

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. MB 11-087

**Bankruptcy Case No. 10-14535-JNF
(Jointly Administered)**

**SW BOSTON HOTEL VENTURE, LLC, et al.,¹
Debtors.**

**THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant,**

v.

**SW BOSTON HOTEL VENTURE, LLC, et al.,
Appellees.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joan N. Feeney, U.S. Bankruptcy Judge)**

**Before Haines, Deasy, and Tester,
United States Bankruptcy Appellate Panel Judges.**

**Gina L. Martin, Esq. and Emanuel C. Grillo, Esq., on brief for Appellant.
Harold B. Murphy, Esq., Charles R. Bennett, Jr., Esq., and John C. Elstad, Esq.,
on brief for Appellees SW Boston Hotel Venture, LLC, et al.**

October 1, 2012

¹ The “Debtors” are SW Boston Hotel Venture, LLC (Case No. 10-14535-JNF) (“SW Boston”), Auto Sales & Service, Inc. (Case No. 10-14528-JNF), General Trading Company (Case No. 10-14532-JNF), Frank Sawyer Corporation (Case No. 10-14533-JNF), 100 Stuart Street LLC (Case No. 10-14534-JNF), 30-32 Oliver Street Corporation (Case No. 10-16173-JNF), General Land Corporation (Case No. 10-16174-JNF), and 131 Arlington Street Trust (Case No. 10-16177-JNF).

Per Curiam.

The Prudential Insurance Company of America (“Prudential”) appeals from the bankruptcy court’s decision and accompanying order confirming the Debtors’ Modified First Amended Joint Plan of Reorganization (the “Plan”) and the order overruling Prudential’s objection to confirmation of the Plan.² At issue on appeal is whether the bankruptcy court erred in holding that: (1) the Plan complied with the requirements of § 1129³ for confirmation; (2) the consolidation of the Debtors’ estates for distribution purposes was proper; and (3) the City of Boston’s assignment of voting rights which sought to alter substantive rights of creditors under the Bankruptcy Code is unenforceable.

For the reasons set forth below, we **VACATE** and **REMAND** the Confirmation Orders for further proceedings consistent with this opinion.

BACKGROUND

On April 28, 2010, SW Boston and three of its affiliated debtors filed voluntary chapter 11 petitions. The other debtors filed voluntary chapter 11 petitions on June 4, 2010. Prudential has a first priority security interest in and lien on essentially all of the assets of the Debtors (with

² Prudential identified three related but separate documents in its notice of appeal: (1) the “Memorandum” entered on November 14, 2011 regarding confirmation of the Debtors’ Plan [Docket No. 867]; (2) the “Order” entered on November 14, 2011, overruling Prudential’s objection to the Plan [Docket No. 868]; and (3) the “Findings of Fact, Conclusions of Law, and Order Confirming Modified First Amended Joint Plan of Reorganization of SW Boston Hotel Venture LLC, Auto Sales & Service, Inc., General Trading Company, Frank Sawyer Corporation, 100 Stuart Street, LLC, 30-32 Oliver Street Corporation, General Land Corporation and 131 Arlington Street Trust,” entered on November 16, 2011 [Docket No. 869]. All three documents will be referred to collectively as the “Confirmation Orders.”

³ Unless expressly stated otherwise, all references to “Bankruptcy Code” or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

a limited exception). The City of Boston (the “City”) has a second priority lien on most (but not all) of the same assets on which Prudential has a lien. Prudential and the City are parties to an intercreditor agreement pursuant to which the City subordinated its liens against, and right to payment from, the collateral pledged to both of them. This subordination agreement also contemplates the assignment of voting rights from the City to Prudential.

The Debtors filed the Plan in June 2011. The Plan divided creditors and other interests into nine classes and proposed to pay, in full, all allowed claims held by non-insiders using income generated by the Debtors’ operations and the sale of SW Boston’s condominiums in the ordinary course of business. Prudential filed an objection in which it asserted numerous flaws with the Plan, including that the Plan failed to satisfy multiple provisions of 11 U.S.C. § 1129, such as §§ 1129(a)(3), (a)(7), (a)(11), and (b)(2). Prudential also argued that the bankruptcy court fixed its claim at an amount vastly below what the Bankruptcy Code requires because it failed to calculate properly the postpetition interest to which Prudential is entitled, and because the Plan allowed payments on Prudential’s claims to be made over time at a below-market rate of interest. Prudential was the only party to object to and vote against the Plan.

The bankruptcy court conducted a three-day trial on confirmation of the Plan, combined with a hearing on the “Motion of The Prudential Insurance Company of America for an Order Authorizing the Application of Payments Received during the Chapter 11 Cases to Payment of Postpetition Interest Pursuant to Section 506(b) of the Bankruptcy Code” (the “506(b) Motion”). On October 4, 2011, the bankruptcy court entered an order and accompanying memorandum granting, in part, and denying, in part, the 506(b) Motion (the “506(b) Decision”). See In re SW Boston Hotel Venture, LLC, 460 B.R. 4 (Bankr. D. Mass. 2011). In the 506(b) Decision, the

bankruptcy court held that Prudential had failed to establish that it was oversecured at any time prior to the date of SW Boston's sale of the "W" Hotel and, therefore, was entitled to postpetition interest only from June 8, 2011. Based on the 506(b) Decision, the bankruptcy court entered an order (the "Prudential Claim Order") fixing Prudential's allowed secured claim as of October 4, 2011, in the amount of \$51,835,721. Prudential appealed both the 506(b) Decision and the Prudential Claim Order, and the Debtors filed cross-appeals relating to both orders.⁴

On November 14, 2011, the bankruptcy court entered the Confirmation Orders confirming the Plan and overruling Prudential's objections to the Plan. See In re SW Boston Hotel Venture, LLC, 460 B.R. 38 (Bankr. D. Mass. 2011). With respect to Prudential's secured claim, the bankruptcy court determined that, pursuant to the 506(b) Decision and the Prudential Claim Order, Prudential was owed around \$52 million. The Plan provided for payment of the full amount of Prudential's allowed secured claim, by March 31, 2014. Upon the evidence and witness testimony accepted at trial, adopting the United States Supreme Court's "formula approach" as set forth in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the bankruptcy court also found that the interest rate of 4.25% for the cramdown loan would compensate Prudential for the risk attendant to the restructured loan. Also, Prudential was to retain its lien and receive payments with interest at an appropriate rate from the sale of the condominiums, until its allowed secured claim is paid in full. Finally, the Debtors intended to satisfy Prudential's lien in a relatively short period of time, no later than March 31, 2014. Consequently, the bankruptcy court found that Debtors' proposed treatment of Prudential's allowed secured claim was fair and equitable, did not unfairly discriminate, and met the requirements for a cramdown under

⁴ See BAP Nos. MB 11-079, MB 11-082, MB 11-085, and MB 11-086.

§ 1129(b)(2)(A). Moreover, the bankruptcy court found that the Plan provided Prudential with the indubitable equivalent of its claim and that the treatment complied with the requirements of § 1129(b)(2)(A)(i) and (iii).

Prudential appealed the Confirmation Orders, and sought a stay pending appeal from both the bankruptcy court and the Panel. Both of those requests were denied. Without a stay, the Plan became effective on December 1, 2011. The Debtors assert that the Plan became substantially consummated shortly thereafter.

On February 14, 2012, the Debtors filed with the Panel a motion to dismiss this appeal, arguing that the appeal is equitably moot because the Plan had been substantially consummated and no effective relief could be granted to Prudential that would not completely undo the Debtors' reorganization and require the unraveling of the consummated transactions. They argued that because the 506(b) Decision and the Prudential Claim Order are "inextricably intertwined" with the Confirmation Orders and the implementation of the Debtors' reorganization, the decisions are "all part of a whole and one cannot be undone without undoing the others." Prudential opposed the motion to dismiss, arguing that the appeal was not moot as the Plan had not been substantially consummated and because effective relief could still be granted to Prudential without unwinding the Plan. In an order dated March 12, 2012, the Panel denied the motion to dismiss, concluding that the Debtors had failed to carry their burden of showing that the appeal is equitably moot, in part because Prudential is willing to accept alternative forms of relief that would not require an unraveling of the reorganization.

The motion to dismiss having been denied, both this appeal and the appeals relating to the 506(b) Decision and the Prudential Claim Order proceeded to oral argument.

DISCUSSION

The Plan provided for payment in full of all allowed, non-insider claims, plus post-confirmation interest, and proposed to pay these claims using income generated from the Debtors' operations, the sale of the remaining condominiums in the ordinary course of SW Boston's business, and the liquidation of certain assets of the Debtors. As set forth above, the bankruptcy court's 506(b) Decision and the Prudential Claim Order fixing the amount of Prudential's secured claim played an integral part in the confirmation of the Plan. According to the bankruptcy court, allowance of Prudential's claim in the amount originally asserted by Prudential would have rendered the Plan unconfirmable as the stipulated value of the Debtors' assets was substantially less than the amount of Prudential's secured claim.

In a decision entered this date, we have affirmed in part, and reversed in part, the 506(b) Decision and the Prudential Claim Order, and remanded both orders for further proceedings. In our decision, we concluded that the bankruptcy court: (1) erred in holding that Prudential was entitled to accrue postpetition interest only from the date of the hotel sale, as the values found by the bankruptcy court at the hearing on the 506(b) Motion showed that Prudential was fully secured as of the petition date; (2) erred in holding that Prudential was not entitled to postpetition interest computed on a compounded basis; and (3) did not err in awarding Prudential postpetition interest at the default rate set forth in the applicable loan agreement. Such a reversal alters the landscape dramatically. Its practical result is a significant increase in the amount of Prudential's claim, which, in turn, impacts the evaluation of the Plan's terms under § 1129. Thus, we will vacate the Confirmation Orders, and afford the Debtors an opportunity to amend the Plan's terms to account for the increased amount of Prudential's claim and the

resulting pay out to Prudential and/or for the bankruptcy court to fashion alternative forms of relief for Prudential that would not unravel the reorganization.

CONCLUSION

For the reasons set forth above, we **VACATE** the Confirmation Orders and **REMAND** to the bankruptcy court for proceedings consistent with this opinion.