

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 5, 2018 at 10:00 a.m.

1.	16-25217-A-11	WEST LANE PROPERTIES	MOTION TO
	MJH-7	INC.	APPROVE COMPENSATION OF DEBTOR'S
			ATTORNEY
			1-4-18 [107]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Mark Hannon, Attorney at Law, counsel for the revested debtor, has filed a first and final motion for approval of compensation. The requested compensation consists of \$12,885.75 in fees and \$0.00 in expenses. The services cover the period from August 15, 2016 through January 4, 2018. The court approved the movant's employment as the chapter 11 debtor's attorney on September 8, 2016. In performing services, the movant charged an hourly rate of \$345.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The movant's services included, without limitation: (1) analyzing estate asset issues, (2) preparing for and attending the IDI and meeting of creditors, (3) communicating with the United States Trustee and creditors, (4) preparing and reviewing pleadings and documents, (5) attending court hearings, (6) preparing, filing, and prosecuting various motions, (7) assisting the debtor with operating report and business operation issues, (8) preparing a plan and disclosure statement, (9) reviewing and analyzing proofs of claim, (10) communicating with the debtor about various issues, and (11) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of the debtor's bankruptcy estate. The requested second interim compensation will be approved and all awarded interim compensation will be approved on final basis.

February 5, 2018 at 10:00 a.m.

2. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION FOR
BAL-3 L.L.C. RELIEF FROM AUTOMATIC STAY
MACERICH VINTAGE FAIR, L.P. VS. 11-8-17 [117]

Tentative Ruling: This motion was granted. Docket 229. Absent a need for further relief the parties need not attend the hearing.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION FOR
WWH-1 L.L.C. RELIEF FROM AUTOMATIC STAY
GGP NORTHRIDGE FASHION CENTER, L.P. VS. 11-21-17 [142]

Tentative Ruling: The hearing on this motion was continued from December 26, 2017 to give the debtor an opportunity to request relief from a lease forfeiture. The court has not been informed whether that relief was granted or denied.

The movant, GGP Northridge Fashion Center, L.P., seeks relief from the automatic stay with respect to a commercial real property in Northridge, California, where the debtor operates a Cinnabon store. The debtor has been leasing the property from the movant. The debtor failed to make four pre-petition payments to the movant as required by the lease.

The movant served the debtor with a five-day notice to pay or surrender on July 21, 2017. The notice declared lease termination and forfeiture. Following expiration of the notice, the movant filed a complaint for unlawful detainer in state court on August 4, 2017. A default judgement was entered in favor of the movant on August 24, 2017. On September 14, 2017, the debtor filed this bankruptcy case.

If the debtor obtains relief from the forfeiture, the court expects that the debtor has assumed the lease. In that event, this motion will be denied.

If the state court declines to relieve the debtor of the lease forfeiture, the automatic stay will be terminated to permit the movant to obtain possession of the premises. The debtor is unable to assume the lease because its tenancy interest terminated before this case was filed upon expiration of the five-day notice on or about July 26, 2017. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989).

4. 15-29136-A-12 P&M SAMRA LAND MOTION TO
JPJ-2 INVESTMENTS L.L.C. DISMISS CASE
1-17-18 [513]

Tentative Ruling: The motion will be denied, and the case will remain pending.

The chapter 12 trustee moves for dismissal because the debtor is \$76,644.93 delinquent under the terms of the chapter 12 plan. The delinquency is due to nonpayment of the initial annual plan payment due December 25, 2017.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

The debtor states the delinquency in its initial annual payment is due to

planting delays with regard to its \$1 million contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately \$750,000 in the next three to four weeks. The debtor seeks to modify the plan to extend the December 2017 payment to March 15, 2018. The debtor is current on monthly plan payments.

Given the above setback and the debtor's intent to cure the delinquency shortly, the court will not dismiss the case. Accordingly, the motion will be denied.

5. 15-29136-A-12 P&M SAMRA LAND MOTION TO
MAS-10 INVESTMENTS L.L.C. DISMISS CASE
12-29-17 [508]

Tentative Ruling: The motion will be denied, and the case will remain pending.

Creditor AG-Seeds Unlimited moves for dismissal because the debtor delinquent under the terms of the confirmed chapter 12 plan. The debtor's delinquency includes default on one \$30,000 plan payment to the movant, that was due on December 25, 2017 as part of the debtor's initial annual plan payment.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

The debtor states the delinquency is due to planting delays with regard to its \$1 million contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately \$750,000 in the next three to four weeks. The debtor has filed a motion to modify plan, to be heard concurrently with this motion, which seeks to extend the December 25, 2017 payment to March 15, 2018.

Given the above setback and the debtor's intent to cure the delinquency shortly, the court will not dismiss the case. Accordingly, the motion will be denied.

6. 15-29136-A-12 P&M SAMRA LAND MOTION FOR
NCK-12 INVESTMENTS L.L.C. INJUNCTION, FOR CONTEMPT AND FOR
SANCTIONS
1-17-18 [521]

Tentative Ruling: The motion will be denied.

The debtor seeks to hold creditor The Socotra Fund in contempt of court for payment of delinquent property taxes owed by the debtor and seeks sanctions in the amount of \$3,000 for attorney's fees related to the filing of this motion.

The creditor holds a note and deed of trust in the amount of \$1 million secured by the debtor's real property located in Nicolaus, California. After the debtor filed its chapter 12 petition on November 24, 2015, the debtor missed four installment payments of property taxes due to Sutter County. The installments were due on December 10, 2015 and April 10, 2016 in addition to December 10, 2016 and April 10, 2017. The plan failed to provide for the payment of these property taxes.

On October 31, 2017, the creditor paid the post-petition delinquent property taxes, totaling \$30,120.80, to Sutter County in order to protect the priority of its lien on the Nicolaus property. On December 8, 2017, the creditor recorded a "Notice of Default and Election to Sell under Deed of Trust" relating to debtor's failure to pay the property taxes.

The debtor asserts that by paying the debtor's property taxes and recording a notice of default, the creditor violated the automatic stay under 11 U.S.C. § 362 and is thwarting implementation of the confirmed plan in violation of 11 U.S.C. § 1227. The debtor further contends that the creditor is estopped by res judicata from any action with regard to the property taxes.

11 U.S.C. § 362(c)(1) provides "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." 11 U.S.C. §362(c)(1). Cases interpreting this section conclude that plan confirmation, where property reverts in the debtor, terminates the automatic stay. See, e.g., In re Jones, 657 F.3d 921 (B.A.P. 9th Cir. 2009).

11 U.S.C. § 1227 provides:

(a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in section 1228(a) of this title and except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

The motion will be denied for the following reasons.

First, the creditor did not violate the automatic stay by filing a notice of default. Under section 1227(b), confirmation of a chapter 12 plan vested all of the property of the estate in the debtor. Further, section 6.04 of the debtor's confirmed plan explicitly states that property of the estate shall revert in the debtor upon the effective date of the plan. Docket 502 at 14. As of March 29, 2017, the date of plan confirmation, all estate property, including the property securing the promissory note, reverted with the debtor. Thus, the subject property was no longer property of the bankruptcy estate or subject to the automatic stay when the creditor made the payment to Sutter County on October 31, 2017 and filed a notice of default thereafter.

Second, the creditor's actions were not contumacious. The plan did not provide for treatment of the property tax payments owed to Sutter County. Further, the plan explicitly states that the creditor's security interest remains unaltered, except insofar as the plan changes the monthly payments and the interest rate. Per the terms of the deed of trust, the creditor was well within its contractual rights to forward payment to Sutter County for past due property

taxes and to record a notice of default thereafter:

Section 6 of the deed of trust provides that "*Borrower shall promptly pay, satisfy, and discharge: (a) all Impositions affecting the Mortgaged Property before they become delinquent*" Docket 540 at 45, Ex. B.

Section 1.10 of the deed of trust defines "*Impositions*" as including "*All real estate and personal property taxes*" Id. at 12.

Section 12 provides, "*If Borrower fails to make any payment or do any act required by this Deed of Trust . . . Lender or Trustee may (but is not obligated to) (a) make any such payment or do any such act in such manner and to such extent as either deems necessary to preserve or protect the Mortgaged Property, this Deed of Trust, or Lender's security for the performance of Borrower's Obligations and payment of the Indebtedness*" Id. at 48.

Section 13 of the deed of trust requires the debtor/borrower to immediately pay back any sums advanced, and until the sums are re-paid, they become part of the "*Indebtedness*" secured by the deed of trust. Id.

Section 1.12.4 of the deed of trust defines "*Indebtedness*" as including "*Any . . . funds advanced to protect the security or priority of the Deed of Trust*" Id. at 12.

Section 19.1 of the deed of trust provides that failure to pay such "*Indebtedness*" is an "*Event of Default*" that triggers the acceleration clause and authorizes a foreclosure proceeding. Id. at 50.

Third, res judicata did not preclude the creditor's actions with regard to the property taxes. Res judicata or claim preclusion bars the relitigation of any claims that were raised or could have been raised in the prior action. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (citing Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997)). Although an order confirming a chapter 13 plan is a final order with potentially preclusive effect, the extent of that effect, however, is determined in each instance by applying the transactional test to the terms of the specific plan and the manner in which the confirmation was accomplished. In re Summerville, 361 B.R. 133, 142 (B.A.P. 9th Cir. 2007).

While res judicata applies to the terms of a plan, the debtor's plan is silent on property taxes. Property taxes was not addressed in the plan or in the confirmation order. Therefore, confirmation of the debtor's plan cannot be construed to have any preclusive effect on post-confirmation actions taken in relation to payment of property taxes.

Finally, no injunctive relief can be granted in the absence of an adversary proceeding. See Fed. R. Bankr. P. 7001.

7.	15-29136-A-12	P&M SAMRA LAND	MOTION TO
	NCK-13	INVESTMENTS L.L.C.	MODIFY CHAPTER 12 PLAN
			1-17-18 [527]

Tentative Ruling: The motion will be denied.

The debtor asks the court to modify its chapter 12 plan confirmed on March 29, 2017. Docket 502. The debtor wishes to modify the plan in order to increase the monthly payment by \$500. This sum will be disbursed to the Sutter County

tax assessor to cure property tax arrears. This claim was not included in the confirmed plan. The debtor also seeks to delay the initial annual payment date from December 25, 2017 to March 15, 2018.

11 U.S.C. § 1229(a)(2) allows the court to extend or reduce the time for payments due under the plan.

The reason for the extension in the initial annual plan payment is due to planting delays with regard to the debtor's \$1 million fulfillment contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately \$750,000 in the next three to four weeks.

Given the above setback, the court would be willing to grant the motion and modify the plan to extend the deadline for the annual plan payment to March 15, 2018. However, the debtor's proposal to include monthly payments to the county tax assessor in the modified plan is unnecessary. In order to protect the priority of their lien on the subject property, creditor The Socotra Fund, L.L.C. advanced the debtor's outstanding post-petition delinquent property tax obligations in the amount of \$30,120.80 to Sutter County on October 31, 2017 and recorded a notice of default and intent to sell on the subject property on December 8, 2017. Accordingly, if the debtor wishes to cure the property tax arrears, the debtor must reimburse the creditor prior to the expiration of the notice of default. Alternatively, the debtor may file a new modified plan and a motion to confirm it and set a hearing prior to the expiration of the notice of default. The new modified plan may proposed repayment of the advanced property taxes on terms other than payment in full prior to the expiration of the notice of default.

In light of the foregoing deficiency, the motion will be denied.