

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

---

In re:

TE-KON TRAVEL COURT, INC.,

Debtor.

---

Case No. DK 04-01848

Chapter 11

Hon. Scott W. Dales

In re:

TE-KHI TRAVEL COURT, INC.,

Debtor.

---

Case No. DK 04-01847

Chapter 11

Hon. Scott W. Dales

In re:

TE-KHI SERVICE CENTER, INC.,

Debtor.

---

Case No. DK 04-01849

Chapter 11

Hon. Scott W. Dales

In re:

PETROLEUM HOLDINGS, INC.,

Debtor.

---

Case No. DK 04-01850

Chapter 11

Hon. Scott W. Dales

ORDER REGARDING SUMMARY JUDGMENT MOTION

PRESENT: HONORABLE SCOTT W. DALES  
United States Bankruptcy Judge

This contested matter arises out of the Motion to Enforce and Implement Terms of Fourth Amended Joint Plan of Reorganization or, in the Alternative, to Convert Case (DN 486, the “Motion to Enforce”) filed by U.S. Bank, National Association (“U.S. Bank”), as Trustee for the benefit of FMAC Loan Receivables Trust, 1998-C, and U.S. Bank, as Trustee for the benefit of

FMAC Loan Receivables Trust, 1998-D (“Lenders”) and the Debtors’ opposition to that motion. In accordance with the court’s Pretrial Order dated April 24, 2009, the Lenders have filed a Motion for Summary Judgment (DN 529, the “Summary Judgment Motion”). Debtors timely filed their opposition, which they supported with documents and affidavits as Fed. R. Civ. P. 56 requires.

The gravamen of the Lenders’ Summary Judgment Motion is that their admittedly premature recording of the escrowed deeds prior to the expiration of the seven-day cure period could not have caused any harm because the Debtors would have been unable to arrange take-out financing to make the required “balloon payment” during that cure period in any event.

In response, the Debtors explain, through affidavits and exhibits, that they had arranged approximately \$1,000,000 in short-term financing through one Dr. Jay M. Larson, which would have enabled them to close on the larger take-out re-financing with Southwest Guaranty. They further explained that Dr. Larson’s willingness to make the short-term loan was itself contingent upon his being satisfied that the Debtors’ proposed sales of two truck stops to Roady’s Truck Stops (“Roady’s”) and TravelCenters of America (“TA”) were pending, because the sale proceeds would be used to retire his bridge loan.

The affidavits of Dr. Larson and Mr. Kelly Rhinehart of Roady’s, together with the correspondence from Southwest Guaranty and TA, appear to support Debtors’ version of events, thereby raising genuine issues of material fact about whether the Lenders’ conduct in 2007 interfered with the Debtors’ performance under the Plan. Indeed, the affidavit testimony, if credited at trial, could establish that recording the formerly escrowed deeds raised fatal doubts in the buyers’ and new lenders’ minds about the Debtors’ ability to close the contemplated refinancing and truck stop sales, at a crucial time in the Debtors’ negotiations. Moreover, the

Debtors' reports of the Lenders' delays in providing payoff figures similarly corroborate the Debtors' version of events. The record in this matter -- including the apparent confusion of Lenders' counsel about the role of U.S. Bank in this matter -- may also corroborate Debtors' claim that they could not get a timely payoff figure.<sup>1</sup> It is at least conceivable that the securitization of the loan, and the resulting confusion about who was calling the shots (either U.S. Bank or one or more of its subcontracted servicers), contributed to the unhappy situation during the summer of 2007 that the Debtors describe in their response to the Summary Judgment Motion and, more generally, in their opposition to the Motion to Enforce.

Finally, the authorities that the Debtors cite in opposition to the Summary Judgment Motion make these factual disputes material. The Debtors may be able to establish grounds for estoppel or an excuse for non-performance, and thereby buy themselves additional time to arrange take-out financing to satisfy the Lenders' claims under the Plan.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Summary Judgment Motion (DN 529) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon John T. Piggins, Esq., Matthew Boettcher, Esq., Douglas C. Bernstein, Esq. and Dean E. Rietberg, Esq.

END OF ORDER

---

<sup>1</sup> See Opinion and Order Regarding Reconsideration Motion, dated October 1, 2009 at p. 2.