UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 2, 2015 at 10:00 a.m.

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1. 15-27601-A-11 ELK GROVE COMMUNICATIONS TOWER, INC.
COUNTY OF SACRAMENTO VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-1-15 [8]

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the U.S. 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, County of Sacramento, seeks relief from the automatic stay as to a real property in Elk Grove, California, under 11 U.S.C. § 362(d)(1) and (d)(4). The movant holds a $77,521.06 claim secured by the property, representing unpaid property taxes.

The court will grant relief under section 362(d)(4), which prescribes that:

"*On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .*

"*with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either-*

"*(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or*

"*(B) multiple bankruptcy filings affecting such real property.*"

This is the debtor's fourth bankruptcy case since February 22, 2013, involving the subject property.

On February 22, 2013, the debtor filed a chapter 11 case, Case No. 13-22324. That case was dismissed on March 12, 2013 due to the debtor's failure to file its bankruptcy schedules and statements. The debtor filed another chapter 11 case on February 19, 2014, Case No. 14-21555. That case was dismissed on March

18, 2014 due to the debtor's lack of representation by an attorney. The debtor filed yet another chapter 11 case on February 20, 2015, Case No. 15-21313. That case was dismissed on March 10, 2014 due to the debtor's failure to file its bankruptcy schedules and statements.

In the prior cases, the debtor owned the subject property. The movant has been attempting to sell the property at a tax sale since at least March 2012. Docket 16 at 2.

As in the prior cases, where the debtor filed no bankruptcy schedules and statements, the debtor filed this case on September 29, 2015, without filing its bankruptcy schedules and statements.

The filing of this case then was part of a scheme to delay, hinder, or defraud creditors, involving multiple bankruptcy filings. Accordingly, the court will grant relief under section 362(d)(4).

In addition, the debtor's history of past deficient bankruptcy filings, not prosecuted by the debtor, is cause for relief from stay under section 362(d)(1).

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to conduct a tax sale as authorized by applicable nonbankruptcy law and to obtain possession of the subject property following sale, if necessary. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

2. 15-27601-A-11 ELK GROVE COMMUNICATIONS TOWER, INC. — STATUS CONFERENCE 9-29-15 [1]

Tentative Ruling: None.

3. 15-27225-A-11 GS1 MOTORS INC. — MOTION TO SET ASIDE DISMISSAL OF CASE O.S.T. 10-19-15 [38]

Tentative Ruling: The motion will be denied.

NextGear Capital, Inc., requests that the October 14, 2015 order dismissing the case be vacated under Fed. R. Civ. P. 60(b)(6), made applicable here by Fed. R. Bankr. P. 9024. The movant holds a $150,199.41 claim against the debtor, secured by all of the debtor's assets, including the debtor's vehicle inventory, consisting of 39 used vehicles. The debtor apparently operates a used car sales business.

The movant asserts that the dismissal should be vacated because 26 of the debtor's 39 used vehicles securing the movant's claim disappeared while the bankruptcy was pending.

The motion will be denied for several reasons.

The motion will be denied because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions.

There are no declarations or affidavits in support of the motion. The motion consists of only one pleading, Docket 38, to which the movant has attached various exhibits. The factual assertions in the motion are not established by admissible evidence and none of the exhibits are authenticated.

For instance, there is no evidence supporting the assertion that 26 of the debtor's vehicles disappeared during the pendency of this case. Also, there is nothing in the record authenticating the movant's promissory note (Exhibit A) and UCC Financing Statement (Exhibit C). Docket 38.

This violates Local Bankruptcy Rule 9014-1(d)(6), which provides: "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e)."

Further, even if the motion were supported by evidence, the movant has not established that reconsideration of the dismissal is warranted. And, even if reconsideration of the dismissal is warranted, the movant has not demonstrated that the case should not have been dismissed.

The only basis for reconsideration invoked by the movant here is Rule 60(b)(6), which allows the court to set aside or reconsider an order or a judgment for ". . . any other reason [besides those enumerated in Rule 60(b)(1)-(5)] that justifies relief."

The court dismissed the case on October 14, 2015 because the debtor did not file its attorney's disclosure statement, schedules, statement of financial affairs, and summary of schedules. When the case was filed on September 14, the court issued a notice of incomplete filing, telling the debtor that the case may be automatically dismissed unless the debtor files the above documents no later than September 28, 2015. Docket 2.

On September 28, the debtor filed a motion for extension of the time to file the missing documents. The movant was noticed with that motion. Dockets 18 & 20. On September 29, the court entered an order authorizing an extension for filing the documents to October 12. Docket 25.

As the missing documents were not filed, the case was dismissed on October 14. Docket 34. The court was justified in dismissing the case, it did not make a mistake. The petition documents were not filed for 30 days after the petition date and the debtor did not file another motion for extension of the time to file the documents.

The movant knew of this case before it was dismissed. The movant was served with the debtor's September 28 motion for extension of the time to file the missing documents. Docket 20. In other words, the movant was aware that the case could be dismissed if the missing documents were not filed. Yet, the movant did nothing to prevent dismissal of the case. The movant did not ask the court not to dismiss the case before it was dismissed.

Furthermore, even if the court were to reconsider dismissal of the case, and assuming the movant's collateral was misappropriated by the debtor during the case, the court would still dismiss the case. The bankruptcy documents were not filed by the debtor even after the extended filing deadline. Dismissal, then, was warranted under 11 U.S.C. § 1112(b)(4)(A) and/or (B) for loss to or diminution of the estate and gross mismanagement of the estate.

Conversion to chapter 7 was never an option because it was not in the best interests of creditors. As disclosed by the debtor in its list of 20 largest unsecured creditors, the movant is the sole secured creditor in the case and its claim appears to be under-secured, meaning there would be no distribution for unsecured creditors if the case proceeded under chapter 7. The list of 20 largest unsecured creditors states that the debtor's assets have a value of approximately $125,000, about $25,000 less than the movant's $150,000 secured claim. Docket 22. The other claims on the list are unsecured.

Therefore, even if the case were converted to chapter 7 and the chapter 7 trustee recovers the 26 missing vehicles, their liquidation would be sufficient to pay only the movant's claim. Conversion would not benefit the unsecured creditors. No chapter 7 trustee is likely to do this. He or she would abandon the over-encumbered assets thereby permitting the secured creditor and the debtor to deal with one another directly.

The court will not convert a case to one under chapter 7 just to have a trustee investigate the debtor's financial affairs. If the movant wishes a judicial process to seize its collateral and account for its disposition by the debtor, it should commence a receivership in the appropriate nonbankruptcy forum.

Absent a benefit to the unsecured creditors, conversion to chapter 7 is unwarranted.

In addition to the foregoing, the debtor has not yet filed any of its schedules or statement of financial affairs. As a result, the court has not had the benefit of reviewing these documents in assessing whether conversion to chapter 7 would benefit the estate and the unsecured creditors.

Accordingly, the court is unpersuaded that the dismissal should be vacated. The motion will be denied.

4.	14-22435-A-7 14-2152 BANK OF STOCKTON V. DUGO	WILLIAM DUGO DBJ-3	MOTION FOR APPROVAL OF COMPENSATION OF DEFENDANT'S ATTORNEY 9-23-15 [74]

Final Ruling: The hearing is continued by the court to November 10, 2015 at 10:00 AM to permit Judge Russell to hear this motion. Judge Russell was the trial judge.

5.	14-22435-A-7 14-2152 BANK OF STOCKTON V. DUGO	WILLIAM DUGO GLJ-2	MOTION FOR STAY PENDING APPEAL 10-7-15 [84]

Final Ruling: The hearing is continued by the court to November 10, 2015 at 10:00 AM to permit Judge Russell to hear this motion. Judge Russell was the trial judge.

6.	15-21575-A-11 JOE L. CURTO AND L. LAVONE CURTO VS.	BR ENTERPRISES, A CALIFORNIA PARTNERSHIP	OBJECTION TO CONFIRMATION OF PLAN 10-19-15 [188]

Final Ruling: This objection has been voluntarily dismissed. Docket 219.

7. 15-21575-A-11 BR ENTERPRISES, A CALIFORNIA PARTNERSHIP — MOTION TO CONFIRM PLAN 9-10-15 [164]
HLC-10

Tentative Ruling: The hearing on the motion will be continued with respect to the issues identified by the ruling below.

Although this motion originally sought confirmation of the debtor's first amended plan, filed on September 10, 2015, the debtor is now seeking confirmation of its second amended plan, filed on October 26, 2015, only seven days before the instant November 2 hearing on this motion. Docket 205.

In the second amended plan, the debtor has incorporated language resolving confirmation objections by two dissenting classes of claims, class 2 (the secured claim of Central Valley Community Bank) and class 5 (the contingent claim of chapter 11 trustee of the BR Enterprises bankruptcy estate, Hank Spacone). Classes 2 and 5 have voted to accept the second amended plan. The dissenting class 3 claim (by the Curto Family Trust) has been extinguished by the sale of the collateral.

This leaves only the dissenting claims of Redding Community Bank unresolved. RCB holds secured proofs of claim 7 and 8, which comprise the class 1 claims in the plan, and holds a general unsecured claim for $667.28, purchased from VESTRA Resources, Inc. on September 2, 2015. RCB has voted to reject the plan and objects to the treatment of its proofs of claim 7 and 8 and the purchased VESTRA claim.

RCB's cash flow feasibility objection will be overruled. The debtor has projected at least $300,000 in sales of its unencumbered Sunset Hills lots to fund its plan. This projection is realistic and not merely speculative as the debtor has generated approximately $632,500 in gross revenue from the sale of the lots from January 2015 until now.

As to the objection that the plan violates the absolute priority rule, RCB's standing for that objection is based solely on RCB's purchased VESTRA general unsecured claim. But, that claim has been reclassified in the second amended plan, making it an unimpaired claim. It has been reclassified as a convenience class 6(a) claim that will be paid in full. And, even though RCB's class 1 claims are impaired, RCB does not have standing to raise the absolute priority rule objection based on those claims because they are secured claims. 11 U.S.C. § 1129(b)(2)(B)(ii) may be raised only by holders of unsecured claims.

Nevertheless, as RCB has not had an opportunity to pose an objection to the debtor's second amended plan, the court will continue the hearing on this motion to provide RCB with an opportunity to object to the reclassification of RCB's purchased VESTRA claim. RCB filed its objection to the first amended plan on October 19, whereas the second amended plan was not filed until October 26. Dockets 194 & 205.

The court will continue the hearing on the motion also to provide RCB with an opportunity to object to the altered treatment of RCB's class 1 claim, Claim 8. The first amended plan provided for no payment of that claim, while the second amended plan has provided for payment of the claim by the earlier of: a sale or refinance of the real property securing that claim (known as the Additional Collateral or the 2,600-acre undeveloped ranch property) or 36 months after the plan's effective date, unless the debtor successfully prosecutes an objection to the claim, filed within 60 days of the plan's effective date. The proposed

payment of claim 8 in the second amended plan includes features (such as negative amortization) which RCB has not had the opportunity to address.

The continuance is limited to the issues identified above. The continuance does not reopen the record for any other objections to the second amended plan.