

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 16, 2015 at 10:00 a.m.

1. 15-27601-A-11 ELK GROVE COMMUNICATIONS MOTION TO
UST-2 TOWER, INC. DISMISS CASE
10-1-15 [11]

Tentative Ruling: The motion will be denied.

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), pointing out that the debtor is not represented by counsel.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

Specific causes for conversion or dismissal are identified in 11 U.S.C. § 1112(b)(4)(A)-(P).

These instances of cause are not exhaustive, however. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is prejudicial to creditors - which is not enumerated in section 1112(b)(4) - is also cause for purposes of section 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

Another cause for conversion or dismissal under section 1112(b) is a corporate debtor's lack of counsel. Local District Rule 183(a), as incorporated by Local Bankruptcy Rule 1001-1(c), provides that "A corporation or other entity may appear only by an attorney."

The debtor, a corporation, filed this case on September 29, 2015 without the representation of an attorney licensed to practice law before this court. The bankruptcy petition was executed by the debtor's president, Donald Tenn, who is not an attorney licensed to practice law before this court. He is not listed with the California State Bar as an attorney licensed to practice law in California. Nor is he admitted to practice before this court pro hac vice.

Nevertheless, the debtor retained an attorney on or about October 26, after this motion was filed. On October 26, the debtor filed a motion for extension of the stay. Docket 25. As such, the debtor is represented by an attorney now and the lack of legal representation is no longer a cause for conversion or dismissal. Accordingly, this motion will be denied.

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

Tentative Ruling: None.

3. 14-26702-A-13 TERRY/ELLEN AMOS ORDER TO
14-2326 SHOW CAUSE
AMOS V. HSBC MORTGAGE 10-30-15 [45]
SERVICES, INC. ET AL

Tentative Ruling: The adversary proceeding will be dismissed without prejudice as to the remaining defendants in this action.

This order to show cause was issued due to the plaintiff Terry Amos' failure to prosecute this adversary proceeding. The complaint already has been dismissed as to all defendants, except for Ameriquest Mortgage Company and HSBC Mortgage Services, Inc.

A review of the docket indicates that Ameriquest and HSBC have not been served or properly served with the summons and adversary proceeding complaint. The only proof of service on file with the court, pertaining to the complaint, is Docket 9. Although this proof of service states that the summons and complaint were served on November 24, 2014, it does not state who was served or how service was addressed. And, even if the court were to assume that these defendants were served with the summons and complaint, it cannot determine whether there has been compliance with Fed. R. Bankr. P. 7004(b)(3). Ameriquest and HSBC have not made an appearance in the action either.

Also, the main case has been dismissed. Hence, this proceeding is no longer pendent to a bankruptcy. The bankruptcy court has no subject matter jurisdiction over the proceeding in the absence of a bankruptcy case.

Given the proceeding has been pending for more than a year without service, or at least proper service of Ameriquest and HSBC, and given the lack of subject matter jurisdiction, the proceeding will be dismissed without prejudice.

4. 13-23517-A-7 TRACY GATEWAY, LLC MOTION TO
15-2055 HCS-6 SET ASIDE
FUKUSHIMA V. SUTTER CENTRAL 9-22-15 [41]
VALLEY HOSPITALS ET AL

Final Ruling: The hearing on this motion was continued to February 8, 2016 at 10:00 a.m. Docket 51.

5. 14-30833-A-11 SHASTA ENTERPRISES MOTION TO
FWP-18 SELL AND PAY
10-19-15 [388]

Tentative Ruling: The motion will be granted.

The chapter 11 trustee requests authority to sell "as is" "where is" for \$140,000 cash the estate's interest in 1.52 acres of bare land on Aviation Drive in Redding, California, to Shasta View Mill, L.L.C.

Except for approximately \$1,000 in outstanding property taxes - to be paid from escrow, the property is unencumbered. The property is nonetheless subject to non-monetary encumbrances, such as easements, dedications, notices and

redevelopments. The sale is subject to such non-monetary encumbrances.

The trustee also asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h), asks for a good faith finding under section 363(m), and asks for approval of the payment of the real estate commission.

The trustee seeks permission to pay the following from escrow:

- property taxes (both outstanding and pro-rated),
- typical closing/escrow costs, and
- broker's commission (aggregate of 5% to be shared with the buyer's broker).

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. The sale will generate approximately \$129,000 for the estate, for distribution to creditors of the estate. Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

The court will waive the 14-day period of Rule 6004(h), will make a good faith finding under section 363(m) with respect to Shasta View, and will authorize payment of the real estate commission to MERIT, the estate's broker, under MERIT's terms of employment.

6. 13-34541-A-11 6056 SYCAMORE TERRACE MOTION TO
CAH-25 L.L.C. APPROVE DISCLOSURE STATEMENT
9-22-15 [321]

Tentative Ruling: The motion will be granted and the disclosure statement filed on September 22, 2015 (Docket 324) will be approved, subject to the debtor an amendment stating the outcome of the adversary proceeding involving the debtor and Mahboob Tehranian.

7. 13-21454-A-11 TRAINING TOWARD SELF MOTION FOR
CAH-37 RELIANCE, A CALIFORNIA FINAL DECREE
10-13-15 [369]

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 U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor is asking the court to close the case and enter a final decree, contending that the plan was confirmed, that payments under the confirmed plan are being made, that the debtor is current on quarterly fees to the U.S. Trustee, and that there are no pending motions or adversary proceedings.

11 U.S.C. § 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Similarly, Fed. R. Bankr. P. 3022 provides that "[a]fter an estate is fully

administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

In the chapter 11 context, courts have defined full administration as substantial consummation. In re Wade, 991 F.2d 402, 406 n.2 (7th Cir. 1993) (citing In re BankEast Corp., 132 B.R. 665, 668 n.3 (Bankr. D.N.H. 1991)). Substantial consummation is defined by section 1101(2) as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."

This court confirmed the debtor's chapter 11 plan on May 28, 2015. Docket 358. The confirmation order is final. Property has reverted in the debtor pursuant to the terms of the plan. Docket 358 at 19. According to the debtor, the confirmed plan does not contemplate the transfer of any property.

Given that the debtors are current on their plan payments, that they have continued to operate their business under the terms of their confirmed plan, and given that there are no outstanding motions or adversary proceedings, substantial consummation has been achieved. Accordingly, the court will enter a final decree and close the case. The motion will be granted.

8. 15-25059-A-12 TIMOTHY WILSON MOTION TO
JPJ-1 DISMISS CASE
10-6-15 [32]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case. The trustee cites 11 U.S.C. § 1208(c)(1), which provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

More, 11 U.S.C. § 1221 provides: "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

The debtor opposes dismissal, citing three excuses for not meeting the 90-day deadline of section 1221 and filing his plan on October 30, 2015.

This case was filed on June 24, 2015. Thus, the 90-day deadline for filing of the debtor's chapter 12 plan was September 22, 2015. The debtor did not file a plan until after this motion was filed. This motion was filed on October 6 and the debtor filed his plan on October 30. Docket 40.

However, the requirement in section 1221 requiring that a plan be filed is mandatory. The statute prescribes that "[t]he debtor shall file a plan." And, while section 1221 contemplates that the court may extend the 90-day deadline, the debtor did not request an extension of the deadline prior to the expiration of the deadline. Nor has the debtor justified the failure to request an extension before expiration of the deadline.

The first excuse offered by the debtor is the need to wait for a secured to file a proof of claim. Conceivably this might explain the failure to propose a plan but it does not explain the failure to seek an extension of the 90-day deadline.

Similarly, the debtor's eight-day evacuation from his home and business in September 2015 due to the Butte fire did not prevent his attorney from moving for an extension of the deadline.

The debtor's last excuse - that his counsel "was called away from the office due to a family emergency" - also fails to explain why an extension was not requested before the expiration of the deadline.

The court sympathizes with any emergency the debtor's counsel may have had. But, the motion mentions no dates during which the debtor's counsel was away from the office. This is important as the 90-day deadline ended on September 22 and, as the court recalls, the debtor's counsel made appearances before the court in other matters in the second part of August, after his returning to the office from the family emergency. The court also notes that there is no declaration in support of the opposition from the debtor's counsel. Given the foregoing, the court cannot excuse the debtor from failing to comply with the 90-day deadline.

The debtor's failure to file a plan within 90 days of the voluntary petition date is cause for dismissal. The motion will be granted and the case will be dismissed.

9. 11-34464-A-7 STUART SMITS ORDER TO
11-2636 APPEAR FOR EXAMINATION (STUART
BARDIS V. SMITS LANSING SMITS)
10-14-15 [61]

Tentative Ruling: None. The respondent and judgment debtor shall appear and be sworn in prior to the court's November 16, 2015 10:00 a.m. calendar.

10. 15-20796-A-12 SILVIA LEPE MOTION TO
JPJ-1 DISMISS CASE
10-9-15 [43]

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 debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for

cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

This case was filed on February 2, 2015. The debtor filed a plan on March 18, 2015 but the court denied confirmation on April 27. Since then, the debtor has not filed another chapter 12 plan. This is unreasonable delay that is prejudicial to creditors and it is cause for dismissal.

The court also notes that the principal secured creditor in the case obtained relief from the automatic stay on August 28, 2015, including relief under 11 U.S.C. § 362(d)(4). Docket 42. This is further cause for dismissal as that creditor's claim is secured by the debtor's only real property and income-generating asset, thus making her reorganization futile. Accordingly, the motion will be granted and the case will be dismissed.