UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

January 6, 2014 at 10:00 a.m.

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1. 09-42310-A-12 ERIC ANTHEUNISSE — MOTION TO DISMISS CASE
IRS-1 — 11-19-13 [188]

Tentative Ruling: The motion will be denied.

The IRS moves for dismissal because the debtor has not been complying with applicable non-bankruptcy law - namely, the filing of tax returns and payment of taxes - after the confirmation of his chapter 12 plan on April 15, 2010. Docket 127.

The movant has produced evidence that the debtor has not filed his 2011 and 2012 income tax returns, and has not filed his fourth quarter 2010, third and fourth quarters 2012, and first quarter 2013 employment tax returns. The debtor also owes $4,481.43 on account of his 2010 income taxes and owes $3,019.71 for employment taxes. Docket 190.

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 . . . (6) material default by the debtor with respect to a term of a confirmed plan."

In section 6.02, the debtor's confirmed chapter 12 plan states that "Debtor's financial and business affairs shall be conducted in accordance with applicable non-bankruptcy law including the timely filing of tax returns and payment of taxes." Docket 127 at 9.

The debtor has produced evidence that he paid his 2010 income tax liability, he filed his 2011 and 2012 tax returns, paid his taxes for 2011 and 2012, filed the fourth quarter 2010 employment return, filed the third and fourth quarters 2012 employment returns, filed the first quarter 2013 employment return, and paid his employment tax liabilities. Docket 198 & 199.

Given that debtor that has filed the required returns and paid applicable taxes, albeit tardily, the motion will be denied.

2. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C. — MOTION TO EMPLOY
CAH-2 — 12-6-13 [12]

Tentative Ruling: The motion will be denied without prejudice.

The debtor requests approval to employ C. Anthony Hughes as counsel for the debtor's estate, effective November 14, 2013. The proposed attorney will assist the debtor in the administration and prosecution of this case.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including . . . on a contingent fee basis."

The motion will be denied. Mr. Hughes received a pre-petition retainer of $7,500 for his services in this case that was paid by a third-party, Krystyna Trzepla. Yet, the motion does not explain Ms. Trzepla's interest in the debtor, her relationship with the debtor's principal, Hossein Bozorgzad, why is she paying Mr. Hughes' fees as opposed to the debtor, and why is Mr. Bozorgzad not paying Mr. Hughes' fees. The court needs this information to assess Mr. Hughes' disinterestedness.

Further, Mr. Hughes' supporting declaration has not been executed under the penalty of perjury. Docket 14.

3. 11-28942-A-11 JAMES/MANUELA NORTON — MOTION TO CONVERT OR DISMISS CASE 9-19-13 [265]
UST-1

Tentative Ruling: Assuming the court confirms the debtors' chapter 11 plan, this motion will be denied. In the event the court does not confirm the plan, the court will take up the merits of this motion. A ruling on the merits follows below.

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

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that: the debtors have not timely filed their monthly operating reports for October 2012 and May and June 2013; and this case has been pending for approximately 2.5 years without an order approving a disclosure statement or confirming a plan.

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."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (B) gross mismanagement of the estate; . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter. . . ." 11 U.S.C. § 1112(b)(4)(A), (B), (F). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtors did not file their October 2012 operating report until October 4,

2013, after this motion was filed, and they have not explained why the report had not been filed on time. They also have not explained why their February, May and June 2013 reports were filed late, on March 24, 2013, June 25, 2013, and July 21, 2013, respectively. They merely question the actions of their existing attorney. Docket 280.

But, aside from the issues pertaining to the late-filed operating reports, this case has been pending for 2.5 years without an approved disclosure statement and without a confirmed plan. The debtors are now seeking to replace their counsel because they are obviously dissatisfied with the services of their existing counsel.

The 2.5-year delay to obtain plan confirmation is cause for the granting of this motion. It has taken the debtors 2.5 years to determine that they need new counsel who can complete their relatively simple chapter 11 case. The debtors have five real properties, including four rentals, and have tax debt of less than $4,000. They do not run a business and their source of income is solely from employment - Mr. Norton is an electronic technician and Mrs. Norton is a realtor.

The court is not willing to give the debtors additional time to obtain plan confirmation. 2.5 years is more than sufficient time for the debtors to obtain plan confirmation. The debtors' desire to replace their existing counsel serves as an admission of their inability to obtain plan confirmation during the last 2.5 years this case has been pending. The court is not persuaded that the debtors can confirm a plan in this proceeding.

In reaching this conclusions, the court also notes that their opposition to the motion does not have evidence that they are able to confirm a plan. The only supporting declaration to the opposition, executed by Mrs. Norton, states nothing about the debtors' ability to fund a plan. Their real properties have an aggregate value of $1,914,000, whereas the debt secured by the properties totals approximately $3,040,776. See Schedule A.

As the debtors have listed no unsecured debt in Schedule F, other than the undersecured portion of their real property debt and $396 in medical bills, the court is perplexed at how they will secure an acceptance of the plan by the general unsecured creditors. The absolute priority rule is also an issue as the debtors are retaining property without paying 100% dividend to the general unsecured creditors. The debtors' latest plan offers to pay only a 5.5% dividend to general unsecured creditors. Docket 269 at 18. This is further reason why the court is not persuaded that the debtors are able to confirm a plan, even if the court were to gave them additional time.

Given the foregoing, there is cause for dismissal or conversion under 11 U.S.C. § 1112(b)(1).

As an aside note, the court is strongly suspicious that the debtors have not listed all of their debt in the schedules. For instance, aside from $3,984 in outstanding taxes and $396 in medical bills, the only unsecured debt in the schedules is the under-secured portion of the real property debt. It is difficult for the court to believe that the debtors have no credit card or other consumer unsecured debt.

The debtors' real properties are all over-encumbered and their personal property is either exempt or of inconsequential value to the estate. The only personal property of the debtors that is not claimed as exempt is $425 in

miscellaneous costume jewelry. Dismissal rather than conversion then is in the best interest of the creditors and the estate. The motion will be granted and the case will be dismissed.

4. 11-28942-A-11 JAMES/MANUELA NORTON — MOTION TO CONFIRM PLAN
WW-3 — 11-25-13 [290]

Tentative Ruling: The motion will be conditionally granted.

The debtors ask the court to confirm their chapter 11 plan.

The prior plan proposed by the debtor was filed along with a disclosure statement. Dockets 239 & 240. The debtors have filed two newer versions of their disclosure statements since February 18, 2013. Dockets 254, 269. But, they have not filed corresponding newer versions of their plan.

The court needs to be sure that there is a plan on the docket that tracks the terms of the last version of the debtors' disclosure statement, approved by the court on November 12, 2013. Docket 269, 283.

Also, the debtors have not submitted the order for the November 12, 2013 approval of their disclosure statement. Docket 283. The debtors must correct this deficiency.

Subject to the foregoing and subject to the court reviewing the tabulation of ballots at the hearing, the court is prepared to confirm the plan.

5. 09-33746-A-13 ARSENIO/MARTHA SANTOS — MOTION TO DISMISS
13-2346 — NLG-1 — 12-3-13 [8]
SANTOS ET AL V. BAC HOME LOANS SERVICING, L.P. ET AL.,

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

Defendants BAC Home Loans Servicing and Seterus, Inc., seek dismissal of all the claims in the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The plaintiffs, Arsenio and Martha Santos, the debtors in the underlying chapter 13 bankruptcy case, oppose the motion.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The subject complaint contains six causes of action:

(1) a request for declaratory relief that the plaintiffs met the requirements of the Troubled Asset Relief Program's Home Affordable Modification Program,

(2) breach of the trial period plan agreement with Seterus,

(3) breach of the servicer participant agreement with BAC Home Loans Servicing,

(4) promissory estoppel,

(5) breach of the implied covenant of good faith and fair dealing, and

(6) violations of Cal. Bus. & Prof. Code §§ 17200, et seq.

The basic dispute in this proceeding is whether the plaintiffs satisfied the requirements for a loan modification and whether the defendants were required to grant them a loan modification.

The motion will be granted to the extent the claims are seeking the imposition of a loan modification on the defendants. The plaintiffs have asked the defendants to approve a short sale of the property as to which they were seeking a loan modification with the defendants. The defendants have represented to this court that they have approved the short sale of the property. Obtaining approval of a short sale by the plaintiffs is inconsistent with any loan modification. Seeking a loan modification indicates an intent to remain on the property, whereas seeking the approval of a short sale reflects an intent to sell the property. Thus, all claims will be dismissed to the extent the plaintiffs are seeking the imposition of a loan modification.

Further, claim one - a disguised HAMP violation claim - will be dismissed in its entirety without leave to amend because the plaintiffs do not have a private right of action under HAMP. Manabat v. Sierra Pac. Mortgage Co., Case No. CV F 10-1018 LJO JLT, 2010 WL 2574161, at *11 (E.D. Cal. June 25, 2010). Although claim one is formulated as a request for relief, it asks for a declaration that the defendants violated HAMP.

As to the remaining aspect of claims two through six, the motion will be denied. The motion has introduced matters outside the complaint, namely, allegations in a supporting declaration that the plaintiffs did not satisfy the loan modification requirements imposed on them. Claims two through six hinge on whether the plaintiffs satisfied all loan modification requirements.

For instance, claim five - breach of the implied covenant of good faith and fair dealing - presumes the existence of a contract, implying that the plaintiffs satisfied the loan modification requirements.

A covenant of good faith and fair dealing exists in every contract, requiring each party to act in good faith and fair dealing in its performance not to deny the opposing party the benefit of the bargain. Zendejas v. GMAC Wholesale Mortg. Corp., Case No. 1:10-CV-00184 OWW GSA, 2010 WL 2490975, at *7 (E.D. Cal. June 16, 2010) (citing to Carma Developers, Inc. v. Marathon Development California, Inc., 2 Cal. 4th 342, 371 (1992)). "A prerequisite for any . . . [*sic*] action for breach of this covenant is the existence of a contractual relationship between the parties, because the covenant is an implied term in the contract." Zendejas at *7 (citing to Smith v. San Francisco, 225 Cal. App. 3d 38, 49 (1990)).

Additionally, while claim six - violations of Cal. Bus. & Prof. Code §§ 17200, et seq. - implicates the asserted HAMP violations by the defendants, claim six is much broader than just an unlawful business practice. Unfair competition is defined to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Thus, the practice in question does not have to be unlawful. It

may be unfair or fraudulent as well.

The plaintiffs' assertions that the defendants were involved in unfair or fraudulent business practices necessarily implicates the plaintiffs' satisfaction of the loan modification requirements. If the plaintiffs did not satisfy all loan modification requirements, they would not be able to claim that the defendants' practices resulting in the denial of the loan modification were unfair or deceptive.

The complaint states that the plaintiffs met all loan modification requirements.

Hence, the court cannot resolve the motion on the merits of claims two through six without considering matters outside the complaint, *i.e.*, the defendants' evidence that the plaintiffs did not satisfy all modification requirements.

However, as this adversary proceeding was filed only on November 3, 2013 and the parties have not had the opportunity to conduct discovery, the court will not convert this motion to a motion for summary judgment. Except as stated above, the motion will be denied with respect to claims two through six.

The motion will be granted in part and denied in part.

6. 11-47056-A-11 HILL TOP L.L.C. MOTION TO DISMISS CASE
MRL-9 12-13-13 [160]

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

The debtor seeks the because dismissal of this case because creditors have obtained relief from stay to satisfy their claims by foreclosing on the debtor's principal assets.

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."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

The creditors holding claims secured by the parcels have both obtained relief from stay to exercise their state law remedies. Valley Community Bank obtained relief from stay as to one of the parcels in 2012 and Dr. Norman Nedde obtained relief from stay as to the other parcel just in October 2013. The sole purpose for the debtor's existence was to develop the parcels and build hotel and restaurant space. The debtor's only other assets are approximately $7,475, listed in Amended Schedule B. Docket 28.

Given the foregoing, there is no likelihood of reorganization or rehabilitation for the debtor. As the debtor's assets total only approximately $7,475, dismissal is in the best interest of the estate. Administering $7,475 in assets is cost prohibitive when one accounts for administrative expenses. The motion will be granted and the case will be dismissed.

7. 13-33582-A-11 RIVER CITY CAR WASH L.L.C. STATUS CONFERENCE
10-21-13 [1]

Tentative Ruling: None.

8. 13-33582-A-11 RIVER CITY CAR WASH L.L.C. MOTION FOR
FWP-1 RELIEF FROM AUTOMATIC STAY
NORTH VALLEY BANK VS. 12-4-13 [50]

Tentative Ruling: The motion will be granted.

The movant, North Valley Bank, seeks relief from the automatic stay as to a real property in West Sacramento, California (645 Harbor Blvd). The debtor operates a car wash business from the property.

The property has a value of approximately $1,261,881 and it is encumbered by claims totaling approximately $2,095,582, consisting of the movant's sole mortgage against the property. See also Schedule A (stating that the movant's claim totals $1,931,315). Thus, there is no equity in the property.

As to necessity to an effective reorganization, the debtor has the burden to establish necessity to an effective reorganization, when the moving creditor has shown that its claim is undersecured. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376.

While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

As this case was filed on October 21, 2013, this motion is being heard within four months of filing.

Although the debtor has the burden of persuasion to establish that there is a realistic prospect of effective reorganization, there is no evidence from the debtor on this point. There is only one declaration in support of the opposition, the declaration of Stacy Carbonel. Docket 58. That declaration does not say anything about the debtor's ability to reorganize. In fact, the declaration says that "I am in the process of working on financial projections." Docket 58 ¶ 9. Hence, the debtor has not carried its burden to establish a realistic prospect of effective reorganization.

This motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(1), which requires oppositions with evidence to be filed within 14 days prior to the hearing on the motion.

Solely based on the foregoing, relief from stay under 11 U.S.C. § 362(d)(2) is warranted.

In reaching its conclusion that relief from stay is warranted, the court also notes that the debtor's sole potential source of income is the car wash business currently operated by the debtor from the subject property. Docket 58 ¶ 9. The debtor's only other commercial property (649 Harbor Blvd) was foreclosed before this case was filed.

Additionally, the debtor is being operated by Stacy Carbonel, who took control of the business in August 2013, pursuant to a state court order in a marital dissolution proceeding, after her former spouse operated the business for six years. Docket 58 ¶¶ 3-5.

In other words, the debtor is proposing to fund a chapter 11 plan with the proceeds from a being operated by a person who has been in control of the business for only four months.

We are in December 2013 and, in the court's experience, car wash businesses are seasonal, meaning that the business is generating little or no income at this time. And, the debtor is being managed by a person who does not have the experience of operating the debtor even for one annual cycle.

Given the above facts and given the absence of probative evidence from the debtor, relief from stay under 11 U.S.C. § 362(d)(2) will be granted.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

9. 13-33582-A-11 JDM-2 — RIVER CITY CAR WASH L.L.C. — MOTION TO USE CASH COLLATERAL 12-23-13 [60]

Tentative Ruling: The motion will be denied because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions. This violates Local Bankruptcy Rule 9014-1(d)(6), which provides: "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e)."

10. 13-35293-A-11 — CORTNEY WELLS LAND & INVESTMENT PROPERTIES, — STATUS CONFERENCE 12-2-13 [1]

Final Ruling: The status conference is dropped from calendar as moot because the case was dismissed on December 13, 2013.