

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

**September 5, 2017 at 10:00 a.m.**

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1. 17-25004-A-11 SARINA BRYSON MOTION TO  
MRL-1 EMPLOY  
8-8-17 [10]

**Tentative Ruling:** The motion will be granted in part.

The debtor requests authority to employ Liviakis Law Firm, P.C., as bankruptcy counsel for her estate. Liviakis also asks for approval of its compensation. The proposed compensation is a hybrid arrangement including a flat fee of \$11,400 and an hourly rate for services not covered by the flat fee services. The motion defines the services covered by the flat fee as:

*"a. Assistance with the requirements of the Bankruptcy Court, Bankruptcy Code, Bankruptcy Rules and the Office of the United States Trustee, as they pertain to Debtor;*

*"b. Advice with regard to certain rights and remedies of the bankruptcy estate and the rights, claims and interests of creditors;*

*"c. Representation in any proceeding or hearing in the Bankruptcy Court unless Debtor is represented in such proceeding or hearing by other special counsel;*

*"d. Assistance in the preparation of all required reports, applications, statements, plan, confirmation of plan pleadings and orders and any matters for this bankruptcy case."*

Docket 11 at 2.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including . . . on an hourly basis, on a fixed or percentage fee basis."

The court concludes that the terms of employment and compensation are reasonable. Liviakis is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved.

The court, however, will not approve any compensation at this time because it

is premature to determine whether the proposed compensation is for reasonable and necessary service and whether it is "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a); In re Reimers, 972 F.2d 1127, 1128 (9<sup>th</sup> Cir. 1992) (quoting In re Confections by Sandra, Inc., 83 B.R. 729, 731 (B.A.P. 9<sup>th</sup> Cir. 1987)). At the conclusion of Liviakis' services, the court can re-examine the flat fee compensation terms in light of the events and occurrences in the case.

2. 16-28443-A-7 SCOTT TIBBEDEAUX MOTION TO  
17-2061 DISMISS  
ALTMANN V. TIBBEDEAUX ET AL., 7-14-17 [44]

**Tentative Ruling:** The motion will be granted and the amended complaint will be dismissed without leave to amend.

The defendant, Scott Tibbedeaux, the debtor in the underlying chapter 7 case, moves for dismissal of the complaint on the ground that it fails to state a claim upon which relief can be granted.

The plaintiff filed this adversary proceeding on April 14, 2017. The plaintiff filed an amended complaint on July 5, 2017, after the court dismissed the original complaint for failure to state a claim upon which relief can be granted. Dockets 36 & 42. This motion was filed on July 14.

The amended complaint will be dismissed under Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012(b).

Rule 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).

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).

For every claim of fraud or involving mistake, the complaining party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). "The plaintiffs must include the 'who, what, when, where, and how' of the fraud." Lane v. Vitek Real Estate Indus. Group, 713 F. Supp. 2d 1092, 1102 (E.D. Cal. 2010).

The amended complaint lacks foundational facts about the relationship between the plaintiff and the defendant. Nor does it contain facts about underlying dispute. The amended complaint says nothing specific about what the defendant did to the plaintiff and how he harmed the plaintiff.

The universe of factual assertions in the amended complaint is as follows:

- "[The plaintiff] was left broke and handicap [sic] at the age of 69 by [the defendant]." Docket 42 at 2.
- "Had [the defendant] filed lawsuit properly or appealed the decision of the Court allow[ing] my documents to be presented, it is beyond doubt that [the plaintiff] owed nothing for the property owned 7+ years belonging to my corporation not m[e]." Docket 42 at 1.
- "Had [the defendant] after taking more money from completed [sic] correctly my credit report my credit would have been stronger for loans - attached." Docket 42 at 1.

The relationship between the plaintiff and the defendant cannot be discerned from the foregoing. It says nothing about what, if anything, the defendant did to harm the plaintiff. The complaint mentions the defendant's involvement in a lawsuit, but it does not state what lawsuit, when that lawsuit was filed, the

parties to the lawsuit, whether the plaintiff retained the defendant to represent him in the lawsuit, when he retained him, and the disposition of the lawsuit.

This falls short of the plausibility standard for pleading under Iqbal. See also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55, 1055 n.6 (9th Cir. 2011).

The statements in the amended complaint also do not show that the plaintiff is entitled to relief. See Fed. R. Civ. P. 8(a)(2), as made applicable here by Fed. R. Bankr. P. 7008. Just because the plaintiff states that the defendant did something or did not do something does not make mean the plaintiff is entitled to relief.

With respect to the fraud claim, the amended complaint also violates the particularity requirements of Fed. R. Civ. P. 9(b). There is no plausibility, much less particularity in the complaint's allegations pertaining to the fraud claim. In fact, there are no allegations whatsoever speaking to the fraud claim. For example, the complaint refers to no representations made by the defendant, his intent when making them, or reliance on them by the plaintiff.

Further, the amended complaint will be dismissed because some of the claims referenced in the complaint are not recognized by existing law. The amended complaint contains the following claims:

- (1) elder abuse,
- (2) abandonment of responsibilities,
- (3) malicious intent to cause financial harm,
- (4) fraud and deceit,
- (5) violation of fiduciary duty,
- (6) unconscionable filing of facts incorrectly [sic], and
- (7) violation of due process, U.S. Constitution.

There is no basis for asserting a cause of action for "abandonment of responsibilities," "malicious intent to cause harm," "violation of fiduciary duty," or "unconscionable filing of facts." While some of these may be elements of other claims for relief, they are not independent causes of action.

Given the foregoing, the amended complaint fails to state a claim upon which relief can be granted. As the court has already given the plaintiff the opportunity to amend his complaint in order to state a claim upon which relief can be granted, the dismissal of this amended complaint will be without leave to amend.

3. 17-21973-A-7 JOSE/MARIA PIMENTEL MOTION TO  
SSA-3 USE CASH COLLATERAL O.S.T.  
8-28-17 [90]

**Tentative Ruling:** The motion will be denied without prejudice.

The chapter 7 trustee seeks approval through December 31, 2017 to use cash collateral of the Bank of Stockton.

11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed cash to be used consists of the following:

- (1) Proceeds from the cultivation, harvesting, and sale of sudan grass, at a real property in Escalon, California;
- (2) Proceeds from the rental of a real property in Tracy, California (20260 S. Lammers Rd.) to tenants, including the boarding of a horse, with total rental proceeds of \$1,050 a month;
- (3) Proceeds from the rental of a real property in Tracy, California (20246 S. Lammers Rd.) to tenants, with total rental proceeds of \$1,000 a month;
- (4) Proceeds from the lease of a mobile home on a real property in Tracy, California (19934 S. Lammers Rd.) to tenants, with total rental proceeds of \$800 a month; and
- (5) Proceeds from the sale of the debtors' dairy herd.

The trustee projects having \$53,250 in cash collateral through December 31, 2017, consisting of \$27,500 in proceeds from the sale of the sudan grass, \$13,750 from the rental of the real properties, \$12,000 from the sale of the dairy herd. Docket 84.

The proposed use of the cash is to pay \$20,000 to harvest the sudan grass and \$3,206 in monthly expenses for the real properties, including the payment of utilities (\$1,136), insurance (\$70), water (\$0 – has been prepaid for six months), and other miscellaneous expenses (\$2,000). The proposed use of cash totals \$36,030 (\$20,000 for the harvest of the grass + \$16,030 for five months at \$3,206 of expenses a month). Docket 84.

While the court understands that there is sufficient cash collateral to pay what the trustee wants to pay, the motion does not establish some fundamentals about whether the secured creditor(s) is adequately protected.

First, the motion does not say whether there are any other creditors are secured by the cash.

Second, the motion does not identify the claims secured by each of the assets generating the cash.

Third, the motion does not identify the amount of each claim secured by each of the assets in question.

Fourth, the motion does not identify all collateral for each claim.

As a result, the court cannot determine whether the secured creditor(s) is adequately protected. The trustee has not met her burden of persuasion under section 363. Accordingly, the motion will be denied without prejudice.

4. 17-21973-A-7 JOSE/MARIA PIMENTEL  
SSA-4

MOTION FOR  
AUTHORITY TO OPERATE BUSINESS  
O.S.T.  
8-28-17 [93]

**Tentative Ruling:** The motion will be granted.

The chapter 7 trustee is asking the court for authority through December 31, 2017 to operate the debtors' farming and rental businesses, including:

- (1) The cultivation and harvesting of sudan grass on a real property in Escalon, California;
- (2) The rental of a real property in Tracy, California (20260 S. Lammers Rd.) to tenants, including the boarding of a horse, with total rental proceeds of \$1,050 a month;
- (3) The rental of a real property in Tracy, California (20246 S. Lammers Rd.) to tenants, with total rental proceeds of \$1,000 a month; and
- (4) The lease of a mobile home on a real property in Tracy, California (19934 S. Lammers Rd.) to tenants, with total rental proceeds of \$800 a month.

11 U.S.C. § 721 provides that "[t]he court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."

The trustee believes that the businesses should be operated for a limited period of time, to reduce waste, maintain the properties while they are being marketed for sale, and preserve the value of the properties to the estate.

The proposed operation and management of the businesses is in the best interest of the estate and the creditors and is consistent with the orderly liquidation of the estate's interest in the property and the estate in general. As the trustee is planning to liquidate the properties and has already contacted a real estate broker to start marketing their sale, collecting the rental payments will enable the trustee to defray some of the maintenance costs until the properties are sold. The court will authorize the operation and management of the businesses until December 31, 2017, without prejudice to the trustee asking for authority to operate and manage the businesses beyond that date. The motion will be granted.

The court will require the trustee to file monthly operating reports with the court and serve them on the U.S. Trustee.

5. 16-21585-A-11 AIAD/HODA SAMUEL

STATUS CONFERENCE  
3-15-16 [1]

**Tentative Ruling:** None.

6. 16-21585-A-11 AIAD/HODA SAMUEL  
FWP-6

MOTION TO  
USE CASH COLLATERAL AND FOR  
REPLACEMENT LIENS  
7-24-17 [871]

**Tentative Ruling:** The court granted this motion in a ruling issued on August 7 (order entered on August 22), but continued the hearing on the motion to

September 5 in order to consider secured creditor U.S. Bank's request for adequate protection payments from the rent generated by one of the residential real properties remaining in the estate. Dockets 889 and 887. Subject to hearing from both the trustee and U.S. Bank, the court will determine whether to approve the requested adequate protection payments at the hearing.