

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

December 21, 2017, at 10:00 a.m.

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1. [17-22347-E-11](#) UNITED CHARTER LLC MOTION FOR RELIEF FROM
MET-1 Jeffrey Goodrich AUTOMATIC STAY AND/OR MOTION
FOR TURNOVER OF CASH
EAST WEST BANK VS. COLLATERAL, MOTION TO APPOINT
TRUSTEE, MOTION TO DISMISS CASE,
MOTION/APPLICATION TO CONVERT
CASE FROM CHAPTER 11 TO CHAPTER
7
11-22-17 [80]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on November 22, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is denied without prejudice.

East West Bank ("Movant") seeks relief from the automatic stay with respect to United Charter LLC's ("Debtor in Possession") real property commonly known as 1904, 1908, 1912, 1916, 1920, 1928,

1936 Weber Avenue, 1881 E. Market Street, 1617, 1555, 1531, 1523 E. Main Street, Stockton, California (“Property”). Movant has provided multiple declarations to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The L. Kurth DeMoss Declaration states that there are seven pre-petition payments in default, with a pre-petition arrearage of \$783,312.79. Dckt. 84. Pursuant to a cash collateral stipulation, the Declaration provides evidence that Movant has received \$31,477.98 in payments as of November 2, 2017.

The DeMoss Declaration mentions an auction for the Property through auctioneer Ten-X and states that a review of the website during the auction showed bids of \$4.5 million, \$5.5 million, and then \$7 million at the end of the auction. That testimony is further explained and clarified by the Declaration of Mary Tang. Dckt. 83. The Tang Declaration states that the Property did not sell for \$7 million as listed on the Ten-X website; instead, the highest bid received was \$3 million.

Grounds Stated with Particularity (FED. R. BANKR. P. 9013) Upon Which the Requested Relief Is Based

The Motion for Relief From the Automatic Stay states with particularity the following grounds as the basis for the requested relief:

“The Motion is based upon cause, lack of adequate protection, and lack of equity. In the alternative, Movant requests that the Court issue an order requiring a Chapter 11 Trustee to be appointed, the case dismissed, or the case be converted to Chapter 7.

The Bankruptcy Court has jurisdiction over this proceeding pursuant to 11 U.S.C. §362, 28 U.S.C. §157 and §1334, and it is a core proceeding within the definition of 28 U.S.C. §157(b).

On or about April 7, 2017, UNITED CHARTER LLC (“Debtor”) filed a Petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of California, Division of Sacramento, Case No. 17-22347.

This Motion is based upon the Notice of Hearing, the Motion, the Memorandum of Points and Authorities, the Declarations of L. Kurth DeMoss, Colin Morrison, and Mary Ellmann Tang, the Exhibits to the Motion Notice of Hearing, and the pleadings on file herein, the records and files in this action, and upon such further oral and documentary evidence as may be presented.”

Motion, p. 2:2–15.

On its face, the “grounds” appear to be the “factual finding” by Movant that there is a “lack of equity” in the Property, as well as Movant’s legal conclusions that cause exists and that Movant’s interests are not adequately protected. There is little for the court to consider as “grounds,” but merely adopt the legal conclusions and one factual finding of Movant. As discussed below, such pleading does not satisfy the basic

law and motion pleading requirements of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

It may be that Movant asserts that the court can canvas the notice of hearing, the points and authorities, three declarations, all of the exhibits, all of the pleadings filed in this case, and the records and files in this bankruptcy case, as well as whatever else Movant (without regard to the Local Bankruptcy Rules for the proper filing of pleadings and evidence) dumps on the court at the hearing. Then from canvassing everything above, the court can then draft for Movant the grounds and state them as required by Federal Rule of Bankruptcy Procedure 9013 for Movant. As discussed below, the court declines the opportunity to provide such legal services for a party in a contested matter or adversary proceeding.

DEBTOR IN POSSESSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION

Debtor in Possession filed a Memorandum of Points and Authorities in Opposition on December 11, 2017. Dckt. 103. Debtor in Possession disagrees with Movant's portrayal of the condition of the Property, of Debtor in Possession's rehabilitation efforts, and with Debtor in Possession's compliance with the cash collateral stipulation.

Debtor in Possession relates that a property tenant in August 2016 was discovered operating an illegal marijuana business and had rewired the electrical wiring and built illegal interior walls and ceilings. Debtor in Possession was required to make numerous repairs to comply with building codes and to restore power. While those repairs were happening, Debtor in Possession was not receiving rental income and was unable to make its monthly mortgage payments, leading to default. Debtor in Possession filed this case to prevent a foreclosure sale.

Debtor in Possession argues that improvements have been made to the Property as well, including install a fence around more than fifteen acres, cleaning up all trash, removing weeds, trimming overgrown grass, and removing broken window glass. Currently, Debtor in Possession states that there are no uncorrected citations by the City of Stockton or any other government agency.

When the Property was offered at auction through Ten-X, Debtor in Possession did not receive a successful third-party bid that was sufficient to Movant's secured claim. Debtor in Possession decided to list the Property for sale in the local market and tried to secure a tenant in the interim period before a potential sale.

Debtor in Possession heard from seven prospective tenants, six of whom have shown a strong interest in leasing the Property. Two potential tenants signed leases that await court approval, two are waiting for approval from the City of Stockton, and two have withdrawn interest because of city requirements. The remaining potential tenant is Wal-Mart, who has not yet clarified its interest.

For the two tenants awaiting court approval, Debtor in Possession states that they will lease 38,000 square feet and add \$9,000.00 per month in the first year to Debtor in Possession's gross revenue from the Property. Debtor in Possession expects the monthly gross from those two leases to increase to \$10,500.00 in their second years.

The other two leases would cover 30,000 square feet and add approximately \$7,000.00 per month to Debtor in Possession's gross revenue from the Property. A lease by Wal-Mart could be for 45,000.00 square feet and could add between \$15,000.00 and \$18,000.00 per month to gross revenue. Debtor in Possession is also finalizing a listing agreement for the Property with a broker, John Anderson.

In contrast to Movant's contention, Debtor in Possession argues that the April 10, 2017 property taxes were paid late because of a misunderstanding about whether there was authority to pay the taxes. For the "irregular" payments, Debtor in Possession argues that irregularity is not an event of default under the cash collateral stipulation. Additionally, for the one notice of default issued, Debtor in Possession cured the default.

Debtor in Possession argues that Movant has not calculated the cash collateral stipulation correctly. Debtor in Possession interprets the stipulation to require it to pay to Movant all net rents collected, after payment of \$7,785.00 in monthly expenses and after paying the April 10, 2017 property taxes. Debtor in Possession argues that the most recent Operating Report for October 2017 shows Movant being overpaid, when \$23,713.00 was due and \$31,477.98 was paid. *Compare* Dckt. 98 (Operating Report), *with* Dckt. 84 (DeMoss Declaration stating that \$31,477.98 was paid).

Debtor in Possession states that a Plan of Reorganization and Disclosure Statement have been drafted and are being finalized and will show Movant as the only creditor with a secured claim.

Debtor in Possession contends that its actions in prosecuting this case do not warrant granting relief from the automatic stay for Movant. To Debtor in Possession, Movant's accusations are misleading in a case that is being prosecuted in good faith.

DISCUSSION

As indicated above, the present Motion suffers from several pleading issues. Before getting to the substance of the Motion, the court first addresses Movant's election to combine multiple claims for different types of relief in one motion.

Multiple Claims for Relief Combined into One Motion

The court notes that this Motion attempts to join multiple claims for relief in one motion. The Motion seeks different types of relief, based on different legal authorities, in this one Motion. These multiple claims for relief are stated as:

- A. Grant Relief from the Automatic Stay
- B. Order Debtor to Turn Over Cash Collateral to Movant (sounding as a mandatory injunction)
- C. Appoint a Chapter 11 Trustee
- D. Dismiss the Case

E. Convert the Case to Chapter 7

Motion, p. 2:16–21. The first states a claim for relief arising under 11 U.S.C. § 362. The second appears to be requesting a mandatory injunction for Debtor in Possession to deliver collateral to Movant. The third distinct request for relief is the appointment of a trustee, dismissal of a case, or conversion to Chapter 7 (the court required to consider these three alternatives when presented with a motion seeking relief of any of the other two).

Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow a party to join as many claims as it may have against an opposing party in a complaint. However, for the bankruptcy court's contested matter practice (motions and applications not made in an adversary proceeding), the United States Supreme Court has not included Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018. Federal Rule of Bankruptcy Procedure 9014(b). Though this court may make such Rule 7018 provisions applicable in a contested matter, it has not done so for this contested matter, and Movant has not requested such application of Rule 7018 in this Contested Matter. Federal Rule of Bankruptcy Procedure 9014 does not provide a mechanism for a party to unilaterally impose the application in a contested matter.

The reason for the Supreme Court not allowing a party to combine various different claims for relief into one motion, as opposed to a complaint, is founded on several very practical principles. First, in a contested matter, the hearing can be conducted within fourteen to twenty-eight days. LOCAL BANKR. R. 9014-1(f); FED. R. BANKR. P. 9006(d), 2002. This can be contrasted to an adversary proceeding in which the responsive pleadings are not due until thirty-days after the issuance of a summons, no substantive motion generally not heard until nine to twelve months into the adversary proceeding, and the trial being conducted eighteen to twenty-four months after the complaint is filed.

Second, a motion may be only between the debtor and movant, such as a motion for relief from the automatic stay, or it may be between the movant and the world, such as a motion to dismiss, convert, or appoint a trustee. Throwing different claims for different relief in one motion can create a procedural mess of a conflicting “maybe they are, but maybe they are not, parties in interest” situation.

Request for “Turn Over” of Property of the Bankruptcy Estate

Included in the prayer of the Motion, Movant demands that the court order Debtor in Possession (though the motion states to have “Debtor” turn over the property of the estate, the court presumes that Movant actually is referencing Debtor in Possession, who is actually in possession of property of the bankruptcy estate) turn over “Cash Collateral” to Movant. The Motion does not state what grounds exist and any legal authority for the court to order such a “turn over” of the cash collateral.

In the twenty-page Points and Authorities, Movant provides a two-page discussion of “cash collateral. Dckt. 82 at 9–10. In the two pages, the legal discussion (which does not constitute grounds stated with particularity in the motion) why the court “must” order that the cash collateral be “turned over” to Movant consists of :

“Movant duly filed a Notice of Perfection pursuant to § 546(b) on April 24, 2017. See Doc. #14. No other creditors claim an interest in the rents generated by the Property. Accordingly, the Court should order the Debtor to turn over the Cash Collateral to Movant.”

Id., at 2:18–21. That statement reads in the general nature of the now clearly disapproved assertion that 11 U.S.C. § 105(a) empowers a bankruptcy judge to order whatever he or she thinks “right,” notwithstanding any legal authority for such exercise of federal judicial power. *Stern v. Marshall*, 564 U.S. 462 (2011).

The Supreme Court has expressly provided in Federal Rule of Bankruptcy Procedure 7001(7) that a request for injunctive relief, such as a mandatory injunction requiring an opposing party to do something, must be by adversary proceeding. An exception is a proceeding to compel the debtor to deliver property to the trustee or a proceeding under 11 U.S.C. § 554(b) (compelling abandonment of property by a trustee, which abandonment is then made to the debtor) or § 725 (disposition of property not otherwise administered by a Chapter 7 trustee).

Interestingly, the term “turnover” and the court issuing an order for “turn over” of property arises under 11 U.S.C. § 542 and § 543, in which by motion the bankruptcy trustee may obtain an order for other persons to “turn over” property of the estate to the trustee. Movant is not a trustee and is not entitled to assert rights to have property of the estate “turned over” to Movant by virtue of a motion filed with the court.

Review of Minimum Pleading Requirements for a Motion

As addressed above, the Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. Fed. R. Bankr. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. See 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a

contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Review of Points and Authorities Grounds for Relief from Automatic Stay

While inappropriate as a pleading device by Movant, the court has reviewed the portion of Movant's Memorandum of Points and Authorities relating to the request for relief from the automatic stay to see if there is anything in the nature of irreparable harm that has been inadequately pleaded by Movant. Movant presents the following six arguments for cause under 11 U.S.C. § 362(d)(1):

1. A confirmable plan is not possible;
2. The auction requirement of \$7.8 million price demonstrates that Debtor in Possession is not reasonable about settling debts;
3. Debtor in Possession has purposely failed to pay property taxes;
4. Cash collateral payments have been irregular;
5. Continued property violations are negatively affecting the Property; and
6. Debtor in Possession's actions regarding the auction may have been harmful to the Property's value.

The court is unpersuaded by any of the six arguments presented by Movant. First, a confirmable plan may be possible in this case. Movant presents its first argument on the grounds that the Property valuation and Debtor in Possession income are too low to pay debts through a Plan. Debtor in Possession has countered by describing how there may be several tenants in the near future that will increase gross revenue dramatically enough to fund a plan. The court declines to rule prematurely that a plan is not possible when Debtor in Possession presents evidence that a plan is being finalized and that more income could be arriving shortly (once the court approves lease agreements).

Second, Movant's entire argument that the auction price was unreasonable is based upon an assertion that Debtor in Possession "was being greedy." Dckt. 82 at 12:21-22. Merely seeking to receive a higher bid than the liabilities in this case is not indicative of greediness, and Movant's assertion is not conclusive proof of any act that warrants granting relief from the automatic stay. Movant has not presented any support for its "greediness" argument.

Third, Debtor in Possession has argued that property taxes were paid, despite Movant's assertion that they were not. Additionally, Debtor in Possession argues that the delay in paying them was due to a question of whether there was authority to pay them under the cash collateral stipulation. The court's latest order approving the continued use of cash collateral allocates \$3,800.00 in monthly expenses for county property taxes, estimated to be paid as \$22,800.00 semi-annually. Dckt. 77.

Fourth, irregularity of payments is not actually argued as being a ground for relief. Debtor in Possession has demonstrated that it has cured all defaults, but regardless, Movant only asserts that there have been a few "problems" receiving payments. Movant does not actually argue that any of the problems justify the court granting relief from the automatic stay.

Fifth, while Movant argues that it does not have confirmation that the marijuana violations have been resolved and that other tidiness violations have been issued, Debtor in Possession has provided a substantial timeline of events demonstrating how all violations have been cured. Debtor in Possession even asserts that as of now there are no violations on the Property asserted by the City of Stockton.

Sixth, Movant argues that redacting the minimum price for the Property at auction and that “increasing the bids to \$4.5 million and \$5.5 million” may have dampened the bidding process. As before, that contention is unsupported by any factual or legal basis, and Movant does not actually argue that its unsupported speculation is worthy of the court granting relief.

Under 11 U.S.C. § 362(d)(2), Movant argues that there is no equity in the Property valued at \$4,580,000.00 with encumbrances of \$5,357,181.59. Movant also alleges that the Property is not necessary for an effective reorganization because they are not generating sufficient revenue. As Debtor in Possession has presented, there may a significant increase in revenue in the near future, and the Property is necessary to generate those leasehold funds.

Movant’s Motion for Relief from the Automatic Stay is lacking and has been rebutted sufficiently for the court to determine that denying the Motion is appropriate. The court does not reach or address the additional requested relief. Denial of the Motion is without prejudice.

Additional Issues Raised By the Motion

In Movant’s twenty pages of arguments, citations, quotations, conjecture, and speculation (the Points and Authorities) there is a passing reference made to an issue that may be significant in this case. If Movant had prepared a motion to convert, appoint a trustee, or dismiss, the issue may have been identified and advanced for the court to consider.

The relevant comments include:

United Cabinet Supply (“UCS”), an entity owned by Zhang (the president and responsible representative of the Debtor in Possession), occupies space at the Properties and pays \$6,000 per month in rent. UCS and other tenants have been late on lease payments causing delayed cash collateral payments to Movant. (Tang Decl. ¶10.)

The September Cash Collateral check was received by Movant’s counsel on October 18, 2017, but the amount of the check was only \$3,235.00. Debtor’s counsel explained that UCS and JAS Trucking paid late. (Tang Decl. ¶10.)

...

As evident in the Statement of Financial Affairs, between August 5, 2016 and March 28, 2017, the Debtor paid Raymond Zhang (“Zhang”) \$344,409.37, which was within the one year period prior to filing this case. Zhang is a co-borrower on the Note and managing member of Debtor (See Declaration for Non-Individual Debtor, Docket #12, p. 1).”

Dckt. 14 at 4:5–10; 5:11–14.

The above, if proven, may well be a basis for concluding that Debtor and Mr. Zhang have irreconcilable conflicts and are unable to serve as Debtor in Possession. However, when just thrown into a motion for relief from the stay, they are lost in the clutter of twenty pages of points and authorities and a motion instructing the court to read everything else in the file to identify the actual grounds asserted.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by East West Bank (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

All further and other relief beyond relief from the automatic stay is denied without prejudice.