

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

MOUNTAIN EDGE LLC,

Debtor.

No. 12-10835 t11

ORDER RESULTING FROM STATUS CONFERENCE

This matter is before the Court in connection with the Debtor's Plan of Reorganization Dated November 8, 2012, doc. 73 (the "Amended Plan"), and the objection thereto filed by creditor Clare Miller ("Miller"), doc. 82 (the "Objection"). Debtor recently withdrew the Amended Plan because no impaired creditor class accepted it. A final confirmation hearing, scheduled for December 20, 2012, was canceled and the Court instead held a status conference. At the status conference, Miller (through counsel) argued that the Court must grant her stay relief pursuant to 11 U.S.C. § 362(d)(3) because the Amended Plan did not, when filed, have a reasonable possibility of being confirmed within a reasonable time. *See* § 362(d)(3)(A).¹ Miller's arguments are set forth in her Objection.

Miller agreed at the status conference that if the Amended Plan satisfied § 362(d)(3)(A) when filed, then Debtor would be able to pursue confirmation of a further amended plan, so long as Debtor complied with the filing and confirmation deadlines for small business debtors.²

The Court agreed to review the Amended Plan and consider the stay relief issue. It has now done so, and finds that the Amended Plan satisfied the requirements of § 362(d)(3)(A) when

¹ It is undisputed that this is a single asset real estate case. It is also undisputed that Debtor has not commenced payments of interest at the non-default contract rate, an option under § 362(d)(3)(B) to keep the automatic stay in place.

² Under these requirements, Debtor must file a second amended plan by December 28, 2012, *see* § 1121(e)(2), and obtain confirmation of such plan within 45 days after the filing date. § 1129(e).

filed, so that granting stay relief is not required at this time. However, the Court believes it appropriate to impose conditions to continuing the automatic stay, as set forth below.

A. Miller's Negative Amortization Argument. In the Objection, Miller first argues that the Amended Plan was not confirmable when filed because it is a negative amortization plan. Objection, pp. 1-5. The Court agrees with Miller that negative amortization plans are suspect, especially where, as here, the creditor is undersecured. See *In re Sunflower Racing, Inc.*, 226 B.R. 673, 688 (D. Kan. 1998); *In re Mount Carbon Metropolitan District*, 242 B.R. 18, 35 (D. Colo. 1999); *In re General Electrodynamics Corp.*, 368 B.R. 543, 550 (Bankr. N.D. Tex. 2007). The Court finds, however, that the Amended Plan is not a negative amortization plan. The Amended Plan provides that Miller's claim would be paid in full with 4.75% interest, amortized over about 34 years with a 10-year "balloon." Debtor projects that Miller's claim would be paid down to \$0 before the 10-year balloon date through lot sales. These treatment terms may or may not comply with 11 U.S.C. § 1129, but they are not tantamount to negative amortization. Of course Miller would like to be paid sooner with a higher interest rate, but such disagreement does not mean that the Amended Plan proposes negative amortization or its equivalent.

It appears that Miller's negative amortization argument is based largely on the assertion that a 4.75% rate is inadequate. Objection, p. 3. If a confirmation hearing had been held, the Court would have taken evidence and ruled whether the proposed interest rate complied with § 1129(b)(2)(A)(i)(II). Had the Court found the rate insufficient, it would not have confirmed the Plan. The Court cannot say at this point whether the proposed rate is sufficient under §1129.

Miller raises related objections about the proposed amortization schedule and balloon payment. Objection, p. 3. These are legitimate concerns, but whether they would have resulted

in denial of plan confirmation depends on the facts of the case, which are not now before the Court.

B. Miller's §363(k) Argument. Miller's other main argument is that the Plan was not confirmable because it did not preserve her rights under §363(k).³ Objection, pp. 5-6. The Court agrees with Miller that her credit bid rights must be preserved in any plan. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070, 182 L. Ed. 2d 967 (2012) (per § 1129(b)(2)(A)(ii), §363(k) credit bid rights cannot be terminated by a Chapter 11 plan). The Amended Plan is silent on Miller's § 363(k) rights. Nevertheless, the Court does not believe Debtor intended to take away those rights. Rather, it seems likely the Amended Plan was drafted without consideration of the issue, and that if the matter had been brought to Debtor's attention at a confirmation hearing, Debtor would have agreed that the Amended Plan preserved Miller's credit bid rights.

This interpretation is bolstered by the fact that the Amended Plan is also silent about whether all net proceeds from the sale of Miller's collateral will be paid to Miller. At the status conference, Debtor's counsel confirmed Debtor's intent to pay Miller all such proceeds. The Court believes Debtor had a similar unstated intent concerning Miller's credit bid rights.

C. Miller's Other Arguments. In addition to the negative amortization and 363(k) arguments, Miller asserts that the Amended Plan is not feasible, Objection, p. 3, that the treatment of Miller's claim is not reasonable, *id.*, and that the plan unfairly shifts market and other risks to Miller. Objection, pp. 3-5. The Court is not overruling any of these objections, and will take them up if and when they are raised in connection with confirmation of Debtor's second amended plan. *See, e.g., In re Mount Carbon Metropolitan District*, 242 B.R. at 35 (plan terms that provide for deferred payments over an extensive period of time may make the

³ § 363(k) allows secured creditors to credit bid if their collateral is sold.

showing of feasibility difficult). However, the objections do not go to whether the Amended Plan is unconfirmable on its face, since the objections cannot properly be ruled upon without an evidentiary hearing.

D. Deadlines for Filing and Confirming a Second Amended Plan. The Court's decision to continue the automatic stay in effect is conditioned on Debtor's compliance with the plan filing and confirmation deadlines set out in footnote 2 above.

E. Contents of Second Amended Plan. Debtor's second amended plan should contain, inter alia, a statement that all net proceeds from the sale of Miller's collateral will be paid to Miller, and a statement that Miller's § 363(k) credit bid rights are preserved.

F. Interim Interest Payments. At the status conference, the Debtor volunteered to make interest-only payments to Miller between now and a final confirmation hearing on a second amended plan, all without prejudice of Miller's right to argue, inter alia, that she is entitled to immediate stay relief. The Court thinks it is reasonable to condition continuation of the automatic stay on the Debtor commencing interest-only payments to Miller.

THE COURT THEREFORE ORDERS:

1. Debtor shall file a second amended plan by December 28, 2012, which plan shall contain, inter alia, the provisions set forth in Section E above.

2. A final hearing on confirmation of the Second Amended Plan shall be held within 45 days after the filing date.

3. Debtor shall commence interest-only payments to Miller, at Miller's non-default contract rate, with the first payment due January 1, 2013 and late on January 10, 2013. The February, 2013 payment shall be for a full month, even though the confirmation hearing likely

will be held mid-February. Miller may accept all such payments without prejudice to any rights or arguments she may have.

4. So long as Debtor complies with the foregoing, the automatic stay shall remain in effect until further order of the Court.



Hon. David T. Thuma
United States Bankruptcy Judge

Entered on docket: December 21, 2012.

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