partners in return for their retention of

JW-28

their partnership interests in the Debtor. Without reliance on the feasibility of the payment being made, § 1129(a)(10) provides that at least one impaired class must vote in favor of the plan "without including any acceptance of the plan by any insider", and because this class is comprised of insiders of the Debtor as that term is defined in § 101(31), the vote of this class can not be considered impaired and consenting for confirmation purposes.

Additionally, Summatyme takes the position that the Amended Plan does not meet the absolute priority rule of §1129 (b)(2)(B). As stated previously on the issue of the value of the Complex, even the Debtor has anticipated the problems with collecting the equity payment based upon the death of one partner and the Chapter 11 bankruptcy of another partner. However, as the Court has denied confirmation for the other reasons stated within, it need not rule upon this argument at this time.

D. Conclusion

Under §1129(a)(10), if there are one or more impaired classes of claims under the Plan, at least one such class must accept the Plan, without counting the acceptances of insiders. Based on a value of \$3,410,747.00 Summatyme has both a secured claim in the amount of \$3,410,747.00 and an unsecured claim in the amount of \$193,094.68, an amount which would control the unsecured Class IV vote. Therefore, for the reasons stated above, as the votes of Class I, Class III, Class V, and Class VI are not entitled to be counted, and as Class II and Class IV have rejected the Amended Plan, the Debtor does not meet the requirements of §1129 and confirmation of the Amended Plan must be denied. For all of these reasons, it is

Jw - 29

ORDERED, that Summatyme's objection to the confirmation of the Debtor's Amended Plan is sustained and confirmation of the Amended Plan is denied.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

June 17, 1996.

ju - 30