UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 14, 2016 at 10:00 a.m.

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1. 16-26804-A-11 MARCO PALMA — STATUS CONFERENCE
10-13-16 [1]

Final Ruling: This status conference will be dropped from calendar given the dismissal of this case on October 31, 2016.

2. 13-35308-A-7 DOROTHY PARENT — MOTION FOR
15-2229 — SUMMARY OR PARTIAL JUDGMENT
FUKUSHIMA V. SWENDEMAN — 10-7-16 [53]

Tentative Ruling: The motion will be granted in part and denied in part.

The plaintiff, Alan Fukushima, who is the trustee in the underlying chapter 7 bankruptcy case, seeks summary judgment against the defendant, Dorothy Swendeman, as successor in interest to Robert Swendeman—her deceased husband, on the first three claims in this action, including:

(1) an avoidance claim, under which this motion seeks relief pursuant to 11 U.S.C. § 544(a)(3),

(2) determining that the lien recorded in favor of Robert Swendeman is invalid, and

(3) cancellation of cloud on title based on Cal. Civil Code § 3412.

The defendant's principal contention is that although the abstract of judgment was signed by Laurence Blunt, counsel for Mr. Swendeman, and was recorded after Mr. Swendeman had already passed away, Mr. Blunt had authority to sign the abstract, received from another agent of Mr. Swendeman, Thomas Turk. The defendant contends that Mr. Turk's and Mr. Blunt's agency relationship with Mr. Swendeman continued until they discovered Mr. Swendeman had died.

The defendant also:

- argues that Mr. Blunt had authority to sign the abstract as he also had an interest in the claim represented by the abstract (also known as "power coupled with interest") — *i.e.*, he had the authority to collect the attorney's fees and costs incurred in the litigation against Dorothy Parent, the debtor in the underlying bankruptcy case;

- argues that the plaintiff has not shown that the defendant has not ratified either Mr. Turk's or Mr. Blunt's actions prior to them discovering that Mr. Swendeman had passed away;

- challenges the evidence on the cloud on title claim;

- challenges that Dorothy Swendeman is the proper defendant in this case, given that she no longer has interest in Mr. Swendeman's claim.

In December 2008, attorney Laurence Blunt entered into a retainer agreement with Mr. Swendeman to represent him in a real estate broker commission dispute with the debtor. Under the agreement, Mr. Blunt agreed to a contingency attorney fee agreement, where the fees were to be determined by the court, and also acquired an attorney lien for fees and advanced costs, against Mr. Swendeman's claims. Docket 59, Ex. C.

The retainer agreement was not executed directly by Mr. Swendeman. It was executed by Thomas Turk as "authorized agent" for Mr. Swendeman. Docket 59, Ex. C.

Mr. Blunt, on behalf of Mr. Swendeman, litigated in state court against the debtor, to collect on a real estate broker commission. Mr. Blunt obtained a judgment in favor of Mr. Swendeman against the debtor, for $225,333.47. The judgment was entered on November 8, 2010. Mr. Swendeman died on July 14, 2011.

An abstract of the judgment, signed by Mr. Blunt, was recorded with the Tehama County Recorder on November 7, 2011. This recorded abstract arguably became a judicial lien against the debtor's 50% interest in a real property in Tehama County. Docket 59, Exs. A-B.

The debtor filed the underlying chapter 7 case on December 2, 2013. On June 10, 2015, the trustee filed an objection to Mr. Swendeman's proof of claim. The court sustained the objection and disallowed the claim in an order entered on August 25, 2015. Case No. 13-35308, Dockets 395 & 401. In its ruling, the court recognized that Mr. Blunt had no authority to file the proof of claim on behalf of Mr. Swendeman in the bankruptcy case. Case No. 13-35308, Docket 395. The trustee filed this adversary proceeding on November 30, 2015.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

Initially, whether Dorothy Swendeman is the proper defendant in this case should be decided solely by the plaintiff. To the extent the court enters a judgment in the plaintiff's favor here, that judgment would be binding only on the defendant named in this action. The court is not making any determinations as to who owns the interest in Mr. Swendeman's claim against the debtor.

The court will not enter a summary judgment on the cloud on title claim, as the evidence in support of the motion does not establish "serious injury" as prescribed by Cal. Civil Code § 3412, which provides that:

"A written instrument, in respect to which there is a reasonable apprehension

that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

If and when the court enters a judgment avoiding the lien and/or declaring it invalid, the plaintiff can record such judgment in the property's chain of title, much like a "satisfaction of judgment" can be recorded. More, if and when the court authorizes a sale of the property, the avoidance and/or determination of invalidity of Mr. Swendeman's lien against the property will be referenced, making it clear that the lien is no longer valid. There is then no reasonable apprehension that the recorded abstract "may cause serious injury." Buyers in bankruptcy purchase property free and clear of liens in bona fide dispute on regular basis, without the need of application of Cal. Civil Code § 3412. See 11 U.S.C. § 363(f)(4).

Next, the court will not give preclusive effect to determining the validity of the lien from its ruling disallowing Mr. Swendeman's proof of claim in the underlying bankruptcy case. The issue raised by the plaintiff here is not identical to the issue litigated in the objection to the proof of claim.

"Under . . . federal law, collateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding."

Hydranautics v. FilmTec Corp., 204 F.3d 880, 885 (9th Cir. 2000).

The issue litigated here is whether Mr. Blunt had the authority to execute and file an abstract of judgment on Mr. Swendeman's behalf, on November 7, 2011. The issue in connection with the disallowance of the proof of claim was whether Mr. Blunt had the authority to execute and file a proof of claim on Mr. Swendeman's behalf, on April 25, 2014. These issues are not identical as they entail different actions by Mr. Blunt on behalf of Mr. Swendeman, approximately two and one-half years apart.

The court agrees that the lien is invalid as Mr. Blunt had no authority to act on behalf of Mr. Swendeman when Mr. Blunt executed and filed the abstract of judgment.

The plaintiff has standing to challenge the validity of the subject under the bankruptcy trustee's strong arm powers of 11 U.S.C. § 544(a)(3), which provides that:

"(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--
"(1) . . .

"(2) . . . or

"(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser

exists."

Under California law, "*(a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:*

"*(1) Its revocation by the principal.*

"*(2) The death of the principal.*

"*(3) The incapacity of the principal to contract.*

"*(b) Notwithstanding subdivision (a), any bona fide transaction entered into with an agent by any person acting without actual knowledge of the revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.*

"*(c) Nothing in this section shall affect the provisions of Section 1216.*

"*(d) With respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent the provisions of this section conflict with or contravene any other provisions of the statutes of California pertaining to the proxy, the latter provisions shall prevail.*"

Cal. Civ. Code § 2356.

When Robert Swendeman passed away on July 14, 2011, the agency he created with Mr. Blunt for the collection of the judgment based on the unpaid real estate commissions, terminated. Cal. Civil Code § 2356(a)(2).

The court is not convinced that Mr. Blunt owned a specific, actual and present interest in the subject of the agency—namely the judgment and its collection. See Capital Nat'l Bank of Sacramento v. Stoll, 220 Cal. 260, 264 (1934) (requiring a specific and present property interest in the subject of the agency). Moreover, "[i]t is not sufficient that the interest is in that which is to be produced by the exercise of the power." Frink v. Roe, 70 Cal. 296, 310 (1886).

Mr. Blunt's claim to this is based on Mr. Swendeman's granting of an attorney lien on the claims to be prosecuted by Mr. Blunt on Mr. Swendeman's behalf.

The attorney lien created by the retainer agreement between Mr. Blunt and Mr. Swendeman is only for "costs advanced and attorney's fees as determined and approved by the trial Judge." Docket 59, Ex. C ¶ 7.

However, these costs and attorney's fees are recoverable under the agreement by Mr. Blunt only "*if a recovery is obtained* for Client [Mr. Swendeman]." Docket 59, Ex. C ¶ 4.

In other words, Mr. Blunt's interest in the recovery on Mr. Swendeman's claim against the debtor is contingent on Mr. Blunt's ability to recover on that claim. He has no independent interest in the claim; his interest is in that which is to be produced by the exercise of the power, namely, collection of the judgment.

And, Mr. Blunt's ability to recover on Mr. Swendeman's claim ended when Mr. Swendeman died, on July 14, 2011. When his ability to recover on Mr.

Swendeman's claim ended, his ability to recover his attorney's fees and costs ended as well, under the terms of the retainer agreement. Thus, at the time he signed and filed the abstract, Mr. Blunt had no specific, actual and present interest in the judgment.

Cal. Civil Code § 2349, which prescribes that "[a]n agent, unless specially forbidden by his principal to do so, can delegate his powers to another person . . . ," does not apply.

When Mr. Swendeman died on July 14, 2011, it was not only Mr. Blunt's agency authority that ended. Mr. Turk's agency authority from Mr. Swendeman ended as well. The court has no evidence that Mr. Turk's agency authority somehow survived Mr. Swendeman's passing.

As such, the court rejects Mr. Blunt's contention that he received authority from Mr. Swendeman via Mr. Turk to sign and file the abstract of judgment, creating the lien. Mr. Turk himself no longer had authority to act as an agent for Mr. Swendeman, when Mr. Blunt signed and filed the abstract of judgment in November 2011. Mr. Turk had no authority to give to Mr. Blunt when he signed and filed the abstract.

Mr. Blunt's reliance on Cal. Civil Code § 2355 is also misplaced. This statute prescribes when an agency is terminated, a broader question than what Cal. Civil Code § 2356(a) covers, when the power of an agent is terminated.

Under Cal. Civil Code § 2355, "[a]n agency is terminated, as to every person having notice thereof, by any of the following:

"(a) The expiration of its term.
"(b) The extinction of its subject.
"(c) The death of the agent.
"(d) The agent's renunciation of the agency.
"(e) The incapacity of the agent to act as such."

On the other hand, the issue of notice is irrelevant under Cal. Civil Code § 2356(a).

Further, the court rejects Mr. Blunt's other authorities for establishing his agency authority from Mr. Turk. The statutes and cases cited by Mr. Blunt refer to a principal's liability to third parties, when an agent for the principal acts under ostensible or apparent authority to bind or incur liability for the principal. See Cal. Civ. Code § 2356(b) (referring to third parties as "any person").

The issue here is not liability for Mr. Swendeman to third parties and Mr. Blunt is not a third-party under these circumstances. Mr. Blunt is an agent or sub-agent of Mr. Swendeman. There is no third-party liability involved for Mr. Swendeman here. The issue is strictly Mr. Blunt's authority to act on behalf of Mr. Swendeman when he signed and filed the abstract of judgment.

Section 2356(b) has no bearing on Mr. Turk's actions in acting as agent for Mr. Swendeman in connection with the 2008 retainer agreement with Mr. Blunt as there was no breach in the agency relationship between Mr. Swendeman and Mr. Turk at that time. Mr. Swendeman had not passed away yet.

Cal. Civil Code § 2334 is inapplicable. It provides: "*A principal is bound* by acts of his agent, under a merely ostensible authority, to those persons only

who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." The issue here is not whether Mr. Swendeman is bound "to . . . persons . . . who have . . . incurred a liability or parted with value . . . ." Mr. Swendeman's liability to third parties is not at issue here.

The same is true with respect to the cases by the defendant. They pertain to a principal's liability for the acts of his agent to third parties.

Furthermore, Mr. Turk was never Mr. Blunt's principal. Mr. Swendeman was always the principal of Mr. Blunt. It was based on the authority of Mr. Swendeman that Mr. Blunt was collecting on the judgment.

The retainer agreement identifies Mr. Swendeman as the "Client" of Mr. Blunt and not Mr. Turk. Mr. Turk is identified merely "as authorized agent for Robert Swendeman." Docket 59, Ex. C at 1. Mr. Blunt named Mr. Swendeman as the real party in interest and judgment creditor on the abstract of judgment. Docket 59, Ex. A at 2. Mr. Turk was never named as a party in any of the collection litigation.

And, as evident from Mr. Blunt's papers in this action, the interest in the unpaid commission and judgment was inherited by Dorothy Swendeman and is now apparently held by a family trust, not by Mr. Turk.

The court rejects the contention that Mr. Blunt continued to have authority to collect on the judgment after the passing of Mr. Swendeman because Mr. Blunt received his agency authority from Mr. Swendeman through Mr. Turk, who was merely a real estate agent associated with Mr. Swendeman prior to his passing. Incidentally, according to Mr. Blunt, "[Mr.] Turk was sent a check for payment in full of his claim [relating to the claim against the debtor] on April 9, 2011." Docket 68 at 2.

Mr. Blunt's obligations as a licensed attorney in California were to Mr. Swendeman and not to Mr. Turk. Mr. Blunt's representative authority as agent for Mr. Swendeman was not derived or dependent on the asserted agency relationship between Mr. Turk and Mr. Swendeman. Mr. Blunt's obligations to Mr. Swendeman were not dependent on what Mr. Turk or anyone else knew about Mr. Swendeman's passing.

This includes Mr. Blunt's affirmative obligation toward Mr. Swendeman to "keep [him] reasonably informed about significant developments relating to the employment or representation." California Rule of Professional Conduct 3-500. Significant developments within the meaning of California Rule of Professional Conduct 3-500 would have included the filing of an abstract of judgment to collect on the judgment.

There is no evidence in the record that Mr. Blunt ever followed up with Mr. Swendeman about the progress of the collection. Incidentally, the same is true about Mr. Blunt's communications with Mr. Turk. There is no evidence of Mr. Blunt apprising Mr. Turk of the progress of the collection at the time the abstract was signed and filed. If Mr. Turk was indeed acting as agent for Mr. Swendeman in the employment of Mr. Blunt to collect the judgment, Mr. Blunt should have kept at least Mr. Turk apprised of the collection progress. Yet, there is no evidence of Mr. Blunt keeping Mr. Swendeman or Mr. Turk "reasonably informed about significant developments relating" to the collection. Docket 65, Ex. 7; Docket 68.

Given the foregoing, the court will avoid the lien created by the filing of the abstract of judgment signed by Mr. Blunt. As a bona fide purchaser with a perfected transfer at the time of the commencement of the bankruptcy case, the plaintiff may challenge the validity of the recorded abstract of judgment on behalf of Mr. Swendeman. There is no genuine issue of material fact that Mr. Blunt had no authority from Mr. Swendeman to sign and file an abstract of the judgment entered in favor of Mr. Swendeman. The court will enter summary judgment on the plaintiff's first two claims. The motion will be denied as to the third cloud on title claim. The motion will be granted in part and denied in part.

3.	16-25217-A-11 MJH-3	WEST LANE PROPERTIES INC.	MOTION FOR CONFIRMATION OF PLAN AND FINAL APPROVAL OF DISCLOSURE STATEMENT 9-22-16 [33]

Tentative Ruling: The motion will be denied without prejudice.

The debtor is asking the court to approve on a final basis the disclosure statement filed on September 22, 2016 and confirm the chapter 11 plan attached to the disclosure statement. Docket 33.

The motion will be denied for the following reasons:

(1) There is no plan filed as a stand alone document.

(2) The plan does not provide for the claim of the California Franchise Tax Board. The Board has filed a priority proof of claim in the amount of $823.54.

(3) The plan does not set a deadline for the filing of objections to proofs of claim.

(4) The disclosure statement states that there will be no discharge for the debtor, as it is a corporation. Contra 11 U.S.C. § 1141(d)(1)(A).

(5) The plan does not provide for the actual interest rate on San Joaquin County's Tax Collector's claim.

(6) The plan does not provide for San Joaquin County's Tax Collector's full proof of claim amount. In the plan, the claim is provided for in the amount of $22,172, whereas the County filed a proof of claim in the amount of $47,468.42. The plan and disclosure statement should state what the debtor plans to do about the proof of claim, if the plan does not provide for the full amount of the proof of claim.

(7) The deadline for filing of non-governmental proofs of claim is December 13, 2016 and the deadline for filing governmental proofs of claim is February 5, 2017. The court is unwilling to confirm a plan prior to the passing of those deadlines, given that the plan does not say what will happen with proofs of claim filed post-confirmation prior to those deadlines.

Future amendments of the plan and disclosure statement should be accompanied by red/black-lined versions.

4. 16-22330-A-7 WINNIEFREDO/LORAINE MACANDOG PLC-2
16-2136 TRAVIS CREDIT UNION V. MACANDOG ET AL
MOTION TO APPROVE COMPENSATION FOR DEFENDANTS' ATTORNEY 10-17-16 [21]

Tentative Ruling: The motion will be granted.

The defendants, Winifredo and Loraine Macandog, the debtors in the underlying chapter 7 bankruptcy case, seek attorney's fees against the plaintiff, Travis Credit Union, pursuant to 11 U.S.C. § 523(d), which provides that:

"*If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.*"

The plaintiff opposes the motion as untimely arguing that the defendants' failed to file the motion within 14 days of judgment. In the alternative, the plaintiff argues that it was substantially justified in bringing its nondischargeability action.

The defendants filed a reply stating that the motion for attorney fees was timely. The reply argues that the order on the motion to dismiss that was signed by the court on September 21, 2016 but did not become final until October 7, 2016, the last day the plaintiff could file an amended complaint. The defendants also contend that the opposition does not establish that the plaintiff was substantially justified in bringing the nondischargeability action.

The defendants filed the underlying chapter 7 case on April 13, 2016. The plaintiff filed the instant adversary proceeding on July 5, 2016. The complaint contained a single claim under section 523(a)(2)(B). On August 5, 2016, the defendant filed a motion to dismiss. Docket 7. At the September 6, 2016 hearing on the motion to dismiss, the court granted the motion and allowed the plaintiff 14 days to amend its complaint. Docket 13. The court also ordered the defendants' counsel to file the order granting the motion to dismiss. Id. The plaintiff filed a notice of dismissal of case on September 20, 2016. Docket 14. At the status conference on September 21, 2016, because the defendants' counsel had not yet filed the order on the motion to dismiss, the court ordered the defendants' counsel to file the order no later than September 23, 2016. Docket 16. The defendants' counsel filed the order of dismissal, which gave the plaintiff leave to amend the complaint until October 7, 2016, and it was signed by the court on September 21, 2016. Docket 18.

This motion for attorney fees was filed on October 17, 2016. Assuming judgment was entered on September 21, 2016, the motion for attorney's fees was filed 26 days after the entry of judgement.

Federal Rule of Civil Procedure 54, incorporated by Federal Rule of Bankruptcy Procedure 7054, provides that a motion for attorney's fees must be filed no later than 14 days after entry of judgment. Fed. R. Civ. P. 54(d)(2)(B)(I); Fed. R. Bankr. P. 7054(b)(2)(A).

In contrast, the local rules for this district allow a motion for attorney's fees to be filed up to 28 days after entry of judgment. The Ninth Circuit has

held that local rules adopting different time periods for filing motions for attorney's fees are valid orders of the court for purposes of FRCP 54(d). See Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1257 (9th Cir. 1997).

Local Bankruptcy Rule 1001-1(c) provides:

"*The Federal Rule of Bankruptcy Procedure and these Local Rules govern procedure in all bankruptcy cases and bankruptcy proceedings in the Eastern District of California. The following Local Rules of Practice of the United States District Court for the Eastern District of California apply in all bankruptcy cases and proceedings: Rules 173 (Photographing, Recording or Broadcasting of Judicial Proceedings), 180 (Attorneys), 181 (Certified Students), 183 (Persons Appearing In Propria Persona), 184 (Disciplinary Proceedings Against Attorneys), 292 (Costs), and 293 (Awards of Attorneys' Fees). Except for these enumerated rules, no other Local Rules of Practice of the United States District Court for the Eastern District of California apply.*"

District Rule 293(a) provides that "[m]otions for awards of attorneys' fees to prevailing parties pursuant to statute shall be filed not later than twenty-eight (28) days after entry of final judgment."

The instant motion is timely. It was filed 26 after the court dismissed the action, in compliance with District Rule 293(a), as incorporated by Local Bankruptcy Rule 1001-1(c).

The defendants were the prevailing parties in this section 523(a)(2) proceeding as the court dismissed all claims against them; thus, section 523(d) is applicable.

To avoid a fee award under section 523(d), a creditor must show that its position is substantially justified. In re Hunt, 238 F.3d 1098, 1103 (9th Cir. 2001). That is, the creditor must show that its challenge had a reasonable basis both in law and in fact. Id.

The Bankruptcy Appellate Panel for the Ninth Circuit has held that where the bankruptcy court dismissed a creditor's nondischargeability claim under section 523(a)(2)(A) and granted the debtor's motion for summary judgment on the creditor's claim under section 523(a)(2)(B), and the creditor did not appeal or collaterally attack those determinations, the creditor could not argue that it had a reasonable factual and legal basis for its fraud claim; and therefore, the creditor could not establish the defense under section 523(d) that its position was substantially justified. See In re Machuca, 483 B.R. 726, 735–36 (B.A.P. 9th Cir. 2012).

In this section 523(a)(2)(B) adversary proceeding, the court dismissed the complaint on the basis that the assertions therein were not plausible due to limited factual support. Specifically, the court ruled that the "sole basis for asserting that there were material false statements on the loan application is that the salary and rent figures in the application are materially different from the salary and rent figures in the bankruptcy schedules, filed approximately nine months after the loan application." Docket 13 at 2. The plaintiff did not appeal or collaterally attack that determination. Although the plaintiff had leave to amend its complaint to supplement its factual basis, the plaintiff declined to do so and filed a notice of dismissal. In its opposition to this motion, the plaintiff points to fact that the court found insufficient (that the figures on the application and bankruptcy schedules differed) to argue that its position was substantially justified. Accordingly,

the plaintiff has not met its burden to defend that its position was substantially justified; and therefore, the defendant is entitled to attorney's fees under section 523(d) as the prevailing party.

Of course, the fees paid to the attorney must be reasonable and necessary. The defendants seek $2,660.00 in attorney fees and $2.96 expenses, for a total of $2,269.96 in legal fees. The time sheets submitted as an exhibit to the motion indicate that the attorney for the defendants charged an hourly rate of $350 and spent 7.5 hours researching and preparing the motion to dismiss in addition to attending multiple hearings on the motion. Docket 25, Ex. A. The court concludes that the attorney's fees are reasonable and necessary. The court also notes that the plaintiff has challenged neither the reasonableness nor the necessity of the fees.

5.	15-29136-A-12 MAS-8	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION FOR CONTEMPT 9-15-16 [342]

Tentative Ruling: The motion will be granted.

The court continued the hearing on this motion from October 17, 2016, in order to permit the debtor to file additional papers concerning its production of documents.

Creditor Ag-Seeds Unlimited (Ag) seeks an order holding debtor P&M Samra Land Investments, L.L.C., and its counsel, Noel Knight, in contempt for failure to obey a court discovery order and for sanctions of not less than $12,079.90. Ag also requests an order to show cause as to why the debtor and its counsel should not be held in criminal contempt for failure to comply with discovery.

This court has inherent authority to impose sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The authority covers a broad range of conduct that goes beyond the violation of an order. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). While it may be used to impose civil contempt sanctions, this inherent authority may be applied without resorting to contempt proceedings, but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003) (noting that the inherent sanction authority, and civil penalties in general, must either be compensatory in nature or designed to coerce compliance); see also Miller v. Cardinale (In re Deville), 280 B.R. 483, 495 (B.A.P. 9th Cir. 2002) (citing and discussing Chambers at 42-51 and Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996)).

Chambers, at 43, holds that the inherent sanction authority includes power to control admission to the court's bar and to discipline attorneys who appear before the court. See also Lehtinen at 1059 (reminding the suspended attorney that attorney disciplinary proceedings are neither civil nor criminal in nature and are not for the purpose of punishing but to maintain the integrity of the courts and the profession).

To exercise its inherent authority to sanction, a court must make explicit finding of bad faith or willful conduct, which is conduct more egregious than mere negligence or recklessness. Lehtinen at 1058.

Bad faith is determined by examining the totality of the circumstances. In re Rolland, 317 B.R. 402, 414-15 (Bankr. C.D. Cal. 2004). The misrepresentation

of facts, the unfair manipulation of the Bankruptcy Code, the history of filings and dismissals, and the presence of egregious behavior are all factors to be considered in determining whether bad faith exists." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

A finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

A violation of an order is willful when the respondent knows of the order and intentionally performs the action violating it. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002).

The court ordered a Rule 2004 examination and a document production per Ag's request on March 23, 2016. Dockets 56 & 59.

Thereafter, Ag filed a motion to compel compliance with the order and for sanctions. On June 13, the court entered an order directing the debtor to produce the documents in the subpoena and awarding compensatory sanctions against the debtor and its counsel, Noel Knight, jointly and severally.

Believing that the debtor had failed to comply with the June 13 order, Ag filed another motion to compliance and for sanctions. This prompted the debtor's promise to comply with the court's orders but then it once again failed to comply. The court granted Ag's second motion and awarded the $1,985 in sanctions jointly and severally against both the debtor and Mr. Knight. The court made detailed findings as to numerous violations of its orders. See Docket 246. The court incorporates by reference those findings and conclusions. Id.

In its order granting Ag's second motion, the court provided:

- In the event the documents are not produced to Ag's counsel by August 18, the court assesses further sanctions — calculated to coerce future compliance — jointly and severally against both the debtor and Mr. Knight, in the amount of $300 a day, for every day the documents are not produced after August 18.

- The court will also order Paul Samra to appear for a further Rule 2004 examination no later than August 29, 2016, to provide Ag-Seeds with the information he failed to disclose at the July 15 examination, on the basis that he did not know.

- In the event Paul Samra does not make himself available prior to August 29 for another Rule 2004 examination, at a time also convenient for Ag-Seeds' counsel, the court assesses further sanctions — calculated to coerce future compliance — jointly and severally against both the debtor and Noel Knight, in the amount of $200 a day, for every day Paul Samra does not make himself available for a further examination after August 29.

- The court will issue an order to show cause for why the debtor and Noel Knight should not be additionally sanctioned for their misconduct as described in this ruling. The hearing on this order shall be on September 6, 2016 at 10:00 a.m. The debtor and Mr. Knight may file any papers in connection with the order no later than August 22, 2016.

Docket 247, August 17, 2016 Order.

At the September 6, 2016 hearing on the order to show cause, the court determined that Mr. Knight and the debtor did not respond or attempt to further explain their conduct outlined in the court's ruling on Ag's second motion to compel and for sanctions, and did not address why the court should not assess additional sanctions against them, beyond the sanctions requested by Ag's second motion. Docket 318. The court then ordered the debtor and Mr. Knight, jointly and severally, to pay sanctions of $2,000. Docket 330.

Ag's instant motion establishes that Ag has not received documents from the debtor pertaining to the loans secured by the debtor's real property and has not received Quicken/Quickbooks records, ledgers, detailed income and expense statements, and the like. Docket 344.

The court continued the hearing on this motion from October 17 in order to provide the debtor with opportunity to explain what it has already produced to Ag, when it was produced, what has not been produced, and why it has not been produced. Specifically, the court instructed the debtor to have the person most knowledgeable, as required by the subpoena, execute a declaration attesting to these issues.

The debtor's further pleading concerning the document production is titled, "Debtor's Response to Court Request for History of All Document Production to AG Seeds Unlimited; Corrected with Signature Addition Page 6." Docket 418. The response consists of information about documents previously produced to Ag, how documents were produced to Ag, when documents were produced, which documents were not produced, and new documents discovered by the debtor and recently produced to Ag. Docket 418.

However, the debtor's response is wanting.

The response is executed by the debtor's counsel, Noel Knight, declaring that "I hereby attest, under penalty of perjury, that all of the above commentary on Debtor document production and submitted documentation is correct and truthful." Docket 418 at 8.

Yet, the response does not state that Mr. Knight has personal knowledge about the information in it. And, he is not the custodian of the debtor's documents, nor is he the person most knowledgeable about the debtor's affairs or its records. Throughout this proceeding, the debtor has tendered Paul Samra, its managing member, as the person most knowledgeable concerning the debtor's affairs and its books and records.

The response, while signed by Paul Samra, is signed only in his individual capacity. He has not signed it on behalf of the debtor. Docket 418 at 9.

More, his attestation that "the matters stated therein are true" is based on information and belief. "I am informed and believe . . . ." Docket 418 at 9. He is admitting that he does not necessarily have personal knowledge of the information in the response. The response says nothing about his personal knowledge of the information in the response. See Fed. R. Evid. 602.

For instance, the response refers to newly discovered documents in Hood, California. Yet, Paul Samra does not say that he discovered the documents or was present at their discovery. Paul Samra's signature and attestation merely refer to the several attestations and signatures of Noel Knight in the response, as basis for his attestation that the information in the history is true. In other words, Mr. Samra attests that, based on what Mr. Knight told

him, the facts in response are true.

In short, the signatures and attestations of Mr. Knight and Paul Samra purporting to establish and authenticate the statements in the response are meaningless.

Further, even if true, the statements in the response are vague, ambiguous and incomplete.

For example, the response provides a list of documents admittedly not produced to Ag, including, without limitation, documents relating to the transfer of assets, account books, records, ledgers, etc. Docket 418 at 5-6. Documents on the list are not numbered in sequential order and the court cannot tell whether documents are missing, they are misnumbered or the debtor is using the numbers from the subpoena to identify the documents. In the list, documents 1-6, 8-10, 14-15 and 19-21 appear to be missing. Docket 418 at 5-6. The court should not have to speculate about this.

The response also states that the documents not produced to Ag "were not available for transmission or in existence at the time of the above listed document productions, nor in our possession or control." Docket 418 at 5.

But, the court cannot tell what "not available" or "not in existence" means. As the debtor just discovered many new documents, which is discussed in more detail below, it seems the debtor had the documents, or many of them, all along — it just had not searched for them. If documents were truly not available for transmission, the debtor has not explained why they were not available. Not once has the debtor objected to the document production or sought a protective order during the last approximately eight months, identifying documents that were not available for production and explaining why they were not available. The same is true as to documents not in existence. The debtor has not identified a single document not produced because it was not in existence at the time the court entered the March 23 order.

Also, with regard to some of the missing documents, Mr. Knight further declares in another signed statement that, "I hereby attest, under penalty of perjury, that the Debtor does not have available nor maintains the following . . . Check Registers, Book Ledgers, and Bookkeeping paraphernalia." Docket 418 at 7.

Immediately after the above statement, Mr. Knight further declares that "Debtor has now acquired software to address all record keeping deficiencies." Id.

Yet, there is nothing in the response explaining why the debtor never maintained bookkeeping records. This is especially important as Paul Samra admits in a declaration that "over the past 3 years, [he] ha[s] made periodic cash disbursements to both [his] wife Manit and [his] son Steven for the purchase of parts, goods, supplies, and services for which, there may not be either invoice or receipt." Docket 418 at 11. Paul Samra's wife, Manjit Samra, also admits that "[she] may not have a receipt for [the purchase or farm related parts and supplies]." Docket 418 at 13.

These statements beg the question of why the debtor has not maintained bookkeeping, even after the filing of this case. This case has been pending for approximately one year, since November 24, 2015. And only now — one year into the case – the debtor is starting to keep records.

If not fraud, at best this is evidence of bad faith and gross mismanagement of

the debtor.

Other problematic statements follow. The response admits that the debtor has just discovered "boxes stored at its Hood, California property" containing "receipts, paper invoices, and bank statements," which will be provided to Ag. Docket 418 at 7.

The response also states that the debtor will be providing or has provided the following documents to Ag: "Scott Chau Promissory Note," "Receipt for Interest Payment to Scott Chau," "Thiel Note," "Saini Note," and "River City Bank Statements, May to August 2014." Docket 418 at 7-8.

At its "Hood, California property location," the debtor further admits to "locat[ing] about 4 more boxes containing cash receipts, payment receipts, and assorted invoices related to P & M Samra and will provide one collective PDF of content via e-mail on November 7, 2016." Docket 418 at 8.

The debtor does not say when it discovered the above documents, but it must have been after the October 17 hearing on this motion, as the documents were not mentioned prior to that date. Nevertheless, there is no explanation as to why the debtor did not look for these documents earlier. The court's March 23, 2016 document production order was entered nearly eight months ago. The question is why it has taken eight months of time consuming and expensive litigation to motivate the debtor to locate and produce these documents.

The debtor also does not say who located the new documents. This is important because there is no evidence of Paul Samra or Mr. Knight having personal knowledge as to the discovery of the documents.

The response also lists "DOCUMENTS NOT IN CONTROL OF DEBTOR WHICH CAN BE OBTAINED AND PRODUCED," including "Communications between Debtor and All Financial Institutions," "2015 and 2016 River City Bank Statements," and "2015 Bank Statements from Bank of Feather River."

But, the debtor does not say why it did not promptly obtain the above-mentioned documents.

In summary, the debtor's statements in the response (Docket 418) are unhelpful, ambiguous and lacking in crucial detail. The statements do not change the fact that the debtor's failure to immediately search for, identify, and produce the requested documents has caused approximately eight months of time-consuming and expensive litigation, not to mention violation of court order.

The debtor's statements in the response, even if true, demonstrate that the debtor has had many of the requested documents in its possession or control and that they should have been promptly located and produced to Ag. Nonetheless, the debtor ignored its responsibility to locate and produce these documents on multiple occasions, despite multiple motions for sanctions and orders of this court.

The court already issued coercive sanctions of $300 per day from and after August 18, 2016, but many of those court ordered documents were not produced by the initial October 17 hearing on this motion. See Dockets 246 & 247. The "discovery" of the documents in Hood makes this abundantly clear. See Docket 418.

Ag has requested sanctions related to attorney and court reporter time spent in

obtaining the documents in addition to coercive sanctions of $8,400 plus $300 per day from and after September 15, 2016 until the earlier of (a) the date of the hearing on this motion or (b) the actual production of the previously ordered documents.

The continued failure of the debtor to produce documents requested by Ag's March 22 subpoena and lack of disclosure of basic information about the debtor's operations by Paul Samra at the July 15 and August 29 examinations made the filing of this motion necessary. The debtor's further response to this motion demonstrates that the debtor has been engaging in willful misconduct by not locating and producing the documents required by the court's March 23 order. This is bad faith.

The court will award the requested sanctions in the amount of $21,679.90 as follows:

(1) $18,000 (representing $300 of coercive sanctions per day from August 18, 2016 through October 17, 2016), solely against the debtor;

(2) $2,695 for 6 hours of work performed by Ag' counsel at an hourly rate of $350 in preparation for unfruitful Rule 2004 examinations on July 15, 2016 and August 29, 2016, in addition to 1.8 hours spent preparing the instant motion, against the debtor; and

(3) $984.90 for work performed by the court reporter at an hourly rate of $235 at the aforementioned examinations, jointly and severally against the debtor.

The $18,000 in sanctions shall be paid to the court by a cashier check, made payable to the United States Treasury, within seven days of entry of the order on this motion. The other $3,679.90 ($2,695 + $984.90) in sanctions shall be paid by a cashier check directly to Ag' counsel, Mark Serlin, within seven days of entry of the order on this motion.

The debtor shall be prohibited from utilizing any documents not produced by the November 14 hearing date on this motion, for any claim, defense or assertion in this bankruptcy proceeding.

The above sanctions are awarded to coerce the debtor's compliance with the court's orders and compensate Ag for having to enforce its right to the documents.

The court will not issue an order to show cause regarding criminal contempt as this exceeds the jurisdiction of a bankruptcy court. The Ninth Circuit has held that a bankruptcy court may "impose civil contempt sanctions, [. . .] but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003).

The debtor filed two motions apparently in response to this motion. The first is a countermotion to extend the automatic stay and for sanctions. Docket 369. The court has not awarded any damages to the debtor that would offset the sanctions ordered herein.

The second is the debtor's October 3, 2016 "reply" to the instant motion which will be stricken because it is devoid of any evidence establishing its factual assertions, such as a declaration or affidavit. Docket 366.

The debtor's initial opposition/response to this motion lacks merit and is non-

responsive. It does not deny that the debtor has failed to produced documents requested by Ag' subpoena. It says that the debtor provided "99.9% of all chapter 12 documentation in its possession." Docket 366 at 2.

It does not deny the debtor having the documents requested by Ag's subpoena and still not received by Ag. It does nothing to explain the violations of the June 13 order.

6.	15-29136-A-12 NCK-6	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO CONFIRM PLAN 8-29-16 [264]

Tentative Ruling: The motion will be denied.

The debtor seeks confirmation of its "corrected" third amended chapter 12 plan, filed on August 29, 2016. Docket 264.

Each of the following parties has filed opposition to confirmation of the plan:

- the Socotra Fund, L.L.C., along with Gary E. Roller, trustee of the Gary E. Roller Profit Sharing Plan and the Petit Revocable Trust, dated March 29, 1999 (first mortgage holder on the debtor's farm real property);

- IRA Services Trust Co. CFBO (second mortgage holder on the debtor's farm real property) and trust settlor Shankuntala Saini;

- unsecured creditor Ag-Seeds Unlimited.

Plan confirmation will be denied for the following reasons:

(1) This case is not being prosecuted in good faith and the plan is not proposed in good faith because the debtor has repeatedly violated discovery-related orders of the court. Thus, creditors have not been able to ascertain information about the debtor's income, expenses, and operations. The court incorporates by reference its ruling on Ag's latest motion for sanctions, also being heard on this calendar, DCN MAS-8.

(2) Neither the plan nor the evidence in support of its confirmation provide sufficient detail to warrant a conclusion that it is feasible. The plan states that the debtor will implement the plan by "continuing its farming operations," but fails to elaborate with projections of revenue suggesting the plan payments will be made. Docket 266 at 7.

(3) Further, the plan's feasability apparently hinges on contributions from Stone Lake Farm Enterprises, Inc., "to the extent necessary." Id. Reliance on open-ended contributions from a third party is not likely feasible. The failure to identify an approximate amount of the contributions precludes the court from analyzing the likelihood that such contributions will be made.

(4) The arrangement with creditor Michael Thiel to pay $30 a month for the rental of a residence on the estate's real property prejudices other creditors, including the three mortgage creditors senior to the Thiel Trust, because the debtor is not receiving fair market rental value for that residence, while the plan is paying only interest to the senior mortgage creditors.

The court finds it unnecessary to address other basis for plan confirmation denial.

7. 15-29136-A-12 MAS-6 — P&M SAMRA LAND INVESTMENTS L.L.C. — MOTION TO CONVERT CASE 9-8-16 [331]

Tentative Ruling: The motion will be denied without prejudice.

The court continued the hearing on this motion from October 17, in order to assess the further filings promised by the debtor in connection with Ag's motion for sanctions.

Creditor Ag-Seeds Unlimited renews its motion to convert this case from chapter 12 to chapter 7 on the ground that the debtor has committed fraud. A prior motion to convert was denied without prejudice because it was not served correctly. That imperfection has been corrected. Docket 204. The instant motion argues that the debtor and its counsel have defied a court order to comply with a Rule 2004 examination and produce documents and that such noncompliance amounts to fraud. Also, Ag's counsel has argued that Paul Samra's wife and son have been taking cash from the debtor for their own purposes.

Secured creditor IRA Services Trust Co. CFBO, Shankuntala D. Saini, has filed a joinder in the motion. Docket 363.

Conversion of a chapter 12 case to chapter 7 may be granted pursuant to a request by the debtor under 11 U.S.C. § 1208(a) or pursuant to a request by a party in interest, such as a creditor, under 11 U.S.C. § 1208(d). But, the court may convert the case on a motion by a party in interest only "upon a showing that the debtor has committed fraud in connection with the case." 11 U.S.C. § 1208(d).

The court has seen nothing in the record before it suggesting that the debtor has committed fraud in connection with this case. The movant does not offer, and the court cannot find, any case law supporting the contention that failure to comply with court discovery orders amounts to fraud.

Specifically, the debtor's further filings in connection with the motion for sanctions indicate that there may be invoices and receipts at least for some of the cash purchases done by Paul Samra's wife and son. The debtor has apparently discovered documents that should have been produced but were not produced by the debtor to Ag pursuant to the March 23, 2016 Rule 2004 order. Docket 418. As such, the court cannot conclude that Paul Samra's wife and son have been taking cash from the debtor for their own purposes.

The movant has other remedies for the debtor's failure to obey court discovery orders, including, without limitation, relief under Fed. R. Bankr. P. 2005 and further sanctions against the debtor and the debtor's counsel. The motion will be denied without prejudice.

The court will strike the joinder to the motion. Docket 363. The civil and bankruptcy rules do not allow for the joinder of parties to motions or oppositions to motions.

8. 16-21585-A-11 — AIAD/HODA SAMUEL — STATUS CONFERENCE 3-15-16 [1]

Tentative Ruling: None.