

**UNITED STATES BANKRUPTCY COURT
Eastern District of California**

Honorable Christopher D. Jaime
1200 I Street, Suite 200
Modesto, California

PRE-HEARING DISPOSITIONS COVER SHEET

DAY: TUESDAY

DATE: May 11, 2021

CALENDAR: 1:00 P.M. CHAPTER 13

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule, or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters and no appearance is necessary. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within seven (7) days of the final hearing on the matter.

Final Ruling

Introduction

Before the court is a fourth modified Chapter 13 plan and a motion to confirm it filed by debtor Sharon M. Hamilton ("Debtor"). Dkt. 292. The Chapter 13 Trustee ("Trustee") filed an opposition to the motion and objects to confirmation. Dkt. 299. The Debtor filed a reply. Dkt. 302.

The court has reviewed the motion, opposition, reply, and all related declarations and exhibits. The court has also reviewed and takes judicial notice of the docket. See Fed. R. Evid. 201(c)(1).

The court has determined this matter may be decided on the papers. See General Order No. 618 at p.3, ¶ 3 (E.D. Cal. May 13, 2020) (ordering courthouse closure "until further notice" due to the COVID-19 pandemic and further ordering that all civil matters are to be decided on the papers unless the presiding judge determines a hearing is necessary). The court has also determined that oral argument will not assist in the decision-making process or resolution of the motion. See Local Bankr. R. 9014-1(h), 1001-1(f).

The court's decision is to deny the motion to modify plan and order the case dismissed. All other objections are ordered overruled and all other relief requested is denied.

Analysis

The court begins its analysis with reference to the order of April 1, 2021, dkt. 298, which incorporates the court's ruling on the Trustee's earlier motion to dismiss included in the civil minutes of March 30, 2021.¹ Dkt. 297. Based on the length of delay and the extent of the plan payment default by the Debtor, with which the parties are familiar, the Trustee's motion to dismiss was conditionally denied and the Debtor was ordered to proceed in this case in a very clear and specific manner consistent with the manner in which the Debtor represented to the court over one year ago that she would proceed. The ruling in the civil minutes incorporated into the order states as follows:

The Debtor shall have 45 days from March 30, 2021, to confirm a modified plan. If a modified plan provides for the sale of real property, the Debtor shall also file, set, and serve a motion to sell to be heard concurrently with the hearing on the motion to confirm the modified plan. Given the extent of the Debtor's default, delay, and non-performance in this case no further extensions shall be granted absent compelling and extraordinary circumstances. If the Debtor fails to comply with any aspect of this ruling - to be incorporated into the court's order - the case may be dismissed on the Trustee's ex parte application.

The Debtor's fourth modified plan provides for the sale of certain real property to fund it. Dkt. 294 at 8, § 7.03. The Debtor did not file, set, and serve a motion to sell the subject real property to be heard concurrently with the current motion to confirm the fourth modified plan. For at least three reasons, the Debtor has also not demonstrated the compelling and extraordinary circumstances necessary for an extension

¹The civil minutes were posted on the court's website as a Final Ruling on March 29, 2021. They were therefore available to the Debtor before the fourth modified plan and motion to confirm it were filed the following day, March 30, 2021.

of time to file a motion to sell or confirm a modified plan.

First, this is not a circumstance in which the Debtor was ordered to do a certain act by a specific date or within a specific timeframe but was unable or prevented from doing so, or did so late, because of some unusual or atypical circumstances. See *Law Offices of David A. Boone v. Durham-Burk (In re Eliapo)*, 468 F.3d 592, 601 (9th Cir. 2006). Rather, here, the Debtor simply disobeyed (and made absolutely no attempt whatsoever to comply with) the court's unambiguous order to file, set, and serve a motion to sell so that the sale motion would be heard with the current motion to confirm. The court is hard-pressed to find these circumstances compelling and extraordinary.

Second, the reply is not supported by any declaration (or other evidence) and statements by the Debtor's attorney in the reply are not evidence of compelling and exceptional circumstances- or evidence of anything else for that matter. *Singh v. INS*, 213 F.3d 1050, 1054 n.8 (9th Cir. 2000) (counsel's statements in briefs are not evidence).

Third, the Debtor's declaration filed with the motion to confirm the fourth modified plan states that "there are buyers for [the subject property]." Dkt. 295 at 2:12. So by the Debtor's own admission there is no impediment to a sale and - thence - a sale motion. When viewed in this context, together with the absence of evidence of compelling and extraordinary circumstances, the reply is yet another effort by the Debtor to further delay doing what she told the court she would do over one year ago and to date has failed to do despite having numerous opportunities to do so, *i.e.*, file a motion to sell with a modified plan. See dkt. 286 at 2, ¶ 4a (citing dkts. 209, 210). These are also not compelling and extraordinary circumstances.

In short, the fourth modified plan proposes a sale of real property to fund it, a motion to sell was not filed, set, and served as ordered, and there are no compelling and extraordinary circumstances that warrant an extension of the time to file a motion to sell or confirm a modified plan. Under these circumstances, the fourth modified plan is not feasible. See 11 U.S.C. § 1325(a)(6). The court will therefore sustain the Trustee's objection to confirmation of the fourth modified plan on this basis. The motion to confirm the fourth modified plan will be denied and the fourth modified plan will not be confirmed.

The court further concludes that there is cause to dismiss this Chapter 13 case as previously conditionally ordered.² The Debtor's failure to comply (or even attempt to comply) with the court's order to file, set, and serve a motion to sell to be heard concurrently with the motion to confirm the fourth modified plan is cause for dismissal. See 11 U.S.C. § 1307(c); *Aubert-Brown v. Meyer (In re Aubert-Brown)*, 2013 WL 394162 at *1 (E.D. Cal. Jan. 30, 2013) (affirming ex parte dismissal of chapter 13 case based on debtor's failure to provide chapter 13 trustee with documents by date ordered). So too is the over one year delay by the Debtor with regard to a motion to sell real property to pay creditors under a modified plan which the court concludes is unreasonable (particularly in light of the Debtor's repeated representations that she would file a sale motion with a modified plan, her numerous opportunities to do so, and the absence of compelling and extraordinary circumstances) and prejudicial to creditors due to the Trustee's inability to disburse sale proceeds and other funds. See 11 U.S.C. § 1307(c)(1); *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (9th Cir. BAP 2011) ("A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1).").

²The court construes the statement in the opposition that "[t]he Trustee stands ready to file his ex parte application to dismiss this case," dkt. 299 at 3:13, as an ex parte application by the Trustee to dismiss consistent with the April 1, 2021, order. Dkts. 298, 297 at 2. Moreover, because the IRS has a blanket lien on all of the Debtor's assets, unsecured creditors would receive nothing in a Chapter 7 case. See dkt. 295 at 3, ¶9. Dismissal rather than conversion is therefore in the best interests of creditors.

Conclusion

For the foregoing reasons,

The motion to confirm the fourth modified plan is ORDERED DENIED and this chapter 13 case is ORDERED DISMISSED for the reasons stated in the minutes.

All other objections are ORDERED OVERRULED and all other relief requested is DENIED.

The court will issue an order.

3. [20-90680](#)-B-13 ALVARO/JAZMIN HERNANDEZ MOTION TO CONFIRM PLAN
[TMC-2](#) T. Mark O'Toole 3-31-21 [[52](#)]

Final Ruling

The Debtors having filed on May 7, 2021, a notice of withdrawal for the pending motion, the withdrawal being consistent with any opposition filed to the motion, the court interpreting the notice of withdrawal to be an ex parte motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7014 for the court to dismiss without prejudice the motion, and good cause appearing, the motion is dismissed without prejudice.

The motion is ORDERED DISMISSED WITHOUT PREJUDICE for reasons stated in the minutes.

4. [21-90089](#)-B-13 LEONARD MOJICA OBJECTION TO CONFIRMATION OF
AP-1 Richard Kwun PLAN BY WELLS FARGO BANK, N.A.
Thru #5 3-26-21 [[16](#)]

WITHDRAWN BY M.P.

Final Ruling

Wells Fargo Bank, N.A. having filed a notice of withdrawal of its objection, the objection is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The matter is removed from the calendar.

There being no other objection to confirmation, the plan filed March 1, 2021, will be confirmed.

The objection is ORDERED DISMISSED WITHOUT PREJUDICE for reasons stated in the minutes.

IT IS FURTHER ORDERED that the plan is CONFIRMED and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

The court will issue an order.

5. [21-90089](#)-B-13 LEONARD MOJICA OBJECTION TO CONFIRMATION OF
[RDG-1](#) Richard Kwun PLAN BY RUSSELL D. GREER
4-20-21 [[18](#)]

Final Ruling

The Chapter 13 Trustee having filed a supplemental ex parte motion to dismiss its objection, the objection is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The matter is removed from the calendar.

There being no other objection to confirmation, the plan filed March 1, 2021, will be confirmed.

The objection is ORDERED DISMISSED WITHOUT PREJUDICE for reasons stated in the minutes.

IT IS FURTHER ORDERED that the plan is CONFIRMED and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

The court will issue an order.