UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| In re | : | Chapter 11 |
| KAWIN ASSOCIATES, L.P. | : | |
| Debtor | : | Bankruptcy No. 04-10282F |

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MEMORANDUM

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Kawin LLC, which refers to itself as the reorganized chapter 11 debtor, has filed a motion requesting that Wells Fargo Bank, N.A. issue bond certificates to KA Acquisition Corp. (hereinafter, "KA") "of any and all bond certificates that were not surrendered in accordance with the Plan on or before July 27, 2005." Kawin also seeks an order directing Wells Fargo to "reject any request to redeem or transfer bonds received from any person or entity who or which failed to surrender bonds in accordance with the Plan."

Wells Fargo has no objection to Kawin's motion; indeed, as will be discussed, Wells Fargo urged Kawin to seek both forms of relief. However, Kawin's motion is opposed by UBS Financial Services, Inc, f/k/a UBS PaineWebber, Inc. (hereinafter "UBS"). UBS holds some of the bonds that were not surrendered by July 27, 2005. Moreover, UBS has filed its own motion demanding payment from Kawin. (That

second motion is scheduled for a hearing on January 11, 2006 and so is not technically before me.)[1]

These two motions are related. Moreover, the relief sought by Kawin and by UBS poses issues involving notice, for which no party has offered competent evidence. Therefore, for the reasons that follow, I conclude that it would be inappropriate to adjudicate Kawin's demands for relief at this time.

I.

A.

On January 5, 2004, Kawin Associates, L.P. filed a voluntary petition in bankruptcy under chapter 11. According to its approved Disclosure Statement, at 2, Kawin had an ownership interest in commercial real property located in Philadelphia, an interest that it valued at only $1.7 million as of the date of its bankruptcy filing. Disclosure Statement, at 13, 29. This real property was liened by a mortgage and trust indenture, and the indenture trustee—which at the time of the bankruptcy filing was Mellon Bank, N.A —had obtained a prepetition judgment in foreclosure. Id. The indenture trustee filed a secured proof of claim, dated March 12, 2004, in an amount exceeding $4.5 million. (See Claims Docket #1.) As an addendum to its proof of claim,

[1]As will be developed below, the confirmed plan required Kawin to pay funds to the indenture trustee who would hold those funds in escrow and then pay bondholders. Debtor's First Amended and Modified Chapter 11 Plan of Reorganization, ¶¶ 4.4.1, 7.1.1. Thus, it is unclear why UBS believes it can demand payment from Kawin rather than from Wells Fargo, the current indenture trustee.

Mellon explained that it was acting on behalf of the 1995 Series A and Series B bondholders.

Kawin proposed a chapter 11 reorganization plan by which a new entity (referred to in the plan as NewCo, but which was later modified to KA) would lend money to the debtor and would acquire all of the outstanding Series 1995 bonds via transfer. KA anticipated pledging these bonds as collateral so it could obtain the funds promised to the debtor as the essential ingredient of the reorganization plan. In return for the extinguishment of their bonds, the bondholders were promised a plan distribution estimated to be not less than a 54% dividend. Disclosure Statement, at 13. This plan, as modified, was confirmed without creditor opposition on June 15, 2004.

Under the terms of the confirmed First Amended and Modified chapter 11 plan, the Series 1995 bondholders were classified as secured creditors with liens against the debtor's interest in the realty. Furthermore, the plan required the bondholders to surrender their bonds to the indenture trustee if they were to receive the payment promised them under the plan. First Amended and Modified Plan, ¶¶ 4.4, 5.1.1, 7.1.1.

The funds payable to the bondholders were held by the indenture trustee, id. at ¶ 7.1.1, which was to receive the Series 1995 bonds from the bondholders prior to tendering distribution. Id. at ¶ 5.1.1. Moreover, the plan provided that the indenture trustee would, upon the KA loan closing, pledge the outstanding Series 1995 bonds as security for the KA loan. Id. at ¶ 5.1. The plan also provided that assets of the estate would revest in the debtor unless otherwise provided for in the plan. Id. at ¶ 13.1.

The deadline for surrendering the bonds to the indenture trustee in return for payment was one year from the effective date of the plan. Id. at ¶¶ 1.148, 4.4.1, 13.5. Furthermore, ¶ 13.5 of the confirmed plan stated:

> 13.5 **Failure of Exchange Date.** If the Exchange Date under a Plan implemented under Article V does not occur within 30 days after the Effective Date as to any Series 1995 Bond, the Debtor and Indenture Trustee are authorized to execute or deliver on behalf of the Holder or Record Owner of such Series 1995 Bond any instrument required to effectuate the transfer of such Bond to NewCo[2] with the register of bonds and the outstanding Series 1995 Bonds shall be deemed transferred to NewCo in all respects. The Holder or Record Owner of such Series 1995 Bond must surrender such Bond to NewCo accompanied by the necessary documents within one (1) year of the Effective Date to receive a distribution under section 4.4.1 of the Plan. The distribution to the Holder of such Series 1995 Bond shall be held in the Closing Escrow pursuant to Code § 1143 pending the occurrence of the Exchange Date.

According to the debtor's report of plan voting filed with this court, at least some of the bondholders must have been provided with copies of the plan, the disclosure statement and a ballot for plan voting, because twenty-three of the twenty-five ballots cast from bondholders supported the plan. And whether or not the bondholders were so notified, clearly the indenture trustee was aware of the plan terms.

After this plan was confirmed, the debtor filed a motion on October 21, 2004, along with a distribution report, asserting that the approved plan was substantially consummated, that the indenture trustee had received distributions in excess of $2.5 million, and that a final decree should be entered under Fed. R. Bankr. P. 3022. On

[2]The plan originally identified NewCo as the plan funder, but a "plan supplement" later identified the funder as KA Acquisition Corp.

December 23, 2004, a final decree was issued and this case was closed pursuant to Rule 3022.

B.

On September 19, 2005, Kawin filed a motion to reopen this bankruptcy case for purposes of adjudicating the instant motion. 11 U.S.C. § 350(b); see generally In re Pacor, Inc., 1995 WL 355238, at *1 (E.D. Pa. 1995). That motion to reopen was granted as unopposed.

Kawin's present motion is styled "Reorganized Debtor's Motion For An Order Authorizing and Directing Successor Indenture Trustee, Wells Fargo Bank, N.A., To Issue Bond Certificates To KA Acquisition Corp." Kawin filed a certification that this motion was served upon a number of entities and individuals including Paine Webber, which is the predecessor in interest to objector UBS.

In its motion, Kawin asserts that Wells Fargo is the present indenture trustee, succeeding Mellon Bank. Moreover, Kawin maintains that the effective date of the plan was July 27, 2004, and that the one-year deadline for 1995 bondholders to surrender their bonds to the indenture trustee was July 27, 2005. Kawin further avers that certain series A bonds were not surrendered by that deadline.[3] It also pleads that "Wells Fargo has requested that the Reorganized Debtor request an order from this Court

[3]It identified those bonds as follows: "[the] CUSIP numbers for the Series A Bonds that were not surrendered are: 717818ST6; 717818SX7; 717818SY5; 717818TA6; 717818TB4; and 717818TL2. 246828-1."

authorizing and directing Wells Fargo to issue to KA Acquisition Corp. such bond certificates as may be necessary to effectuate the transfer of ownership to KA Acquisition Corp. of those Series A Bonds that were not surrendered on or before July 27, 2005 and (b) to reject any request to transfer bonds received from any person or entity that did not surrender bonds in accordance with the Plan."

Kawin now seeks the precise relief requested by the indenture trustee, Wells Fargo. As a result, despite the title of its motion, Kawin does not seek only to compel Wells Fargo to issue replacement bonds to KA. It also seeks to preclude those bondholders who had not surrendered their bonds by July 27th from demanding any payment from Wells Fargo. Moreover, although not stated in its prayer for relief, Kawin's motion refers to plan provision ¶ 4.4.1, which paragraph in turn refers to 11 U.S.C. § 1143. As will be discussed below, Bankruptcy Code sections 347(b) and 1143 could provide a basis for Kawin to demand that the indenture trustee pay to it those funds held for bondholders who have not met the surrender deadline.

Kawin's motion has triggered a response in opposition from UBS. In essence, UBS asserts that it never received service of Kawin's proposed plan, and never received notice of the bond surrender deadline. Response of UBS, ¶ 5. UBS acknowledges that Mellon Bank did provide it with notice of Kawin's bankruptcy filing and of the proposed distribution to bondholders under the confirmed plan in August 2004. Id. at ¶ 17. Nonetheless, UBS contends that it had no notice of the one-year deadline, and thus it failed to timely surrender bonds in the face amount of $105,000.[4] It requests that

[4]Apparently UBS did surrender other Series 1995 bonds, but alleges that this action was unconnected with Kawin's confirmed plan.

the one-year deadline be extended and it be permitted to exchange the Series 1995 bonds in its possession. It also filed a separate motion seeking the same relief (albeit apparently naming an incorrect respondent).

Wells Fargo then filed a response to UBS's objection, contending that the indenture trustee does not oppose the extension of the exchange deadline for UBS; indeed, it supports an extension of the deadline for all bondholders that have not timely surrendered their Series 1995 Kawin bonds. However, Wells Fargo also seeks to dispel the "suggestion that the [Indenture] Trustee failed to take appropriate action" with regard to UBS. Therefore, it alleges various communications that occurred between UBS and the indenture trustee regarding the Series 1995 Kawin bonds prior to the surrender deadline. Presumably, these averments are intended to demonstrate that the indenture trustee fulfilled all of its duties to UBS.

Kawin has filed its own response to UBS's opposition. In it, Kawin contends that the indenture trustee has already provided KA with:

> replacement bond certificates for all Series 1995 Bonds that were timely surrendered. However, Wells Fargo has indicated that it would not issue replacement bond certificates for those Holders that did not comply with the Surrender Date under the Plan, such as the $105,000 of bonds held by UBS without a specific order of this Court.

Reply, ¶ 22.

Kawin further asserts that the surrender of bonds to Wells Fargo was not "a condition precedent to the Indenture Trustee issuing the necessary replacement bond certificates to KA . . . ." Id. at ¶ 25. Thus, Kawin maintains that UBS's request for an extension to exchange its bonds is "irrelevant" to Kawin's request for replacement bonds under the confirmed plan. Id. at 27.

C.

Thus, the present positions of the three parties to this dispute can be distilled to the following:

Kawin demands that Wells Fargo tender to KA replacement bonds for all Series 1995 bonds that were not exchanged as of July 27, 2005, and that delinquent bondholders be denied any future distributions from funds held in escrow by the indenture trustee. Wells Fargo has no objection to doing so; however, Wells Fargo seeks a court order directing such a transfer to KA and authorizing its refusal to tender any future payments to the delinquent bondholders.

UBS contends that it never knew about the one-year exchange deadline and demands that the deadline be extended so it can tender its bonds to Kawin—although under the plan it was supposed to tender those bonds to Wells Fargo and obtain its share of the distribution held in escrow by Wells Fargo. Again, Wells Fargo has no objection to paying UBS (and any other similarly situated bondholders), but seeks a court order to do so. Kawin opposes UBS's request. I view this opposition as implying that Kawin believes that it, rather than UBS, is entitled to the funds held in escrow, although the reorganized debtor does not mention such relief in its motion.[5]

[5]If Kawin were not intending to seek payment of the escrowed funds still held by Wells Fargo, then the positions of the three parties would be easily reconcilable: Wells Fargo would simply transfer replacement bonds to KA—which Kawin desires and Wells Fargo has no objection to so doing— and pay UBS, which Wells Fargo also has no objection to doing, and then cancel the UBS bonds, which UBS does not oppose once it has received the plan distribution.

Therefore, the present controversy involves two connected questions. Can the UBS bonds be cancelled and replacement bonds issued in favor of KA in accordance with the confirmed plan? And is UBS or Kawin entitled to the funds held in escrow by Wells Fargo that were to be distributed to this bondholder? Given Wells Fargo's position and desire for a court order, there is also a third question potentially lurking underneath: If the UBS bonds are cancelled and the funds paid to Kawin, is the indenture trustee liable to that bondholder?[6]

A hearing was held on Kawin's motion and UBS's objection. Neither party offered any evidence (other than referring to the confirmed plan) but simply made oral argument. Thereafter, the parties supplemented their arguments with written memoranda.

II.

After confirmation of a chapter 11 plan, a bankruptcy court has limited jurisdiction. See, e.g., In re Resorts International, Inc., 372 F.3d 154, 164-65 (3d Cir. 2004). Section 1142(b) of the Bankruptcy Code does provide, however, that:

> The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

[6]Interestingly, Kawin does not believe that it needs an adjudication from this court to enforce the terms of its confirmed plan, but understands Wells Fargo's desire for such an order. Debtor's Memorandum, ¶ 22. Thus, Wells Fargo's concern regarding its potential liability appears to be the motivating force for Kawin's motion.

To the extent that Kawin is seeking relief from Wells Fargo to obtain replacement bonds for KA as specified under the confirmed plan, or later seeks funds held by Wells Fargo under section 347(b) and the revesting feature of the confirmed plan, it would appear that section 1142(b) would grant this court subject matter jurisdiction to determine such requests. See generally In re TLI, Inc., 213 B.R. 946 (N.D. Tex. 1997); In re Goldblatt Bros., Inc., 132 B.R. 736 (Bankr. N.D. Ill. 1991). Similarly, this court may have jurisdiction to decide if the UBS bonds can effectively be cancelled in accordance with the terms of the confirmed plan. The latter two issues, though, affect the rights of UBS and so could implicate issues of due process as concerns UBS's property rights.

Conversely, to the extent Wells Fargo and UBS dispute the former's actions as indenture trustee, this bankruptcy court may not possess jurisdiction over that dispute, as its outcome would not seem to implicate the terms of the confirmed plan. See generally In re Guild and Gallery Plus, Inc., 72 F.3d 1171 (3d Cir. 1996).

The bondholder-surrender provisions of the confirmed plan allude to section 1143 of the Code, and they were correct to do so. 11 U.S.C. § 1143 provides:

> If a plan requires presentment or surrender of a security or the performance of any other act as a condition to participation in distribution under the plan, such action shall be taken not later than five years after the date of the entry of the order of confirmation. Any entity that has not within such time presented or surrendered such entity's security or taken any such other action that the plan requires may not participate in distribution under the plan.

Section 1143 is derived from section 204 of the former Bankruptcy Act, as well as from former Chapter X Rule 10-405(b). See 8 Collier on Bankruptcy, ¶ 1143.LH (15th ed. rev. 2005). The purpose behind this statutory provision is to fix a deadline by which securities will be surrendered as part of the reorganization process. See generally

H.R. Rep. No. 595, 95th Cong., 1st Sess. 419 (1977). Section 1143 "only sets an outside date for surrender or presentment of a security . . . . It does not restrict the plan proponent from selecting an earlier date by which such actions must be taken and a plan may provide for an earlier date." 8 Collier on Bankruptcy, ¶ 1143.01 at 1143-2. This statutory provision is also related to section 347(b), id. at ¶ 1143.02, which states:

> Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the case may be, becomes the property of the debtor or of the entity acquiring the assets of the debtor under the plan, as the case may be.

I note the provisions of sections 347(b) and 1143 because Kawin argues in its post-hearing memorandum as though the only relief it seeks is a court directive to Wells Fargo for the indenture trustee to transfer replacement bonds to KA pursuant to the terms of the confirmed plan. Were that so, then Kawin may be correct that the disputed question of notice to UBS would be irrelevant to that relief. But Kawin's motion also seeks to preclude UBS (and other bondholders) from demanding any distribution from the funds held in escrow by Wells Fargo. Obviously, UBS's property rights would be affected by such additional relief; and Wells Fargo desires such a prohibition because it fears that both Kawin and UBS will demand payment of those funds, and it seeks a protective court order without the necessity of filing an interpleader action under Fed. R. Bankr. P. 7022.

Without now attempting to adjudicate UBS's motion to extend the surrender deadline, I am aware that there have been few reported decisions construing the power of a bankruptcy court to extend a surrender date established either by section 1143

or by the express terms of a confirmed chapter 11 plan. The Bankruptcy Court for the Middle District of Florida issued three decisions on the same date in In re The Charter Co., reported at 97 B.R. 636, 97 B.R. 640, and 97 B.R. 645 (Bankr. M.D. Fla. 1989). In that trilogy, the bankruptcy court concluded that it possessed the equitable power to extend the surrender deadline; however, it chose to exercise that power only when notice to the security holder was inadequate. Compare 97 B.R. at 639 and 644 (extension granted) with 97 B.R. at 648 (extension denied). See also In re IBIS Corp., 272 B.R. 883, 888 (Bankr. E.D. Va. 2001) ("Creditors are entitled to fair notice of the terms of a plan affecting their ability to participate in the plan. . . . They cannot be required to construe a plan or guess as to the eligibility requirements to participate in the plan.").

The court in Charter, however, recognized that such extensions were typically not granted under the former Bankruptcy Act. For example, in In re Peyton Realty Co., 148 F.2d 771 (3d Cir. 1945), the Third Circuit Court of Appeals held that the court had no power to extend the surrender deadline for securities after the entry of a final decree in the case. Notice of the exchange deadline had been "sent to all known bondholders and advertisements were inserted in the Philadelphia newspapers." Id. at 772. Other courts had issued similar rulings. See, e.g., Duebler v. Sherneth Corp., 160 F.2d 472 (2d Cir. 1947); In re City Stores Co., 94 F. Supp. 266 (D. Del. 1950); In re Reo Motor Car Co., 74 F. Supp. 142 (E.D. Mich. 1947).

To the extent that these pre-Code decisions denying any power to extend a securities surrender deadline relied upon the issuance of a final decree and the closing of the reorganization case, I note that the instant chapter 11 case was reopened at Kawin's request. Thus, that jurisdictional problem may have been resolved in this instance.

Furthermore, one cannot readily interpret those earlier decisions as authorizing the denial of any extensions in those instances in which the bondholder neither knew nor should have known of the surrender deadline due to inadequate notice. Pre-Code decisions have acknowledged due process concerns where a creditor's lien is invalidated, see City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 297 (1953), or where a creditor is precluded from receiving a distribution under a confirmed plan. See In re Harbor Tank Storage Co., 385 F.2d 111 (3d Cir. 1967).

Indeed, in Jones v. Chemetron Corp., 212 F.3d 199, 209 (3d Cir. 2000), the Court of Appeals observed: "[I]f a potential claimant lacks sufficient notice of a bankruptcy proceeding, due process considerations dictate that his or her claim cannot be discharged by a confirmation order." If the creditor is unknown to the chapter 11 debtor, then in some instances "[s]uch due process considerations are often addressed by the appointment of a representative to receive notice for and represent the interests of a group of unknown creditors," id., or publication notice may be sufficient. See Chemetron Corp. v. Jones, 72 F.3d 341, 348 (3d Cir. 1995) ("It is well established that, in providing notice to unknown creditors, constructive notice of the bar claims date by publication satisfies the requirements of due process.").

Thus, the loss of creditor rights in the bankruptcy process implicates due process. However, the type of notice due a creditor and its adequacy will depend upon a variety of circumstances, including (but not limited to) the following: was the creditor known to the debtor; if not, was it reasonable to require the debtor to discover the creditor's identity; was there a third party representative of the creditor to whom notice was given; was the creditor aware of the bankruptcy filing in sufficient time to protect its

interests; and was a non-debtor responsible for providing notice. See generally see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

In this contested matter, Kawin argues that UBS, which has denied the adequacy of notice, had the opportunity to present evidence on this issue but failed to do so. As mentioned earlier, no party offered any evidence at the hearing, although they later attached various documents to and made allegations in their pleadings and post-hearing memoranda. However, it is also true that Kawin, which was the moving party and which implicitly sought relief against UBS, also presented no evidence of the adequacy of its notice. See also id. at 319 (trustee of a common trust fund did not demonstrate adequate notice to all beneficiaries).

In light of the absence of evidence on the issue of notice, and with UBS's motion for an extension scheduled to be heard shortly, I conclude that it would be inappropriate to presently adjudicate Kawin's motion, since it seeks relief against both Wells Fargo and UBS. Accordingly, I will defer any ruling until after the hearing on UBS's motion.[7]

An appropriate order shall be entered.

[7]This will be an evidentiary hearing. Unless all parties so agree, all witnesses must appear, testify and be subject to cross-examination. Declarations will not be admitted into evidence. See Fed. R. Bankr. P. 9017 (incorporating, inter alia, Fed. R. Civ. P. 43(e)).

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| In re | : | Chapter 11 |
| KAWIN ASSOCIATES, L.P. | : | |
| Debtor | : | Bankruptcy No. 04-10282F |

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ORDER

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AND NOW, this 21st day of December 2005, for the reasons stated in the accompanying memorandum, it is hereby ordered that a ruling on the motion of Kawin LLC titled "Reorganized Debtor's Motion For An Order Authorizing and Directing Successor Indenture Trustee, Wells Fargo Bank, N.A., To Issue Bond Certificates To KA Acquisition Corp." shall be deferred until after the hearing on the motion of "UBS . . . To Compel Payment from Kawin LLC Pursuant to Section 4.41 of the Plan Upon Surrender of . . . Series 1995 Bonds," presently scheduled to be heard on January 11, 2006.

BRUCE FOX
United States Bankruptcy Judge

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