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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-10-1336-JuHBa
)	
INDUSTRY WEST COMMERCE CENTER)	
LLC,)	Bk. No. 10-10088
)	
Debtor.)	
)	
<hr/> CENTRAL PACIFIC BANK,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M *
)	
INDUSTRY WEST COMMERCE CENTER)	
LLC; TODD JBRE, LLC,)	
)	
Appellees.)	
<hr/>)	

Submitted on May 11, 2011
at San Francisco, California

Filed - May 24, 2011

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: Carl Lewis Grumer, Esq., Manatt, Phelps & Phillips, LLP argued for Appellant Central Pacific Bank
Monique Jewett-Brewster, Esq., MacConaghy & Barnier, PLC argued for Appellee Industry West Commerce Center, LLC
Steven Marc Olson, Esq., argued for Appellee Todd JBRE, LLC

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Before: JURY, HOLLOWELL, and BARRECA,¹ Bankruptcy Judges.

2 Appellant, secured creditor Central Pacific Bank ("CPB"),
3 appeals the bankruptcy court's order confirming the Modified
4 Plan of Reorganization dated August 16, 2010 (the "Modified
5 Plan") filed by chapter 11² debtor and appellee Industry West
6 Commerce Center, LLC.

7 We AFFIRM.

8 **I. FACTS**

9 Debtor is a California limited liability company that is
10 engaged in the business of owning and operating investment real
11 property. In January 2007, debtor obtained a short-term
12 construction loan from CPB for \$17 million to develop commercial
13 property in Santa Rosa, California. The note was secured by a
14 first deed of trust on the property, had a maturity date of
15 July 11, 2008, and bore an interest rate based on the Prime Rate
16 plus .25%. Under the terms of the note, debtor had the option
17 to elect a Libor Rate under certain conditions.

18 Debtor later obtained two additional loans to complete the
19 construction and development of the property. Debtor executed a
20 promissory note in the amount of \$1 million for a two-year term
21 at 12% interest in favor of Clinton James Brown, Jr. and Cindy
22 Lue Brown, as trustees of the Clinton James Brown, Jr. and Cindy
23

24
25 ¹ Hon. Marc L. Barreca, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

26
27 ² Unless otherwise indicated, all chapter, section and
rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 Lue Brown Trustee U.T.D. The note was secured by a second deed
2 of trust on the property and had a maturity date of May 1, 2010.
3 This note was later assigned to appellee, Todd JBRE, LLC
4 ("Todd").³ Debtor executed another promissory note in the
5 amount of \$2 million in favor of Mark and Irma McClure, as
6 trustees of the McClure Trust, which was secured by a third deed
7 of trust on the property. The McClures held a 20% membership
8 interest in debtor.

9 Debtor planned to obtain long term financing to replace
10 CPB's loan once it matured, but that financing never
11 materialized due to the constriction of credit markets starting
12 in mid-2008. CPB extended the maturity date of its loan by one
13 year to July 11, 2009, at which time debtor defaulted. Although
14 it is not entirely clear from the record, the contract rate at
15 the time of debtor's default was apparently around 3.55% and the
16 default rate was 8.5%.

17 On September 30, 2009, CPB filed an action for judicial
18 foreclosure and related relief against debtor, its guarantors,
19 and its junior lienholders in the Sonoma County Superior Court.
20 Debtor cross-complained for breach of the construction loan
21 agreement. The parties attempted to negotiate a resolution
22 toward the end of 2009, but those negotiations were
23 unsuccessful.

24 On January 14, 2010, debtor filed its chapter 11 petition.
25 Debtor's bankruptcy case was a single asset real estate case in
26 which CPB had the most significant secured claim. Debtor filed

27
28 ³ Todd joined in debtor's brief on appeal.

1 four reorganization plans and, as is typical in single asset
2 real estate cases, CPB objected to the plan which required
3 debtor to seek cramdown of the plan over its objection. In
4 concept, each of debtor's plans were essentially the same with
5 the primary dispute over whether the proposed cramdown interest
6 rates were fair and equitable to CPB and Todd.

7 Debtor filed its original plan on February 19, 2010.
8 Under the plan, debtor proposed to restructure the notes of CPB,
9 Todd and the McClures by making interest-only payments with the
10 notes becoming due and payable in seven years. The proposed
11 interest rates varied, with CPB paid at the "Libor Rate Option"
12 and/or the "Prime-Based Rate" as specified in the original note,
13 Todd at the rate of 5.5% and the McClures at the rate of 5%.⁴
14 Debtor further proposed to pay the \$93,000 in general unsecured
15 claims in full with interest, with quarterly installment
16 payments commencing one year after the Effective Date of the
17 plan.

18 CPB objected to the plan, arguing then, as it does now,
19 that debtor sought to place all the risk on CPB by proposing a
20 cramdown interest rate that was too low over a seven-year term.
21 CPB maintained that the rate should be 9.65% interest due to the
22 length of the plan and other risks. Finally, CPB asserted that
23 the property should be sold because debtor was solvent and could
24 pay all non-insider secured and unsecured claims in full if
25
26

27 ⁴ The McClures accepted the plan and the 5% rate of
28 interest.

1 there was a sale.⁵

2 In support of its objection, CPB filed the declaration of
3 Steven D. Dunn ("Dunn"), a licensed real estate appraiser. Dunn
4 opined that the "as is" market value of the property as of
5 April 13, 2010, was \$18,740,000.

6 CPB also submitted the declaration of Richard W. Ferrell
7 ("Ferrell"), a real estate finance consultant. Ferrell declared
8 that the appropriate interest rate under the circumstances was
9 between 9.65% and 11.41%. To support those rates, Ferrell
10 stated that debtor presented several risk factors which
11 compelled a higher interest rate, including (but not limited to)
12 the loan to value ratio, the debt service coverage ratio, the
13 seven-year term of the plan, the fact that leases were expiring
14 during the term of the plan, the presence of two subordinate
15 trust deeds, and the oversupply of industrial space in debtor's
16 geographical area. In the end, Ferrell concluded that the plan
17 was not feasible because there was inadequate cash flow to
18 support payment of the 9.65% rate.

19 On May 31, 2010, debtor submitted a modified plan which
20 proposed to increase the interest rate to 4.45% for CPB's claim
21 and 5.75% for Todd's claim. The seven-year term remained.

22 In support, debtor submitted the declaration of Raymond B.
23

24 ⁵ Todd's objection was similar to that of CPB's. Todd
25 also objected to the cramdown rate of interest on its claim and
26 further contended that the plan was not feasible since debtor
27 could not establish that the payoff at the end of the seven-year
28 term could occur. Todd requested that the court deny
confirmation of the plan and convert the case to chapter 7 on the
ground that liquidation of the property would provide for payment
of the creditors in full.

1 Mattison ("Mattison"), a licensed real estate appraiser.
2 Mattison declared that the fair market value of the property "as
3 is" was \$23,640,000 as of August 24, 2009. He further opined
4 that the fair market value was \$24,730,000 if it was fully
5 leased. Finally, Mattison stated that if the buildings were
6 sold "in bulk," the "as is" value was \$22,460,000 and a
7 "prospective bulk stabilized value" (fully leased) was
8 \$23,490,000.

9 Debtor also submitted the declaration of its financial
10 advisor, Patrick W. Kilkenney ("Kilkenney"). Kilkenney concluded
11 that there was no efficient market rate of interest for the
12 three loans on debtor's property. Kilkenney attributed his
13 conclusion to several factors, including, but not limited to:
14 the current market constriction, the capital adequacy issues
15 facing lenders, uncertainty of the global creditor markets, more
16 restrictive underwriting criteria and lenders' desire to curtail
17 lending to commercial real estate until there was more certainty
18 in the market.

19 Kilkenney further testified that using the Prime Rate and
20 considering numerous "risk" factors, it was his opinion that the
21 interest rate for CPB should be 4.45% (Prime Rate of 3.25% plus
22 130 basis points). He further opined that the Todd loan should
23 carry an interest rate of 5.75%.

24 Finally, debtor submitted the declaration of Vincent Rizzo
25 ("Rizzo"), who was the Managing Member of Rizzo & Associates,
26 LLC, an entity which held a 64.33% membership interest in debtor
27 and was responsible for its management. Rizzo stated that the
28 property was 60% occupied and that he believed the property

1 would generate positive cash flow to pay the proposed higher
2 interest rates of 4.45% to CPB and 5.75% to Todd. Rizzo also
3 opined that at the end of the seven-year period "we will be out
4 of the current downturn." Last, Rizzo declared that the
5 property was "high quality" and there was little existing or
6 planned inventory with the same quality. Based on his beliefs,
7 Rizzo concluded that debtor would be able to sell or refinance
8 the project at the end of the plan term.

9 On June 3, 2010, the bankruptcy court conducted an
10 evidentiary hearing at which it heard testimony from the various
11 experts, Rizzo and others. The court took the matter under
12 submission. In a Memorandum Decision dated June 8, 2010, the
13 court concluded that debtor's modified plan was unconfirmable
14 because it did not offer "fair and equitable" treatment to Todd.
15 The court did not address CPB's treatment under the plan.

16 After entry of the court's decision, debtor attempted to
17 negotiate a consensual plan with Todd, but was unsuccessful.
18 Debtor filed a second modified plan on July 10, 2010, addressing
19 the court's concerns with respect to Todd, but made no changes
20 to its treatment of CPB's claim.

21 After debtor filed its second modified plan, it reached an
22 agreement with Todd. Therefore, debtor filed a third modified
23 plan which provided that Todd would be paid its prepetition
24 contract rate of 12% and a \$200,000 cash payment immediately
25 after plan confirmation. The modified plan also reduced the
26 loan term to three years with another extension possible on the
27 payment of an extension fee of 200 basis points (\$15,000).

28 CPB's treatment remained unchanged.

1 On July 29, 2010, CPB filed an objection to this plan,
2 raising objections similar to those it had raised before. In
3 response, debtor argued that its plan would not be feasible if
4 the court set the interest rate anywhere near the 9.65%
5 requested by CPB and also provided a declaration that the
6 proposed plan interest rate of 4.45% was purportedly higher and
7 more profitable than current loans being underwritten and
8 serviced by CPB. CPB refers to this as the "new evidence" that
9 debtor introduced.⁶

10 On August 5, 2010, the bankruptcy court held a
11 confirmation hearing on the modified plan and again took the
12 matter under submission. On August 16, 2010, the court issued a
13 Memorandum Decision denying confirmation of the July 21, 2010
14 modified plan, but specified the terms under which the plan
15 would be confirmed. The court found the seven-year term
16 reasonable, but concluded that the proposed interest rate on
17 CPB's loan should be adjusted upward to 4.95%.

18 The court arrived at its decision by relying on the Sixth
19 Circuit's decision in Bank of Montreal v. Official Comm. of
20 Unsecured Creditors (In re Am. Homepatient, Inc.), 420 F.3d 559,
21 567-68 (6th Cir. 2005), cert denied, 549 U.S. 942, 127 S.Ct. 55,

22 _____
23 ⁶ Debtor submitted a rate sheet that showed CPB was
24 lending at a rate of 3.75% and evidence regarding cost of funds.
25 There is no indication that the bankruptcy court considered this
26 evidence and we suspect that it did not. At the close of the
27 August 5, 2010 confirmation hearing, counsel for CPB made clear
28 that if the court took the matter under submission and was going
to consider new evidence, it wanted the opportunity to present
rebuttal evidence first. There is nothing in the record that
shows the court requested rebuttal evidence when it took the
matter under submission.

1 166 L.Ed.2d 251 (2006). The Sixth Circuit in American
2 Homepatient held that a bankruptcy court should first determine
3 whether there was an efficient market for the type of loan at
4 issue, and, if not, then use the formula approach.

5 The bankruptcy court explained that there was no efficient
6 market rate of interest to be applied as the cramdown interest
7 rate for CPB's loan. Therefore, it applied the formula
8 approach. The court started with the current Prime Rate of
9 3.25% and enhanced it for risk factors, while considering the
10 contract rate as some sort of vague admission by the secured
11 creditor.

12 The court viewed the primary risk as the possibility that
13 the commercial real estate market would implode due to a lack of
14 available money in the future. The court found this risk
15 required an adjustment up from prime, but not to the extent
16 argued by the Bank, "as there remains the possibility that
17 Congress would intervene to make funds available rather than
18 allow the commercial real estate market to tank." The court
19 further explained that the fact the property was not fully
20 leased and that some of the leases would expire during the term
21 of the plan also presented significant risk. On the other hand,
22 the court recognized that there was at least \$1 million in
23 equity in the property over and above CPB's lien which militated
24 for a lower interest rate.⁷ The court concluded that 120 basis

25
26 ⁷ At the hearing, the court observed that debtor's
27 appraisal was at \$22 million and CPB's appraisal was at \$19
28 million. The court noted that "an appraisal is not an exact
science, so we're looking at somewhere around 20 million dollars
(continued...)

1 points should be added to the Prime Rate to cover the risk of
2 further economic downturn and 50 basis points should be added
3 for risks associated with possible declining lease revenue.
4 Accordingly, the court determined that the cramdown interest
5 rate should be 4.95%.

6 Debtor amended its plan to comport with the bankruptcy
7 court's ruling. On August 20, 2010, the court entered the order
8 confirming the Modified Plan and overruled all other objections
9 to confirmation.

10 On September 2, 2010, CPB timely filed this appeal, but did
11 not seek a stay pending appeal from the bankruptcy court or this
12 Panel. On December 15, 2010, debtor filed a motion to dismiss
13 this appeal as moot. Debtor's motion was considered with the
14 merits at oral argument.

15 **II. JURISDICTION**

16 The bankruptcy court had jurisdiction over this proceeding
17 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction
18 under 28 U.S.C. § 158.

19 **III. ISSUES**

20 A. Whether the bankruptcy court erred in determining that
21 the 4.95% post-confirmation cramdown rate of interest provided
22 CPB with the present value of its claim under the fair and
23 equitable test set forth in § 1129(b)(1); and
24

25
26 ⁷(...continued)
27 value." Presumably the court arrived at the \$1 million in equity
28 by using the \$20 million number and subtracting the roughly \$18.8
million in debt against the property which was listed in debtor's
disclosure statement.

1 B. Whether the bankruptcy court erred in confirming the
2 Modified Plan because it was not filed in good faith in
3 violation of § 1129(b)(3).

4 IV. STANDARDS OF REVIEW

5 "The ultimate decision to confirm a reorganization plan is
6 reviewed for an abuse of discretion." Computer Task Grp., Inc.
7 v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003).
8 Under the abuse of discretion standard, we first "determine de
9 novo whether the [bankruptcy] court identified the correct legal
10 rule to apply to the relief requested." United States v.
11 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the
12 bankruptcy court identified the correct legal rule, we then
13 determine under the clearly erroneous standard whether its
14 factual findings and its application of the facts to the
15 relevant law were: "(1) illogical, (2) implausible, or
16 (3) without support in inferences that may be drawn from the
17 facts in the record." Id.

18 The ultimate conclusion of whether a plan provides fair and
19 equitable treatment for a secured creditor is a question of law
20 which we review de novo because it requires analysis of the
21 meaning of the statutory language in the context of the
22 Bankruptcy Code's "cram down" scheme. See Arnold & Baker Farms
23 v. United States (In re Arnold & Baker Farms), 85 F.3d 1415,
24 1421 (9th Cir. 1996); cf. Patterson v. Fed. Land Bank (In re
25 Patterson), 86 B.R. 226, 227 (9th Cir. BAP 1988) (In chapter 12
26 case, the determination of what factors to apply in a valuation
27 calculation under § 1225 is an interpretation of a statute which
28 is reviewed de novo, but the application of the factors involved

1 in a valuation calculation is a question of fact which is
2 reviewed under a clearly erroneous standard).

3 A bankruptcy court's findings on the issue of whether the
4 total deferred payments under the plan provide a secured
5 creditor with the present value of its claim are factual
6 findings reviewed under the clearly erroneous standard.
7 Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352,
8 1358 (9th Cir. 1986); Conn. Gen. Life Ins. Co. v. Hotel Assocs.
9 of Tucson (In re Hotel Assocs. of Tucson), 165 B.R. 470, 474
10 (9th Cir. BAP 1994). We give substantial deference to a
11 bankruptcy court's cramdown interest rate determination. Farm
12 Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 696 (9th
13 Cir. 1990).

14 A bankruptcy court's finding of good faith is also a
15 factual finding which will not be overturned unless clearly
16 erroneous. Brotby, 303 B.R. at 184.

17 A factual determination is clearly erroneous if the
18 appellate court, after reviewing the record, has a definite and
19 firm conviction that a mistake has been committed. Anderson v.
20 City of Bessemer City, N.C., 470 U.S. 564, 573 (1985); Hinkson,
21 585 F.3d at 1263 (holding that a court's factual determination
22 is clearly erroneous if it is illogical, implausible, or without
23 support in the record).

24 We may affirm the bankruptcy court's decision on any ground
25 fairly supported by the record. Wirum v. Warren (In re Warren),
26 568 F.3d 1113, 1116 (9th Cir. 2009).

1 V. DISCUSSION

2 A. Mootness

3 At the outset, we consider whether this appeal is moot.
4 Failure to seek a stay pending appeal does not automatically
5 render an appeal moot. Jorgensen v. Fed. Land Bank of Spokane
6 (In re Jorgensen), 66 B.R. 104, 107 (9th Cir. BAP 1986).

7 However, we may dismiss an appeal based on equitable mootness
8 when a debtor has substantially consummated its plan or the
9 rights of third parties would be prejudiced if we were to
10 reverse the bankruptcy court's decision. See Arnold Baker
11 Farms, 85 F.3d at 1420. As the party asserting mootness, debtor
12 has the burden of proof. Oregon Advocacy Ctr. v. Mink, 322 F.3d
13 1101, 1116-17 (9th Cir. 2003).

14 Debtor contends its plan has been substantially
15 consummated⁸ thereby rendering this appeal moot. Debtor's
16 position is belied by ¶ 6.16.3 of its Modified Plan, entitled
17 Final Decree, which states:

18 After the Plan is substantially consummated, the
19 Reorganized Debtor will file an application for a
20 Final Decree, and will serve the application as
provided in the Local Rules.

21 We have reviewed the bankruptcy court's docket and there is no
22 docket entry showing that debtor has ever moved for a Final
23

24 ⁸ "[S]ubstantial consummation' means - (A) transfer of
25 all or substantially all of the property proposed by the plan to
26 be transferred; (B) assumption by the debtor or by the successor
27 to the debtor under the plan of the business or of the management
of all or substantially all of the property dealt with by the
28 plan; and (C) commencement of distribution under the plan."
§ 1101(2).

1 Decree.⁹ "In light of this significant omission, it is
2 difficult to divine how substantial consummation allegedly
3 occurred." See Pioneer Liquidating Corp. v. United States
4 Trustee (In re Consol. Pioneer Mortg. Entities), 248 B.R. 368,
5 375 (9th Cir. BAP 2000).

6 At any rate, substantial consummation by itself does not
7 resolve the issue. We still must consider whether we could
8 grant effective relief. First Fed. Bank of Cal. v. Weinstein
9 (In re Weinstein), 227 B.R. 284, 289 (9th Cir. BAP 1998). Based
10 on the record before us, we conclude that no events or
11 transactions have occurred that make it impossible for us to
12 grant relief that is both effective and equitable.

13 The plan at issue is straightforward. There are no
14 complicated transactions to unravel because, since confirmation,
15 debtor has simply been making interest-only payments to its
16 secured creditors and has paid 50% of the amount owed to its
17 unsecured creditors. Further, the \$200,000 cash payment which
18 was paid to Todd does not require unraveling. Under the
19 Modified Plan, debtor retained the power to sell its property,
20 but the property has not been sold and remains available to
21 satisfy the secured claims of CPB and Todd. Thus, debtor's
22 payment to Todd simply means that it owes Todd \$200,000 less in
23 the event the property is sold.

24 Finally, CPB and Todd are parties to this appeal and debtor
25

26 ⁹ We take judicial notice of the documents filed with the
27 bankruptcy court through the electronic docketing system. Atwood
28 v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233
n.9 (9th Cir. BAP 2003).

1 has cash reserves that could easily pay the balance owed to
2 unsecured creditors. In short, a reversal of the bankruptcy
3 court's decision would not require any disgorgements nor would
4 the rights of absent third parties be prejudiced.¹⁰ Accordingly,
5 we conclude that the appeal is not moot and we have jurisdiction
6 to consider the merits of CPB's appeal.

7 **B. The Fair And Equitable Requirement Under § 1129(b)(1)**

8 Generally, a chapter 11 reorganization plan may be
9 confirmed only with the assent of each class of impaired
10 creditors. §§ 1126(c); 1129(a)(8). However, if an impaired
11 class of creditors rejects a plan, the plan nonetheless may be
12 confirmed if the other requirements of confirmation are met and
13 the plan is "fair and equitable" under § 1129(b), the so-called
14 "cramdown provision."

15 "Fair and equitable" treatment of CPB requires debtor to
16 (1) provide for CPB to retain its lien on the property and
17 (2) provide for payments that include an appropriate rate of
18 interest so that CPB realizes the present value of its secured
19 claim. § 1129(b)(2)(A). The first element is not at issue in
20 this appeal because debtor's Modified Plan provided for CPB to
21 retain its lien. Under the second element, two separate
22 valuations are involved: "[f]irst, the court must determine the
23 value of the creditor's collateral. Second, the court must
24 determine the value of the deferred payments proposed by the

25
26 ¹⁰ Rizzo's declaration also stated that Mark and Irma
27 McClure pledged their third deed of trust as collateral to a
28 third party. However, the pledge does not support debtor's
mootness argument because there was no evidence in the record
that the third party in any way relied upon the confirmed plan.

1 plan to determine whether the present value of such payments at
2 least equals the value of the collateral." Wells Fargo Bank
3 N.W. v. Yett (In re Yett), 306 B.R. 287, 291 (9th Cir. BAP
4 2004). CPB does not assign error to the court's decision
5 concerning the first valuation – the value of the property.¹¹

6 Under the second valuation determination, courts in the
7 Ninth Circuit have used the "formula approach" to calculate a
8 permissible cramdown rate of interest. The "formula" or "risk
9 plus" method starts with a standard measure of risk free
10 lending, such as the Prime Rate or the rate on treasury
11 obligations, and adds an upward adjustment based on the debtor,
12 the plan, and the security for the loan. Fowler, 903 F.2d at
13 697-99; United States v. Camino Real Landscape Maint.
14 Contractors, Inc. (In re Camino Real Landscape Maint.
15 Contractors, Inc.), 818 F.2d 1503, 1508 (9th Cir. 1987). Both
16 debtor and CPB in their respective briefs accept the formula
17 approach as applicable under these circumstances, relying on
18 Till v. SCS Credit Corp., 541 U.S. 465 (2004)¹² and to a lesser
19

20 ¹¹ At the June 3, 2010 hearing, the bankruptcy court noted
21 that there was not that much of a difference between the two
22 appraisals – CPB's at approximately \$19 million and debtor's at
23 approximately \$22 million. The court observed that an appraisal
24 "is not an exact science" and that "we're looking at somewhere
around \$20 million dollars value." The attorney for CPB agreed
that the value of the property "really [wasn't] a big issue."

25 ¹² Till was a chapter 13 debtor and the cramdown interest
26 rate pertained to a truck. Under Till, the court found that the
27 appropriate interest on a secured claim is calculated based on
the national Prime Rate and then adding a risk premium - to
28 account for the dual risks of inflation and default, considering
such issues as the nature of the security and duration and

(continued...)

1 extent on the Sixth Circuit's decision in American HomePatient,
2 420 F.3d at 567-68. In any event, the bankruptcy court's
3 approach was consistent with Ninth Circuit precedent.

4 Therefore, the applicability of the above mentioned authorities
5 does not matter in the outcome of this appeal.

6 CPB's main complaint is that the bankruptcy court erred in
7 its application of the formula by failing to properly assess the
8 risks. In particular, CPB contends that the court did not give
9 due consideration to the evidence they presented which
10 demonstrated that a higher interest rate was warranted.

11 In support of this argument, CPB first points out that the
12 bankruptcy court did not explain how it came up with the numbers
13 that it did and cited no evidence to support them. We are
14 unpersuaded with this argument because a bankruptcy court, as
15 fact finder, does not need to enumerate all the minutiae in the
16 evidence. Rather, it is enough that the court's findings are
17 sufficiently explicit to provide us with a clear understanding
18 of the basis for the cramdown interest determination. Fowler,
19 903 F.2d at 699. "The extent of findings required will vary
20 depending on the circumstances of each case and the evidence
21 presented in the bankruptcy court." Id. Under these
22 circumstances and based on the evidence presented, we conclude
23 that the bankruptcy court's findings were sufficiently explicit

24
25 ¹²(...continued)
26 feasibility of the plan. 541 U.S. at 479. In passing, the court
27 acknowledged the differences between cramdown loans in chapter 13
28 cases versus chapter 11 cases and suggested that it may be
appropriate in the chapter 11 context for a court to determine
the rate of interest in an "efficient" market, assuming such a
market existed. Id. at 477 n.14.

1 to provide us with a basis for its decision.

2 The record shows that the parties' experts presented a
3 range for the cramdown interest rate between 4.45% and 11.41%
4 depending upon how the various risks were assessed. The court
5 heard extensive testimony from debtor's expert, Kilkenny, who
6 opined that an interest rate of 4.45% was appropriate for an
7 interest-only \$16.8¹³ million loan, secured by collateral worth
8 \$22 million, with a seven-year balloon payment. Kilkenny
9 testified that property values in the Santa Rosa area had
10 somewhat stabilized, subject to what might happen in the economy
11 in the future. He also testified that in determining the
12 appropriate interest rate, he considered that the current
13 lending market was looking for a 60% loan to value ("LTV")
14 ratio. He viewed CPB as having a LTV of 72%, which was high.

15 Kilkenny testified that he added 50 basis points to the
16 Prime Rate of 3.25% by considering "circumstances of the
17 estate." These circumstances included how debtor evolved into
18 bankruptcy, the nature of the tenants, and the current market
19 conditions. He then added 25 basis points after considering the
20 nature of the collateral, i.e., that the property was Class A,
21 that it was new and in a desirable location, did not need
22 repairs, and could accommodate larger vehicles, which was
23 beneficial for the tenants who were mostly distribution type
24 tenants. Kilkenny added another 25 basis points for plan
25 feasibility after examining cash flow and considering the

26
27 ¹³ Actually, the parties disputed the exact amount owed.
28 Debtor contends that it owed CPB approximately \$16.25 million and
CPB contends debtor owed it \$16.875 million.

1 experience of management.

2 Finally, he further added 20 basis points for plan
3 duration. Kilkenny testified that he examined the original note
4 which gave debtor an option of a "mini-perm" or extension of the
5 loan for five years.¹⁴ Therefore, Kilkenny opined that a five to
6 seven year term for the type of loan at issue would not be
7 "unusual." Further, he mentioned a report that showed 1.4
8 trillion dollars was coming due in the commercial real estate
9 market between 2010 and 2014, of which 40% were underwater.
10 Based on the report, Kilkenny stated that it made sense for
11 debtor to go beyond 2014.

12 Ferrell, CPB's witness, testified regarding his opinion
13 that the interest rate should be between 9.65% and 11.41%.
14 Ferrell assigned the biggest risk enhancement to the security as
15 between 440 and 615 basis points. Depending upon which
16 appraisal was used, Ferrell testified that the risk went up when
17 the property was valued at \$19 million rather than \$22 million
18 because of the diminished equity cushion. On cross-examination,
19 debtor's attorney attempted to discredit Ferrell's opinion
20 regarding the security enhancement based on Ferrell's previous
21 opinion with respect to the security enhancement component in
22 another bankruptcy case where he used the same numbers for a

23
24
25 ¹⁴ The court questioned CPB's counsel regarding the mini-
26 perm aspect of the note. Counsel argued that the five-year
27 option was available under only very specified circumstances,
28 certain loan to value, debt service coverage ration, etc. He
stated that some of the conditions occurred, but many of them did
not.

1 nearly vacant, aging office building in downtown Detroit.¹⁵

2 Ferrell also added 150 basis point for plan feasibility.
3 In connection with feasibility, Ferrell relied on an economic
4 report which optimistically predicted that there would be a 20%
5 rebound in commercial real estate transactions in 2010 in the
6 North Bay area. However, Ferrell also used his 9.65% interest
7 rate to determine whether the plan would be feasible. He
8 concluded that the plan would not be feasible because debtor
9 would have a \$625,000 cash shortfall the first year.

10 In applying the formula approach, the bankruptcy court
11 appropriately considered what it viewed as the heightened risks
12 associated with debtor and its property. We recognize that
13 describing the positive and negative aspects of the collateral
14 and debtor was not that difficult, but ascribing a particular
15 number of basis points to the overall risk factor is easier said
16 than done. The Ninth Circuit recognized this in Camino Real
17 stating that "rough estimates are better than no estimates" and
18 holding that they were willing to "rely on the expertise of the
19 bankruptcy judge." 818 F.2d at 1508.

20 In light of these parameters, we conclude that the
21 bankruptcy court's findings and upward adjustments to Kilkenny's

22
23 ¹⁵ To the extent the bankruptcy court's findings rested on
24 determinations regarding the credibility of the witnesses, we
25 must give "even greater deference to the trial court's findings;
26 for only the trial judge can be aware of the variations in
27 demeanor and tone of voice that bear so heavily on the listener's
28 understanding of and belief in what is said." Anderson, 470 U.S.
at 575; see also Fed. R. Civ. P. 52(a) (made applicable by Fed.
R. Bankr. P. 7052) (requiring the reviewing court to give due
regard "to the trial court's opportunity to judge the witnesses'
credibility."); Rule 8013 (same).

1 proposed interest rate were based on a plausible account of the
2 evidence considered against the entirety of the record. Thus,
3 we may not reverse the court even if we were convinced that had
4 we been sitting as the trier of fact, we would have weighed the
5 evidence differently. "Where there are two permissible views of
6 the evidence, the factfinder's choice between them cannot be
7 clearly erroneous." Anderson, 470 U.S. at 574.

8 CPB further contends that the court relied on speculation
9 and its own views for its decision, rather than the evidence.
10 CPB refers to the court's statement that "a plan which avoids a
11 sale is generally in the best interests of the economy as a
12 whole, as it results in one less property available for sale,
13 thereby assisting in maintaining overall property value." CPB
14 takes the court's statement out of context. At the August 5,
15 2010 hearing, there was a discussion on the record regarding
16 whether it was improper for debtor to protect its equity even
17 though the requirements for confirmation had otherwise been met.
18 The court recognized that a debtor's solvency did not prevent
19 confirmation of its plan as long as the plan was otherwise
20 confirmable. "The whole idea is that in appropriate cases, even
21 though we could sell, it's better for everybody if we don't."
22 The court simply restated this view in its Memorandum Decision,
23 albeit in connection to the economy as a whole. Under these
24 circumstances, the court's statement is simply dicta.

25 In reality, CPB has steadily complained that the plan is
26 not fair and equitable because debtor is solvent and could pay
27 all non-insider creditors in full from a sale of its property
28 now rather than making CPB wait seven years for its money.

1 However, the plain language of § 1129(b) requires that a
2 creditor simply receive the "present value" of its secured claim
3 for a cramdown confirmation to succeed – there is nothing in the
4 Bankruptcy Code to suggest that this value should change with a
5 debtor's level of financial solvency.

6 CPB also references the court's remark in its August 16,
7 2010 Memorandum Decision about the possibility that Congress
8 would bail out the commercial real estate market rather than let
9 it fail. Contrary to CPB's implication, we cannot reasonably
10 infer that the court totally ignored the evidence presented and
11 based its decision on a possible bail out. Therefore, we affirm
12 because the court's decision is sustainable based on the
13 evidence in the record, as discussed above. Warren, 568 F.3d at
14 1116.

15 In short, under the clearly erroneous standard of review,
16 we are required to uphold the bankruptcy court's determination
17 when it falls within a broad range of permissible conclusions.
18 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400, 110 S.Ct.
19 2447, 110 L.Ed.2d 359 (1990)). Further, in Till, the Supreme
20 Court recognized that the factors relevant to the risk
21 adjustment fell squarely within the bankruptcy court's area of
22 expertise and noted that the court must "select a rate high
23 enough to compensate the creditor for its risk but not so high
24 as to doom the plan." 541 U.S. at 479-80. Applying the
25 foregoing authorities and standards, we conclude that there is
26 nothing in the record before us that indicates the bankruptcy
27 court's determination of the cramdown interest rate was
28 completely outside the range of permissible conclusions.

1 **C. The Good Faith Requirement Under § 1129(a)(3)**

2 We do not have much to add on the topic of debtor's good
3 faith because CPB has intertwined its arguments regarding the
4 fair and equitable requirements with those for good faith.
5 Suffice it to say that § 1129(a)(3) does not define good faith,
6 but a plan is proposed in good faith where it achieves a result
7 consistent with the objectives and purposes of the Bankruptcy
8 Code. Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re
9 Sylmar Plaza, L.P.), 314 F.3d 1070, 1074-75 (9th Cir. 2002).

10 The only basis for CPB's good faith argument is that
11 debtor's Modified Plan places all the risk on CPB while leaving
12 debtor solvent. However, insolvency is not a prerequisite to a
13 finding of good faith under § 1129(a). Id. "In enacting the
14 Bankruptcy Code, Congress made a determination that an eligible
15 debtor should have the opportunity to avail itself of a number
16 of Code provisions which adversely alter creditors' contractual
17 and nonbankruptcy rights." Id.

18 Although the bankruptcy court did not make an explicit
19 finding of good faith in its August 16, 2010 Memorandum
20 Decision, its comments on the record demonstrate that it
21 certainly recognized the tenets expressed in Sylmar. Debtor,
22 solvent or not, simply did what it was entitled to do under the
23 Code by meeting the requirements for confirmation of its plan.
24 In short, CPB points to no evidence in the record which would
25 support its argument that the requirements under § 1129(a)(3)
26 were not met.

27 **VI. CONCLUSION**

28 For the reasons discussed above, we AFFIRM.