UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge
Sacramento, California

August 13, 2019 at 9:00 a.m.

1.19-23103-D-11 **DAMON RUSHIN**
Pro Se

MOTION TO VACATE DISMISSAL OF CASE
7-22-19 [38]

DEBTOR DISMISSED: 07/17/2019

Appearance required for Damon G. Rushin

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

On July 23, 2019, the court issued an Order setting this hearing and requiring the appearance of the debtor, Damon G. Rushin. Dckt. 39. Notice of the hearing was provided on the debtor and the Office of the U.S. Trustee on July 25, 2019. Dckt. 41. 19 days' notice was provided.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Vacate is ~~Denied~~.

Damon G. Rushin the debtor ("Debtor), who was the Debtor in Possession ("ΔIP ") in this case, filed the instant Chapter 11 case on May 15, 2019. Dckt. 1.

On June 19, 2019, the court issued an Order To Show Cause ("OSC") why the case should not be dismissed for failure to pay filing fees of $430.00. Dckt. 30. On July 17, 2019, a hearing on the Order to Show Cause was held, and the OSC was sustained. Dckts. 34, 35.

On July 22, 2019, ΔIP filed this instant Motion to Vacate. The Motion states ΔIP is dyslexic and sometimes misses deadlines; that ΔIP realized he was late for the "meeting" on the OSC, but made the filing fee payment the same day; and that ΔIP has help going forward in meeting deadlines.

ΔIP seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (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);
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (4) the judgment is void;
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> (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.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also*

Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

Here, the case was dismissed after ΔIP failed to pay the $430.00 filing fee. ΔIP argues that he missed the deadline due to dyslexia, and made the payment the same day as the hearing on the Order To Show Cause.

However, the deadline for paying the filing fee was not the hearing date of the OSC. The filing fee was due June 14, 2019. Dckt. 30. After missing that deadline, ΔIP waited another month to pay the fee, running right up to the OSC hearing date on July 17, 2019.

Beyond ΔIP not meeting deadlines, it appears ΔIP is also incapable of prosecuting this case. On Debtor's statement of current monthly income Debtor lists nothing–however, Debtor states he has $30,000.00 in monthly wage gross income on Schedule I. Dckts. 19, 25. Then, Debtor has ($10,500) a month withheld for his Social Security and tax payments, which equals $126,000 in tax and Social Security payments.

Debtor then computes that he has only $10,450 in monthly income. However, $30,000 minus ($10,500) in tax and Social Security withholding is $19,500.00.

On Schedule J Debtor lists having ($4,300) in monthly expenses. *Id.* at 4-5. Then when subtracting the ($4,300) in expenses from the monthly income, Debtor shows there being a negative ($1,000) a month net income. This is clearly inconsistent with the Debtor's miscalculation of monthly income or the court's calculation based on the gross income and tax/Social Security withholding.

On Schedule A/B Debtor's sole listed assets are two vehicles. Dckt. 23.

Debtor lists no creditor having secured claims on Schedule D. Dckt. 23 at 13-14. On Schedule E/F Debtor lists Royce Classic, LLC as having a priority claim of $11,000. *Id.* at 16.

On the Statement of Financial Affairs Debtor states that he has had no income in the current year to the date of filing this case, and that in the prior two years Debtor had no income from any source. Statement of Financial Affairs Questions 4, 5; Dckt. 24 at 14.

Debtor then states he has no business, but then lists Arden Auto Collision as an "Auto body Repair" business that existed from 3/6 to 6/12. *Id.* at 14.

DISCUSSION

A review of the file in this case, Schedules, and Statement of Financial Affairs that Debtor faces serious challenges in trying to file, much less prosecute, a Chapter 11 case in pro se. The late filing fee is the smallest of his challenges.

The Schedules appear to be facially inaccurate. Debtor must have more assets than merely two vehicles. Debtor has no creditors, if Schedules D and E/F are accurate. Debtor purports to have $30,000 a month in wage income.

In some of the documents filed Debtor states that he is member of the limited liability company identified as Arden Auto Collision Center. Dckt. 13 at 17. It appears that Debtor may believe that if he files a Chapter 11 case for himself as a member of a limited liability company, then the limited liability company is in bankruptcy. That would be incorrect.

At the hearing, xxxxxxxxxxxxxx.

From what has been filed and argued, there is not a basis for vacating the dismissal of this case. Debtor and ΔIP have not shown that there is a likelihood that Debtor, as ΔIP, has a case that can be prosecuted in this case. Rather, it appears that Debtor is in desperate need of obtaining counsel to try and restructure which, by Debtor's statement, is a hugely successful generator of monthly wage income for Debtor.

~~The Motion is denied.~~

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Vacate filed by debtor and debtor in possession in *pro se,* Damon G. Rushin having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is denied~~.

2.19-23452-D-7 **GEL-2**	**CIAO RESTAURANTS, LLC** **Gabriel Liberman**	**CONTINUED MOTION TO EMPLOY GABRIEL E. LIBERMAN AS ATTORNEY** **6-11-19 [22]**

CONVERTED TO CH. 7:
07/08/2019

APPEARANCE OF GABRIEL LIBERMAN IS REQUIRED FOR AUGUST 13, 2019 HEARING ON MOTION TO EMPLOY

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors and Office of the United States Trustee on June 12, 2019. By the court's calculation, 62 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Employ is granted.

Ciao Restaurants, LLC, the Debtor in Possession ("ΔIP") seeks to employ Gabriel E. Liberman ("Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. [FN. 1]

FN. 1. On its face, the Motion to Employ states that Ciao Restaurants, LLC, the "**Debtor**" is seeking authorization to employ. Debtor is a defined term under the Bankruptcy Code, the entity that files/is put into bankruptcy. In a Chapter 11 case there is a separate legal entity, the "debtor in possession," who

serves in the place of a trustee so long as one is not appointed. The debtor is possession is a fiduciary of the bankruptcy estate and exercises the powers of a trustee. Though it is the same person as the debtor, it is akin to a beneficiary of a family trust who elects to serve as the trustee. As trustee he/she must serve as the fiduciary trustee, owing duties to the trust and the other beneficiaries, separate and apart from his/her rights and interests as a beneficiary.

If ruled on as written, the motion would be denied out of hand, there being no legal basis for the court authorizing the employment of counsel for the "debtor" in a Chapter 11 case and for that debtor's counsel to be paid from the bankruptcy estate.

ΔIP filed this Motion while the case was still under Chapter 11. ΔIP argues Counsel's services are necessary to help Debtor fulfill its duties as the debtor in possession. The Declaration of Gabriel Liberman presents testimony that he and his firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys. Dckt. 23.

JULY 3, 2019 HEARING

At the July 3, 2019 hearing the then-presiding Judge Bardwil continued the hearing on the Motion because of ambiguity regarding what fees were to be paid as a retainer. Civil Minutes, Dckt. 62. The court stated as follows:

> The application is not clear about the amount of the retainer Counsel has received and is to receive post-petition. The application states (1) that the debtor has paid Counsel $10,000 for a pre-petition retainer, that pre-petition fees and costs totaled $6,277, and that Counsel is currently holding a retainer of $3,723 in its client trust account; (2) that a third-party payor, Palmer Riedel, will pay $5,000 per month, for a total of $20,000, for total fees of $25,000.00 (Debtors Appl., filed June 11, 2019, at 4:28); and (3) that [p]ost-petition payments shall be held in THE FIRMs client-trust account and the FIRM will file the necessary disclosures with the Court for any post-petition payments. Id. at 5:1-2. The numbers do not appear to add up. If Counsel received $10,000 pre-petition and is to receive another $20,000 post-petition, the total fees received as a retainer would be $30,000, not $25,000.

SUPPLEMENTAL DECLARATION

The Supplemental Declaration and Disclosure of Compensation Form, filed July 17, 2019, clarify that $10,000.00 has been paid by the debtor, Ciao Restaurants, LLC, towards a retainer, and that $15,000.00 will be paid post-petition for a total retainer of $25,000.00. Dckts. 77, 78.

CONVERSION TO CHAPTER 7

On July 8, 2019, the court issued an Order granting Debtor's Motion and converting this case to one under Chapter 7. Dckt. 66.

APPLICABLE LAW

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

DISCUSSION

Given the conversion of the case to Chapter 7, it is unclear if ΔIP and Counsel are still proceeding under the same terms. It is clear that a retainer of $25,000.00 is not going to be necessary for any counsel for the debtor in possession.

This case was filed on May 30, 2019, and then just twenty-six (26) days later the ΔIP filed the Motion to Convert this case to a Chapter 7 liquidation, which hearing was requested on shortened time.

The court grants the Motion authorizing the employment. Fees and costs allowed for such professional shall be determined by subsequent motion.

Applicant shall retain in his attorney trust account all of the retainer monies pending further order of the court and shall not release, repay, or refund any amounts to any person.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Ciao Restaurants, LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and Ciao Restaurants, LLC, the Debtor in Possession, is authorized to employ Gabriel Lieberman, as counsel for the Debtor in Possession.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that Gabriel Liberman, counsel for the Debtor in Possession shall hold all retainer amounts received, from whatever source, in his client trust account, not to be disbursed, refunded, reimbursed, or other released without further order of this court.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

3.19-23452-D-7 GEL-3 | **CIAO RESTAURANTS, LLC** **Gabriel Liberman** | **CONTINUED MOTION TO APPROVE STIPULATION FOR MODIFICATION OF AUTOMATIC STAY** **6-19-19 [39]**

CONVERTED TO CH. 7:
07/08/2019

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors and Office of the United States Trustee on June 19, 2019. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Stipulation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion For Approval of Stipulation is xxxxx.

The Debtor in Possession, Ciao Restaurants, LLC, filed this Motion seeking approval of a stipulation entered into with creditor Rewards Network Establishment Services Inc. ("Creditor"). The Stipulation would modify the automatic stay provisions to allow state court litigation in the Superior Court of California, Placer County, case number SCV042619 captioned, *Marc Riedel vs. MIRANDA MULGECI, an individual, JOE CHARITY, an individual, CIAO PIZZA, a California Limited Liability Company, REDBIKE TOURS, LLC, a California Limited Liability Company, CIAO RESTAURANTS, LLC, a California Limited Liability Company sued derivatively et. al.* ("State Court Litigation") to proceed on the merits.

The then Debtor in Possession argues this Stipulation avoids the cost of a Motion For Relief and promotes judicial economy.

JULY 3, 2019 HEARING

At the July 3, 2019 hearing the court continued the hearing in consideration of the parties' request. Civil Minutes, Dckt. 75.

CONVERSION TO CHAPTER 7

On July 8, 2019, the court issued an Order granting Debtor's Motion and converting this case to one under Chapter 7. Dckt. 66.

The Chapter 7 Trustee is now the real party in interest for the bankruptcy estate in this Contested Matter.

DISCUSSION

At the hearing, xxxxxxxxxxxxxx.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Ciao Restaurants, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxxxxxxxxxxx

4.19-23452-D-7 GEL-5	**CIAO RESTAURANTS, LLC Gabriel Liberman**	**CONTINUED MOTION FOR ORDER TO APPROVE STIPULATION FOR ORDER AUTHORIZING CASH COLLATERAL 6-26-19 [47]**

CONVERTED TO CH. 7: 07/08/2019

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors and Office of the United States Trustee on June 26, 2019. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Stipulation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion For Approval of Stipulation is xxxxx.

The Debtor in Possession, Ciao Restaurants, LLC ("Debtor"), filed this Motion seeking approval of a stipulation entered into with creditor Rewards Network Establishment Services Inc. ("Creditor"). The Stipulation would allow the use of cash collateral as outlined in the budget attached as Exhibit C, Dckt. 49.

JULY 3, 2019 HEARING

At the July 3, 2019 hearing the court continued the hearing in consideration of the parties' request. Civil Minutes, Dckt. 63.

CONVERSION TO CHAPTER 7

On July 8, 2019, the court issued an Order granting Debtor's Motion and converting this case to one under Chapter 7. Dckt. 66.

The Chapter 7 Trustee is now the real party in interest for this Contested Matter.

DISCUSSION

At the hearing, xxxxxxxxxxxxxx.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Employ filed by Ciao Restaurants, LLC ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is xxxxxxxxxxxxxx