

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Hearing Date: February 6, 2014 at 11:00 a.m.

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In the Matter of

Chapter 7

MIDDLE BAY GOLFERS' ASSOCIATION, INC.

Case No.: 13-70361-dte

Debtor.
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MOTION

**TO: THE HONORABLE DOROTHY T. EISENBERG,
UNITED STATES BANKRUPTCY JUDGE:**

Kenneth Kirschenbaum, the Chapter 7 Trustee for the estate (the "Estate") of Middle Bay Golfers' Association, Inc. (the "Debtor"), by and through his attorneys, Kirschenbaum & Kirschenbaum, P.C., moves for entry of an order: (a) seeking authorization, pursuant to Federal Rule of Bankruptcy Procedure 9019, for the Trustee to enter into a Stipulation of Settlement with South Bay Country Club, LLC and Weinstein Enterprises, Inc. compromising and settling the controversy regarding the termination of South Bay Country Club, LLC's interest in the certain Assignment & Assumption Agreement in accordance with the terms and conditions set forth in the Stipulation of Settlement annexed hereto; and (b) granting such other and further relief as the Court deems just and appropriate.

BACKGROUND

1. On January 23, 2013 (the "Petition Date"), Middle Bay Golfers' Association, Inc. filed a voluntary petition for relief pursuant to Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). Kenneth Kirschenbaum was appointed as the Interim Trustee, has since qualified as Trustee and is acting as Chapter 7 Trustee.

2. Prior to the Petition Date, the Debtor operated a country club, including an 18-hole golf course known as the Middle Bay Country Club and a restaurant and catering facility

located on approximately 138 acres on the water at 3600 Skillman Avenue, Oceanside, New York (the “Premises”). As a result of Super Storm Sandy, the Premises were devastated and in need of extensive repairs and renovations. Because of the devastation inflicted on the Premises, the Debtor could not afford the repairs it was obligated to make under its non-residential real property lease. Accordingly, the Debtor ceased the operation of its business and filed for Chapter 7 relief on the Petition Date.

3. By Agreement of Lease, dated August 24, 1967, Weinstein Enterprises, Inc. (“Weinstein” or “Landlord”) leased the Premises to the Debtor. This lease was modified and extended pursuant to an Extension and Modification of Lease Agreement made as of March 8, 2013 (the “Lease”) entered into between Weinstein and the Trustee.

4. On February 11, 2013, the Trustee filed a motion seeking Bankruptcy Court (the “Court”) approval to sell the Estate’s right, title and interest in the Lease through a public auction sale. The Court entered an order on February 25, 2013 authorizing the sale, and the auction was held on March 12, 2013. Tariq Khan (“Khan”) was appointed as the successful bidder, and he subsequently assigned his rights and interests to purchase the Lease to South Bay Country Club, LLC (“South Bay”).

5. Pursuant to that certain Assignment and Assumption Agreement dated April 8, 2013 (the “A&A Agreement”), entered into between and among the Trustee, Weinstein and South Bay, South Bay agreed to purchase the Estate’s right, title and interest in the Lease for \$2.6 million, subject to the terms and conditions of the A&A Agreement. Under the A&A Agreement, South Bay paid the Estate \$1 million as a deposit, with the balance to be paid on April 19, 2013 at 11:00 a.m. (the “Delivery Date”), with time being of the essence. Of the \$2.6 million purchase price, \$2 million was to be paid to the Landlord at closing and held in a “Work

Fund” for use by South Bay in connection with the repair and restoration of the Premises. The A&A Agreement also contained a liquidated damages provision pursuant to which South Bay would lose its entire deposit if it defaulted under the A&A Agreement.

6. South Bay requested additional time to consummate the sale, which was consented to by the Trustee and the Landlord. Pursuant to the Agreement to Extend Delivery Date, dated April 19, 2013 (the “First Extension Agreement”), the Delivery Date was extended to June 20, 2013, with time being of the essence. Under the First Extension Agreement, South Bay paid the Estate a total of \$1.25 million as an additional deposit, increasing the entire deposit to \$2.25 million. South Bay also reimbursed the Estate for rent and real estate taxes. The First Extension Agreement granted South Bay a license for access to the Premises in connection with the clean-up, maintenance and restoration of the golf course and the structures on the Premises and authorized South Bay, if it obtained the requisite insurance, to commence its business operations. Similar to the A&A Agreement, the First Extension Agreement also contained a liquidated damages provision, which provided that South Bay’s entire deposit of \$2.25 million (the “Deposit”) would be retained by the Estate if South Bay defaulted under the First Extension Agreement or any provision of the Lease and the other applicable agreements.

7. Because South Bay was not able to close and pay the balance of the consideration on June 20, 2013, it requested another extension of the Delivery Date. Under the Second Extension Agreement dated June 20, 2013 (the “Second Extension Agreement” and together with the Lease, the A&A Agreement and the First Extension Agreement, the “Agreements”), the Delivery Date was extended to July 9, 2013, with time being of the essence. The Second Extension Agreement required South Bay, among other things, to reimburse the Trustee for rent,

real estate taxes and insurance premiums incurred by the Trustee and for South Bay to be in full compliance with the terms of the previous agreements.

8. The Second Extension Agreement also mirrored the A&A Agreement and the First Extension Agreement by containing a liquidated damages provision, and it mirrored the First Extension Agreement in that it continued South Bay's license to the Premises. Both the First Extension Agreement and the Second Extension Agreement provided that the Trustee could terminate South Bay's license if the Trustee determined that South Bay was not adequately preserving or protecting the Premises.

9. Due to various defaults under the Agreements, on July 2, 2013, the Landlord and the Trustee notified South Bay that it was in default. Pursuant to a letter (the "Termination Letter") personally delivered to Khan by the Trustee, the Trustee terminated South Bay's license for access to the Premises, and directed South Bay to vacate the Premises. When South Bay failed to comply, the Trustee filed a motion (the "First Motion") on July 3, 2013, seeking, among other things, to (i) terminate South Bay's interest in the A&A Agreement, (ii) terminate South Bay's license, (iii) direct South Bay to vacate the Premises, and (iv) authorize the Trustee to operate the Debtor's business.

10. The Court held an initial hearing on the First Motion on July 11, 2013, and evidentiary hearings on August 6, 2013, August 15, 2013, August 26, 2013, August 27, 2013, and September 23, 2013, after which the Court took the matter under submission.

11. On October 31, 2013, the Trustee filed an emergency motion (the "Second Motion" and together with the First Motion, the "Motions") for an order directing South Bay to vacate the Premises immediately and authorizing the Trustee to take any necessary actions to remove certain violations of the local fire prevention ordinances in light of a violation issued by

the Nassau County Fire Commission, Office of Fire Marshal, which issued a violation order directing that there be no occupancy of the Premises until the fire sprinkler system was fully operational. The Court held a hearing on the Second Motion on November 3, 2013 and at the conclusion of the hearing the Court took the Second Motion under submission.

12. On December 5, 2013, the Court entered its Memorandum Decision (the “Decision”) and a separate Order (the “December 5 Order”) granting, among other things, the Motions authorizing the Trustee to terminate South Bay’s license, directing South Bay to vacate the Premises within 14 days of the entry of the Order, and scheduling a separate evidentiary hearing on the issue of damages (“Damages Hearing”).

13. On December 16, 2013, South Bay filed a Notice of Appeal from the December 5 Order and the Memorandum Decision, which appeal is pending in the United States District Court for the Eastern District of New York (the “District Court”) and is entitled *In re Middle Bay Golfers’ Association, Inc.*, Case No. 13-cv-7502 (ADS) (the “Appeal”). South Bay also sought a stay pending appeal.

14. By Order (the “District Court Order”) dated December 30, 2013, as amended, the United States District Court for the Eastern District of New York, Spatt, D.J., granted South Bay leave to appeal the December 5 Order and a partial stay enjoining the Trustee from selling his right, title and interest in the Lease on the condition that South Bay post a supersedeas bond in the amount of \$1 million by 6:00 p.m. on Friday, January 10, 2014. No such bond was posted.

15. Subsequent to the District Court Order, the Trustee, the Landlord and South Bay (collectively, the “Parties”) engaged in settlement discussions. In furtherance thereof, the Parties have agreed to resolve the issues, in accordance with the terms and conditions set forth in the

“Settlement Agreement”, annexed hereto as Exhibit “A”, subject to Court approval upon notice to all parties-in-interest.

STANDARD FOR APPROVAL OF SETTLEMENT PURSUANT TO RULE 9019

16. Federal Rule of Bankruptcy Procedure 9019 provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.”

17. It is well established that settlements are favored over continued litigation. *See In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991).

18. A decision to either accept or reject a compromise and settlement is within the sound discretion of the court. *See In re Drexel Burnham*, 134 B.R. at 505. In examining a settlement, the responsibility of the bankruptcy judge is “to canvass the issues and see whether the settlement ‘fall[s] below the lowest point in the range of reasonableness.’” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (citation omitted). Moreover, “a ‘mini trial’ on the merits is not required.” *In re Drexel Burnham*, 134 B.R. at 505.

19. The standard for determining whether a proposed compromise or settlement is above the lowest point in the range of reasonableness was set forth by the Supreme Court in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). The court is to look at the following factors: (i) the balance between the likelihood of success compared to the present and future benefits offered by the settlement; (ii) the prospect of complex and protracted litigation if the settlement is not approved; (iii) the proportion of the class members who do not object or who affirmatively support the proposed settlement; (iv) the competency and experience of counsel who support the settlement; (v) the relative benefits to be

received by individuals or groups within the class; (vi) the nature and breadth of releases to be obtained by officers and directors; and (vii) the extent to which settlement is the product of arm's length bargaining. See *In re NW Investors II, LLC*, 2007 U.S. Dist. LEXIS 58791, *1, 10-11 (E.D.N.Y. July 30, 2007); *In re Drexel Burnham*, 134 B.R. at 497; *In re Texaco Inc.*, 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988).

20. When analyzing whether to approve a settlement, a bankruptcy court “need not conduct an independent investigation in formulating its opinion as to the reasonableness of a settlement. The Court can give weight to the Trustee’s informed judgment that a compromise is fair and equitable.” *In re Drexel Burnham*, 134 B.R. at 496. In addition, the court should not substitute its judgment for that of the trustee, but merely test whether the trustee’s choice falls below the range of reasonableness. See *In re Carla Leather*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984).

21. Furthermore, the court may approve a settlement even if it believes that the trustee ultimately would succeed in the litigation of the pending matter. See *In re Teltronics Services, Inc.*, 46 B.R. 426, 428 (E.D.N.Y. 1984).

TERMS OF THE SETTLEMENT AGREEMENT

22. The pertinent terms of the Settlement Agreement are set forth as follows:

a. Fourteen days after the entry of a final Court Order approving the Settlement Agreement, the Trustee shall disburse two payments: (i) a payment to South Bay in the sum of \$500,000.00 (the “Initial Settlement Amount”); and (ii) a payment to the Landlord in the sum of \$400,000.00 as partial payment on its filed general unsecured claim. Both payments shall be disbursed to the respective counsel for South Bay and the Landlord.

b. The Landlord will subordinate its pre-petition unsecured claim (Claim Number 97) in the amount of \$5,056,220.71 against the Estate to enable the administrative and priority claims to be paid in full, and to subordinate its claim to the remaining allowed general unsecured claims, in a sum of not more than \$600,000.00. The Trustee anticipates the subordination will result in a payment of the general unsecured claims in full, without interest. The payments to the general unsecured creditors shall be made after April 21, 2014.

c. Pursuant to the Landlord's subordination of its claim to the general unsecured creditors, the Landlord agreed not to object to the Trustee's application, dated June 28, 2013 [ECF Docket #132], for an order authorizing an interim distribution to remaining general unsecured creditors.

d. The Parties shall execute a stipulation of dismissal of the Appeal presently pending before the District Court, with such dismissal being with prejudice and without costs to any of the Parties.

e. The Trustee shall disburse a second payment to South Bay in the maximum sum of \$150,000.00, subject to reduction in the event that there are claims asserted against the Estate and/or the Landlord by third parties who provided goods or services to South Bay (the "Third Party South Bay Claims"). The Third Party South Bay Claims include claims that may form the basis of the filing of a Notice of Mechanics Lien against the Premises.

f. The Parties agreed that the Trustee is authorized in his sole discretion, upon consultation with South Bay, to settle, compromise and/or pay the Third Party South Bay Claims that are asserted against the Estate or the Landlord by April 15, 2014 (the "Claim Deadline"). The \$150,000.00 maximum additional payment to South Bay will serve as the source of the funds for the Trustee to make payment on the Third Party South Bay Claims. To the extent

that the Third Party South Bay Claims paid by the Trustee do not exceed the sum of \$150,000.00, any sum remaining after deducting the Third Party South Bay Claims shall be disbursed to South Bay three business days after April 15, 2014.

g. However, if the Third Party South Bay Claims exceed the sum of \$150,000.00, then the distribution to the creditors holding allowed general unsecured claims shall be reduced dollar for dollar to the extent the aggregate sum disbursed to pay the Third Party South Bay Claims exceeds \$150,000.00. For example, if the Trustee is required to expend \$200,000.00 to resolve claims against South Bay, the amount of the distribution to general unsecured creditors would be reduced by \$50,000.00 (the amount in excess of the \$150,000.00). The general unsecured creditors would be paid pro rata based upon a total distribution to general unsecured creditors in the sum of \$550,000.00 instead of \$600,000.00. The Parties agreed that the Trustee is authorized to settle, compromise or pay any South Bay Third Party Claims, provided that the aggregate of such payments does not exceed \$250,000.00. To the extent that the payments exceed the sum of \$250,000.00, the Trustee shall seek Court approval and authorization to settle and make such payments.

h. With respect to the equipment at the Premises, the Landlord has until February 10, 2014 to determine if it will elect to retain any of the equipment leased or financed by South Bay (the "Equipment"), in which case Landlord agrees to assume all liabilities for such Equipment and hold South Bay and Khan harmless for any liabilities incurred under such leased or financed Equipment. As for any and all Equipment that the Landlord does not seek to retain, South Bay shall take such actions as may be necessary to have said Equipment removed from the Premises by March 10, 2014. Neither Landlord nor the Debtor's estate shall have any liability for

the storage and/or condition of the Equipment. South Bay shall not remove any of the Debtor's equipment.

i. Both the South Bay Parties (as defined in the Settlement Agreement) and the Trustee Parties (as defined in the Settlement Agreement) issued general releases to each other as set forth more fully in the Settlement Agreement. Furthermore, South Bay shall obtain a general release from any of its partners, principals or members who made payment directly to the Estate as part of South Bay's deposits, including, but not limited to Irfan Khawaja and E&M Ice Cream Inc.,

23. Given the existing facts and circumstances, as well as the applicable law, the Trustee submits that approval of the Settlement Agreement would be in the best interests of the creditors and the Debtor's Estate.

24. The Settlement Agreement represents the culmination of extensive negotiations between the Trustee, the Landlord and South Bay to resolve the remaining outstanding issues between them and to avoid further litigation costs that could be incurred in connection with the pending damages hearing before the Court.

25. The Estate has approximately \$2.8 million in the Estate's bank account which it can utilize to make the distributions contemplated in the Settlement Agreement. Those distributions will be made to South Bay, the Landlord, creditors holding allowed general unsecured claims and administrative creditors. Furthermore, the Trustee anticipates that the Estate shall receive an additional sum of approximately \$400,000.00 in connection with the Debtor's pending tax certiorari matter, for a combined sum of \$3.2 million.

26. Once the Estate disburses the payment of \$500,000.00 to South Bay and the payment of \$400,000.00 to the Landlord, the projected sum of \$2.3 million will remain in the

Estate bank account (which sum is inclusive of the Estate's receipt of the pending tax certiorari funds). Furthermore, provided that there are no Third Party South Bay Claims filed by the Claim Deadline, then the additional \$150,000.00 payment to South Bay shall be disbursed along with the approximately \$600,000.00 payment to the general unsecured creditors. This will reduce the balance of the funds marshalled in the Estate to the sum of \$1,550,000.00, which remaining funds will be used to pay the outstanding administrative claims and will be utilized to make further partial payment on the Landlord's subordinated general unsecured claim.

27. With respect to the payments to be made to South Bay, those payments will not exceed the sum of \$650,000.00. South Bay will receive an initial payment of \$500,000.00, and is entitled to receive a maximum additional payment of \$150,000.00, which sum is subject to reduction based upon the disbursement of Estate funds to satisfy any claims or mechanics' liens that are filed against South Bay, the Landlord or the Estate in connection with South Bay's possession and operation of the Premises.

28. Based upon representations by South Bay, and upon information and belief, any mechanics' liens or claims against South Bay are not anticipated to be in excess of \$150,000.00. Therefore, the Trustee does not believe that the general unsecured creditors will be impacted. However, to the extent that the claims made against South Bay exceed the sum of \$150,000.00, and the Trustee is unable to settle or resolve those claims before a court of competent jurisdiction, then any sums in excess of the \$150,000.00 will be deducted from the total funds available for distribution to the general unsecured creditors. The Trustee believes that any impact resulting therefrom will be nominal.

29. The Trustee submits that the Settlement Agreement is in the best interests of the general unsecured creditors. From the Estate's perspective, the key provision of the Settlement

Agreement is the subordination of the Landlord's general unsecured claim to the other general unsecured claims. The Landlord's claim is approximately \$5 million and the other general unsecured claims aggregate to the sum of approximately \$600,000.00. If the Landlord did not agree to subordinate its claim, the Trustee estimated that all other general unsecured creditors would receive a 10% distribution on their claims because they would have to share in a pro rata distribution with the Landlord. With the Settlement Agreement, the Landlord is consenting to subordinate its claim to the allowed general unsecured creditors, which will enable those creditors to receive an anticipated **100% distribution**.

30. The Parties have engaged in substantial investigation into the potential Third Party South Bay Claims. Furthermore, to the extent that any such claims are made, the Trustee will analyze and review said claims, and, if appropriate, will contest them or settle them.

31. The Trustee submits that despite any potential Third Party South Bay Claims that may be filed against the Estate and/or the Landlord in excess of the \$150,000.00 sum, the Settlement Agreement, with the subordination of the Landlord's claim, will enable the outstanding general unsecured creditors to receive a substantial distribution on their claims, if not a full distribution. As the potential distribution to those creditors would only be about 10% if they had to share pro rata with the Landlord, the Settlement Agreement is still advantageous to the general unsecured creditors as it affords them the best chance of obtaining a greater distribution.

32. Therefore, the Trustee submits that the Settlement Agreement and the proposed subordination by the Landlord are in the best interests of the Estate.

33. Based upon the fact that there are no novel issues, the Trustee hereby requests that this Court dispense with the requirement that a memorandum of law accompany the Motion.

However, the Trustee hereby reserves its right to submit a memorandum of law to the Court in the event that any opposition to the Motion is filed.

34. No prior application has been made to this Court or to any other court for the relief requested in the Motion.

WHEREFORE, it is respectfully requested that the Court grant the instant Motion in its entirety.

Dated: Garden City, New York
January 28, 2014

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