UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

May 15, 2017 at 10:00 a.m.

1.	15-29600-A-11 UST-1	ANTIGUA CANTINA & GRILL, INC.	MOTION TO CONVERT OR TO DISMISS CASE 3-31-17 [101]

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

The United States Trustee moves for dismissal or conversion to chapter 7, asserting prejudicial delay to creditors and substantial or continuing loss and diminution with no likelihood of rehabilitation.

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."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

The above instances of cause are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

This case was filed on December 14, 2015. Despite being in bankruptcy for more than a year, the debtor has not moved for confirmation of a plan. It owns a single real property, a restaurant in Sacramento, California. Near the start of the case, the debtor was leasing the property to a restaurant business, but because rental income was not sufficient to fund a plan, the debtor decided to list the property for sale. From approximately July 2016 through the end of 2016, the debtor marketed the property for sale.

It did not receive offers with a sufficient purchase price to pay off all encumbrances against the property (property taxes (over $102,000), mortgage (~$800,000), and judicial/tax/statutory liens (~$253,000)).

Therefore, the debtor once again decided to lease the property, to another restaurant business, starting January 1, 2017, at a monthly rate of $13,039.99 (including $1,039.99 for property taxes), with four months of free rent. The debtor contends that the income from the new lease agreement will enable it to fund a chapter 11 plan.

Notwithstanding the new lease agreement, the debtor's delay in obtaining plan confirmation has prejudiced creditors. This is a single asset real estate and the debtor has been in chapter 11 for nearly 18 months without any significant movement toward plan confirmation.

The court does not understand why the debtor did not continue to generate income from the property while marketing it. A commercial real property with an ongoing and unexpired lease agreement would seem to be more valuable than a vacant building. Yet, the debtor stopped generating rental income from the property while it was being marketed for sale. During the months of July and August 2016, the debtor collected no rent from the property. Dockets 77 at 4 & 79 at 4.

Next, the rental income with which the debtor was unable to confirm a chapter 11 plan is not much different from the rental income the debtor will be generating from the new lease. While the property was leased prior to its marketing for sale, the debtor was generating rental income of about $11,000 a month. See, e.g., May and June 2016 Monthly Operating Reports, Dockets 76 at 4 & 66 at 4. With the new lease agreement, the debtor will be purportedly generating $12,000 a month (excluding property tax reimbursement).

The court is not convinced that a rental income of $12,000 a month will enable the debtor to fund a plan when it was unable to do so before with $11,000 a month. This is even more true when one considers that post-petition property taxes and mortgage interest have continued to accrue post-petition. The debtor does not appear to have paid property taxes and mortgage interest while it was marketing the property for sale because it was not generating income from the property.

Further, the debtor has been operating the real property in violation of the Bankruptcy Code and Rules. The debtor admits to not obtaining court approval of its agreement for cash collateral use and adequate protection payments.

"*In or around December 2016 . . . Debtor . . . enter[ed] into an informal, verbal stipulation for cash collateral use and adequate protection with secured creditor Charles N. Travers, pursuant to which Debtor paid the current property tax installment payments on the 2019 O Street Property and begin making monthly adequate protection payments to Mr. Travers in the amount of $6,250.00, which is equal to the amount of interest accruing monthly on the principal balance of $625,000 of the loan at the non-default contract rate of 12% per annum.*"

Debtor's Opposition, Docket 108 at 3.

This verbal agreement violates 11 U.S.C. § 363(b) and Fed. R. Bankr. P. 4001(b) & (d), which require a notice and hearing and court approval of cash collateral use and adequate protection agreements. Not obtaining approval of its agreement with the sole mortgagee creditor in the case has also prejudiced the other creditors, as they have not been informed what the debtor is doing with its cash. No one knows whether and to what extent the debtor is providing adequate protection to the mortgagee.

The foregoing is sufficient cause for dismissal or conversion under section 1112(b).

Finally, the debtor has not accounted for the dissipation of approximately $22,000 it had in June 2016, when it decided to market the property for sale. Docket 76 at 2. The most recent monthly operating report (for March 2017)

indicates that the debtor has only $309 in cash on hand. Docket 107 at 2. The court is at a loss of how the debtor could pay even the U.S. Trustee's quarterly fees. This amounts to substantial or continuing loss and diminution with no likelihood of rehabilitation. This is further cause for dismissal or conversion.

The case will be dismissed given the debtor's inability to sell the property for enough to cover the secured claims and given the mere $309 in cash on hand. There are no other assets to be liquidated for the benefit of unsecured creditors (solely secured creditors to the extent unsecured), nor will the debtor be receiving a chapter 7 discharge, as it is a fictitious entity.

2. 17-21729-A-11 AMERICAN RIVER DETAIL AUTO BODY — MOTION TO VACATE DISMISSAL AND TO EXTEND DEADLINE 3-29-17 [12]

Tentative Ruling: The motion will be denied.

This case was filed on March 16, 2017. The petition identifies the debtor as American River Detail Auto Body. It is both a tax-exempt entity and a small business debtor that is a sole proprietorship, presumably of Jerry Anolik, the person signing the petition for the debtor.

Because the debtor failed to file all required documents with the petition (including master address list, schedules, statement of financial affairs, list of 20 largest unsecured creditors), the clerk caused the issuance of a notice of incomplete filing and notice of intent to dismiss case if documents are not timely filed. Docket 2. This notice was mailed to the debtor.

As to the verified master address list, the notice granted the debtor an extension to file the list even though he failed to request one when the case was filed. By the terms of the notice, the list had to be filed by March 23. As to all other documents, the debtor was advised by the notice that they had to be filed no later than March 30. The notice further informed the debtor that if the documents were not filed timely, the court intended to dismiss the case unless, prior to the expiration of the March 23 and 30 deadlines, the debtor obtained an extension or set a hearing to contest the court's intended dismissal of the case.

A review of the docket reveals that on or before March 23 the debtor did not file a verified master address list, seek and obtain an extension, or request a hearing in connection with the court's notice that it intended to dismiss the case. As a result, the case was dismissed on March 28.

With this motion, the debtor asks the court to vacate the dismissal. The debtor states that he is "having a hard time doing all that is required properly." Docket 12. He claims to have been unable to address the filing deficiencies because he "had planed [*sic*] to seek help last Friday [March 24] at [the court's] clinic on the 3rd floor @ 9:00 AM[,] [h]owever [he] was in the VA hospital in Reno Nevada." Docket 12.

Fed. R. Civ. P. 60(a), as made applicable here by Fed. R. Bankr. P. 9020, prescribes that:

"*The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the*

record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."

Rule 60(a) does not apply here as the debtor asserts no clerical mistake or a mistake arising from oversight or omission found in a judgment, order, or other part of the record.

Next, Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to set aside or reconsider an order or a judgment for:

"*(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.*"

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances."

Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).

The motion has been filed timely. It was filed on March 29, one day after dismissal of the case. Dockets 11 & 12.

The motion will be denied. There is no basis under Rule 60(b) for vacating the dismissal.

The debtor failed to file the creditor master address list despite being informed by the clerk that the list was necessary, despite being given an additional seven days to do so, and despite being informed of the consequences of failing to act timely.

The debtor planned to seek help only on March 24, even though he filed this case on March 16, eight days earlier, and the case was not dismissed until March 28, four days later.

The debtor was not limited to seeking help only from the Bankruptcy Help Desk (located on the third floor, nearby the Clerk's Office of the court) either. He could have consulted with an attorney or sought the help of other legal clinics/aid services in Sacramento.

The court also notes that the Help Desk was open on Friday March 17, one day after he filed this case, in addition to Friday March 24. Yet, he does not explain why he did not visit the Help Desk on March 17.

Additionally, this motion is not accompanied by the missing documents, including the creditor master address list. The court still does not have a

list of the debtor's creditors.

Further, the debtor's plan to use the Bankruptcy Help Desk for assistance makes no sense. The Help Desk is not a bankruptcy legal clinic. It is staffed with volunteer attorneys who are there merely to help unrepresented consumer debtors (and unrepresented creditors) with simple administrative questions.

The Help Desk is not staffed or equipped to provide legal representation to unrepresented persons, much less to assist in the prosecution of a chapter 11 case. This is a chapter 11 business case, the most complex type of bankruptcy. The Help Desk cannot be relied upon to prosecute a chapter 11 case. Most of the attorneys who volunteer at the Help Desk are not even chapter 11 attorneys.

Accordingly, the motion will be denied.

3.	13-35835-A-7 GREG MASTERSON 14-2091 TAYLOR V. MASTERSON	ORDER FOR APPEARANCE AND EXAMINATION (GREG MASTERSON) 11-29-16 [39]

Tentative Ruling: None. The judgment debtor shall appear and be sworn in prior to the 10:00 a.m. calendar and then the judgment creditor may examine the judgment debtor outside the courtroom.

4.	16-22163-A-7 SYLVIA KINERSON 16-2134 ADJ-1 MCGRANAHAN V. KINERSON ET AL	MOTION TO AMEND SCHEDULING ORDER 4-17-17 [37]

Tentative Ruling: The motion will be denied.

The plaintiff, Michael McGranahan, the chapter 7 trustee in the underlying bankruptcy case, seeks extension of the:

- January 27, 2017 expert designation and report exchange deadline to June 9, 2017, and

- April 30, 2017 (previously March 30) expert discovery completion deadline to August 31, 2017.

These deadlines were set by the parties' joint discovery plan (Docket 23), which was approved by this court's December 15, 2016 scheduling order (Docket 34).

When the court approved the parties' joint discovery plan, it provided in its order an extension for completion of discovery to April 30, 2017. Docket 34. As the order does not limit the extension to expert or nonexpert discovery, the extension is of both the March 30, 2017 deadline for completion of non-expert discovery and the April 14, 2017 deadline for completion of expert discovery. Docket 23 at 2; Docket 34 at 2.

This extension was discussed and granted at the December 14, 2016 status conference hearing. Docket 33 at 2:10. The extension was at the plaintiff's request. Id.

Now, the plaintiff is asking for another extension. The plaintiff has not demonstrated it is warranted.

Fed. R. Bankr. P. 9006(b)(1) provides that "*Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.*"

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the debtor; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

Although the plaintiff cites Rule 9006 and Pioneer, he provides little or no evidence for the court to determine the existence of excusable neglect. It is clear that the plaintiff neglected to timely request extension of the expert designation and report exchange deadline. The question is whether the neglect is excusable.

First, the motion says that the plaintiff did not learn of the need for expert discovery until receiving discovery responses from the defendants.

But, the plaintiff received discovery responses from the defendants on January 26, February 10, and March 7. He took the defendants' depositions on March 28. The plaintiff does not explain when he learned of the need for expert testimony in relation to the discovery he completed.

The motion record does not identify the information discovered from the defendants that prompted the plaintiff to recognize the need for expert discovery. The sole supporting declaration simply refers to "newly discovered information in both written and oral discovery." Docket 39 at 3.

The court is unconvinced that discovery responses received from the defendants were determinative of whether the plaintiff needed additional expert discovery. The avoidance causes of action asserted by the plaintiff in his complaint are, among others, pursuant to 11 U.S.C. § 548(a)(1)(B)(i) and Cal. Civ. Code § 3439.05. Both statutes involve the question of whether the transfer was for reasonably equivalent value.

In other words, without having to rely on anyone's discovery, it should have been obvious to the plaintiff from the face of his own complaint that valuation of the property transferred would be an issue litigated at trial. Any valuation of property, especially from the trustee's perspective, would require specialized knowledge and thus expert opinion at trial. See Fed. R. Evid. 701 (prescribing that non-experts are not permitted to testify as to specialized knowledge).

The plaintiff did not need the defendants' discovery to know of the necessity for expert opinion and compliance with the expert discovery deadlines. The plaintiff's need for a real estate appraiser was reasonably known by him prior

to the January 27 expert designation and report exchange deadline.

The plaintiff says nothing convincing about the delay in filing this motion and, as such, the court is not convinced of his good faith in addressing expert discovery issues.

Second, the plaintiff has delayed approximately 80 days, since the January 27 deadline, before filing this motion. The delay is substantial and it has been squarely within his control.

Finally, the plaintiff is seeking an extension of the April 30 expert discovery completion deadline to August 31 and extension of the January 27 expert designation and report exchange deadline to June 9.

These are over four-month extensions.

The court disagrees that the proposed new discovery deadlines to June 9 and August 31 would not prejudice the defendants. This case has been pending since July 1, 2016. The proposed extensions would push discovery deadlines well beyond one year after the case filing. Such extensions are likely to multiply litigation between the parties and cause the defendants to incur additional costs. Once expert discovery has been extended, the disclosure of more information may easily lead to necessity for further non-expert discovery.

The court is not willing to grant the extensions, especially when the plaintiff should have known from the start of the case that he would need an expert witness.

Excusable neglect has not been demonstrated. Accordingly, the motion will be denied.

5. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY
FWP-22 — 4-17-17 [772]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtors, the chapter 11 trustee the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Felderstein Fitzgerald Willoughby & Pascuzzi LLP, attorney for the chapter 11 trustee, has filed its second interim motion for approval of compensation. The requested compensation consists of $148,235 in fees (including a discount of $14,729.50) and $3,637.54 in expenses, for a total of $151,872.54. This motion covers the period from August 1, 2016 through March 31, 2017. The court approved the movant's employment as the trustee's attorney on May 19, 2016. In performing its services, the movant charged hourly rates of $195, $350, $395,

$405, and $495.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation:

(1) assisting the trustee in communicating with the debtors and responding to their complaints, requests, and motions,

(2) reviewing and responding to stay relief motions,

(3) assisting the trustee with reviewing offers for the purchase of the estate's three shopping centers,

(4) analyzing claims secured by the centers,

(5) preparing and prosecuting motions for sale of the three shopping centers,

(6) preparing and prosecuting motions for assumptions and assignments of leases,

(7) responding to objections by the debtors,

(8) communicating with overbidders,

(9) assisting the trustee with the sale closings,

(10) analyzing residential properties and appellate litigation for abandonment,

(11) preparing and prosecuting abandonment motions,

(12) analyzing a refinancing offer from the debtors,

(13) analyzing substantive consolidation issues as to a limited liability company,

(14) preparing and prosecuting a motion for substantive consolidation,

(15) attending various court hearings,

(16) drafting orders,

(17) conducting research on various legal issues,

(18) litigating various issues on appeal relating to the sale of the three shopping centers,

(19) preparing and filing supplemental pleadings to the trustee's cash collateral use motion,

(20) preparing and prosecuting a motion to approve a compromise with the debtors, which motion had to be eventually dismissed,

(21) assisting the trustee with the general administration of the estate,

(22) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved.