Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
February 28, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 19-17670-MKN
	)	Chapter 11
VAC FUND HOUSTON, LLC,	)	
	)	Date: February 26, 2020
Debtor.	)	Time: 10:30 a.m.
	)	

ORDER ON MOTION FOR DETERMINATION OF GOLDMAN SACHS BANK USA'S ENTITLEMENT TO PAYMENT FOR POST-PETITION DEFAULT INTEREST[1]

On February 26, 2020, the court heard the Motion for Determination of Goldman Sachs Bank USA's Entitlement to Payment for Post-Petition Default Interest, brought by the above-captioned Debtor. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On December 2, 2019, a voluntary Chapter 11 petition was filed by VAC Fund Houston, LLC ("Debtor"), along with its schedules of assets and liabilities ("Schedules") and statement of financial affairs ("SOFA"). (ECF No. 1). In its real property Schedule "A," Debtor listed fifty-five separate parcels of property located in Texas. In its creditor Schedule "D," Debtor listed Genesis Capital LLC, aka Goldman Sachs ("Goldman Sachs") as having numerous claims in various amounts secured by deeds of trust against various scheduled parcels of real property. Debtor lists a value of each of the parcels of real property listed in Schedule "A" and repeated in

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq.

Schedule "D," as well as the amount owing on each secured claim listed in Schedule "D." Debtor also listed LendingHome Funding Corporation ("LHF Corporation") as having numerous separate claims in various amounts secured by deeds of trust against various separate parcels of real property. None of the claims of Goldman Sachs or LHF Corporation are designated as contingent, unliquidated, or disputed. Debtor's Schedules and SOFA are signed under penalty of perjury by Christopher Shelton as trustee of VAC Fund Houston Trust, Manager of the Debtor.

On December 18, 2019, Goldman Sachs filed a notice of non-consent for use of cash collateral ("Non-Consent Notice") and demand for segregation and accounting of cash collateral with respect to its real property security. (ECF No. 33). In that notice, Goldman Sachs identifies twenty-two parcels of real property in which it asserts a cash collateral interest, see Non-Consent Notice at 1:27 to 2:20, and identifies six separate loans that are separately secured by the twenty-two parcels. Id. at 2:22 to 12:2.

On the same day the Non-Consent Notice was filed, Debtor filed various initial Chapter 11 motions ("First Day Motions"), including a motion for use of cash collateral ("Cash Collateral Motion"), (ECF Nos. 34, 36, 37, and 38), for which an expedited hearing was scheduled for January 3, 2020. (ECF No. 49). Oppositions to the First Day Motions were filed by Goldman Sachs (ECF Nos. 57, 58, and 59), accompanied by the supporting Declaration of Andrea Hageman ("Hageman Declaration"). (ECF No. 61). Opposition also was filed by the Office of the United States Trustee ("UST"). (ECF No. 60).

On January 2, 2020, Debtor filed an "omnibus reply" to the objections filed by Goldman Sachs to the First Day Motions, to which is attached the Declaration of Chris Shelton ("Shelton Declaration"). (ECF No. 69).[2]

On January 3, 2020, Goldman Sachs filed an evidentiary objection to the admission of the Shelton Declaration. (ECF No. 72). On the same date, the First Day Motions were heard, and some relief was granted. A final hearing on the Cash Collateral Motion, *inter alia*, was scheduled for February 21, 2020.

[2] Instead of responding in its omnibus reply to Goldman Sachs' evidentiary objections to the admission of the First Jorgenson Declaration, Debtor apparently submitted the Shelton Declaration.

On January 15, 2020, an official committee of unsecured creditors ("UCC") was appointed. (ECF No. 87).

On January 17, 2020, an interim order authorizing limited use of cash collateral was entered ("Interim Cash Collateral Order"), subject to further consideration at the final evidentiary hearing scheduled for February 21, 2020. (ECF No. 98).

On January 20, 2020, Debtor filed a reply to the Goldman Sachs' Objection ("Debtor Reply"). (ECF No. 99). On the same date, a response in support of the Sale Motion was filed by the UCC ("UCC Response"). (ECF No. 100).

On January 23, 2020, Debtor filed the instant Motion for Determination of Goldman Sachs Bank USA'S Entitlement to Payment for Post-Petition Default Interest ("Interest Motion"). (ECF No. 103). The Interest Motion was noticed to be heard on February 26, 2020. (ECF No. 104).

On January 28, 2020, Debtor filed a supplemental cash collateral budget. (ECF No. 108).

On February 12, 2020, Goldman Sachs filed an opposition to the Interest Motion ("Opposition"). (ECF No. 182).

On February 12, 2020, a response in support of the Interest Motion was filed on behalf of the UCC ("UCC Response"). (ECF No. 183).

On February 19, 2020, an order was entered approving a stipulation to continue the hearing on the Cash Collateral Motion, *inter alia*, from February 21, 2020, to February 26, 2020. (ECF No. 203). Included in the stipulation approved by the court was an exhibit agreed upon between the Debtor and Goldman Sachs as to the value of its parcels of real property collateral for purposes of the Cash Collateral Motion. On the same date, Goldman Sachs filed an objection to the UCC Response. (ECF No. 213).

On February 20, 2020, Debtor filed a reply in support of the Interest Motion ("Debtor Reply"). (ECF No. 228).

On February 24, 2020, the UCC filed a joinder in the Debtor Reply along with a Declaration of Qiulan Tanenbaum ("Tanenbaum Declaration") in support of the joinder ("UCC Reply Joinder"). (ECF Nos. 231 and 232).

On February 25, 2020, Goldman Sachs filed a motion to strike the UCC Reply Joinder ("Strike Motion") along with various evidentiary objections to the Tanenbaum Declaration ("Evidentiary Objection"). (ECF Nos. 234 and 235).

DISCUSSION

Attached as Exhibit "1" to the Interest Motion is a copy of a Promissory Note between the Debtor and Goldman Sachs dated February 27, 2019 ("Note").[3] Attached as Exhibit "2" to the Interest Motion is a one-page document entitled "Asset Data and Interest Calculations for Goldman Sachs (Genesis) with and without Default Interest" ("Calculations Table"). In its motion, Debtor refers to the Shelton Declaration as evidence that Goldman Sachs and LHC are oversecured. See Interest Motion at 2:3-6.

The Note has a maturity date of December 1, 2019. It provides for the loan amount of $2,335,200 to be paid at an interest rate of 8.00 percent per annum. It also includes the following provision:

> INTEREST AFTER DEFAULT. Upon the occurrence of an Event of Default, at Lender's option, and if permitted by applicable law, Lender may add any unpaid accrued interest to principal and such sum will bear interest therefrom until paid at the rate provide in this Note Including any increased rate). Upon an Event of Default, the interest rate on this Note shall immediately increase to the lesser of ten percent (10%) more than the non-default interest rate, or the Maximum Legal Rate (the "Default Rate").

(Emphasis added). Among other things, the Note also provides that it will be governed in all respects by California law.

Section 506(a) provides that the claim of a secured creditor shall be allowed in accordance with the value of its collateral. 11 U.S.C. § 506(a). In the event the value of the collateral exceeds the amount of the secured creditor's claim, Section 506(b) provides that the holder of the claim shall be allowed interest on the claim and any reasonable fees, costs or charges provided under the agreement under which the claim arose. 11 U.S.C. § 506(b).

[3] Copies of each of the six promissory notes are attached as Exhibits 3, 11, 19, 31, 39, and 47 to the Hageman Declaration.

According to the Calculations Table, the allowance of default interest under the Note will significantly impact the funds available for distribution to unsecured creditors. For that reason, Debtor seeks a determination that Goldman Sachs is not entitled to an allowance of default interest on its claim after the Chapter 11 petition was filed on December 2, 2019. Naturally, the UCC supports the Debtor's position as its constituency stands to benefit. There is no basis in the record, however, to make the determination sought by the Debtor.

Goldman Sachs correctly asserts that because it admittedly is an oversecured creditor for purposes of Section 506(b), it is entitled to interest on its allowed secured claim as provided in the Note. There is no dispute that the Debtor is in default under the Note. The default interest provision is only one of the portions of the Note agreed between the parties. In this circuit, there is a presumption that a default interest provision in an agreement is enforceable as long as the claimant is oversecured. See In re Beltway One Development Group, LLC, 547 B.R. 819, 830 (B.A.P. 9th Cir. 2016). See also In re Epicenter Partners, L.L.C., 789 Fed.Appx. 632, 634 (9th Cir. 2020). Compare Pacifica L 51 LLC v. New Investments (In re New Investments, Inc.), 840 F.3d 1137, 1142 (9th Cir. 2015) ("The parties bargained for a higher interest rate on the note in the event of a default, and Pacifica is entitled to the benefit of that bargain under the terms of § 1123(d)."). Like any evidentiary presumption, the burden rests upon the objecting party to rebut the presumption by presenting evidence establishing why a default interest provision should not be enforced under applicable law. See In re Nigro HQ LLC, 2019 WL 5880443, at *3 (Bankr. D.Nev. May 3, 2019).

In this instance, Debtor has cited no persuasive legal authority under California law suggesting that the default interest provision of the Note is unenforceable. Moreover, Debtor has provided no evidence by way of declaration, affidavit, or otherwise to support even an equitable argument that the default interest provision in this case should not be enforced.[4] Thus, the

[4] Exhibit 1 to the Interest Motion is simply a copy of the Note and Exhibit 2 is simply a Calculations Table expressing Debtor's argument as to the effect of Default Interest. The Interest Motion references the Shelton Declaration only to support Debtor's position that Goldman Sachs is oversecured. The Debtor Reply is not accompanied by any supporting evidence whatsoever. Because the argument of counsel is not evidence, it is apparent that the Debtor has failed in all aspects to meet its burden of proof and persuasion.

Interest Motion must be denied because of the Debtor's failure to provide an evidentiary basis to rebut the presumption in favor of enforcement.

The court is mindful that the UCC supports the Interest Motion. The court has reviewed the Tanenbaum Declaration which suggests that the unsecured creditor body consists of vendors who provided goods and services to the Debtor as well as lenders who provided funds for the Debtor's operations.[5] The court accepts at face value that some unsecured creditors will suffer substantial hardship from the Debtor's inability to pay them in full for their goods and services. Even if the court were to ignore the evidentiary objections raised by Goldman Sachs, however, the concerns raised by the UCC are insufficient to overcome the presumption of enforceability of the default interest provision.[6]

Unsecured creditors could have included default interest provisions in their agreements and they may have been entitled to enforce such provisions against the Debtor outside of bankruptcy. In bankruptcy, however, prepetition claims for unmatured interest generally are not allowed under Section 502(b)(2), while postpetition claims for unmatured interest are allowed for oversecured creditors under Section 506(b). In other words, oversecured creditors are afforded protections in bankruptcy that unsecured creditors are not. Thus, the concerns expressed by the UCC, even if established by sufficient evidence, offer no basis for concluding that the default interest provision in the Note is unenforceable.

---

[5] Like all creditor committees formed in a bankruptcy case, the UCC functions to represent the interests of all unsecured creditors rather than the interests of its committee members. Chapter 11 committees have a fiduciary responsibility to their constituencies, see Shaw & Levine v. Gulf & W. Indus. Inc. (In re Bohack Corp.), 607 F.2d 258, 262 n.4 (2nd Cir. 1979) and In re Nat'l R.V. Holdings, Inc., 390 B.R. 690, 700 (Bankr. C.D. Cal. 2008), and individual committee members may be sued for breaching such duties if the lawsuit is authorized by the court. See generally Blixseth v. Brown (In re Yellowstone Mountain Club, Inc.), 841 F.3rd 1090, 1095 (9th Cir. 2016). Any suggestion that the members of the UCC are advancing their own interests rather than the interests of all unsecured creditors, however, has no evidentiary support in the current record on the Interest Motion.

[6] Because the UCC Joinder and the Tanenbaum Declaration are not material to the outcome of the Interest Motion, the court denies without prejudice the Strike Motion and Evidentiary Objection.

IT IS THEREFORE ORDERED that the Motion for Determination of Goldman Sachs Bank USA's Entitlement to Payment for Post-Petition Default Interest, brought by the above-captioned Debtor, Docket No. 103, be, and the same hereby is, **DENIED.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent to all parties via BNC

Copies sent via BNC to:
VAC FUND HOUSTON, LLC
ATTN: OFFICER/MANAGING AGENT
1000 N GREEN VALLEY
HENDERSON, NV 89074