UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
KLE, INC.,	)	CASE NO. 02-30455 HCD
d/b/a TRUMAN'S NIGHTCLUB,	)	CHAPTER 11
d/b/a TRUMAN'S,	)	
	)	
DEBTOR.	)	

Appearances:

Patricia Primmer, Esq., attorney for debtor, May Oberfell & Lorber, 300 North Michigan Street, South Bend, Indiana 46601; and

Mark E. Wagner, Esq., attorney for creditor G.E. Capital, Inc., Kizer & Neu, 319 West Jefferson Street, P.O. Box 158, Bremen, Indiana 46563-2626.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 29, 2003.

KLE, Inc., doing business as Truman's Nightclub and as Truman's ("debtor"), filed its plan of reorganization under Chapter 11 of the Bankruptcy Code on June 10, 2002. On September 26, 2002, G.E. Capital, Inc., the successor in interest to the claim of Heller First Capital Corporation ("creditor"), filed its Objections to the debtor's plan. The court held a hearing on the debtor's plan on October 24, 2002, and a trial on the creditor's objection to confirmation of the plan on April 29, 2003. The court then took the matter under advisement. For the reasons set forth below, the court grants the creditor's Objections in part and denies them in part.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(L) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

John Shockey owns KLE, Inc., which does business as Truman's Nightclub at the 100 Center in Mishawaka, Indiana. The company filed its chapter 11 bankruptcy petition on February 4, 2002, and its plan of reorganization and disclosure statement on June 10, 2002. It has continued to operate its business as a debtor-in-possession. Under the plan the debtor's largest creditor, Heller First Capital Corporation, now G.E. Capital, Inc., is a class 3 claimant and is owed $720,000. Its debt is secured by a mortgage on the business premises. The funds were borrowed to purchase the debtor's business assets when it began its operations in 1998. The debtor plans to pay this creditor as its allowed secured claim the sum of $250,000 over a 15-year period with interest at the rate of 7% per annum – 180 equal monthly installments of $2,247.08. The balance of the debt, $470,000, is treated as an unsecured claim.

The creditor raised three objections to the plan that were argued at trial.[1] It objected to the plan provision that released the mortgage that the creditor holds on real estate owned by John Shockey, the debtor's

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[1] The creditor decided not to pursue several of its objections at trial. One of the original objections, however, was mentioned in the creditor's closing argument without any previous presentation of evidence or legal argument during trial. The creditor objected to the fifteen-year time period for paying its claim. It is not sufficient to make allusion to an issue in a closing summation when the party did not raise that objection in the pre-trial order or at trial. *See In re Wiredyne, Inc.*, 3 F.3d 1125, 1128 (7th Cir. 1993) (finding that argument not raised at trial was waived); *Costello v. Oppenheimer & Co., Inc.*, 711 F.2d 1361, 1371-72 (7th Cir. 1983) (disallowing evidence presented in closing argument). The court notes, nevertheless, that numerous courts have approved chapter 11 plans with repayment terms of fifteen years or longer. *See In re Arden Props., Inc.*, 248 B.R. 164, 173 (Bankr. D. Ariz. 2000) (listing cases). It finds that a fifteen-year repayment period is not, in itself, an obstacle to approval of this chapter 11 plan.

principal. It also contended that the plan undervalued the amount of the creditor's secured claim. Finally, it asserted that the plan was not feasible. KLE responded that the secured portion of the creditor's claim was a fair and accurate representation of the value of the collateral securing the indebtedness. It asserted, as well, that its plan was feasible and that it would reorganize successfully.

Trial on the creditor's objection to confirmation of KLE's chapter 11 plan was held on April 29, 2003. The first of the three issues was resolved by the parties themselves at trial. The creditor had objected to the plan's provision that, upon confirmation, the creditor's mortgage on the personal residence of John Shockey would be released. At the trial, the debtor agreed that the release of the personal property would be taken out of the plan. The remaining issues at trial were the value of the secured portion of the creditor's claim and the feasibility of the debtor's plan.

The first witness to testify was John W. Shockey, the sole proprietor of KLE and the president and secretary of the corporation KLE, Inc. He stated that he has owned Truman's Nightclub five years. He purchased the club in June 1998 for $900,000.[2] He received an SBA loan of $720,000, financed by the creditor. John Shockey paid 10% ($90,000) as a down payment, using his life savings, he testified. The other 10% down payment was financed by the previous owner, Tim Matthias. The business is a nightclub, restaurant, and cabaret lounge with live entertainment. It is part of the 100 Center complex. The business has nine employees, four of which are full-time.

Mr. Shockey testified that his club serves food and alcohol and that the customers pay only in cash. Moreover, he pays all the bills promptly. For that reason, he explained, he has no indebtedness to his inventory suppliers and no accounts receivable except real estate and personal property taxes.

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[2] According to the debtor's disclosure statement, the purchase price of $900,000 was based on an August 4, 1998, appraisal by The Appraisal Group, estimating the value of the building to be $735,000. The other components of the valuation were the business itself and its good will. The creditor Heller Financial financed $720,000 with a 22-year note to secure the indebtedness; it holds a mortgage on the premises and a security interest in the operating assets. The remaining 20% was paid as a down payment by John Shockey and the previous nightclub owner, Tim Matthias. R.46 at 3.

He stated that he began having financial problems 1½ years after buying the business. When he considered selling the business, however, he received a bid of only $275,000 for the building. The bidder told him that the building was only worth that amount, and Mr. Shockey knew he could not afford to sell it for that amount. By the end of 2001, the burden of paying the debt to the creditor became overwhelming and he defaulted on the payment of the note. When Heller filed a lawsuit against Truman's in state court, seeking foreclosure, Mr. Shockey, with the advice of counsel, decided to file a chapter 11 petition. He told the court that he has filed all the monthly operating reports timely and has timely paid his taxes and the trustee's fees. He has never missed or delayed the payments of $1,543.75 to the secured creditor each month. He testified that he voluntarily agreed to pay the creditor the full amount of the debt because it demonstrated his good faith and because he wanted to keep the building.[3] The operating reports for the fourteen months the debtor has been in chapter 11, from February 2002 until March 2003, set forth the debtor's income and expenses, the cash flow of the company. There were five months of negative cash flow – February, August and December 2002 and January and February 2003. However, he pointed out that the last operating report, dated March 31, 2003, has a positive bank balance of $2,707.34, after the timely payments to all creditors, including this secured creditor, and payments to the United States Trustee, the accountant and attorneys.

Mr. Shockey filed the chapter 11 plan in June 2002. It plans to pay the secured creditor $250,000 at 7% interest over a 15-year period. The $250,000 value was based on the Cressy & Everett/Grubb & Ellis appraisal of the building. Under the plan, the payments to the secured creditor will increase by $700 each month. He is prepared and able to pay the additional amount, he testified. He explained that, in order to raise revenues for the increased $700 payments a month, he plans to open another room in Truman's. He stated that he already has increased prices and decreased expenses by adding insulation, cutting the manager's salary, reducing the

[3] The KLE disclosure statement revealed that, around the time of the creditor's lawsuit, the debtor ordered a market analysis by Cressy & Everett/Grubb & Ellis, a commercial real estate brokerage firm. Its report, issued on October 19, 2001, stated that the debtor could expect "a probable selling range around $250,000." R. 46 at 4.

inventory on hand, and working fifteen hours a day himself. He testified that this business is his life, that he has invested his life savings in the building, and that he is determined to make it work. Between January 1, 2003 and April 27, 2003, he said, the business had a positive cash flow of $7,005.58. *See* Debtors's Ex. 6.

On cross examination, Mr. Shockey testified that he has worked at Truman's since it opened in 1991 and that he worked his way up from waiter and bartender to the owner. At the time he bought Truman's, it was a viable business. However, the cost of buying it, $900,000, was too high, he insisted. He explained that the economy slowed down around the middle of 1999; the worst new year's eve Truman's had was at the millennium. Six months later, he stated, his business recovered a bit, to its present level. He also pointed out that the five negative cash flow months involved such expenses as excessive repairs. He asserted that the payment of $2,247.08 per month to the creditor under the plan is fair, and that the interest rate of 7% is higher than the current interest rate of 5.24%. He noted that, even with the negative cash flow months, he has improved his cash flow position by $10,780.63, his positive bank balance figure last month. Over fourteen months, he has improved his cash flow by about $12,000, he testified.

The creditor's concern was that the debtor would not be able to pay the additional $700 per month to it under the plan. The creditor contended that, had Mr. Shockey made the plan payments of $2,247.08 for the fourteen previous bankruptcy months, he would have paid an additional $9,000 to the creditor, and therefore the debtor would barely be breaking even. Mr. Shockey responded that the bills still would have been paid. He pointed out that he increased the debtor's revenue by increasing prices and expanding the business to utilize the side of the building that is not now used. He anticipated an increased $800-1,000 a week in revenues for the new part of the building. He understood that he must continue to make timely payments and to make the payment to the creditor at a $700 monthly higher amount or the debtor will lose the building.

The creditor's expert witness was Kevin Vannucci, a certified public accountant who is the manager of Elkhart's office of McGladrey and Pullen. He is an Accredited Senior Appraiser of the American Society of Appraisers. He reviewed KLE's corporate income tax returns for 2000 and 2001 and the monthly operating reports the debtor filed with the court. The witness prepared a historical analysis of the debtor's cash flow in 2002 and then prepared a business forecast for 2003-2006 using a 2% inflation factor, which is the current inflation rate.

Mr. Vannucci examined the treatment of the creditor under the plan: The creditor would get $250,000 at 7% interest for 15 years. The payment would be $2,247.08 a month, for a total payment of $26,964 a year. He noted that the debtor has been paying $1,543.75 a month now. With respect to the unsecured portion of the debt, the plan proposes to pay to unsecured creditors 50% of the prior year's net operating income through the year 2005. Mr. Vannucci pointed out that the net operating profits in 2002 were $22,818. Under the plan, therefore, half of that sum, $11,409, would go to the unsecured creditors. In considering whether there would be cash flow, he stated that the debtor's 2002 total payments to the creditor were $10,808. If the plan is confirmed, the debtor would pay $26,964.00 annually to the creditor.

Mr. Vannucci then gave his opinion that the plan is not feasible. Looking at the business historically and forecasting, he believed the business could not cash flow the debt payments that are stipulated in the plan. It cannot sustain a cash flow, he stated. By his calculations, the debtor would have a negative cash flow of $6,300 for the year 2002. Moreover, since the January and February 2003 figures were negative as well, he calculated that the cash flow, as of March 1, 2003, was a negative $16,650.

To make the plan cash flow, he calculated that KLE needed to increase its sales by about 24% above the profit made at the end of 2002. He suggested that such an increase was not reasonable to expect. He noted that the trend was a significant drop in sales from 2000 through 2002. He did not believe the business could increase its sales by 24%, when annual sales have dropped by 16%.

On cross examination, the CPA admitted that, by using the amounts reported on the debtor's monthly statements, he did not factor out expenses that would not be ongoing expenses of the business, such as attorney fees and trustee fees. The CPA also conceded that he did not deduct depreciation from the $22,818 net income calculation he used, based on the monthly statements for February through December 2002. He agreed that the amount to be paid to the unsecured creditors – half of the net income — would be adjusted downward if depreciation were subtracted from the net income, because the $22,818 net income would be a smaller amount and thus the unsecured creditors' half of it would be less. He admitted, as well, that his net operating figure did not deduct the interest payments KLE was making to the bank.

Mr. Vannucci testified that, under his calculations, after the debtor made payments of $10,808 to the creditor in 2002, it still had $22,818 positive cash flow at the end of the year. However, he insisted that, because the debtor's future payments to the creditor under the plan were much larger, the debtor would have a negative cash flow. In his expert opinion, the debtor could not have cashflowed if it had been required to make the stepped up plan payments over the past fourteen months.

The debtor's counsel focused on this testimony that the debtor, at the end of 2002, had a positive net cash flow of $22,818 after it paid the $10,808 owed to the creditor. The CPA agreed that, if the debtor had been required to make the allotted payments of $2,247.08 a month required by the plan (rather than the lower amount he currently pays), he would have paid $16,156 more in 2002 payments than the $10,808 he actually paid. He acknowledged that, because the debtor still had cash flow of $22,818 at the end of 2002, the debtor would have had sufficient cash flow in 2002 to make the additional payments of $16,156 to the creditor. Therefore, he reluctantly agreed, the debtor could have paid the stepped up cash payments required under the plan during 2002.

CPA Vannucci responded that other factors had to be added to his calculation. For example, the debtor had to pay 50% of the net income to unsecured creditors. He recognized that his calculation did not take into account either depreciation or future capital expenditures, if the debtor planned to expand. However, he maintained his opinion that the plan was not feasible.

The debtor's expert witness was certified public accountant Christine Lauber, an accountant for 32 years. She testified that she is the accountant for the debtor. She attended the 341 meeting and set up the monthly operating reports for John Shockey to prepare for the court. After reviewing the debtor's operating reports and conducting an overall analysis of its financial status, she expressed the opinion that the payments to the creditor, increasing from $1,543.75 now to $2,247.08 under the plan, are feasible. She stated that in her opinion the debtor can make those stepped up payments and the business can cash flow.

On cross examination, she testified that she prepared the 2002 tax return. She explained that the cash balance decreased from 2001 to 2002 by about $10,000. Her explanation for the decrease was that long term debt went down by about $10,000. For example, she said, the business had some capital leases with beverage equipment that was subsequently returned to the supplier.

Ms. Lauber agreed that sales had been declining since Mr. Shockey purchased KLE. Both auditors used the same figures and the same information provided by John Shockey, and both of them acknowledged the debtor's declining profits. However, she based her judgment on what the KLE owner has done in the last fourteen months. For purposes of the 2002 tax return, she calculated the loss. In her view, nevertheless, she believed that the debtor could handle the increased payments to the creditor. She removed from the debtor's monthly operating reports the expenses that would not be there in the future – the United States Trustee fees and the attorney fees, for example – and she concluded that, even though it will be tight, it is feasible to make the payments under the plan. She pointed out that Mr. Shockey paid, during the bankruptcy, about $500-750 a quarter for trustee fees and about $2,400 in attorney fees. Ms. Lauber did not agree with Mr. Vannucci's prediction that sales would have to increase by 24%. She testified that the monthly bankruptcy reports, when examined altogether, show that the debtor can make it. In fact, she found that, using Mr. Vannucci's calculation of a $22,818 positive cash flow, even with the larger payments required by the plan the debtor would be able to maintain a positive cash flow.

Discussion

The court is asked to consider two issues: whether the debtor's chapter 11 plan undervalues the creditor's secured claim; and whether the debtor's chapter 11 plan is feasible.[4] It is understood that the debtor intends to remain in business and to retain the collateral securing the creditor's claim. It has no desire to abandon the real estate. In fact, it plans to pay the creditor's claim in full. However, it disputes the value of that collateral underlying the secured claim; in its plan, it has reduced that value to $250,000, thereby reducing the secured portion of the creditor's claim to that value and allocating the remaining part of the claim to unsecured status.

A. Valuation of the creditor's secured claim

The renowned bankruptcy treatise *Collier on Bankruptcy* explained the determination of value in a chapter 11 case:

> [S]ection 506(a) is often relevant in establishing the amount that must be paid to a secured creditor pursuant to a plan under chapters 11, 12 and 13. For example, in the chapter 11 context, section 1129(b)(2)(A)(i) requires that, in order for a plan to be confirmed over the objection of a secured creditor, the creditor must receive under the plan at least the present value of the amount of the creditor's allowed secured claim. Similarly, section 1325(a)(5) requires that, in order to confirm a chapter 13 plan, the debtor must, at a minimum, pay the holder the value of its secured claim unless the holder consents to less favorable treatment. As noted by the Supreme Court, for purposes of section 1325(a)(5), the amount of the creditor's secured claim is to be determined in accordance with section 506(a).

4 *Collier on Bankruptcy* ¶ 506.03[4][a] at 506-28 (Resnick, Alan N. and Henry J. Sommer, eds., 15th ed. rev'd 2003) (*citing Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S. Ct. 1879, 138 L.Ed.2d 148 (1997)). Section 506(a) of the Bankruptcy Code "describes the extent to which an allowed claim is to be treated as a secured claim for purposes of the Code, as well as how a secured claim is to be valued."[5] 4 *Collier* ¶ 506.01 at

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[4] The court notes that the parties did not refer to any provision of the Bankruptcy Code or to any case law in order to support their arguments concerning valuation and feasibility.

[5] Section 506(a) states: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the

(continued...)

506-5. The section applies to the various chapters of the Bankruptcy Code, including chapter 11. *See First Union Comm'l Corp. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enters., Inc.)*, 81 F.3d 1310, 1318 n.9 (4th Cir. 1996); *cf. In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1323 (7th Cir. 1995) (accepting valuation of chapter 11 creditor following the dictates of § 506(a), but finding that the creditor waived the valuation argument), *cert. denied*, 519 U.S. 965 (1996).

Although § 506(a) governs whether a part or all of a creditor's claim should be classified as secured, the section does not establish a method for determining the valuation of a chapter 11 debtor's collateral. *See Financial Sec. Assurance Inc. v. T-H New Orleans Ltd.P'ship (In re T-H New Orleans Ltd.P'ship)*, 116 F.3d 790, 799 (5th Cir. 1997). However, it states that a creditor's allowed claim is secured "to the extent of the value of such creditor's interest in the estate's interest in such property." The section further provides parameters for determining that valuation: "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property."

The Supreme Court, in *Associates Commercial Corp. v. Rash*, held that "when a debtor, over a secured creditor's objection, seeks to retain and use the creditor's collateral in a Chapter 13 plan," the value of the collateral is determined, under § 506(a), by "what the debtor would have to pay for comparable property (the replacement-value standard)" rather than the foreclosure-value or some other standard. *Id.*, 520 U.S. at 955-56, 117 S. Ct. at 1882. By "replacement value," the Court meant "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." *Id.*, 520 U.S. at 959 n.2, 117 S. Ct. at 1884 n.2. The Court then held:

> In sum, under § 506(a), the value of the property retained because the debtor has exercised the § 1325(a)(5)(B) "cram down" option is the cost the debtor would incur to obtain a like asset for the same "proposed use."

Id. 520 U.S. at 965, 117 S. Ct. at 1886.

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[5](...continued)
valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a).

This court will utilize the *Rash* Court's guidance in determining the amount to be paid to the creditor in this chapter 11 cram down context, even though *Rash* focused on a chapter 13 cram down. [6] *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d at 799 (applying *Rash* when valuing collateral in a chapter 11 plan). This court, then, is to identify "the best way of ascertaining replacement value on the basis of the evidence presented." *Id.*, 520 U.S. at 965 n.6, 117 S. Ct. at 1886 n.6; *see also Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457, 119 S. Ct. 1411, 1423, 143 L.Ed.2d 607 (1999) (finding that "the best way to determine value is exposure to a market"). *Rash* requires a bankruptcy court to determine what a willing buyer would pay for the property in its present state. *See In re Arden Props., Inc.*, 248 B.R. 164, 172 (Bankr. D. Ariz. 2000).

The property at issue is the former Kamm's Brewery Stable Building which is part of the 100 Center in Mishawaka, Indiana. The building housing Truman's Nightclub consists of 10,975 square feet on two floors. The building is divided into three spaces, the largest of which includes the second floor. It was built in 1900 and sits on an irregularly shaped parcel of .26 acres. Many of the buildings around it were built in the 1800s and were rehabilitated for retail and office use. The 100 Center, as a retail/commercial site, has interesting historical significance but has had limited success in attracting a sufficient number of patrons.

The evidence presented to assist the court in ascertaining the value of the real estate consists of three appraisal reports. The appraisal which established the purchase price of the building ("appraisal # 1") was the August 4, 1998, report by The Appraisal Group, Inc.. That appraisal estimated the value of the building on August 4, 1998, to be $735,000. A different certified appraiser in that same Appraisal Group, Inc. valued the building ("appraisal # 2") on November 29, 2001, for the creditor at $370,000. The third appraisal, ordered by the debtor ("appraisal # 3"), was done by Cressy & Everett/Grubb & Ellis on October 19, 2001. That company

[6] The Seventh Circuit Court of Appeals has noted that the cram down provisions of chapters 11, 12, and 13 are analogous and that courts "have considered all three provisions to be similar and have analyzed them interchangeably." *In re Till*, 301 F.3d 583, 587 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2572 (2003). The Fifth Circuit Court of Appeals has applied *Rash* to valuation of chapter 11 collateral. *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d at 799.

valued the property at $25.00 a square foot, or $266,000. It considered the probable sale price to be $250,000.

The court finds that appraisal # 1 is not helpful in determining present value. Not only is that valuation five years old, but also the same appraisal group, three years later, valued the property at half its original valuation. Appraisal # 1 offered nine comparable properties to illustrate value. Most are restaurants, but they are in varied locations and none is near the 100 Center.[7] The dates of the property sales also vary widely, starting in 1988. In the court's view, the sale of the Emporium Restaurant in downtown South Bend for $680,000 in 1992 is not a comparable sale. Nor are sales in 1988, 1989, 1993, or 1994. The 3,000 square foot restaurant that sold two and one-half years earlier, in 1996, for $300,000 was located in Union Pier, Michigan, and appears to have little comparable value. The court finds that such comparable properties do not demonstrate what a willing buyer would pay for the subject property in its present state. Only one property sold in the same year that Truman's Nightclub was appraised: It was an 8,000 square-foot one-story frame restaurant on four acres in Granger, Indiana, called the Sports Page. It sold for $475,000. The court finds it difficult to establish a value for the Truman's Nightclub building based on this evidence. *See* Stipulated Ex. 1.

Appraisal # 2 contains much of the same information provided in the original appraisal. It offered three comparable properties (one of which was the Sports Page restaurant listed above). One property was a 5,101 square foot one-story building in the 100 Center that sold six months earlier for $150,000. The price per square foot was listed as $27.41. Another was a rehabilitated post office in Niles, Michigan, a one-story walkout masonry building with about 19,000 square feet of space, which sold in 1990 for $650,000. The price per square foot for it was $34.36. The appraiser stated that he made adjustments for location, age, site size, and date of sale to account for market conditions. In his opinion, the subject property was valued at $35 a square foot, for a price of $370,000, which he said was in the middle range of the comparable properties. *See* Stipulated Ex. 2.

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[7] There are mistakes in the information given about comparable properties, as well. For example, comparable No. 3 is on West Colfax Avenue in South Bend. The report states it is in the "same block" as the 100 Center. Those of us living in the South Bend/Mishawaka area know that that designation is incorrect.

The court finds this appraisal more helpful than the first appraisal, because it contains a comparable property in the 100 Center, which is a unique location. It was curious, however, that the comparable property in the 100 Center, which sold only six months earlier, was valued at $27.41 a square foot and that the KLE property was valued at $35.23 a square foot. No explanation for the difference in valuation was given. The court found this analysis, in the end, unsatisfactory.

Appraisal # 3 presented comparable property information in a narrative form instead of a chart:

> Setting a value on the building is extremely difficult. There are no real comps to support a justified value. A replacement cost approach would be out of the question given the age and historical status of the site. An income approach would be useful, however, square foot rates would be in the $5 to $6 dollar range given the character of the individuals that would most likely be interested in the site. Office use again would probably be in the same range. These ranges reflect the general physical condition of the Center as a whole. The individuals looking would be those looking for an inexpensive short-term space.
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> If we look at what recent sales within the Center have been, we may have a better understanding of value. The former Boiler House recently sold for $128,000 with the owner putting $12,000 into escrow for utility upgrades after being on the market more than two years. The former Bath Shop/ Thai restaurant sold for less than $100,000. The main Building was purchased for approximately $300,000.
>
> This is a difficult site and will take an entrepreneurial/developer with time, energy, and the financial stability to give the area the time it needs to develop . . . .
>
> I believe a realistic value to be $25.00 a sq. ft. (10,635 sq. ft.) or $266,000. We should list the property for $325,000, and look for a probable selling range around $250,000. . . . The economic climate currently is very difficult. Along with the terrorist attacks, the economy has slowed dramatically and owner/investors are being very cautious. Given this along with the unique characteristics of the site, I believe these values to be appropriate and give the best chance for a timely sale.

Stipulated Ex. 3.

The court has studied the appraisals in detail and has reviewed the testimony at trial. It finds, first, that all three appraisals looked at different approaches to value and, in the end, all three determined the current market value of the property. The court did not find that the two appraisals by The Appraisal Group, Inc., were more extensive, as the creditor asserted. In the view of the court, on this record the Cressy & Everett/Grubb & Ellis analysis was the most appropriate evaluation of the subject property and comparable properties. It took into consideration the unique aspects of the 100 Center complex and the present economic conditions. It considered the purpose of the valuation and the use of the property, and most accurately reflected what the debtor would have to pay for comparable property in its present state. The court finds that, based on the evidence presented, the Cressy & Everett/Grubb & Ellis appraisal demonstrated the best way of ascertaining replacement value — the amount a willing buyer in the debtor's business would pay a willing seller to obtain property of like age and condition, as the Supreme Court required. *See Rash*, 520 U.S. at 959 n.2, 117 S. Ct. at 1184 n.2. The debtor's proposed valuation of $250,000, based on that appraisal, appropriately values the real estate and also the amount of the creditor's secured claim. Accordingly, the court determines that the debtor's chapter 11 plan does not undervalue the creditor's secured claim.

B. <u>Feasibility of the debtor's chapter 11 plan</u>

The creditor also contends that the debtor's plan is not feasible. It claims that its accounting expert's historical and forecasting figures demonstrated that the debtor probably cannot succeed once it increases its payments to the creditor and adds payments to the unsecured creditors.

The court, in determining whether the debtor's plan can succeed, must consider whether the plan is feasible. That requirement is set forth in 11 U.S.C. § 1129(a)(11), which states that the "court shall confirm a plan only if all of the following requirements are met: . . . (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor of the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

The court is obliged to scrutinize the plan and the evidence presented at trial to determine whether the plan "offers a reasonable prospect of success and is workable." 7 *Collier on Bankruptcy* ¶ 1129.03[11] at 1129-64 (Resnick, Alan N. and Henry J. Sommer, eds., 15th ed. rev'd 2003). "In determining that the plan was feasible, the bankruptcy court need not find that it is guaranteed to succeed; '[o]nly a reasonable assurance of commercial viability is required.'" *In re 203 N. LaSalle St. P'ship*, 126 F.3d 955, 961-62 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434, 119 S. Ct. 1411, 143 L.Ed.2d 607 (1999) (quoting *In re T-H New Orleans Ltd.*

P'ship, 116 F.3d 790, 801 (5th Cir.1997) (brackets in original); *accord In re Acequia, Inc.*, 787 F.2d 1352, 1364 (9th Cir.1986); *In re Monnier Bros.*, 755 F.2d 1336, 1341 (8th Cir.1985)). Court decisions have set certain parameters in determining feasibility. For example, they have ruled that "visionary schemes" promising creditors more than the debtor can achieve should not be confirmed. *See Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456, 1460 (10th Cir. 1985). However, the "mere potential for failure of the plan is insufficient to disprove feasibility." *S & P, Inc. v. Pfeifer*, 189 B.R. 173, 182-83 (N.D. Ind. 1995) (citation omitted). The plan should be judged by "whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Id.* at 182 (citation omitted). In the view of most courts, the threshold of proof necessary to satisfy the feasibility requirement is relatively low. *See* 7 *Collier* ¶ 1129.03[11]at 1129-65 (listing cases). The debtor bears the burden of demonstrating the feasibility of its plan by a preponderance of the evidence. *See Danny Thomas Props. II Ltd. P'ship v. Beal Bank, S.S.B. (In re Danny Thomas Props. II Ltd. P'ship)*, 241 F.3d 959, 962 (8th Cir. 2001).

In considering whether the debtor's plan is workable and whether the debtor can meet its future obligations, the court has reviewed the testimony of the expert accountants and of Mr. Shockey, the owner who is most knowledgeable of the future prospects of the reorganized debtor. The court finds that both experts were of the opinion that the debtor's financial circumstance was tight. One stated that the business could succeed; the other stated that it could not. Mr. Shockey presented the debtor's financial records and testified that, between January 1 and April 27, 2003, it had a positive cash flow of $7,005.58. He further pointed out that, over the last fourteen months, it improved its cash flow by about $12,000. He stated that the debtor made all its payments to the creditors, trustee, accountant and attorneys fully and timely. He also explained the business plan for making the increased payments to the creditor and to the unsecured creditors. He and the debtor's accountant demonstrated that the debtor could have made those increased payments even over the pre-confirmation period. Although the creditor's expert witness believed the business could not increase its sales sufficiently to cover the increased payments under the plan, he had to agree that the debtor had sufficient cash flow at the end of 2002 to have made the stepped up cash payments required under the plan.

The court finds that the debtor successfully bore its burden of establishing the feasibility of its plan. *See S & P, Inc.*, 189 B.R. at 183 (stating that "'section 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan'") (quoting *In re SM 104 Ltd.*, 160 B.R. 202, 234 (Bankr. S.D. Fla. 1993)). The court, after reviewing the debtor's plan and disclosure statement, the monthly operating reports, other documents of record, and the testimony of the witnesses at trial, has found that the debtor's future projections under the plan are feasible. It agrees with both parties that the debtor's financial responsibility in this endeavor will not be an easy one.[8] The court has scrutinized the facts in light of the factors listed by this court in *In re S & P, Inc.*, 189 B.R. 159, 168-69 (Bankr. N.D. Ind. 1995). The debtor's records indicate that the earning power of the business and the capital structure are adequate at this time, and that economic conditions are slowly beginning to improve. The management of the debtor will remain constant, and the debtor's accountant and attorney have expressed confidence in Mr. Shockey's ability to manage the business of the debtor in possession. One aspect of a sufficiently successful operation is the dedication of a debtor's principal to the reorganization, and the court finds such commitment in the principal of this company. His personal investment in the business and his ability to create a cash flow for the business, slowly but surely, are enough to allow the court to find that the chapter 11 plan is workable and that the business has a "reasonable assurance of commercial viability." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d at 801.

After scrutinizing the plan carefully, the court determines that the debtor's plan is feasible.

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[8] The court notes an insightful statement made in the disclosure statement: "In essence, Truman's is occupying a building that it either grossly overpaid for back in 1998 or that has experienced a horrendous drop in value since its purchase by Truman's. The truth be known, it is probably a combination of both of the above scenarios." R. 48 at 5.

Conclusion

For the reasons presented above, the court denies the Objections of Heller First Capital Corporation now G.E. Capital, Inc. The court determines that the chapter 11 plan of the debtor KLE, Inc., doing business as Truman's Nightclub and as Truman's, does not undervalue the creditor's secured claim. It also determines that the plan is feasible. Finally, the court finds that the parties resolved the third objection at trial. The debtor agreed to remove from the plan the provision that released the creditor's mortgage on the personal residence of the debtor's principal when the plan was confirmed. The parties having agreed to that change in the plan, that objection now is moot.

Having denied this creditor's objections to the debtor's plan and finding no other objections to the plan, the court now finds that the debtor successfully met its burden of proof to establish that its plan of reorganization is confirmable under 11 U.S.C. § 1129(a) and (b). Accordingly, the court grants confirmation of the debtor's chapter 11 plan.

SO ORDERED.

Harry C. Dees Jr. JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT