UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 4, 2014 at 10:00 a.m.

1.	12-28413-A-7 14-2115 MCGRANAHAN V. BEAR PROPERTIES L.L.C. ET AL.	F. RODGERS CORPORATION SMR-1	MOTION TO DISMISS 4TH, 5TH AND 6TH CLAIMS FOR RELIEF 5-28-14 [7]

Tentative Ruling: The motion will be denied.

The defendant, GE Commercial Finance Business Property Corporation and General Electric Credit Equities, Inc., seeks dismissal of claims four, five, and six.

Fed. R. Civ. P. 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations

contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The facts giving rise to the subject dispute, as described by the complaint, are as follows. On February 9, 2006, the debtor in the underlying bankruptcy case, F. Rodgers Corporation, entered into a purchase and sale agreement with Livermore NBP, L.L.C. Under the agreement, the debtor was to purchase real property in Livermore, California from Livermore NBP. The original price under the agreement was $5,898,518. The debtor was required to make two deposits of $600,000 each within a schedule prescribed by the agreement.

The property consisted of land and a 20,000 square foot shell building Livermore was to build on the land for $2,428,332 at Livermore's expense. In addition, Livermore NBP was required to make some office improvements to the building, with the debtor paying any costs in excess of $945,000, plus a fee for Livermore NBP to manage the construction of the office improvements.

In September 2006, the debtor and Livermore NBP executed a first amendment to the agreement, revising the purchase price to $5,009,556.

On January 9, 2007, the debtor and Livermore NBP executed a second amendment to the agreement, increasing the size of the shell building from 20,000 to 30,000 square feet, increasing the purchase price to $8,980,842, and increasing the required deposits from the debtor to $1,800,000.

In June 2008, the debtor and Livermore NBP entered into a third amendment to the agreement, confirming that the shell building and office improvements were "substantially completed" and providing for an escrow closing date of July 31,

2008.

Between the execution of the February 9, 2006 original purchase agreement and the July 31, 2008 escrow closing date, the debtor assigned the purchase agreement with Livermore NBP to Bear Properties, L.L.C., an entity owned by Frank Rodgers, the debtor's principal. Mr. Rodgers executed the assignment on behalf of both the debtor and Bear. Although the assignment is dated February 10, 2006, the first, second and third amendments to the purchase agreement were not executed by Bear - they were executed by the debtor.

The complaint alleges that Bear paid no consideration for the assignment of the purchase agreement.

In 2008, Mr. Rodgers directed the debtor's chief financial officer, Matt Warner, to secure a loan from the defendant, GE, for the purchase of the property. On April 23, 2008, GE sent a proposal to Mr. Warner for a 25-year loan to an entity to be formed by Mr. Rodgers. The proposal required the debtor to execute a lease agreement for the property with the new entity, for a term no less than the term of the loan and "in an amount sufficient to cover the annual debt service on a 1.15 to 1.0 basis, assuming a triple net lease." Docket 1 at 4. "The proposal also required maintenance of certain financial covenants by FRC, to be defined in the course of negotiating and underwriting the specific terms of the loan, and payment of a deposit of 1% of the estimated loan amount if the proposal was accepted." Id.

On April 25, 2008, Mr. Rodgers accepted GE's loan proposal on behalf of Bear. As part of its acceptance, Bear sent an $80,000 check to GE. The funds came from the debtor in the form of an $82,000 check "paid by [the debtor] to Bear." Docket 1 at 4.

On June 23, 2008, GE issued a loan commitment in the amount of $6,460,000. The commitment incorporated most of the terms of the loan proposal, except that it required a 22-year loan repayment, with a 22-year amortization. The commitment also increased the interest rate of the loan from 7.52% to 8.51% and modified the terms of the loan guarantee of Mr. Rodgers.

On June 23, 2008, Mr. Rodgers accepted the commitment on behalf of Bear and sent a $64,000 check to GE, which was funded by a $65,000 check from the debtor to Bear.

Pursuant to the terms of the loan proposal, the debtor and Bear entered into a triple net lease on July 16, 2008. Under that agreement, the debtor leased the property from Bear for 22 years, with a starting monthly rent payment of $60,000.

The purchase of the real property closed on July 31, 2008. A title deed transferring the property from Livermore NBP to Bear was recorded on August 1, 2008. The total purchase price was $9,128,140. The debtor paid $1.8 million in escrow deposits and $144,600 in required payments to GE through Bear. The debtor also paid $789,892 at closing by wiring the funds directly into escrow.

The balance of the purchase price was funded by GE's loan in the amount of $6,460,000 and a partial guaranty by Mr. Rodgers. The initial monthly loan payments were in the amount of $54,616.13.

In addition to the foregoing amounts, the debtor also paid $69,036 to Bear for Bear to pay Harvest Properties for tenant improvements to the real property.

In connection with the close of escrow, the debtor, Bear and GE also entered into a subordination, attornment, and lessee-lessor estoppel agreement, whereby the debtor agreed that it would not modify or terminate the triple net lease between itself and Bear. Mr. Rodgers executed the agreement on behalf of both the debtor and Bear.

The total amount paid by the debtor in connection with the purchase of the real property was $2,803,527.98.

The debtor filed the underlying chapter 7 bankruptcy case on April 30, 2012 and GE foreclosed on the real property on or about November 29, 2012, after Bear defaulted on its loan obligations to GE. GE did not obtain relief from automatic stay in the debtor's bankruptcy case before foreclosing on the property.

This adversary proceeding was filed by the plaintiff on April 25, 2014. The complaint contains six causes of action, including:

Claim ONE. A claim solely against Bear seeking avoidance under 11 U.S.C. § 544 and Cal. Civ. Code § 3439.04(a)(1), of the debtor's transfers to Bear of: the funds used for the purchase of the property and the debtor's interest in the property vis-a-vis the assignment of the debtor's purchase agreement with Livermore,

Claim TWO. A claim solely against Bear and identical to claim one, pursuant to 11 U.S.C. § 544 and Cal. Civ. Code § 3439.04(a)(2),

Claim THREE. A claim solely against Bear and identical to claim one, pursuant to 11 U.S.C. § 544 and Cal. Civ. Code § 3439.05,

Claim FOUR. A claim against GE for avoidance of GE's post-petition foreclosure of the real property, effectuated without leave or relief from stay obtained from the bankruptcy court,

Claim FIVE. A claim for violation of the automatic stay against GE, seeking declaration that GE's post-petition foreclosure violated the stay, and

Claim SIX. Seeking recovery on the avoidance claims under 11 U.S.C. § 550(a), including claims one through four, against both GE and Bear.

The court will not consider any of the evidence submitted with this motion. This is a motion to dismiss and the court will not exercise its discretion to convert the motion to one for summary judgment. Fed. R. Civ. P. 12(d). The court will not entertain a summary judgment motion without discovery having even started and without the motion's compliance with Local Bankruptcy Rule 7056-1(a), which requires a statement of undisputed facts.

GE is seeking dismissal of claims four, five and six, arguing that claims four and five are barred by the untimeliness of claims one through three, which claims GE argues are barred by the four-year and seven-year statutes of limitation of Cal. Civ. Code § 3439.09. Although claims one through three are asserted solely against Bear, GE contends that the plaintiff's "claims against GE are contingent upon a determination that the February 10, 2006 Assignment from Debtor to Bear was a fraudulent transfer." Docket 7 at 8.

GE argues that the plaintiff's "fourth claim for relief fails because property does not become part of the bankruptcy estate until it is recovered." Docket 7

at 9.

The motion is based on the assumption that the trustee is seeking to hold GE liable for violation of the automatic stay because it foreclosed on property of the estate as defined by 11 U.S.C. § 541(a)(3), namely, "property that the trustee recovers under section . . . 550 . . . of this title."

The trustee is not invoking the definition of property of the estate under 11 U.S.C. § 541(a)(3). Rather, he is invoking the definition of property of the estate under 11 U.S.C. § 541(a)(1), namely, "all legal or equitable interests of the debtor in property as of the commencement of the case." The plaintiff's claims four and five are not dependent on his recovery of that property from Bear. The complaint clearly asserts that the debtor retained "equitable" interest in the real property, even after Bear took legal title to the property, in light of all the funds the debtor transferred to Bear and into escrow to effectuate Bear's purchase of the property. Docket 1 at 5.

In other words, while the plaintiff may be seeking to avoid the debtor's transfer of legal title to the property or its interest in the purchase agreement, the debtor was not required to have legal title to the real property in order for it to have had interest in the real property as of the petition date.

As the motion does not even contemplate or address that the plaintiff is asserting a stay violation as to the estate's equitable interest in the real property, there is nothing else this court must address with respect to claim four. Claim four will remain pending.

Claim five is not duplicative because it is seeking declaratory relief for violation of the automatic stay, *i.e.*, that GE violated the stay by foreclosing on the property post-petition, that the foreclosure is void, etc. See, e.g., 11 U.S.C. § 362(k). There is nothing duplicative of a stay violation claim when paired with a section 549 avoidance claim.

More, even if somehow claims four and five could be interpreted as duplicative, nothing prevents the plaintiff from asserting them in the alternative.

Finally, as claim six is the recovery component of the avoidance sought in claim four, claim six will not be dismissed either.

The motion will be denied.

2. 12-35623-A-7 RONALD/KIMBERLY SUTTON — MOTION TO AMEND JUDGMENT
12-2590
KOSTECKI ET AL V. SUTTON ET AL. — 7-7-14 [156]

Final Ruling: The hearing on this motion will be continued to Judge David E. Russell's calendar.

3. 12-35330-A-12 BETTE SPAICH — MOTION FOR ORDER OF ASSIGNMENT
12-2669 BS-5
SPAICH V. ROTH ET AL. — 6-23-14 [118]

Tentative Ruling: The motion will be denied without prejudice.

Bette Spaich, plaintiff and judgment creditor herein and the debtor in the underlying Chapter 12 bankruptcy, moves the Court for an order of assignment of

assets under Cal. Civ. Proc. Code § 708.510.

Cal. Civ. Proc. Code § 708.510(a) states "except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor or to a receiver appointed pursuant to Article 7 (commencing with Section 708.610) all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including but not limited to the following types of payments: (1) Wages due from the federal government that are not subject to withholding under an earnings withholding order. (2) Rents. (3) Commissions. (4) Royalties. (5) Payments due from a patent or copyright. (6) Insurance policy loan value."

On April 7, 2014 the Court granted plaintiff's motion for entry of judgment. Docket 92. The judgment specially enforced a Settlement Agreement between plaintiff, Bette Spaich, on the one hand, and Alfred Nevis, Cornelius Farms, LLC, and John Roth, on the other hand. Under the terms of the Settlement Agreement, Alfred Nevis and/or Cornelius Farms, LLC, were required to deposit $400,000 into an escrow established by that agreement. As of this time, only $200,000 has been deposited into escrow.

Plaintiff has attached as Exhibit A, along with her declaration, a copy of a Memorandum of Contact of Sale, dated November 5, 2010. Docket 120. The Contract, dated November 5, 2010, provides for the sale of real property in Multnomah County, Oregon. Id. In the Contract, William J. Anderson is identified as the seller and Cornelius Farms, L.L.C., is identified as the buyer of the property. The purchase price is $420,000. The Contract requires that the purchase price be paid "48 months from the date of the Contract" or no later than November 5, 2014. Id.

In this motion, plaintiff requests an assignment of all payments and real or personal property due to Cornelius from the Contract.

Under the Contract, Cornelius is the purchaser of the real property, meaning that it will not be receiving any funds from the sale of the property. Conversely, under the terms of sale, Cornelius would have to pay the $420,000 purchase price for the property. There is no evidence that Cornelius will be receiving any funds from the Contract that could be assigned to plaintiff under Cal. Code Civ. Proc. § 708.510(a).

Further, Cal. Civ. Proc. Code § 708.510(a) limits assignments to "a right to payment due or to become due." Cal. Civ. Pro. Code § 708.510 does not permit the assignment of real or personal property to the judgment creditor, other than "a right to payment." The court then cannot order the assignment of the real property to the plaintiff. Accordingly, the motion will be denied.

4. 14-25893-A-11 ZOYA KOSOVSKA — ORDER TO SHOW CAUSE 7-7-14 [31]

Tentative Ruling: The case will be converted to chapter 7.

The debtor was given permission to pay the petition filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment fee in the amount of $429 due on July 2, 2014 was not paid.

This is cause for conversion to chapter 7, dismissal, or appointment of a

trustee. See 11 U.S.C. § 1112(b)(1), (b)(4)(K).

As the debtor has listed two real properties in Schedule A, both in Rocklin, California, without listing any encumbrances against those properties in Schedule D, the court concludes that conversion to chapter 7 - as opposed to dismissal - is in the best interest of the creditors and the estate. Accordingly, the case will be converted to chapter 7.