UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 30, 2015 at 10:00 a.m.

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1. 15-23700-A-12 JOE/MARIA PIMENTEL — OBJECTION TO CLAIM
JPJ-1
VS. ACCLAIM CREDIT TECHNOLOGIES — 9-24-15 [48]

Final Ruling: This objection to proof of claim has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1)(A). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. 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 objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained.

The chapter 12 trustee objects to the general unsecured proof of claim of Acclaim Credit Technologies, POC 21 for $1,745.30, filed on September 8, 2015. The basis for the objection is that the proof of claim is untimely, as it was filed after the non-governmental bar date of August 31, 2015.

The court agrees and a review of the case docket shows that there has been no request for extension of that deadline. Accordingly, the claim will be disallowed as untimely.

2. 15-27601-A-11 ELK GROVE COMMUNICATIONS TOWER, INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY
COUNTY OF SACRAMENTO VS. — 10-1-15 [8]

Tentative Ruling: The motion will be granted.

The hearing on this motion was continued from November 2. A ruling on the merits follows below.

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.

From the foregoing, the court infers that the filing of this case 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).

The court rejects the debtor's contention that the movant has not proven that the filing of this case was part of a scheme to delay, hinder, or defraud creditors. Short of the debtor admitting that the filing of this case was part of a scheme to delay, hinder, or defraud creditors, there is never direct evidence of the debtor's intent in filing a bankruptcy case. The court may only infer intent from the surrounding circumstances, including the debtor's history of filings. Given this debtor's history of prior bankruptcies - as outlined above, this court infers that the filing of this case is part of a scheme to delay, hinder, or defraud creditors.

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.

3. 15-27601-A-11 ELK GROVE COMMUNICATIONS TOWER, INC. — STATUS CONFERENCE 9-29-15 [1]

Tentative Ruling: None.

4. 15-27601-A-11 UST-2 ELK GROVE COMMUNICATIONS TOWER, INC. — MOTION TO 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.

5. 15-25059-A-12 TIMOTHY WILSON — OBJECTION TO EXEMPTIONS 9-11-15 [28]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

6. 15-25059-A-12 TIMOTHY WILSON — MOTION TO CONFIRM CHAPTER 12 PLAN
WW-1 — 10-30-15 [38]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

7. 15-25059-A-12 TIMOTHY WILSON — MOTION TO VALUE COLLATERAL
WW-2
VS. UMPQUA BANK — 11-2-15 [43]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

8. 15-25059-A-12 TIMOTHY WILSON — MOTION TO VALUE COLLATERAL
WW-3
VS. GEORGE AND SYLVIA NIU — 11-2-15 [46]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

9. 15-25059-A-12 TIMOTHY WILSON — MOTION TO VALUE COLLATERAL
WW-4
VS. SHIRLEY SITNER — 11-2-15 [49]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

10. 15-25059-A-12 TIMOTHY WILSON — MOTION TO AVOID LIEN
WW-5
VS. COMMERCIAL EQUIPMENT LEASE CORP., ET AL. — 11-2-15 [51]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

11. 15-25059-A-12 TIMOTHY WILSON — MOTION TO AVOID LIEN
WW-6
VS. SUSQUEHANNA COMMERCIAL FINANCE, INC. — 11-2-15 [55]

Final Ruling: This matter will be dismissed as moot because the case was dismissed on November 18, 2015.

12. 14-28468-A-11 BUALAI WHITE — MOTION TO CONFIRM PLAN
MRL-10 — 7-7-15 [161]

Tentative Ruling: The motion will be granted.

The debtor asks the court to confirm the chapter 11 plan filed on July 7, 2015. Docket 161. Subject to reviewing the tabulation of ballots at the hearing, the court is prepared to confirm the plan.

13. 15-24471-A-7 DHANA MORANT
15-2172 SDB-1
MORANT V. UNITED STATES OF AMERICA INTERNAL REVENUE

MOTION FOR ENTRY OF DEFAULT JUDGMENT
10-19-15 [14]

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 defendant, the IRS, 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 plaintiff, Dhana Morant, who is the debtor in the underlying chapter 7 bankruptcy case, Case No. 15-24471, moves for default judgment on its claim to have the income taxes owed for 2004, 2005, 2006, 2007, 2008 and 2009 declared dischargeable. The plaintiff received a chapter 7 discharge in the underlying bankruptcy case on August 31, 2015. The underlying case was filed on June 1, 2015.

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

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

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

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

11 U.S.C. § 523(a)(1) and (a)(7) provide that:

"*(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–*

"*(1) for a tax or a customs duty –*

"*(A) of the kind and for the periods specified in section 507(a)(3) [claims in involuntary cases] or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;*

"*(B) with respect to which a return, or equivalent report or notice, if required –*

"*(i) was not filed or given; or*

"*(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or*

"*(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;*

"*. . .*

"*(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty –*

"*(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or*

"*(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.*"

11 U.S.C. § 507(a)(8) provides that:

"*(a) The following expenses and claims have priority in the following order:*

"*. . .*

"*(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--*

"*(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--*

"*(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;*

"*(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--*

"*(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and*

"*(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or*

"*(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.*"

Therefore, for income taxes to be discharged in bankruptcy, the plaintiff must satisfy all the following:

(1) The tax payer must not have made a fraudulent return or willfully attempted in any manner to evade or defeat the taxes. 11 U.S.C. § 523(a)(1)(C).

(2) The return for the taxes must have been last due, including extensions, at least three years before the petition filing date. 11 U.S.C. § 523(a)(1)(A); 11 U.S.C. § 507(a)(8)(A)(i).

(3) The tax payer must have filed a return for the tax obligation to be discharged at least two years prior to the petition date. 11 U.S.C. § 523(a)(1)(B)(ii).

(4) The tax debt to be discharged must have been assessed by the taxing authority at least 240 days prior to the petition filing date, as provided in 11 U.S.C. § 507(a)(8)(A)(ii), or if the taxes were not assessed before the filing of the petition, the taxes are not assessable as provided in 11 U.S.C. § 507(a)(8)(A)(iii).

The court has no evidence indicating or suggesting that the plaintiff prepared or filed a fraudulent return, or willfully attempted in any manner to evade or defeat the subject taxes. The last return for the taxes in question (2009) was last due on or about April 15, 2010. The plaintiff's chapter 7 case, on the other hand, was filed on June 1, 2015, more than three years later.

Further, the court has evidence that the plaintiff filed timely returns for each of the tax years for which she is seeking a declaration of dischargeability. Docket 16. And, the 240-day assessment rule does not apply here as the taxes were self-assessed when the plaintiff filed her returns. Accordingly, the plaintiff's taxes owed for 2004, 2005, 2006, 2007, 2008 and 2009 are dischargeable and will be declared as such.

Finally, the defendant's default was entered on October 15, 2015 and this motion was filed on October 19, 2015. Docket 10. The defendant has made no appearance in this adversary proceeding. Hence, this motion will be granted and the court will enter a default judgment in favor of the plaintiff. The plaintiff shall lodge both an order granting this motion and a judgment corresponding to this ruling.

14. 15-24471-A-7 DHANA MORANT — STATUS CONFERENCE
15-2172 — 8-27-15 [1]
MORANT V. UNITED STATES OF AMERICA INTERNAL REVENUE

Final Ruling: The status conference hearing will be dropped from calendar as moot. No appearance is required.

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

Tentative Ruling: The motion will be granted.

The debtor asks the court to confirm its chapter 11 plan (third amended) filed on November 23, 2015. Docket 230.

As the objections by Redding Bank of Commerce have been resolved by agreement, the court is prepared to confirm the plan, subject to reviewing the tabulation of ballots at the hearing and subject to the debtor confirming that the November 23 plan alters solely RBC's claims.

16. 15-25781-A-12 GLORIA AVILA — MOTION TO CONFIRM CHAPTER 12 PLAN 10-15-15 [18]
TOG-3

Tentative Ruling: The motion will be denied.

The debtor is seeking confirmation of her chapter 12 plan filed on October 15, 2015. Docket 22. Wilmington Trust National Association (Ocwen Loan Servicing), however, objects to plan confirmation. Docket 29.

The motion will be denied because the plan does not provide for the payment of any pre-petition arrears to Wilmington. Wilmington asserts it is owed approximately $27,906 in pre-petition arrears. The plan does not deny the existence of pre-petition arrears.

Wilmington has also noted that there is a co-borrower on Wilmington's loan, an individual named Roberto Domingo. While Mr. Domingo is not a debtor in this case, this raises a question of whether Mr. Domingo owns an interest in the debtor's real property. There is nothing in the record to clarify this. The debtor's Schedule A says only that the debtor own a fee simple interest in the property. It does not say, however, that the debtor owns 100% interest in the property. This must be clarified by the debtor.

The court will overrule the other objections by Wilmington.

The plan is not attempting to strip down Wilmington's claim to the value of the property without a motion. The plan unequivocally states that Wilmington's "claim is fully secured and will be paid in full by debtor." Docket 22 at 4.

Further, the objection to the proposed 4.75% interest rate will be overruled because Wilmington has produced no evidence in support of its confirmation objection that the proposed 4.75 interest rate is inconsistent with Till.

The Supreme Court decided in Till v. SCS Credit Corp., 541 U.S. 465 (2004), that the appropriate interest rate is determined by the "formula approach." This approach requires the court to take the national prime rate in order to reflect the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate it for the loan's opportunity costs, inflation, and a slight risk of default.

The bankruptcy court is required to adjust this rate for a greater risk of default posed by a bankruptcy debtor. This upward adjustment depends on a variety of factors, including the nature of the security, and the plan's feasibility and duration. Cf. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir. 1990); In re Camino Real Landscape Main. Contrs., Inc., 818 F.2d 1503 (9th Cir. 1987).

To set the appropriate rate, the court is required to conduct an "objective inquiry" into the appropriate rate. The debtor's bankruptcy statements and schedules may be culled for the evidence to support an interest rate.

"Moreover, starting from a concededly *low* estimate and adjusting *upward* places

the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing. . . ." Till at 479.

But, there is no admissible evidence from Wilmington, in the form of declaration or affidavit in support of its objection, of its assertion that the loan should be repaid at a higher than the proposed 4.75% rate.

The same is true with respect to the contention that a 15-year reamortization of Wilmington's loan is impermissible. There is no evidence from Wilmington that such a loan term is unreasonable. Nor does Wilmington explain why a 15-year reamortization is unreasonable. It only argues that "twelve years [beyond the proposed three-year plan] is too great a time to extend the maturity of the loan." Docket 29 at 2.

17. 14-31890-A-11 SHAINA LISNAWATI — STATUS CONFERENCE 12-6-14 [1]

Tentative Ruling: None.