

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Hearing Date: June 19, 2014 at 10:00 a.m.
Objection Date: June 12, 2014 by 5:00 p.m.

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In the Matter of

Chapter 7

MIDDLE BAY GOLFERS' ASSOCIATION, INC.,

Case No.: 13-70361-LAS

Debtor.
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TRUSTEE'S MOTION FOR AN ORDER: (A) AUTHORIZING THE TRUSTEE TO MAKE A 100% INTERIM DISTRIBUTION TO UNSECURED CREDITORS WITH TIMELY FILED AND ALLOWED CLAIMS AGAINST THE ESTATE; (B) AUTHORIZING THE TRUSTEE TO MAKE A SECOND INTERIM DISTRIBUTION TO WEINSTEIN ENTERPRISES, INC. IN THE SUM OF \$300,000.00; (C) AUTHORIZING LIMITED NOTICE; and (D) GRANTING SUCH OTHER AND FURTHER RELIEF AS THIS COURT DEEMS JUST AND APPROPRIATE

**TO: THE HONORABLE LOUIS A. SCARCELLA,
UNITED STATES BANKRUPTCY JUDGE:**

Kenneth Kirschenbaum, Esq., the Chapter 7 Trustee (the "Trustee") of the estate (the "Estate") of Middle Bay Golfers' Association, Inc. (the "Debtor"), by and through his attorneys, Kirschenbaum & Kirschenbaum, P.C., submits this motion (the "Motion") seeking entry of an order:

(a) pursuant to 11 U.S.C. §§ 105 and 726(a) and Bankruptcy Rule 3009, authorizing the Trustee to make a 100% interim distribution to the Estate's unsecured creditors holding timely filed and allowed claims against the Estate and tardily filed claims against the Estate allowed pursuant to 11 U.S.C. § 726(a)(2)(C) (the "Claims")¹ as set forth in Schedule "A" annexed hereto;

¹ April 25, 2013 was fixed as the date by which all proofs of claims were required to be filed against the Debtor's Estate (the "Bar Date"). However, several creditors filed claims after the Bar Date and subsequently contacted the Trustee's counsel and stated that they did not learn of the Debtor's bankruptcy filing until after the passage of the Bar Date. After investigation into their statements, the Trustee entered into stipulations with those creditors, in

(b) pursuant to 11 U.S.C. §§ 105 and 726(a) and Bankruptcy Rule 3009, authorizing the Trustee to make a second interim distribution to Weinstein Enterprises, Inc. in the sum of \$300,000.00 on account of its subordinated general unsecured claim;

(c) pursuant to 11 U.S.C. § 105(a) and Bankruptcy Rule 9007, authorizing the limiting of notice prospectively in the Debtor's bankruptcy proceeding, to (i) the Office of the United States Trustee for the Eastern District of New York; (ii) Weinstein Enterprises, Inc.; (iii) governmental agencies to the extent required by the Bankruptcy Rules and the Local Rules; and (iv) those persons who have formally appeared and requested service of notice of all matters in this proceeding pursuant to Bankruptcy Rule 2002, with notice for those parties being limited to electronic notice through the Court's Electronic Case Filing system; and

(d) granting such other and further relief as this Court deems just and appropriate.

BACKGROUND:

1. On January 23, 2013, the Debtor filed a voluntary petition for relief (the "Petition") pursuant to Chapter 7 of the Bankruptcy Code, and Kenneth Kirschenbaum was appointed as Chapter 7 Trustee, in which capacity he was duly qualified and continues to serve.

2. The Debtor, prepetition, operated a country club and a golf course known as the Middle Bay Country Club located at 3600 Skillman Ave, Oceanside, New York 11572 (the "Premises"). As a result of Superstorm Sandy, the Premises were devastated, and the damage resulted in the closing of the Debtor's operation and the instant Chapter 7 bankruptcy filing.

which the creditors formally stated their failure to receive notice. Pursuant to the Trustee's motion dated November 14, 2014, the Trustee sought entry of an order: (a) determining that certain creditors with tardily filed claims are entitled to receive distribution on their claims in accordance with 11 U.S.C. § 726(a)(2)(C) and (b) authorizing the Trustee to make distribution to those creditors (ECF Docket No. 199). The motion was granted by the Court pursuant to Order dated December 18, 2013 (ECF Docket No. 225). Therefore, the instant motion seeks distribution for those creditors with timely filed and allowed claims and those creditors with tardily filed claims allowed pursuant to 11 U.S.C. § 726(a)(2)(C) as per the Court's December 18, 2013 order.

3. One of the Estate's assets was its interest in a non-residential real property lease (the "Lease") for the Premises between the Debtor and the Debtor's landlord, Weinstein Enterprises, Inc. ("Landlord"). Pursuant to Court Order, the Trustee attempted to sell the Estate's right, title and interest in the Lease to Tariq Khan ("Khan"). Khan subsequently assigned his rights and interests for the purchase of the Lease to South Bay Country Club, LLC ("South Bay"). Thereafter, South Bay, the Landlord and the Trustee entered into an Assignment and Assumption Agreement dated April 8, 2013 (the "A&A Agreement"), under which 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.

4. Despite making payments towards the purchase price, South Bay failed to timely tender the full consideration to the Estate, resulting in the parties entering into two subsequent extension agreements of the delivery date, both of which were approved by the Court. The Trustee, under the terms of the two extension agreements, 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. However, South Bay violated the terms of the various agreements, and ultimately the Trustee terminated the license and directed South Bay to vacate. After South Bay failed to do so, the Trustee filed a motion before the Bankruptcy Court seeking, amongst other things, a determination that South Bay's actions resulted in its interest in the A&A Agreement being terminated and entry of an order directing South Bay to vacate the Premises.

5. Following a full evidentiary hearing, Judge Eisenberg entered a Memorandum Decision on December 5, 2013 (the "Decision") holding that South Bay violated the terms of the various agreements and was in material breach of the agreements. Based upon the Court's findings, the Court entered its Decision and corresponding order (the "Order"), terminated South

Bay's interest in the A&A Agreement and directed South Bay to vacate the Premises. The Decision scheduled a subsequent evidentiary hearing for the Court to further consider the issue of potential damages ("Damages Hearing").

6. On December 16, 2013, South Bay filed a Notice of Appeal of the Decision and Order to the United States District Court (the "District Court") and sought a stay pending appeal. At the conclusion of the hearing on South Bay's request for a stay pending appeal, the District Court granted South Bay leave to appeal the Bankruptcy Court's interlocutory order and granted South Bay a limited stay solely to the extent that the Trustee was enjoined from selling the Estate's 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. South Bay failed to post the requisite bond and the stay was extinguished.

7. After the District Court's decision, and prior to the Damages Hearing, the Trustee, the Landlord and South Bay engaged in extensive settlement discussions concerning all of the issues between the parties. As a result of those negotiations, the parties entered into a settlement agreement (the "Settlement Agreement") that was approved by the Court pursuant to Order dated February 6, 2014.

8. A summary of the pertinent terms of the Settlement Agreement are as follows:

a. The Estate was to disburse an initial sum of \$500,000.00 to South Bay as partial settlement of the outstanding litigation. A second payment was to be made to South Bay in the maximum sum of \$150,000.00. The sum of \$150,000.00 was subject to reduction in the event that claims were asserted against the Estate and/or the Landlord by third parties who provided goods or services to South Bay. The \$150,000.00 would be used to fund those

payments (the “South Bay Fund”). The parties agreed that the claim deadline for third-parties to file claims with respect to South Bay would be April 15, 2014.

b. The Estate was to disburse the sum of \$400,000.00 to the Landlord as partial payment on its filed general pre-petition general unsecured claim (Claim Number 97) in the sum of \$5,056,220.71.

c. The Landlord consented to the subordination of its claim to enable the Trustee to pay all administrative and priority claims in full, and to allow for a distribution to the remaining allowed unsecured claims, in a sum of not more than \$600,000.00 (without interest).

9. At the time the parties entered into the Settlement Agreement, the Trustee anticipated that the potential claims to be filed against South Bay would not exceed the sum of \$150,000.00 and, therefore, the Claims would receive a 100% distribution. However, to the extent that the claims made against South Bay exceeded the sum of \$150,000.00, and the Trustee was unable to settle or resolve those claims before a court of competent jurisdiction, the amount needed to satisfy the claims in excess of \$150,000.00 was to be deducted from the total funds available for distribution to the general unsecured creditors.

RELIEF REQUESTED:

A. The Trustee’s Request to Make an Interim Distribution to the Creditors As Per the Settlement Agreement

10. The Claims Deadline passed on April 15, 2014. Two mechanics’ liens were filed against the Premises prior to that date relating to work performed at the Premises at South Bay’s request. The Trustee and South Bay engaged in negotiations with the filers of the mechanics’ liens, which resulted in the reduction of one of the liens. Thereafter, the parties provided the Trustee with general releases and releases of the mechanics’ liens which were filed with Nassau

County. The total amount paid to satisfy the mechanics' liens was the aggregate sum of \$43,400.00.

11. No other mechanics' liens were filed against the Premises.

12. South Bay also requested that the Trustee pay the aggregate sum of \$2,921.00 from the South Bay Fund to two other creditors who performed services at the Premises and provided goods to the Premises at the request of South Bay. Releases were obtained from those parties, and the Trustee made the disbursements as requested. Another disbursement of \$12,000.00 was made to another contractor that performed work for South Bay. The claims against South Bay did not exceed the sum of \$60,000.00. Therefore, South Bay was issued its second disbursement in accordance with the terms of the Settlement Agreement in the sum of approximately \$91,000.00.

13. More importantly, as the claims against South Bay did not exceed \$150,000.00, the Trustee can now make the anticipated 100% distribution on the Claims. A list of those creditors receiving payments and the amounts of said payments are listed on Schedule "A", annexed hereto.

14. The Court should note that on June 28, 2013, the Trustee filed a motion before the Court seeking authorization to make a 100% interim distribution to unsecured creditors holding timely filed and allowed claims (the "Initial Distribution Motion") (ECF Docket No. 132). The Initial Distribution Motion was adjourned several times due to the then-pending litigation between the Estate, the Landlord and South Bay. Upon the resolution of the issues between the parties and the entry of the Settlement Agreement, the Court granted the Initial Distribution Motion pursuant to Court Order dated February 10, 2014 (ECF Docket No. 259). The Order granting the Initial Distribution Motion provided:

ORDERED, that the Trustee is authorized, pursuant to 11 U.S.C. §§ 105(a) and 726 of the United States Code and Federal Rule of Bankruptcy Procedure 3009, to make an interim distribution to creditors in accordance with the terms and conditions set forth in the Settlement Agreement between the Trustee, the Landlord and South Bay that was approved by the Court pursuant to Court Order dated February 6, 2014.

15. Due to the potential reduction of the distribution to be made to the unsecured creditors in accordance with the terms of the Settlement Agreement, the Trustee's counsel informed the Court at the hearing on the Initial Distribution Motion that a subsequent motion would be filed to provide all creditors with notice of the status of the case, and the distribution percentage that the creditors with timely filed and allowed claims would receive, thus necessitating the filing of the instant motion seeking the requested relief.

16. Furthermore, the Landlord has requested that the Trustee issue a second interim distribution in the sum of \$300,000.00 to the Landlord based upon the Landlord's subordinated pre-petition general unsecured claim. The Trustee has no objection to the Landlord's request, especially in light of the fact that the unsecured creditors with filed and allowed claims are being paid in full, and that all remaining funds available for distribution after payment of administrative expenses will go to the Landlord.

17. The sum of approximately \$1.6 million remains in the Estate's bank account, which can be utilized to make the distributions contemplated herein. Furthermore, the Trustee anticipates that the Estate will receive an additional sum of approximately \$400,000.00 in connection with the Debtor's pending tax certiorari matters against Nassau County. It is presently unknown when the tax certiorari matters will be concluded and when the Estate will receive any payment from Nassau County.

18. The Trustee submits that the Estate has sufficient funds to make the disbursements, and the Trustee respectfully requests, pursuant to 11 U.S.C. §§ 105 and 726(a)

and Bankruptcy Rule 3009, Court authorization to make the disbursements to the Estate's allowed unsecured creditors in accordance with the terms of the Settlement Agreement, which was approved by the Court, and to the Landlord.

B. The Trustee's Requests to Limit Notice to Creditors

19. Pursuant to the Debtor's books and records, bankruptcy petition and the Court's Claims Register, at the time of the filing of the petition, there were over 400 creditors (secured and unsecured) that had potential claims against the Estate. Approximately 120 of those potential creditors, or other parties asserting claims against the Estate, have filed claims against the Debtor's Estate. Furthermore, there are several additional parties-in-interest entitled to receive notice in this case, culminating in over 400 mailings to different individuals and entities (the "Notice Parties") each time relief is requested which requires notice to all creditors and parties-in-interest.

20. The Trustee, by and through his counsel, has filed several motions and applications in this case. Understandably, the costs of serving a motion or application on the Notice Parties is extremely burdensome and costly to the Estate due to the photocopying and postage expenses, as well as other expenses associated with such large mailings.

21. By this Motion, the Trustee requests the entry of an order establishing appropriate notice procedures going forward in this case.

22. The secured creditors of the Estate have already received a 100% distribution. The Trustee is now seeking to make a 100% distribution to the creditors on account of the Claims. As such, the Trustee respectfully submits that said creditors no longer require notice of any additional motions or applications made by the Trustee as both the secured and unsecured creditors with allowed claims will have already received a 100% distribution.

23. Going forward in this case, the Debtor's only remaining creditor with a timely filed and allowed claim who will receive distribution after payment of all administrative fees and expenses is the Landlord.

24. Therefore, the Trustee respectfully requests entry of an order limiting notice of future filed motions or applications only upon: (i) the Office of the United States Trustee for the Eastern District of New York; (ii) Weinstein Enterprises, Inc.; (iii) governmental agencies to the extent required by the Bankruptcy Rules and the Local Rules; and (iv) those persons who have formally appeared and requested service of notice (the "Notice of Appearance Parties") pursuant to Bankruptcy Rule 2002 (the "Service List").

25. With respect to the Notice of Appearance parties, the Trustee requests that notice upon those parties be limited to electronic notice through the Court's Electronic Case Filing system ("ECF"), considering that said parties already requested receipt of electronic notice in this case.

26. In the interests of full disclosure to the parties, the Trustee submits that all future documents and motions that are filed by the Trustee or his counsel with the Court that require notice pursuant to the Bankruptcy Rules, the Bankruptcy Code and the Local Rules, will be posted on Kirschenbaum & Kirschenbaum, P.C.'s website. A notice regarding Kirschenbaum & Kirschenbaum, P.C.'s website and url address is being provided to all known creditors of the Estate and parties-in-interest along with the instant Motion.

27. Bankruptcy Rule 9007 provides that: When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the entities for whom, and the form and manner in which the notice shall be given.

28. While the Trustee does not anticipate extensive further motion practice in this case, in the interests of preserving the remaining funds of the Estate, the Trustee believes that the administration of the case going forward would be more efficient and cost effective if the relief requested is granted.

29. Therefore, the Trustee submits that the relief requested in this Motion is in the best interest of the Estate and its creditors, and will not prejudice the rights of any party-in-interest in this case.

30. Notice of the instant motion has been provided to (i) the Office of the United States Trustee; (ii) the Debtor's counsel; (iii) the Debtor's Landlord; (iv) all parties having filed notice of appearance; (v) governmental agencies to the extent required by the Bankruptcy Rules and the Local Rules; and (vi) all known creditors of the Debtor's Estate and those having filed a claim against the Estate. The Trustee submits that no other or further notice need be given.

31. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, it is respectfully submitted that the Court enter an order granting the relief requested in its entirety together with such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
May 21, 2014

KIRSCHENBAUM & KIRSCHENBAUM, P.C.
Attorneys for the Trustee

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