

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

October 30, 2017 at 10:00 a.m.

1. 13-35308-A-7 DOROTHY PARENT MOTION TO
15-2229 LB-15 AMEND OR TO FILE CROSS COMPLAINT
FUKUSHIMA V. SWENDEMAN 9-21-17 [186]

Final Ruling: The hearing on the motion is continued to November 13, 2017 at 10:00 a.m.

The defendant, Cynthia Swendeman, individually and as trustee of the "Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 1994," seeks leave to amend her answer to the plaintiff's complaint. See Dockets 120 & 126.

The court incorporates by reference its ruling on Cynthia Swendeman's related motion to vacate the court's November 17, 2016 order granting summary judgment.

2. 13-35308-A-7 DOROTHY PARENT MOTION TO
15-2229 LB-15 VACATE
FUKUSHIMA V. SWENDEMAN 9-6-17 [166]

Tentative Ruling: The hearing on the motion is continued to November 13, 2017 at 10:00 a.m.

The defendant, Cynthia Swendeman, individually and as trustee of the "Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 1994," moves to vacate the order granting the summary judgment motion of the plaintiff, Alan Fukushima, the chapter 7 trustee in the underlying chapter 7 case. See Docket 168 at 2.

The plaintiff filed this proceeding on November 30, 2015, seeking to avoid Dorothy Swendeman's judicial lien, which is based on an abstract of judgment recorded in the chain of title of real property that is property of the bankruptcy estate.

Pursuant to a summary judgment motion by the plaintiff, the court determined that the judicial lien should be avoided. Dockets 53, 72, 74. Dorothy Swendeman unsuccessfully opposed the motion. Dockets 63-68.

On December 16, 2016, Dorothy Swendeman's counsel filed a notice of death of Dorothy Swendeman, informing all parties in interest that Dorothy Swendeman had passed away. Docket 96.

The court does not have evidence from anyone exactly when Dorothy Swendeman passed away. When she Dorothy Swendeman opposed the motion for summary judgment motion she was alive or at least the opposition filed by her attorney said nothing of her death. See Docket 63 (points and authorities in support of opposition to summary judgment, filed on behalf of Dorothy Swendeman).

October 30, 2017 at 10:00 a.m.

On January 30, 2017, the court granted the plaintiff's Fed. R. Civ. P. 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman. Dockets 116 & 119. On February 13, 2017, the plaintiff filed an amended complaint, adding Cynthia Swendeman, both in her personal capacity and as trustee of a Swendeman family trust, as a defendant. Docket 120.

The plaintiff filed another summary judgment motion on July 10, 2017, seeking summary judgment as to Cynthia Swendeman, in both her individual and family trust representative capacities, given her substitution in the place of Dorothy Swendeman. The court ruled:

"The motion will be denied to the extent it seeks to re-adjudicate the plaintiff's prior summary judgment motion. That motion was filed on October 7, 2016 and heard on November 14, 2016. The order on the motion was entered on November 17, 2016. Dockets 53, 72, 74. That motion has been already adjudicated. The court entered an order granting it in part. Dockets 72 & 74. When the court granted the plaintiff's Rule 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman, Cynthia Swendeman became a defendant in this proceeding subject to any prior adjudications against Dorothy Swendeman. There is no need to relitigate what was already litigated with respect to Dorothy Swendeman.

"Nevertheless, the court will grant this motion in part, determining that Cynthia Swendeman is a successor in interest, both in her individual and representative capacities, to Dorothy Swendeman. Mr. Blunt, former counsel for Dorothy Swendeman and present counsel for Cynthia Swendeman, admitted this on the record at the August 7 hearing on this motion.

"Finally, there are no other claims to be adjudicated in this proceeding. The plaintiff stated at the August 7 hearing on this motion that he is not seeking relief on the single claim as to which summary judgment was previously denied. See Dockets 72 & 120. Prior to entering a judgment, though, the court will allow time for any challenge to its November 17, 2016 order on the prior summary judgment motion. See Dockets 72 & 74. Such challenge must be filed no later than September 6, 2017. By giving this time, however, the court is not determining that any such challenge would be timely, proper, or meritorious."

Docket 161.

The motion now before the court makes no effort to brief the law relevant to vacating the order. For example, Fed. R. Civ. P. 60 has not been even cited in the memorandum of points and authorities. See Docket 168. This is by itself sufficient to deny the motion.

Second, the motion does not indicate whether it is timely.

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 court is unconvinced that the motion is timely. The order which the movant seeks to be vacated was entered on November 17, 2016, nearly one year ago. Docket 74. The movant, Cynthia Swendeman, in her individual and family trust representative capacities, was substituted as a defendant in the place of her deceased mother Dorothy Swendeman, on January 30, 2017. Dockets 116 & 119. This motion was filed seven months after the substitution.

The motion fails to explain why Cynthia Swendeman waited seven months to file this motion. There is nothing in the record that makes this apparent. The court will not speculate on this point. As such, the court determines that this motion has not been filed within reasonable time. This is by itself sufficient to deny the motion.

Third, the motion presents no grounds for the vacating of the November 17, 2016 order.

Once again, Cynthia Swendeman wants to relitigate issues that have been fully litigated. The motion contends that:

- the plaintiff never proved that Cynthia is the successor in interest to Dorothy;
- Cynthia Swendeman has not had the opportunity to conduct discovery;
- Cynthia Swendeman has not had the opportunity to litigate either of the plaintiff's summary judgment motions;
- there is no basis for Cynthia Swendeman to be named a defendant in this litigation;
- the court should determine that the court's granting of the plaintiff's first summary judgment motion on November 14, 2016 is not binding on Cynthia Swendeman.

As recorded by the court in its August 7, 2017 ruling on the plaintiff's second summary judgment motion, Mr. Blunt admitted in open court that Cynthia Swendeman, as an individual and as trustee of the family trust, is the successor in interest to Dorothy Swedeman. Docket 163 at 2:30-4:10

"Nevertheless, the court will grant this motion in part, determining that Cynthia Swendeman is a successor in interest, both in her individual and representative capacities, to Dorothy Swendeman. Mr. Blunt, former counsel for Dorothy Swendeman and present counsel for Cynthia Swendeman, admitted this on the record at the August 7 hearing on this motion."

Docket 161 at 2.

A successor in interest to a deceased plaintiff is not entitled to relitigate

issues resolved when the plaintiff was alive. The successor in interest merely *continues* in the litigation.

If a party is permitted to relitigate what was already litigated by the deceased party, the party would not be a successor in interest but a new and independent party to the litigation. Moreover, Mr. Blunt agreed with this in open court at the August 7, 2017 hearing on the plaintiff's second summary judgment motion. Docket 163 at 5:30-6:00.

The substitution of Cynthia Swendeman in the place of Dorothy Swendeman was not the filing of a new complaint nor the joinder of a new party. The substitution did not trigger the right to file a new answer, conduct new discovery, or relitigate a the summary judgment motion. The court permitted only the substitution of Cynthia Swendeman. It permitted nothing else. See Docket 116. Cynthia Swendeman merely continues the litigation from the point where Dorothy Swendeman passed away.

Fourth, despite the filing of the plaintiff's amended complaint to substitute Cynthia Swendeman for Dorothy Swendeman, that complaint is identical to the original complaint on which the court granted the summary judgment in November 2016. The one exception is that the new complaint dropped a claim as to which the court denied summary judgment. See Dockets 72 & 120.

Fifth, the court will not permit Cynthia Swendeman to file another answer, as Dorothy Swendeman already filed an answer to the identical complaint. See Dockets 6 & 128.

Cynthia Swendeman proposed answer includes a counterclaim against the trustee for breach of fiduciary duty based on an alleged misappropriation of funds against which Cynthia Swendeman claims a security interest. Such a counterclaim is not compulsory as it is wholly unrelated to the subject litigation. The instant litigation relates to the avoidance of the recordation of an abstract of judgment against real property of the estate.

On the other hand, the counterclaim in the proposed amended answer relates to the recordation of a JL-1 with the California Secretary of State against personal property of the debtor. It is alleged that the plaintiff received funds from a family trust that were allegedly encumbered by the JL-1.

The court will not allow amendment of the answer to include a counterclaim that is wholly unrelated to the subject litigation. If Cynthia Swendeman wants to assert that claim against the plaintiff, it should pursued independently.

This adversary proceeding has been pending for nearly two years. The court will not permit further delay of its disposition.

Sixth, nothing in the record suggests that the court should rule differently on the motion for summary judgment.

Finally, once again, Mr. Blunt has raised the July 7, 2016 assignment of the subject judgment by Dorothy Swendeman to Cynthia Swendeman in her capacity as trustee of "the Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 2004." Docket 65, Ex. 8.

The court's understanding of that transfer, based on representations by Mr. Blunt, has been that, at the time of the transfer, Dorothy Swendeman was a beneficiary of that trust and the transfer did not amount to a transfer to a third party for purposes of this litigation.

Nevertheless, given the defense's history of taking inconsistent position, and for the sake of clarity, the court will continue the hearing on this motion and require Cynthia Swendeman and her attorney to answer the following questions:

(1) Are "the Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 2004" (Docket 65, Ex. 8) and "the Robert E. Swendeman and Dorothy B. Swendeman 2004 Trust Dated April 28, 1994" (Docket 168 at 2) different trusts?

(2) What are the differences between the trusts, if any? For instance, are there different beneficiaries, settlors, and/or trustees?

(3) Is the family trust to which Dorothy Swendeman transferred the judgment on July 7, 2016 the same as the family trust of which Cynthia Swendeman is currently a trustee?

(4) Who was the beneficiary(ies) of the trust to which Dorothy Swendeman transferred the judgment on July 7, 2016, at the time of that transfer?

(5) Who was the trustee(s) of the trust to which Dorothy Swendeman transferred the judgment on July 7, 2016, at the time of that transfer?

(6) Who was the beneficiary(ies) of the trust to which Dorothy Swendeman transferred the judgment on July 7, 2016, upon her death in November 2016?

(7) Who was the trustee(s) of the trust to which Dorothy Swendeman transferred the judgment on July 7, 2016, upon her death in November 2016?

(8) On what date did Dorothy Swendeman pass away?

The hearing on this motion will be continued to November 13, 2017 at 10:00 a.m. Mr. Blunt shall file his answers to the above questions, supported by admissible and probative evidence, no later than November 6, 2017. The records on this motion and the related motion to amend answer and file counterclaims (Docket 186) are otherwise closed.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, STATUS CONFERENCE
L.L.C. 9-14-17 [1]

Tentative Ruling: None.

4. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION TO
GEL-4 L.L.C. USE CASH COLLATERAL
10-6-17 [45]

Tentative Ruling: The motion will be granted in part.

First Capital Retail, L.L.C., the chapter 11 debtor, seeks approval to use the cash collateral of several creditors secured by fourteen retail franchise locations throughout California, which the debtor owns and operates. These retail franchises include Focus Brands such as Auntie Anne's, Cinnabon and Mrs. Fields. The cash collateral at issue is the income generated by the debtor's business transactions.

The motion seeks to approve use of cash collateral as of the petition date, September 14, 2017, through March, 2018 for the payment of the operating expenses as set forth in the budget filed concurrently with the motion. Docket 47, Ex. A.

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 rights under 11 U.S.C. § 363. 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 budget includes labor, accounting, advertising, maintenance, insurance, technology, and miscellaneous expenses. See Docket 47, Ex. A.

The proposed use of cash collateral will preserve the going concern of the debtor's businesses, allowing the debtor to continue operating them, thus permitting realization of income through retail transactions. This is in the best interest of the estate and the creditors.

There are five creditors that hold or claim to hold security interests against the debtor's cash collateral: (1) ByLine Bank, successor by merger of Ridgestone Bank, SBA loan; (2) ByLine Bank, successor by merger of Ridgestone Bank, SBA construction loan; (3) ESBF California, LLC, factoring loan; (4) Global Merchant Cash, factoring loan; (5) YellowStone Capital West LLC, factoring loan; and (6) World Global Financing, factoring loan.

The debtor proposes to remit to ByLine Bank monthly adequate protection payments of interest only payment on both notes in the total amount of \$11,032.473 no later than the 15th of each month, such payments to be retroactive to the petition date.

As for the remaining factoring loans, the debtor is currently not seeking authorization to pay any adequate protection payments. Rather, all excess funds will be set-aside in a DIP account, which the debtor will not use without further permission from creditors or the court.

No adequate protection payment for the factoring loans. These loans are junior to Byline Bank's lien and it appears the value of all collateral is less than is owed to Byline.

As further partial adequate protection for the continued use by the debtor of the cash collateral, the debtor proposes to grant continuing replacement liens in favor of the Byline Bank and the factoring loans on the debtor's property, to the extent of the debtor's interest in cash collateral on the date of the order for relief.

Accordingly, the court will approve the debtor's use of the creditors' cash collateral, consistent with the budget proposed in the motion. But, the use will be through January 31, 2018. The debtor may seeks further use of cash collateral

By authorizing cash collateral use, the court is not approving the compensation of professionals of the estate, even if such compensation is accounted for in the cash collateral budget.

5.	17-26125-A-11	FIRST CAPITAL RETAIL,	MOTION FOR
	TF-1	LLC	RELIEF FROM AUTOMATIC STAY
	SUNRISE MALL PROPERTY, L.L.C.	VS.	9-27-17 [21]

Final Ruling: This motion for relief from the automatic stay has been set for

October 30, 2017 at 10:00 a.m.

hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, 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 movant, Sunrise Mall Property, LLC, seeks relief from the automatic stay with respect to a commercial real property in Citrus Heights, California. The debtor has been leasing the property from the movant. The debtor has not made two pre-petition and one post-petition payments to the movant under the lease agreement.

The movant filed and unlawful detainer action against the debtor on August 18, 2017. Judgment was entered on August 25, 2017 against the debtor terminating the lease and entitling movant to obtain possession of the property. Docket 24 at 91. A writ of possession was issued on September 6, 2017. Docket 24 at 93.

This is a liquidation proceeding. The debtor is not operating and it has no ownership interest in the property as she is leasing it only. The foregoing is cause for the granting of relief from stay.

The debtor is unable to assume the lease for the property as the lease has been terminated by the judgment in the unlawful detainer action. Accordingly, the determination of whether the property is necessary to an effective reorganization is moot.

The motion will be granted for cause pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to recover possession of the property as permitted by the state court.

No fees and costs are awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

6.	17-26329-A-11 SHIV SINGH AND POOJA THAKUR	STATUS CONFERENCE 9-23-17 [1]
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Tentative Ruling: None.

7.	12-33158-A-12 GREG HAWES SAC-14	MOTION FOR ENTRY OF DISCHARGE 9-13-17 [245]
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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 chapter 12 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 for entry of a chapter 12 discharge will be granted.

The debtor asks the court to enter his chapter 12 discharge.

11 U.S.C. § 1228(a) provides that:

"Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of the kind specified in section 523(a) of this title."

This case was filed on July 17, 2012. The court confirmed the debtor's chapter 12 plan on October 3, 2012. Docket 82. The court confirmed a subsequent amendment to the plan on July 11, 2014. Docket 230. The debtor does not have any domestic support obligations.

First, the trustee filed a final report on September 11, 2017. Docket 244. The trustee's report demonstrates that the debtor has made the payments required by the plan and that the trustee has made the payments to creditors required by the plan. Docket 244. The requirement imposed by 11 U.S.C. § 1228(a) that the debtor receive a discharge only after completion of all payments under the plan has been satisfied. The court also notes that the trustee filed a statement of nonopposition to this motion on October 17, 2016.

Second, the debtor has filed a declaration in connection with this motion that the debtor is not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. See 11 U.S.C. § 1228(a); Docket 247. No objection has been filed to that certificate and the time to file an objection has expired.

Finally, by service of this motion, the debtor has given all creditors notice that 11 U.S.C. § 522(q)(1) is not applicable, and that there is no pending proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind specified in section 522(q)(1)(B). Dockets 247 and 248. No creditor has objected to this notice. This satisfies the requirements of 11 U.S.C. § 1228(f).

Therefore, no earlier than 10 days after the hearing on this motion, the clerk shall enter the debtor's discharge. See 11 U.S.C. § 1228(f).

8. 16-21585-A-11 AIAD/HODA SAMUEL

STATUS CONFERENCE
3-15-16 [1]

Tentative Ruling: None.

9. 16-21585-A-11 AIAD/HODA SAMUEL
FWP-6

MOTION TO
USE CASH COLLATERAL AND FOR
REPLACEMENT LIENS
7-18-16 [170]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the rental of a shopping center in Rio Linda, California (\$8,268.40 in rents monthly), for the period of November 1, 2017 through January 31, 2018. This center was brought into the estate in April 2017 via a substantive consolidation of the debtors with their limited liability company. See Docket 927.

The other three estate shopping centers have been sold. The sales closed in March 2017. Docket 727 at 2. The trustee seeks to use rental income to pay for, among other things, the maintenance, security, insurance, ground keeping, and utilities of the center. The trustee is currently marketing the center for sale. He believes its value exceeds its encumbrances. The property is encumbered by a single lien of the United States, in the approximate amount of \$3,029,412.64. Docket 927 at 4.

The chapter 11 trustee also seeks permission to use cash collateral generated from the rent of the remaining two residential real properties (209 Prairie Circle (rented at \$800 a month) and 148 Estes Way (rented at \$1,000 a month)), for the period of November 1, 2017 through January 31, 2018. The other four residential properties were abandoned by the trustee months ago. The trustee proposes to use the rental income, of up to \$2,000.00 a month per property, to maintain their condition.

Only the United States and JPMorgan Chase Bank are asserting interests in cash.

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 use of cash collateral will preserve the going concern of the shopping center and two residential properties, allowing the trustee to continue operating them, pending further administration. This is especially true with respect to the shopping center at this time, given the substantial flood damages it sustained recently and the trustee's efforts to remedy such damages. The proposed use of cash collateral is in the best interests of the creditors and the estate.

The proposed budget here is similar to the budgets pursuant to which the court has authorized prior use of cash collateral. See, e.g., Dockets 109, 150, 174, 203, 794, 897, 925. The trustee proposes to grant the secured creditors replacement liens in further generated cash collateral and other cash of the estate. This includes replacement liens to the United States on cash (approximately \$99,000) from accounts against which the United States was attempting to satisfy its judgment on the petition date. The replacement

liens, to the extent applicable, shall not attach to the part of the further cash collateral designated as a "carve-out" for administrative expenses.

Given that the secured creditors agree to the cash collateral use and given that the proposed budget is substantially similar to the budget of the estate's prior cash collateral requests, the motion will be granted as to the shopping center and residential properties.

By authorizing cash collateral use, the court is not approving the compensation of estate professionals, even if such compensation is accounted for in the cash collateral budget.