UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 29, 2014 at 10:00 a.m.

1.	12-28413-A-7	F. RODGERS CORPORATION	MOTION FOR
	14-2115	GJH-2	ENTRY OF DEFAULT OR SUMMARY
	MCGRANAHAN V. BEAR PROPERTIES L.L.C. ET AL		JUDGMENT
			8-30-14 [39]

Tentative Ruling: The motion will be denied.

The plaintiff, Michael McGranahan, the chapter 7 trustee of the underlying case of F. Rodgers Corporation, moves for a default judgment on three avoidance causes of action asserted against Bear Properties, L.L.C. In the alternative, the movant asks for a partial summary judgment.

Fed. R. Civ. P. 55(b)(2) provides that:

"A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

The factors courts consider in determining whether to enter a default judgment include: (i) the possibility of prejudice to the plaintiff, (ii) the merits of the plaintiff's substantive claim, (iii) the sufficiency of the complaint, (iv) the amount at stake, (v) the possibility of a dispute over material facts, (vi) whether the default was due to excusable neglect, and (vii) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

The complaint alleges that on February 9, 2006, debtor 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 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.

The property consisted of land and a 20,000 square foot shell building Livermore NBP was to build for $2,428,332 at its 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 the GE entities for avoidance of GE's post-petition foreclosure of the real property because done without leave or relief from automatic stay,

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

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

The one judgment rule of Fed. R. Civ. P. 54(b), as made applicable here by Fed. R. Bankr. P. 7054(a), precludes this court from entering more than one judgment in this adversary proceeding.

Rule 54(b) provides: "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The claims against the GE defendants, encompassing GE Commercial Finance Business Property Corporation and General Electric Credit Equities, Inc., will be litigated as the GE entities have answered the complaint. Docket 37. Thus, the court will enter one judgment, after litigation of the claims against the GE entities has been concluded.

The court is unwilling to enter a judgment against Bear at this time also because it cannot foresee the development and outcome of the litigation with the GE defendants. At this time, the court cannot tell whether the issues in the claims against Bear will have an impact on the adjudication of issues pertaining to the claims against the GE entities.

2.	14-24234-A-7	JILLIAN WILSON	MOTION TO
	14-2232	NBC-1	DISMISS
	FIRST NATIONAL BANK OF OMAHA V. WILSON		9-3-14 [9]

Tentative Ruling: The motion will be denied.

The defendant, Jillian Dawn Wilson, the debtor in the underlying chapter 7 case, seeks dismissal of the subject 11 U.S.C. § 523(a)(2)(A) claim under Fed. R. Civ. P. 12(b)(6), arguing "that a debtor making the minimum payments over even a short period of time is 'inconsistent with the intent to incur a debt without repaying it.'" Docket 9 at 2-3 (citing and quoting Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280, 1287 (9th Cir. 1996)). Exhibit A to the complaint includes monthly statements allegedly reflecting that the defendant "made all of the minimum payments on the debt prior to filing her bankruptcy petition." Docket 9 at 3. The defendant contends that the plaintiff, First National Bank of Omaha, cannot establish intent to defraud as a matter of law.

The plaintiff opposes the motion, pointing out that the Anastas decision emphasized multiple factors in determining a debtor's intent to defraud.

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).

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).

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).

Preliminarily, the court considers nothing outside the four corners of the

complaint in adjudicating this motion.

Anastas does not limit the intent inquiry to the debtor making at least minimum credit card payments. In fact, the Anastas court did not limit the intent inquiry even to the debtor's financial condition. "The bankruptcy court improperly focused almost exclusively on Anastas' financial condition." Anastas at 1286. The Anastas court criticized the trial court for exclusively focusing on the debtor's financial condition and, even then, for considering evidence that was inconsistent with an intent to defraud. "Anastas incurred the credit card debt over a six month period, during which time he always made his monthly payments. Such behavior is inconsistent with the intent to incur a debt without repaying it." Anastas at 1287. The court disagrees that making at least minimum monthly payments on a credit card pre-petition defeats intent to defraud under 11 U.S.C. § 523(a)(2)(A) as a matter of law. Anastas does not stand for this proposition.

More important, in the subject complaint, intent to defraud is supported by allegations that entail more than just the defendant's financial condition. For instance, the complaint asserts that the defendant incurred the last of a series of credit card charges - totaling $3,714.33 over a 19-day period - only nine days prior to making a payment to her bankruptcy attorney. Docket 1 at 2. The timing of the credit card charges, relative to the defendant's planning to file for bankruptcy, is also strongly relevant in the establishment of intent to defraud. The complaint then is consistent with Anastas.

Accordingly, the motion will be denied. The defendant shall file an answer within seven days of entry of the order on this motion.

3. 14-28468-A-11 BUALAI WHITE — MOTION TO EMPLOY
MRL-1 — 8-29-14 [15]

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 debtor, 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.

The debtor requests authority to employ Liviakis Law Firm, PC as bankruptcy counsel for their estate. Liviakis will assist the debtor with the administration of the chapter 11 estate. The proposed compensation is a hybrid compensation arrangement, including a flat fee of $22,000 for "[a]ll services in the bankruptcy case . . . through the end of the bankruptcy case, with the exception of: (1) defending Debtor against any complaint filed by the trustee or any other party in interest to deny Debtor's discharge; (2) defending Debtor against any complaint filed by any creditor to except its debt from discharge; (3) defending Debtor against any complaint filed by the trustee to avoid or to recover any transfer of property which Debtor made before the filing of their chapter 7 petition; (4) prosecuting any complaint which Debtor is obligated to file for a determination that any indebtedness is dischargeable; (5) appealing

any order of judgment which is entered against Debtor; (6) any legal work necessary after Debtor's chapter 11 case is closed, converted, dismissed, or once Debtor begin the payment phase of their plan." Docket 19 at 2.

The services enumerated above will be covered under an hourly compensation arrangement.

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. The movant 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 recognizes that this is not the final approval of payment of the movant's fees and that its compensation is still subject to review under 11 U.S.C. § 328(a). Under such review, courts can assess whether compensation terms are "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 (9th Cir. 1992) (quoting In re Confections by Sandra, Inc., 83 B.R. 729, 731 (B.A.P. 9th Cir. 1987)). This means that, at the conclusion of the movant's services, the court can re-examine the subject compensation terms in light of developments not anticipated now.

4. 14-28468-A-11 BUALAI WHITE
MRL-2

MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY
8-29-14 [19]

Tentative Ruling: The motion will be granted in part.

The debtor's counsel, Mikalah Liviakis, asks the court to authorize payment of his $22,000 flat fee for post-petition services in this case. This is his first interim motion for compensation.

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 covered by the requested flat fee include "[a]ll services in the bankruptcy case . . . through the end of the bankruptcy case, with the exception of: (1) defending Debtor against any complaint filed by the trustee or any other party in interest to deny Debtor's discharge; (2) defending Debtor against any complaint filed by any creditor to except its debt from discharge; (3) defending Debtor against any complaint filed by the trustee to avoid or to recover any transfer of property which Debtor made before the filing of their

chapter 7 petition; (4) prosecuting any complaint which Debtor is obligated to file for a determination that any indebtedness is dischargeable; (5) appealing any order of judgment which is entered against Debtor; (6) any legal work necessary after Debtor's chapter 11 case is closed, converted, dismissed, or once Debtor begin the payment phase of their plan." Docket 19 at 2.

As this case was filed only on August 21, 2014, the movant has performed few of the necessary post-petition services. Accordingly, the court is not inclined to authorize payment of the full $22,000 flat fee at this time. This is the movant's only first interim motion for compensation, meaning the movant will be making at least one other motion for compensation. Accordingly, the court now will authorize payment of $13,000. The remainder may be requested in a later application.

The court reminds the movant that all compensation requests - including requests involving flat fee arrangements - must be accompanied by a narrative description of the services provided and the movant's time records for such services.

5. 14-28468-A-11 BUALAI WHITE — STATUS CONFERENCE 8-21-14 [1]

Tentative Ruling: None.

6. 14-24689-A-11 ROY SMALLY AND VIVI MITCHELL-SMALLY — MOTION TO VALUE COLLATERAL 8-19-14 [44]
CAH-4
VS. MARIN MORTGAGE BANKERS CORP.

Final Ruling: The hearing on this motion has been continued to October 27, 2014 at 10:00 a.m. Docket 57.