

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 6, 2017 at 10:00 a.m.

1. 17-20604-A-11 RUBEN S VELASQUEZ M.D., MOTION TO
UST-1 INC. DISMISS CASE
2-2-17 [9]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The U.S. Trustee is asking the court to dismiss this case as the debtor corporation is not represented by a licensed attorney.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

Local District Rule 183(a), as incorporated by Local Bankruptcy Rule 1001-1(c), provides that "A corporation or other entity may appear only by an attorney."

The debtor, a corporation, filed this case without the representation of counsel. The petition was signed by the debtor's vice president, Donna Velasquez, who is not identified as an attorney. Docket 1 at 4; Docket 17, Statement of Financial Affairs at 13.

The court also notes that neither Donna Velasquez, nor Ruben Velasquez – the debtor's president – are attorneys licensed to practice in California. Docket 17, Statement of Financial Affairs at 13. Their names do not appear in the California State Bar attorney database. And, they have not been admitted to practice before the United States Bankruptcy Court for the Eastern District of California. Their names do not appear in this court's database of attorneys.

The foregoing is cause for purposes of 11 U.S.C. § 1112(b)(1).

Dismissal as opposed to conversion to chapter 7 is in the best interest of the estate, as the debtor's assets are minimal. Such assets have a scheduled value of \$12,750, \$7,000 from which is receivables. More, the receivables are encumbered by \$70,000 of secured claims. Docket 17, Schedules A/B and D. Given such minimal assets, the case will be dismissed.

2. 17-20604-A-11 RUBEN S VELASQUEZ M.D., ORDER TO
INC. APPEAR AND SHOW CAUSE WHY A
PATIENT CARE OMBUDSMAN SHOULD NOT
BE APPOINTED
1-31-17 [4]

Tentative Ruling: This order to show cause will be discharged as moot.

The court issued this order for the debtor to show cause why a patient care ombudsman should not be appointed. The bankruptcy petition indicates that the debtor operates a health care business within the meaning of 11 U.S.C. § 101(27A).

11 U.S.C. § 333(a)(1) provides that:

If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

The term "health care business" means "any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for – (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care." 11 U.S.C. § 101(27A).

The order to show cause will be discharged as moot, given that the court is granting the U.S. Trustee's motion (DCN UST-1) and dismissing the case.

3. 17-20604-A-11 RUBEN S VELASQUEZ M.D., STATUS CONFERENCE
INC. 1-31-17 [1]

Tentative Ruling: None.

4. 15-29136-A-12 P&M SAMRA LAND MOTION TO
NCK-10 INVESTMENTS L.L.C. APPROVE COMPROMISE
2-6-17 [479]

Tentative Ruling: The motion will be granted.

The chapter 12 debtor in possession requests approval of a global settlement agreement between the debtor's estate and creditor Ag-Seeds Unlimited, resolving discovery disputes between the parties and settling Ag's claim and its treatment under the latest chapter 12 plan. The claim is based on Ag's prior judgment against Steven Samra, who is a member of the family which operates and owns the debtor. In an effort to collect on Steven Samra's claim, Ag instituted a state court action against the debtor pre-petition, seeking alter ego liability against the debtor. The debtor in turn filed this bankruptcy case. Ag and the debtor have been engaged in a prolonged discovery dispute in this case, lasting for nearly 12 months now. Ag has also sought conversion of the case to chapter 7 and has opposed the debtor's attempts at plan confirmation.

Under the terms of the compromise, Ag shall have an allowed claim against the

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debtor in the amount of \$170,000. The claim will be secured by a judgment in that amount entered in the pending state court action against the debtor. The claim shall be paid in full through the debtor's chapter 12 plan. Ag shall record a lien based on the state court judgment, against the debtor's real property in Nicolaus, California. Ag shall also cease its prosecution of the discovery disputes, chapter 7 conversion and opposition to the chapter 12 plan.

11 U.S.C. § 1203 provides that "[s]ubject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation."

On a motion by a chapter 12 debtor, then, and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given the global nature of the settlement, given that the debtor would have likely spent an estimated \$100,000 litigating with Ag in state court, given that the settlement saves the debtor approximately \$60,000 in compensatory damages, given that the settlement does not provide for punitive damages, given the passing of the debtor's family's patriarch and the likely greater role of Steven Samra in the debtor's operations, given that the settlement resolves the most contentious claim against the estate, and given the inherent risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the debtor in possession, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

5. 15-29136-A-12 P&M SAMRA LAND MOTION TO
NCK-11 INVESTMENTS L.L.C. APPROVE COMPROMISE
2-6-17 [484]

Tentative Ruling: The motion will be granted.

The chapter 12 debtor in possession requests approval of a global settlement agreement between the debtor's estate and creditor Paul Hundal, resolving a pending state court litigation and Mr. Hundal's opposition to confirmation of the debtor's chapter 12 plan.

The state court litigation was started by the debtor pre-petition, seeking to recover a \$26,730 payment made by the debtor to Mr. Hundal in connection with the purchase of \$89,100 in walnut tree seedlings from him. Mr. Hundal filed a counterclaim, seeking \$171,230 in damages from the debtor, due to the debtor's breach of contract and Mr. Hundal's resulting loss of profits.

Under the terms of the compromise, the debtor and Mr. Hundal will exchange a release of all claims against each other and Mr. Hundal will not oppose the debtor's attempts at plan confirmation.

11 U.S.C. § 1203 provides that "[s]ubject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation."

On a motion by a chapter 12 debtor, then, and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given the global nature of the settlement, given that the debtor would have likely spent an estimated \$50,000 litigating with Mr. Hundal to collect on its \$26,730 claim, given the dismissal of Mr. Hundal's \$171,230 claim against the estate, and given the inherent risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the debtor in possession, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

6. 15-29136-A-12 P&M SAMRA LAND MOTION TO
NCK-7 INVESTMENTS L.L.C. CONFIRM PLAN
1-2-17 [447]

Tentative Ruling: The motion will be granted.

The debtor seeks confirmation of its fourth amended chapter 12 plan filed on January 2, 2017. Docket 453.

The motion will be granted and the plan will be confirmed. The court will waive the requirement of 11 U.S.C. § 1224 that the hearing on plan confirmation be concluded no later than 45 days after filing of the plan. Given the debtor's settlements with Ag-Seeds and Paul Hundal, cause exists for such a waiver.

7. 15-29136-A-12 P&M SAMRA LAND MOTION TO
NCK-8 INVESTMENTS L.L.C. APPROVE COMPROMISE
1-9-17 [455]

Final Ruling: The motion will be dismissed as moot because the debtor has filed another motion to approve the same compromise – with Ag-Seeds Unlimited – also set for hearing on this calendar, DCN NCK-10. Docket 479.

8. 15-29136-A-12 P&M SAMRA LAND MOTION TO
NCK-9 INVESTMENTS L.L.C. APPROVE COMPROMISE
1-23-17 [467]

Final Ruling: The motion will be dismissed as moot because the debtor has filed another motion to approve the same compromise – with Paul Hundal – also set for hearing on this calendar, DCN NCK-11. Docket 484.

9. 15-29541-A-12 TIMOTHY WILSON MOTION TO
JPJ-1 DISMISS CASE
1-25-17 [128]

Tentative Ruling: The motion will be conditionally denied.

The chapter 12 trustee moves for dismissal because the debtor is \$40,000 delinquent under the terms of the chapter 12 plan, representing one plan payment of \$4,000 due for December 2016 and an annual plan payment of \$36,000 due on December 25, 2016.

The debtor responds to the motion, claiming that he will be current on plan payments before the hearing on this motion.

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.”

As the debtor has not made \$40,000 in payments under the plan, he is in material default for purposes of 11 U.S.C. § 1208(c)(6). This is cause for dismissal. Given the debtor’s response, however, the motion will be denied on the condition that the debtor has brought all plan payments – including any payments due under the plan since the filing of the motion – current. The motion will be conditionally denied.

10. 87-20156-A-7 DALE/ANNA ATKINS ORDER TO
87-2153 BRK-2 SHOW CAUSE
FIBERGLASS REPRESENTATIVES ET 1-24-17 [50]
AL V. ATKINS

Tentative Ruling: The order to show cause will be discharged as moot and Mr. Barrett’s application for sale will be denied.

The court issued this order to show cause, directing the respondent, Sherryll Atkins, administrator of the probate estate of Anna Atkins – a now deceased debtor in the underlying chapter 7 bankruptcy case – to show cause why an order for sale of 518 Catalina Circle, Vallejo, California should not be entered.

The order to show cause was issued on account of an application for sale filed by James Barrett, the assignee of a \$282,000 nondischargeability judgment entered by this court on November 15, 1988 against Anna Atkins. Dockets 46 & 50. In the application, Mr. Barrett is seeking to enforce the judgment against the probate estate of Anna Atkins, by forcing an execution sale of the property.

Sherryll Atkins responds that the state court overseeing the administration of Anna Atkins’ probate estate has already ruled on a similar application by Mr. Barrett, concluding that upon Anna Atkins’ death in August 2013, the subject

property was not community property and thus is not subject to the judgment held by Mr. Barrett.

The court agrees with Sherryll Atkins.

Anna Atkins filed the underlying chapter 7 case with her spouse, Dale Atkins, on January 12, 1987. Post-petition, in April 1987, Fiberglass Representatives filed a nondischargeability adversary proceeding against Anna Atkins. In November 1988, this court – Judge Loren Dahl presiding – entered a judgment determining Fiberglass' \$282,000 debt to be nondischargeable. Anna Atkins had embezzled funds from Fiberglass. In August 1990, the state court entered a final dissolution judgment in the marriage of Anna Watkins and Dale Watkins.

In March 1991, in upholding an earnings withholding order as to Dale Atkins, this court determined that the 1990 dissolution of Anna Atkins' marriage was a sham, intended to defeat enforcement of the judgment. The judgment of nondischargeability was renewed in November 1998. In September 2007, Fiberglass assigned the judgement to Mr. Barrett. The judgment was renewed once again in November 2008.

Anna Atkins passed away in August 2013.

In January 2015, Mr. Barrett applied to the probate court for a determination of title on the property and for the transfer of the property to the probate estate.

On November 8, 2016, the state court issued a written ruling, denying Mr. Barrett's application and determining, among other things, that the property was not community property when Anna Atkins died in 2013.

Mr. Barrett filed an application for order selling the property in this adversary proceeding on January 12, 2017. This order to show cause was issued on January 24 pursuant to that application.

Mr. Barrett's application for sale of the property in this adversary proceeding makes no mention of the state court's determination that the property was not community property and not part of the probate estate of Anna Atkins. Dockets 46 & 47.

Even though this court having concluded that the Atkins' 1990 divorce was a sham, the state court's order on Mr. Barrett's application stands. This court has no evidence in the record that the state court order was ever appealed. Even if the state court was wrong to conclude that the property is not community property subject to Mr. Barrett's claim, and was wrong to consider the Atkins' divorce as valid, this court is not the California Court of Appeal. Mr. Barrett may not collaterally attack the state court's order in this court. Mr. Barrett should appeal the state court's order to the appropriate California appellate court, if he thinks the state court was wrong to deny his application.

Also, while this court concluded that the Atkins' 1990 divorce was a sham, this court has never made determinations about the nature of the subject property or whether the property is subject to enforcement of Mr. Barrett's claim.

The order to show cause will be discharged. It will not permit a collateral attack on the the November 2016 state court order, determining that the property was not community property subject to enforcement of the judgment.

Mr. Barrett's application for sale of the property will be denied.

11. 16-27489-A-13 PALMER COOKE MOTION TO
17-2002 SNM-1 DISMISS ADVERSARY PROCEEDING
COOKE V. NEVADA COUNTY TAX COLLECTOR 2-17-17 [11]

Tentative Ruling: The motion will be granted and the adversary proceeding complaint will be dismissed.

The plaintiff, Palmer Cooke, the debtor in the underlying chapter 13 case, seeks dismissal of his complaint against the defendant Nevada County Tax Collector, contending that the relief requested is moot.

Under Fed. R. Civ. P. 41(a)(1), as made applicable here via Fed. R. Bankr. P. 7041, *"the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared."*

Fed. R. Civ. P. 41(a)(2) prescribes that *"Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."*

The complaint seeks an injunction against a tax sale of the plaintiff's real property, pending confirmation of the plaintiff's chapter 13 plan. The court entered an order confirming the plaintiff's chapter 13 plan on January 30, 2017. Case No. 16-27489, Docket 68. And, because the any injunction would not have retroactive effect, the relief sought by the complaint is moot. Given this, the complaint will be dismissed.