

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 8, 2017 at 10:00 a.m.

1. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO
SET ASIDE
2-2-17 [628]

Tentative Ruling: The motion will be denied.

The debtor Hoda Samuel, currently incarcerated in federal prison, requests stay of the orders authorizing sales of the estate's shopping centers, pending an appeal of those orders.

First, the motion, like this debtor's objections to the sales, will be denied without prejudice because it is not supported by any evidence. This violates Local Bankruptcy Rule 9014-1(d)(7), which provides: "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(c)(4)."

Second, to the extent the motion is seeking dismissal of the case, the motion will be denied in accordance with the court's ruling on Aiad Samuel's motion to dismiss, DCN RJ-5, heard on February 6, 2017. The ruling on Mr. Samuel's dismissal motion is incorporated here by reference.

Third, the court will deny a stay pending appeal.

Fed. R. Bankr. P. 8007 requires an appellant initially to seek a stay pending an appeal from the bankruptcy court. Fed. R. Bankr. P. 8007(a)(1)(A) & (C).

A trial court has discretionary authority to stay proceedings in its own court. Lockyer v. Mirant Corp., 398 F.3d 1098, 1109, 1111 (9th Cir. 2005); Fed. R. Bankr. P. 8007(a)(1).

The standard governing imposition of discretionary stays focuses on a balance of: whether the appellant is likely to succeed on the merits of the appeal, whether the appellant will suffer irreparable injury, whether substantial harm will come to the appellee, and the effect, if any, on the public interest. Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965); Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 191 B.R. 433, 444 (E.D. Cal. 1995) (Wanger, D.J.), aff'd, 128 F.3d 1294 (9th Cir. 1997); Ohanian v. Irwin (In re Irwin), 338 B.R. 839, 845 (E.D. Cal. 2006) (Ishii, D.J.); Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806 (B.A.P. 9th Cir. 1980) (citing Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965)); Dynamic Fin. Corp. v. Kipperman (In re N. Plaza, LLC), 395 B.R. 113, 119 (S.D. Cal. 2008); CWS Enterprises, Inc. v. Freidberg & Parker (In re CWS Enterprises, Inc.), Case No. 09-26849-C-11, 2011 WL 10639726, at *4 (Bankr. E.D. Cal. Aug. 16, 2011).

The motion fails to address this standard.

Mrs. Samuel argues that the sale orders should be overturned because the amount

of the claim asserted by the United States is much less than the asserted approximately \$3.029 million. She says it should be as little as \$250,000.

But, the amount of the United States' claim has no direct relevance to the sales of the properties. Even if Mrs. Samuel is correct that the United States' claim should be reduced, this is not basis for stopping the sales. The trustee is not selling the properties just for the benefit of the United States. The trustee is selling them for the benefit of all creditors, including the mortgagees and unsecured creditors.

The challenge to the amount of the United States' claim *may* raise an issue of how much in proceeds the United States should receive from each sale. However, it does not raise an issue as to the merits of the sales. The court has already determined that: the bankruptcy estate should be administered by a trustee and not the debtors; that dismissal is not in the best interests of creditors; and the sales are in the best interest of the creditors and the estate.

The court's rulings on Fairview's motion to convert to chapter 7 (DCN LCR-1), on Mr. Samuel's motion to strike and dismiss (DCN RJ-5), and on the trustee's three sales motions (DCNs FWP-13, FWP-15, FWP-17) are incorporated here by reference. Dockets 61, 599, 607.

Mrs. Samuel does not dispute that the sales are in the best interest of the creditors – other than the United States – and the estate. She argues only that the sales are not in her best interest. That is not the standard for approval of sales in bankruptcy. The standard is whether the sale is in the best interest of the creditors and the estate. The sale must be fair, equitable, and in the best interest of the estate. Mozer v. Goldman (In re Mozer), 302 B.R. 892, 897 (C.D. Cal. 2003).

Moreover, it can be convincingly argued that the sales are in the best interests of the debtors.

The court made extensive findings of fact in connection with sale motions (these rulings are incorporated above). As determined by the court, each shopping center suffers from extensive deferred repair and maintenance requiring the injection of substantial funds for the continued operation of the properties. Those funds are not available, either to the estate or the debtors.

For instance, as mentioned in the court's ruling on the motion to sell the West Sacramento shopping center, the property is in need of expensive and extensive roof and parking lot repairs and the debtors and the estate do not have the resources to pay for those repairs. Hence, their long term operation by the estate or the debtors is doomed to failure. The best chances of realizing gain from the centers is their sale.

Also, the loans on the Power Inn Road and West Sacramento shopping centers have matured. Docket 590 at 2-3.

On the other hand, Mrs. Samuel is in prison and Mr. Samuel has a track record of unreliability and mismanagement of the properties and the estate.

The creditors' and Mrs. Samuel's best chance of recovering anything from the properties is to allow the trustee to administer and sell them. He has judged that, to avert foreclosure or a judicial lien sale by the United States, marketing the properties for sale, with the agreement of all secured claimants, would generate the maximum recovery from the sale of each property.

Regardless of what happens with the sales, Mrs. Samuel may still object to the United States' proof of claim. She does not need to challenge the sales in order to challenge the amount of the United States' claim. Challenging that claim is no reason to stay the sales. The proper avenue for challenging the claim is to file an objection to the proof of claim. The United States filed a proof of claim in this case on September 12, 2016. POC 25. An objection to the proof of claim may be filed at any time. 11 U.S.C. § 502(a); Fed. R. Bankr. P. 3007 (not containing a deadline for filing an objection to claim).

Mrs. Samuel's motion also seems to assert that because she has appealed her criminal conviction and the restitution award to the United States that it is somehow unfair and or unlawful that the United States be permitted to collect the restitution, whether as a claim in the bankruptcy case or otherwise. However, the court is aware of no stay granted by the court(s) with jurisdiction over that restitution award and no authority has been cited suggesting that the mere appeal of the conviction prevents enforcement of the restitution award.

The court is unconvinced that Mrs. Samuel is likely to succeed on the merits of appealing the sales orders.

Mrs. Samuel claims she will suffer injury if the sale orders or not stayed because the United States will collect an inflated claim.

However, such an injury is not irreparable. Mrs. Samuel has another avenue to challenge the United States' claim. She can challenge the restitution award in connection with her appeal of her conviction and/or she may be able object to the United States' proof of claim.

Conversely, if the sales are halted, the bankruptcy estate is likely to suffer substantial harm. The purchasers will not complete their acquisitions and the estate, which has no significant liquid assets, will be left to deal with shopping centers that are in disrepair and subject to matured mortgages.

The balancing of the above factors strongly favors denying a stay pending appeal of the orders granting the sales. The motion will be denied.

2. 16-21585-A-11 AIAD/HODA SAMUEL MOTION FOR
APPOINTMENT OF COUNSEL
2-2-17 [629]

Tentative Ruling: The motion will be denied.

The debtor Hoda Samuel, who is currently incarcerated in federal prison, asks the court to appoint an attorney for her.

The motion will be denied.

This court does not have the authority or means to appoint an attorney for Mrs. Samuel. In bankruptcy cases, there is no right to counsel such as it exists in criminal cases. Nothing entitles Mrs. Samuel to an attorney, just because she is unable to afford one. Many debtors seeking bankruptcy relief are unable to afford an attorney. This does not qualify them for free legal representation.

Mrs. Samuel is not a debtor-in-possession. When the court appointed a trustee, the debtors were removed as administrators of the estate. Estate funds then are not available to fund Mrs. Samuel's legal representation.