UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 3, 2014 at 10:00 a.m.

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1. 11-30626-A-11 CAL STATE GROWTH FUND — MOTION FOR FINAL DECREE
REC-12 — 1-23-14 [563]

Tentative Ruling: The motion will be granted.

The liquidating trustee moves for an order entering final decree and closing the case as the case has been fully administered.

11 U.S.C. § 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Similarly, Fed. R. Bankr. P. 3022 provides that "[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

In the chapter 11 context, courts have defined full administration as substantial consummation. In re Wade, 991 F.2d 402, 406 n.2 (7th Cir. 1993) (citing In re BankEast Corp., 132 B.R. 665, 668 n.3 (Bankr. D.N.H. 1991)). Substantial consummation is defined by section 1101(2) as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."

The court confirmed the chapter 11 trustee's and the official committee of unsecured creditors' chapter 11 plan on November 15, 2012. The liquidating trustee appointed under the terms of the plan has completed all transfers of property under the terms of the plan, has assumed management of all property addressed by the plan, has commenced distributions to unsecured creditors, has completed the litigation of all claim objections, and has concluded all other pending motions and adversary proceedings. There are no outstanding motions or proceedings.

Based on this, the court concludes that substantial consummation has been achieved. Accordingly, the court will enter a final decree and close the case. The motion will be granted.

2. 13-25330-A-12 PAUL MENNICK — MOTION TO CONFIRM CHAPTER 12 PLAN
WW-3 — 1-22-14 [66]

Tentative Ruling: The motion will be denied.

The debtor moves for confirmation of his chapter 12 plan.

Creditor PSB Credit Services, Inc., opposes confirmation, arguing that the debtor does not qualify as a family farmer, the debtor has unreasonably delayed the prosecution of this case, the plan is unfeasible, and the plan's treatment of PSB's claim is unreasonable.

Creditor Lisabeth D. Rothman opposes confirmation, arguing that the debtor cannot make all payments under the plan, the plan does not comply with the disposable income requirement of 11 U.S.C. § 1225(b), and the debtor has not demonstrated good cause for increasing the plan term from three to five years.

The debtor has filed a reply that modifies the proposed plan by decreasing the repayment term of PSB's claim from 20 to 10 years (from 2034 to 2024), among other things.

The court has already addressed the eligibility issue whether the debtor qualifies as a family farmer in its February 3, 2014 ruling. Docket 80. In addition, as to the unreasonable delay in prosecution of this case, the court has already given the debtor 60 days to confirm a plan in the ruling on the motion to dismiss. Docket 80. The court will not revisit these issues.

Next, the debtor's inability to pay creditors in full in three years is cause to extend the plan term to five years. And, the disposable income requirement of 11 U.S.C. § 1225(b)(B) is not implicated here as the debtor is paying all claims in full under the plan.

Further, PSB contends the plan's treatment of its claim is unreasonable because the debtor proposes to reamortize the term for 10 years, with a 4.5% interest rate. Under the proposed plan the Note will be extended for another 10 years (decreased from 15 years)- from 2014 to 2024.

The Supreme Court decided in Till v. SCS Credit Corp., 541 U.S. 465 (2004), that the appropriate interest rate is determined by the "formula approach." This approach requires the court to take the national prime rate in order to reflect the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate it for the loan's opportunity costs, inflation, and a slight risk of default.

The bankruptcy court is required to adjust this rate for a greater risk of default posed by a bankruptcy debtor. This upward adjustment depends on a variety of factors, including the nature of the security, and the plan's feasibility and duration. Cf. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir. 1990); In re Camino Real Landscape Main. Contrs., Inc., 818 F.2d 1503 (9th Cir. 1987).

To set the appropriate rate, the court is required to conduct an "objective inquiry" into the appropriate rate. The debtor's bankruptcy statements and schedules may be culled for the evidence to support an interest rate.

"Moreover, starting from a concededly *low* estimate and adjusting *upward* places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing. . . ." Till at 479.

The prime rate on the petition date, April 18, 2013, was 3.25% as reported by Money Cafe.com. See http://www.moneycafe.com/library/primerate.htm. As

surveyed by the Supreme Court in Till, courts using the formula approach typically have adjusted the interest rate 1% to 3%.

While PSB argues that the proposed interest rate and 10-year reamortization are unreasonable, PSB's opposition does not explain why they are unreasonable. PSB simply states in its opposition that "[t]he Debtor has not offered any justification or support for his proposal to reamortize the loan for an additional 15 years or to impose an interest rate of 4.5%." Docket 87.

More, PSB's opposition is not supported by any evidence, such as a declaration establishing the factual assertions in the opposition.

Nevertheless, the court will deny plan confirmation because of the following issues:

First, the court cannot determine whether the plan is feasible as the debtor has not confirmed his post confirmation monthly expenses. The court has reviewed the proposed chapter 12 plan. The debtor proposes to pay all claims, including unsecured claims, in full. The plan proposes annual payments of $56,940 ($3,000 a month plus $5,100 a quarter).

The plan provides, beginning August 2013, monthly payments of $3,540 for five months and monthly payments of $3,000 for the remaining 55 months. In addition, beginning February 2014, the plan provides for quarterly payments of $5,100 for the remaining plan term.

The court calculates the debtor's anticipated post-petition annual income at $159,242 ($10,770 monthly income plus $2,500 monthly rental property income). This excludes potential income of $3,000 a month from judgments entered in favor of the debtor. Docket 68.

However, the court cannot confirm the debtor's post-confirmation monthly expenses. Specifically, the court cannot tell whether his monthly expenses of $7,752.13 from Schedule J will remain the same after plan confirmation. Docket 11. The expenses in Schedule J reflect the debtor's financial standing as of the petition date, April 18, 2013, which is over 10 months ago. Just inflation would warrant a several hundred dollar monthly increase in those expenses since the petition date. As the court does not know what will be the debtor's post-confirmation expenses, it cannot determine whether the plan is feasible.

Second, the debtor has not filed tax returns for 2007 through 2011 and 2013. This begs the question of what will be the debtor's pre-petition tax liability for those years. The debtor states in his declaration that he expects to have tax liability of approximately $5,000 for 2007, "small amounts to be owing for 2008 and 2009," and "no tax owing for 2010, 2011, and 2013 due to losses sustained as a result of the Fracchia debacle." Docket 91 at 4.

But, the debtor provides no factual foundation for his opinions on tax liability. The debtor has not been qualified as a tax expert - he is a veterinarian - and there is no mention of the grounds for his opinions. The debtor does not say how he calculated these figures. For instance, the court cannot tell whether the debtor took into consideration interest and penalties in reaching his conclusions.

As additional tax claims can seriously impact the debtor's ability to comply with the terms of the proposed plan, the objecting parties are entitled to more information regarding the plan's feasbility.

Third, while the debtor has decreased the term of repayment for the PSB claim from 20 to 10 years, changing the maturity date from 2034 to 2024, the debtor does not say how he is planning to pay PSB's claim in full, 10 years sooner than originally proposed, without changing the interest rate or monthly payment amount. The debtor's latest plan amendment does not provide for a balloon payment on account of PSB's claim.

Fourth, the debtor is not current with his plan payments. As of January 15, 2014, the Chapter 12 Trustee was holding only $17,000 for distribution to creditors. Yet, the plan requires plan payments of $17,700 through the end of 2013, based on the plan's first five monthly payments of $3,540 each, starting in August 2013. Docket 71 at 5.

Given the foregoing issues, plan confirmation will be denied.

3. 11-39843-A-7 LILIA KRYVOSHEY — ORDER TO SHOW CAUSE 2-12-14 [89]
12-2221
KRYVOSHEY V. DEUTSCHE BANK NATIONAL TRUST COMPANY

Tentative Ruling: The adversary proceeding will be dismissed.

The court issued this order to show cause due to the plaintiff's failure to prosecute the action.

The plaintiff filed a response, seeking the dismissal of the adversary proceeding. Docket 91. Given the plaintiff's response to the order to show cause, the adversary proceeding will be dismissed.

4. 14-20583-A-11 LARRY JENT — STATUS CONFERENCE 1-23-14 [1]

Tentative Ruling: None.

5. 14-20583-A-11 LARRY JENT — ORDER TO SHOW CAUSE 1-27-14 [10]

Tentative Ruling: The order to show cause will be discharged.

This order to show cause was issued because while the bankruptcy petition lists the debtor as being in pro per, not represented by counsel, this bankruptcy petition was filed electronically under the username and password of attorney John Downing. Registered efilers, like Mr. Downing, are prohibited from permitting an unregistered person, like the debtor in possession, from using his or her username and password in order to file electronically. See Local Bankruptcy Rule 5005.5-1(d) (1), (2).

After this order to show cause was issued, Mr. Downing applied and the court granted a request for his employment as counsel for the debtor in possession. The court approved Mr. Downing's employment as counsel for the debtor in possession on February 24, 2014. Docket 44. Given this, the court will discharge this order to show cause. However, if this conduct is repeated in any case, the court will revoke counsel's efiling privileges.

6. 14-20583-A-11 LARRY JENT
GFT-1
THE NORTHERN TRUST COMPANY VS.

MOTION FOR
RELIEF FROM AUTOMATIC STAY
1-30-14 [13]

Tentative Ruling: The motion will be granted in part and denied in part.

The movant, The Northern Trust Company, seeks relief from the automatic stay as to a real property in Truckee, California, pursuant to 11 U.S.C. § 362(d)(1), (d)(2), and (d)(4).

The subject property is held by a revocable family trust, The BHR Trust. The debtor and his non-filing spouse are both the settlors and beneficiaries under the trust, whereas only the non-filing spouse is a trustee of the trust.

"[T]o the extent a debtor holds a beneficial interest in a trust, that beneficial interest becomes property of the estate, unless it is protected by a valid spendthrift provision." Cutter v. Seror (In re Cutter), 398 B.R. 6, 19 (B.A.P. 9th Cir. 2008) (citing 11 U.S.C. § 541(a)(1) and (c)(2)).

Although the property is not owned directly by the debtor, his beneficial interest in the trust, which owns the property, is property of this bankruptcy estate, subject to 11 U.S.C. § 541(c)(2), which excludes from property of the estate any property that is held in trust and subject to a restriction on transfer under applicable nonbankruptcy law. See 11 U.S.C. § 541(a).

Turning to the merits of the instant motion, 11 U.S.C. § 362(d)(4) provides that:

"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either -

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property."

Relief under 11 U.S.C. § 362(d)(4) will be denied.

Holding property in an inter-vivos trust is just another way for a person to hold title to the property. Such property is still treated as owned by the debtor and it is treated by 11 U.S.C. § 541(a)(1) as property of the estate. 11 U.S.C. § 541(a)(1) includes as part of the estate "all legal or equitable interests of the debtor in property," "by whomever held."

That is why the debtor's beneficial interest in the trust is property of the estate, except to the extent it is protected by a valid spendthrift provision. Cutter v. Seror (In re Cutter), 398 B.R. 6, 19 (B.A.P. 9th Cir. 2008) (citing 11 U.S.C. § 541(a)(1) and (c)(2)).

The court will deny relief under 11 U.S.C. § 362(d)(4) as no multiple bankruptcy filings are present and, while the debtor transferred the property pre-petition, the transfer was to a revocable inter-vivos trust, of which the

debtor and his wife are both settlors and beneficiaries. This in no way prevented the movant from enforcing its rights against the property.

11 U.S.C. § 541(a)(2) includes as part of the estate "all interests of the debtor and the debtor's spouse in community property," meaning that both the debtor's and his wife's interests in the property are property of this bankruptcy estate. The debtor and his wife do not claim that their respective interests in the property are their respective separate property.

Thus, when the debtor and his wife transferred the property to the trust, they still retained all their bundle of ownership rights in the property, both legal and equitable interests in the property. And, all their bundle of ownership rights in the property is property of this bankruptcy estate. Thus, for 11 U.S.C. § 362(d)(4) purposes, the debtor and his wife continue to own the property, just under different form of title. Accordingly, relief under 11 U.S.C. § 362(d)(4) will be denied.

In rem relief will be denied under 11 U.S.C. § 105 as well as such relief requires an adversary proceeding. Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006).

Turning to 11 U.S.C. § 362(d)(2), the property has a value of $4.87 million according to the debtor's Schedule D. The court rejects the debtor's new opinion of value for the property at $5.4 million, in his declaration supporting his opposition to the motion. Docket 35.

That opinion is based on the fact that the debtor is "owner" of the property and it is based on a valuation prepared by a real estate broker, Matthew Gelso. But, the debtor's opinion is based on inadmissable evidence, the opinion of Mr. Gelso. And, Mr. Gelso's opinion is inadmissible hearsay because it has not been authenticated by a declaration from Mr. Gelso. Fed. R. Evid. 802.

Also, the $5.4 million Opinion of Value contradicted by the value given in the debtor's schedules. The debtor does not explain why he stated under the penalty of perjury in his schedules that the property has a value of $4,870,000, whereas he is changing his opinion now, contending that the property has a value of $5.4 million.

The $7 million appraisal prepared for the movant in January 2011 and now proffered by the debtor is outdated, especially given the fact that the debtor has been unable to sell the property for less than $5 million since January 2011. The debtor and his wife have been attempting to sell the property since July 2010 without success. As of December 2013, the listing price for the property was $4,995,000. Now, the listing price has been reduced to $4,750,000.

The court also rejects the debtor's $5 million opinion of value for the boulders on the property. The debtor is an airline pilot. He has not been qualified as an expert to render opinion of value for the boulders on the property. The reference to a letter from Carl Crane, also rendering an opinion of value for the boulders, is inadmissible hearsay. Fed. R. Evid. 802. There is no declaration from Mr. Crane in the record.

As to the encumbrances against the property, they total approximately $8,577,200, including outstanding property taxes of approximately $118,000, a first deed that secures a claim of approximately $4,368,968 held by the movant, a judicial lien for $90,232 in favor of National Bank, and a $4 million lien

held by Blackhorse Ranch 1, LLC. Costs of sale are not encumbrances for purposes of the 11 U.S.C. § 362(d)(2) analysis.

Given the foregoing, the court concludes that there is no equity in the property. The court reaches this conclusion even if it agrees with the debtor that the property has a value of $5.4 million or $7 million.

As to necessity to an effective reorganization, the debtor has the burden to establish necessity to an effective reorganization, when the moving creditor has shown that its claim is under-secured. 11 U.S.C. § 362(g); United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

The debtor has not established a realistic prospect of effective reorganization.

First, the debtor does not say in his opposition why the property is necessary to an effective reorganization. The opposition says in a conclusory manner only that the property "is necessary to an effective reorganization." Docket 34 at 4. Hence, the debtor has not met his burden of persuasion as to 11 U.S.C. § 362(d)(2)(b), as prescribed by 11 U.S.C. § 362(g)(2).

Second, a review of the record does not convince the court that the debtor can establish that the property is necessary to an effective reorganization. The debtor is not keeping the property. He has been trying to sell the property since approximately July 2010, unsuccessfully, and the property is currently listed for sale. Apparently, any reorganization will entail the sale of the property.

Because the debtor has been unsuccessful at selling the property for over three and one-half years the court is unconvinced that he could sell the property as part of his reorganization efforts.

On the other hand, while the debtor has dropped the listing price for the property to $4,750,000, even if he receives an offer, the court is not convinced that the debtor can sell the property for sufficient funds to cover all encumbrances against it. As mentioned above, the property's encumbrances total approximately $8,577,200. This means that the debtor cannot sell the property for anything less than $8,577,200 plus the sales costs.

Importantly, when the debtor initially listed the property for sale in July 2010, the listing price was $6,995,000. Ever since then, the debtor has been decreasing the listing price. As of February 21, 2014, the listing price is $4,750,000. Docket 39.

Third, even if the court were to somehow overlook the $4 million lien held by Blackhorse Ranch 1, L.L.C., the debtor still cannot sell the property for $4,750,000 and pay all encumbrances against it. With encumbrances of approximately $4,577,200 ($8,577,200 minus the $4 million lien of Blackhorse) and the traditional 8% sales costs - totaling $400,000 on a sales price of $5 million - the debtor would have to sell the property for at least approximately

$4,977,200, just to break even.

Fourth, the debtor contends that he will be able to fund a plan because he will be obtaining employment with American Airlines as a flight simulator instructor. He also "hope[s] to generate income from [his] business endeavors."

Yet, the debtor does not say what additional income he will be able to earn. He does not even say what are his "business endeavors." He also does not say why he has not obtained this further employment with AA earlier. The debtor contends that he stopped making payments to the movant in or about October 2012. The debtor then has known about his need of further employment over nearly one and one-half years ago. The court considers the debtor's allusions to future employment and income from "business endeavors" mere speculations.

The court also notes that in Schedule I the debtor lists only $2,351 in monthly Social Security income. Schedule I lists no other monthly income for the debtor or his wife. The debtor lists monthly expenses of $19,938 in Schedule J, including the $12,083 owed to the movant, which the debtor has not been paying since about October 2012. Hence, even without making the $12,083 monthly payments to the movant, the debtor does not have sufficient income to cover his expenses, let alone fund a plan of reorganization.

The court is not persuaded that - even if he attempted - the debtor can establish that the property is necessary to an effective reorganization.

Accordingly, relief under 11 U.S.C. § 362(d)(2) is appropriate.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale.

The court is not persuaded that lifting the stay to allow judicial foreclosure of the property is warranted in this case. Because the debtor has disclosed nominal income from the subject property in Schedule I and maintenance of the property appears to be a concern for the movant, the court will modify the automatic stay to allow the movant to seek judicial foreclosure insofar as necessary to obtain the appointment of a receiver in state court to manage the property pending a nonjudicial foreclosure. No other relief will be awarded.

To the extent applicable, the court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9th Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award

of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed $750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of $750.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.