UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 13, 2017 at 11:00 a.m.

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

Tentative Ruling: The motion will be denied.

The hearing on this motion was continued from February 8, pursuant to a request by Hoda Samuel communicated to the court by Aiad Samuel.

Debtor Hoda Samuel is currently incarcerated in federal prison. She requests a stay of the orders authorizing sales of the estate's shopping centers pending her appeal of those orders.

First, the request for a stay is unsupported by any evidence. See Local Bankruptcy Rule 9014-1(d)(7).

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 motion is incorporated by reference.

Even when viewed separately and independently from Mr. Samuel's motion to dismiss the case, Mrs. Samuel's request for dismissal is without merit.

Mrs. Samuel filed two motions to dismiss this case at least as to her. One was filed on January 9, 2017 and the other was filed on January 19, 2017. Dockets 450 & 581.

Neither of Mrs. Samuel's motions to dismiss were served and set for a hearing. 11 U.S.C. § 1112(b)(1) unequivocally requires "notice and a hearing" on any motion to dismiss a chapter 11 case.

Mrs. Samuel's contention that her failure to obtain pre-petition credit counseling as required by 11 U.S.C. § 109(h) warrants dismissal lacks merit. Credit counseling is not a jurisdictional requirement. It is rather a question of individual eligibility that is subject to both waiver and estoppel. Mendez v. Salven (In re Mendez), 367 B.R. 109, 115-17 (B.A.P. 9th Cir. 2007). Mrs. Samuel waived her right to assert the lack of pre-petition credit counseling as reason for dismissal of the case. She, along with her spouse, filed this case on March 15, 2016, approximately one year ago. For nearly 10 months, Mrs. Samuel did nothing to assert her lack of pre-petition credit counseling. Only after the trustee rejected Mr. Samuel's offer to refinance of the shopping center properties and filed motions to sell those properties, did Mrs. Samuel raise eligibility under section 109(h). Docket 450.

Mrs. Samuel also attempts to justify dismissal by her failure to sign the bankruptcy petition, schedules and statements. As admitted by Mrs. Samuel, however, Mr. Samuel filed this bankruptcy case on his and her behalf pursuant to a power of attorney given to him by Mrs. Samuel. Mr. Samuel also told the court that he had filed this case on Mrs. Samuel's behalf pursuant to her power of attorney. Dockets 82 at 1, 450, 581.

When the court commented during a hearing that, despite the power of attorney, Mrs. Samuel needed to sign the schedules, the court was pointing out only that Mr. Samuel could not, as her attorney in fact, testify on her behalf. He could not attest for Mrs. Samuel as to the accuracy of the schedules. Nor could Mr. Samuel act as her attorney at law, as opposed to her attorney in fact.

Mrs. Samuel's failure to sign the schedules does not change the fact that Mr. Samuel filed the voluntary bankruptcy petition on Mrs. Samuel's behalf, with her consent and permission, pursuant to the power of attorney. Dockets 1 & 63. Mrs. Samuel's later refusal to sign the schedules, in an effort to trigger a dismissal of the case, could be cause for dismissal but dismissal was not mandatory. See 11 U.S.C. § 1112(b)(4)(F). Indeed, Fed. R. Bankr. P. 1007(k), permits the court to authorize someone else to file schedules and statements when a debtor fails to do so. A dismissal is not the necessary result from a debtor's failure to file these documents. And, even if there is cause for dismissal, the court is required to dismiss, convert the case to chapter 7, or appoint a trustee, whichever is in the best interests of all creditors and the estate. See 11 U.S.C. § 1112(b)(1). The court opted, for many reasons, to appoint a trustee. See Docket 61, Civil Minutes including the courts findings of fact and conclusions of law.

She has also waived any challenge to Mr. Samuel's filing of this case on her behalf under the power of attorney.

A power of attorney may be used to file bankruptcy on behalf of someone else. United States v. Spurlin, 664 F.3d 954, 959 (5th Cir. 2011); In re Ballard, Case No. I-87-00718, 1987 WL 191320 (Bankr. N.D. Cal. April 30, 1987) (permitting a wife to sign, under a power of attorney, a joint bankruptcy petition for her husband, who was serving in the military).

After the court indicated on May 2, 2016 that it was appointing a chapter 11 trustee to administer the estate, Mr. Samuel filed on May 16, 2016, a motion to dismiss the case, citing Mrs. Samuel's unwillingness to sign the schedules. Dockets 61 & 82. The dismissal motion states that "Hoda Samuel has advised her husband that she *no longer* wishes to proceed with the bankruptcy." Docket 82 at 2 (Emphasis added).

In other words, when the case was filed, she was willing to proceed with the bankruptcy. She had no issue with Mr. Samuel's use of the power of attorney to file this case on her behalf. But, when it looked as if the debtors were about to lose control over the estate because of the appointment of a trustee, she *no longer* wished to proceed with the bankruptcy. Unfortunately for her, once the case was filed, it could not be dismissed without satisfying 11 U.S.C. § 1112(b)(1). Rather than demonstrate that dismissal was in the bests interest of creditors and the estate, Mrs. Samuel attempted to obtain dismissal by pointing to defects that were within the control of herself and her husband.

As she did with her eligibility under section 109(h), Mrs. Samuel did not contest Mr. Samuel's authority to file this case pursuant to the power of attorney until the trustee filed the motions to sell the shopping centers, on

December 23, 2016. Prior to that, Mrs. Samuel participated in this case with Mr. Samuel, without objecting to his exercise of authority under the power of attorney.

For instance, Mr. Samuel filed motions to dismiss on his and her behalf, on May 16, 2016. Docket 82 & 83. Mrs. Samuel and Mr. Samuel also retained an attorney — Edward Smith — together. Docket 78. She could not have personally retained Mr. Smith as her counsel because she has been and is incarcerated in Texas. The application to employ Mr. Smith as their counsel is executed "Aiad Samuel, individually and on behalf of Hoda Samuel through durable power of attorney." Docket 78 at 7.

On May 25, 2016, Mrs. Samuel even filed her own change of address request. Docket 97.

Mrs. Samuel also did nothing to revoke Mr. Samuel's power of attorney, prior to the December 23, 2016 filing of the motions to sell. Nor did she file her own motion to dismiss the case. Her first motion to dismiss was not filed until January 9, 2017. Docket 450.

Mrs. Samuel has waived or is estopped to assert any argument based on her failure to sign documents, obtain credit counseling, be examined a meeting of creditors as a basis for the dismissal of this bankruptcy case. It was filed with her consent by her husband and dismissal is unwarranted under section 1112(b)(1).

Third, the court will deny a stay pending appeal.

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

A trial court has discretion to stay proceedings. 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).

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 the United States should receive from each sale. However, it does not raise an issue as to the merit 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 if the debtors or the estate will continue to operate 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 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, 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.

Next, even if Mrs. Samuel were to be dismissed from this case, this would not stop the sales. As discussed at length in the rulings on the motions to sell, the shopping centers are community property of the debtors and are liable on account of the restitution judgment obtained by the United States against Mrs. Samuel. Dockets 599, 607, 659. The court incorporates the rulings on the sales motion here by reference. Id.

Even if the shopping centers were the separate property of each debtor, and if the case proceeded as to Mr. Samuel alone, the trustee could still sell 100% of the properties. See 11 U.S.C. § 363(h). The United States would have a claim in connection with a sale of Mrs. Samuel's separate property interest in the properties.

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 are 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.

Finally, the history of this case demonstrates that the debtors have sown much confusion, both inside and outside this bankruptcy case, in an effort to evade paying their creditors, in particular the United States. The transfer of the shopping centers to Peter Samuel in 2013, during the pendency of the criminal proceeding against Mrs. Samuel, was done in an apparent effort to prevent the United States from collecting on a future judgment. After Peter Samuel reconveyed the property to his parents on the demand of the United States, see Dockets 599, 607, 659, the debtors then decided to file this bankruptcy case. Once again, this seemed calculated to prevent the United States from collecting the restitution. But, when the court appointed a trustee and it became clear that the properties would to be sold, the debtors started backpedaling, and they sought to dismiss the case. From this, it is clear that the debtors have engaged themselves in a scheme to delay, hinder or defraud creditors.

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.