UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

January 8, 2018 at 10:00 a.m.

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1. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C. — MOTION FOR RELIEF FROM AUTOMATIC STAY
BAL-1 — 10-23-17 [69]
ARDEN FAIR ASSOCIATES, L.P. VS.

Tentative Ruling: The motion will be disposed as provided in the ruling below.

The hearing on this motion was continued from December 11, 2017, in order for the debtor to proceed with a request for relief from the forfeiture. The court has not yet heard from the debtor on whether relief from the forfeiture has been granted. An amended ruling from December 11 follows.

The movant, Arden Fair Associates, L.P, seeks relief from the automatic stay with respect to a commercial real property in Sacramento, California. The debtor has been leasing the property from the movant. The debtor failed to make pre-petition payments to the movant under the lease agreement. On or about May 11, 2017, the movant served the debtor with a 10-day notice to pay or quit. The notice declared a forfeiture of the lease. He debtor did not pay or quit the premises, allowing the notice to expire.

The movant filed and unlawful detainer action against the debtor on July 3, 2017. Judgment for possession was entered on August 10, 2017 against the debtor, terminating the lease and entitling the movant to obtain possession of the property. Docket 74, Ex. 5. A writ of possession was issued on August 29, 2017. Docket 74, Ex. 6.

If the debtor has obtained a relief from forfeiture, the court expects that the debtor will be assuming the lease prior to the deadline for the assumption or rejection of leases. As such, this motion will be denied without prejudice.

On the other hand, if the debtor has not obtained forfeiture relief, the motion will be granted to allow the movant to obtain possession of the subject property, in accordance with the state court's orders and judgment.

The court will not permit the debtor to attack the state court's judgment here. The Rooker-Feldman doctrine precludes this court from setting aside the state court's judgment for possession. There is no "ministerial entry of judgment" exception to Rooker-Feldman.

And, the debtor has no ownership interest in the property. The debtor is unable to assume the lease because its tenancy interest terminated before this case was filed upon expiration of the ten-day notice on or about May 22, 2017. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989).

2.	17-26125-A-11 GEL-5	FIRST CAPITAL RETAIL, L.L.C.	MOTION FOR ORDER AVOIDING PREFERENTIAL TRANSFER, DIRECTING TURN OVER AND MANDATING DELIVERY OF FROZEN FUNDS 11-8-17 [110]

Tentative Ruling: The motion will be dismissed.

The hearing on this motion was continued from November 27, 2017 pursuant to the request of the movant. There have been no new filings related to the motion. The unaltered ruling from November 27 follows.

The debtor in possession seeks an order avoiding (under 11 U.S.C. § 547) and recovering $214,932.33 in frozen funds that are in the debtor's First Data Merchant Services credit card processing account. First Data is credit card processing servicer. The funds were frozen pursuant to an August 2, 2017 New York information subpoena with restraining notice (akin to an order of examination lien under California law) served on First Data by creditor MCA Recovery, L.L.C., the assignee of Yellowstone Capital West, which obtained a pre-petition judgment for $354,137.49 against the debtor.

The motion will be dismissed because it was not served on creditor MCA. While the debtor served MCA's attorney, unless the attorney agreed to accept service in connection with this bankruptcy case, such service is insufficient. See, e.g., Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (B.A.P. 9th Cir. 2004). See Docket 116.

The court also does not understand the role of Yellowstone Capital West in this proceeding. On one hand, the motion says that Yellowstone assigned its judgment against the debtor to MCA prior to the September 14, 2017 petition date. Docket 110 at 3. On the other hand, the motion keeps referring to post-petition contacts between the debtor and Yellowstone in an effort to resolve the debtor's claim to the subject funds. Docket 110 at 4 ¶ 13.

Service on Yellowstone is deficient because it too was not served with the motion. Purported counsel for Yellowstone was not served either. See Docket 116.

Service on First Data was also deficient. From the three addresses given for First Data on the motion's proof of service, one is directed to First Data's counsel in violation of Villar, one is not addressed at all in violation of Fed. R. Bankr. P. 7004(b)(3), and while another is directed to First Data's agent for service of process (Corporation Services Company), it is addressed to "Officer." Docket 116 at 2.

Even in the absence of the foregoing service deficiencies, avoidance of the alleged transfer would be denied. The court cannot determine the extent, validity, or priority of an interest in property in connection with a motion. Such relief requires an adversary proceeding. See Fed. R. Bankr. P. 7001(2).

Further, the issue of turnover is not within the scope of 11 U.S.C. § 543(a) & (b), which applies only to custodians defined by section 101(11). It limits custodians to "appointed" "receiver[s] or trustee[s]," "assignee[s] under a general assignment for the benefit of the debtor's creditors," or "trustee[s], receiver[s], or agent[s] under applicable law, or under a contract, . . . appointed or authorized to take charge of property of the debtor *for the purpose of enforcing a lien against such property*, or for the purpose *of*

general administration of such property for the benefit of the debtor's creditors." 11 U.S.C. § 101(11)(A)-(C).

First Data does not fit within any of those categories. It is not a trustee or receiver and it is not an agent enforcing a lien against such property or administering the property for the benefit of the debtor's creditors.

Also, to the extent the motion asks the court to avoid a preferential transfer, such relief requires an adversary proceeding. See Fed. R. Bankr. P. 7001

Finally, the relief requested by the debtor might be more properly sought by demanding that a party holding security interest in such property return the debtor to possession pursuant to United States v. Whiting Pools, Inc., 462 U.S. 198, 209-10 (1983) (holding that the IRS must turn over to the debtor under 11 U.S.C. § 542(a) property that it had seized to enforce a tax lien, but which property had not been sold yet).

"*Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale. . . . Until such a sale takes place, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a).*"

Whiting Pools at 211.

Here, First Data is merely holding the funds pursuant to instructions of MCA. See N.Y. C.P.L.R. § 5222(b). In other words, while MCA has some control over the funds, MCA has not gained possession of the funds and applied them to its judgment against the debtor. As such, under Whiting Pools, the funds still belong to the debtor and section 542(a) would still require turnover of those funds to the bankruptcy estate. Notwithstanding the turnover and subject to a subsequent successful avoidance action, MCA's lien against the funds, if any, would remain.

3.	17-26125-A-11 GEL-11	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO EXTEND TIME O.S.T. 1-2-18 [218]

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

The debtor in possession moves for a 90-day extension, from January 12, 2018 through April 12, 2018, of the time to assume or reject 16 non-residential leases.

The motion erroneously states that it is seeking the extension for 15 leases. Although the court granted relief from the automatic stay as to the lease associated with Macerich Vintage Faire, L.P., the debtor intends to oppose the unlawful detainer action the landlord will be filing against the debtor.

The debtor originally had 17 leases, but it is not seeking an extension with regard to the lease with Sunrise Mall Property, L.L.C. The court granted relief from the automatic stay as to this lease and the debtor is no longer operating at that location.

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 rights and duties in the assumption or rejection of

any executory contract or unexpired lease of the debtor pursuant to 11 U.S.C. § 365(a).

An unexpired nonresidential real property lease "shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of- (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan." 11 U.S.C. § 365(d)(4)(A).

However, the court may extend the period to assume or reject for 90 days, "prior to the expiration of the 120-day period," on a motion of the trustee. 11 U.S.C. § 365(d)(4)(B)(i). "If the court grants an extension under [section 365(d)(4)(B)(i)], the court may grant a subsequent extension only upon prior written consent of the lessor in each instance." 11 U.S.C. § 365(d)(4)(B)(ii).

"*Thus, under BAPCPA, both the debtor and the court must act within 120 days for the debtor to obtain an extension of time.*

"*However, the applicable statutory language of BAPCPA regarding an extension of time is quite different than the statutory language regarding assumption. In the latter case, unlike a request for an extension of time, § 365(d)(4) makes no mention of a court order, and is, for the most part unchanged by BAPCPA: Pre-BAPCPA provided that 'if the trustee does not assume or reject within 60 days after the date of the order for relief ... then such lease is deemed rejected....' Post-BAPCPA provides: 'an unexpired lease shall be deemed rejected ... if the trustee does not assume or reject the unexpired lease by the earlier of (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming the plan.'*

"*Thus, under BAPCPA, Congress changed the rules regarding extensions of time, but did not change § 365(d)(4) to require a court order within 120 days when a debtor timely files a motion requesting the court to approve the assumption of a lease.*

"*Moreover, the court in [Turgeon v. Victoria Station Inc. (In re Victoria Station, Inc.), 840 F.2d 682] stated that bankruptcy courts, as courts of equity 'are compelled to disfavor a lease forfeiture that would imperil the debtor's reorganization and impede rehabilitative goals.' Victoria Station, 840 F.2d. at 684. Nothing in BAPCPA abolishes or undermines this policy.*

". . . .

"*BAPCPA did not overrule Victoria Station.*"

In re R. Ring Enterprises, Inc., Case No. 08-44903 EDJ, 2009 WL 779800, at *2-3 (Bankr. N.D. Cal., Feb. 19, 2009).

The factors in deciding whether to extend the time to assume or reject leases include:

"*1. Whether the lease is the primary asset of the debtor.*
2. Whether the lessor has a reversionary interest in the building built by the debtor on the landlord's land.
3. Whether the debtor has had time to intelligently appraise its financial situation and potential value of its assets in terms of the formulation of a

plan.
4. Whether the lessor continues to receive the rent required in the lease.
5. Whether the lessor will be damaged beyond the compensation available under the Bankruptcy Code due to the debtor's continued occupation.
6. Whether the case is exceptionally complex and involves a large number of leases.
7. Whether the need exists for a judicial determination of whether the lease is a disguised security interest.
8. Whether the debtor has failed or is unable to formulate a plan when it has had more than enough time to do so.
9. Any other factors bearing on whether the debtor has had a reasonable amount of time to decide to assume or reject the lease."

In re Ernst Home Ctr., Inc. and EDC, Inc., 209 B.R. 974, 980 (Bankr. W.D. Wash. 1997); see also Willamette Water Front, Ltd. v. Victoria Station, Inc. (In re Victoria Station, Inc.), 88 B.R. 231, 236 (B.A.P. 9th Cir. 1988), aff'd, 875 F.2d 1380 (9th Cir. 1989).

The last day for the debtor to assume or reject the subject leases is January 12, 2018. The motion then is timely as it was filed on January 2, 2018 and will be heard on January 8.

The debtor's business operation hinges on having leases for its Cinnabon, Auntie Anne's, and Mrs. Fields franchises. Without the leases, the debtor would be unable to operate and generate revenue, and thus would be unable to reorganize. The leases, in other words, are indispensable to the debtor's survival.

This case also has more than the usual number of leases, making it more factually complex than other chapter 11 cases.

The debtor has produced evidence that a third party is doing its due diligence to determine if it wishes to purchase the managing member's equity in the debtor and assume complete control of the debtor. This third party will be obtaining financing of between $5 to $7.25 million to restructure the debtor's finances and cure all lease arrears. Pre-petition lease arrears total approximately $1.281 million.

While evidence of the likelihood of an equity purchase and financing is thin, the debtor is continuing to make post-petition lease payments on 12 of the 15 leases.

Accordingly, the court is willing to extend the deadline for assumption or rejection of leases until April 12, 2018, as to leases:

- that are post-petition current,
- of property where the debtor is still actually operating,
- that may have been forfeited but as to which the debtor intends to seek relief from forfeiture.

As such, the court will not extend the deadline for assumption or rejection as to the following leases:

1) Westfield Century City – Cinnabon. The debtor is not current on this lease and it is not operating on the property.

2) Westfield Century City – Auntie Anne's'. The debtor is not current on this

lease and it is not operating on the property.

3) Westfield Oakridge – Mrs. Fields. The debtor is not current on this lease and it is not operating on the property.

The court also needs the debtor to clarify whether it is operating at the properties associated with the following leases:

- 5050 Montclair Plaza Lane Owner, L.L.C.;
- Arden Fair Associates, L.P.;
- GGP Northridge Fashion Center, L.P.
- Macerich Vintage Faire, L.P.

The debtor should also clarify why it does not list 5050 Montclair Plaza Lane Owner, L.L.C., on the exhibit list of leases. See Docket 221.

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

4. 17-23129-A-13 TIMOTHY NEHER — MOTION TO SET ASIDE
17-2175 TLN-19
JOINER V. NEHER — 11-28-17 [14]

Tentative Ruling: The motion will be granted.

Defendant Timothy Neher asks the court to set aside the November 20 entry of his default, arguing he was not properly served with the summons and complaint. Docket 11.

The motion is timely, as it was filed on November 28, only eight days after the entry of default.

The court agrees that the summons and complaint were not properly served on the defendant.

Under Fed. R. Bankr. P. 7004(b)(1), service on individuals must be by "first class mail . . . by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession." However, if the individual is a debtor, Fed. R. Bankr. P. 7004(b)(9) requires service on the debtor be made by first class mail "until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing." [Emphasis added.]

The summons and complaint were served on the defendant on September 21, 2017 via first class mail on the defendant at 702 Mangrove Avenue, #248 Chico, California 95926 address, which the defendant admits is his "business address." Docket 6; Docket 14 at 4. But, it is not the address on the petition.

The defendant is the debtor in the underlying chapter 13 case. The address he had listed on the petition, as of the time the summons and complaint were served (September 21), was 4289 Kathy Lane Chico, CA 95973. Case No. 17-23129, Docket 1 at 2. As such, service under Rule 7004(b)(9) was required at the 4289 Kathy Lane address. Although the defendant was not served by first class mail at that address, according to the plaintiff he was personally served at 4289 Kathy Lane. Docket 6.

The defendant was also personally served while he was at 4289 Kathy Lane Chico, CA 95973. Docket 6. If this services actually occurred, it was sufficient. Fed. R. Civ. P. 4(e), as incorporated by Fed. R. Bankr. P. 7004(a)(1), permits the summons and complaint to be personally served on a defendant. However, the defendant denies that he was personally served with the summons and complaint. He claims he was out of town on September 21 and could not have been served at 4289 Kathy Lane on that date. The defendant contends that he found the summons and complaint at his business address, 702 Mangrove Avenue, #248 Chico, California 95926, on November 17. Docket 14 at 4, 9-10 (not as numbered).

The defendant has produced several receipts showing that on September 21 at 1:31 p.m., he was in Livermore; in Sacramento at 3:29 p.m.; and in Lodi at 5:14 p.m. Docket 21 at 6-7 (not as numbered). The defendant states that his work keeps him on the road most of the time. Docket 21 at 2-3.

The receipts show that the defendant could not have been at 4289 Kathy Lane Chico, CA between 3:45 and 4:00 p.m. on September 21, when the plaintiff says he served the defendant. Docket 19 at 2.

Given the receipts produced by the defendant, which demonstrate that he was not in Chico on September 21, and given the defendant's statements in his declaration specifically denying seeing the summons and complaint until November 17, the court concludes that the debtor was not properly served.

Further, there is a strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. See Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974) (noting that default judgments are generally disfavored); Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991). "[W]henever it is reasonably possible, cases should be decided on their merits." Schwab at 355.

The plaintiff has not asserted that he would be prejudiced if the default is set aside.

Accordingly, the motion will be granted and the default will be set aside.

5. 17-27528-A-11 THE FOUNDATION OF HUMAN UNDERSTANDING — STATUS CONFERENCE 11-15-17 [1]

Tentative Ruling: None.

FINAL RULINGS BEGIN HERE

6. 17-25004-A-11 SARINA BRYSON — MOTION FOR RELIEF FROM AUTOMATIC STAY
BDA-1 — 12-5-17 [57]
BMW BANK OF NORTH AMERICA VS.

Final Ruling: The motion will be dismissed without prejudice.

The notice of hearing is not accurate. It states that written opposition need not be filed by the respondent. Instead, the notice advises the respondent to oppose the motion by appearing at the hearing and raising any opposition orally at the hearing. Docket 58 at 2. This is appropriate only for a motion set for hearing on less than 28 days of notice. See Local Bankruptcy Rule 9014-1(f)(2). However, because 28 days or more of notice of the hearing was given in this instance, Local Bankruptcy Rule 9014-1(f)(1) is applicable. It specifies that written opposition must be filed and served at least 14 days prior to the hearing. Local Bankruptcy Rule 9014-1(f)(1)(B). The respondent was told not to file and serve written opposition even though this was necessary. Therefore, notice was materially deficient.

In short, if the movant gives 28 days or more of notice of the hearing, it does not have the option of pretending the motion has been set for hearing on less than 28 days of notice and dispensing with the court's requirement that written opposition be filed.

7. 15-27448-A-7 JOHN/SHAWNTA ODUM — MOTION TO DISMISS ADVERSARY PROCEEDING
16-2036 NOS-4 — 12-8-17 [51]
TOWNEPLACE MANAGEMENT, L.L.C. ET AL., V. ODUM ET AL.,

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 defendants, the trustee, 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 complaint will be dismissed.

The plaintiff, Geoffrey Richards, the trustee in the underlying chapter 7 case, seeks dismissal of the adversary proceeding. The complaint pleads a revocation of discharge claim pursuant to 11 U.S.C. section 727.

Under Fed. R. Civ. P. 41(a)(1), as made applicable here via Fed. R. Bankr. P. 7041, "*the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.*"

Fed. R. Civ. P. 41(a)(2) prescribes that "*Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a*

counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

The defendants answered the complaint without asserting any counterclaims. See Docket 13.

As the plaintiff no longer desires to prosecute the action, the court will dismiss it pursuant to Rule 41(a)(2). The motion will be granted.

8. 15-27448-A-7 JOHN/SHAWNTA ODUM — STATUS CONFERENCE
16-2036 — 2-23-16 [1]
TOWNEPLACE MANAGEMENT, L.L.C. ET AL., VS.
ODUM ET AL

Final Ruling: Given the dismissal of the adversary proceeding, the conference is adjourned.

9. 16-22654-A-7 MARC LIM — MOTION TO
16-2202 RJR-2 — DISMISS ADVERSARY PROCEEDING
CHICK'S PRODUCE, INC. ET AL., VS. LIM — 11-15-17 [60]

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 defendants, the trustee, 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 complaint will be dismissed.

The plaintiffs, Chick's Produce Inc. and Del Fresh Produce, Inc., seek dismissal of their complaint against the defendant, Marc Y. Lim, the debtor in the underlying chapter 7 case, contending that they have reached a settlement and no longer wish to prosecute the action.

Under Fed. R. Civ. P. 41(a)(1), as made applicable here via Fed. R. Bankr. P. 7041, "*the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.*"

Fed. R. Civ. P. 41(a)(2) prescribes that "*Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.*"

The complaint seeks to determine the dischargeability of certain debts owed to

plaintiffs pursuant to 11 U.S.C. sections 523(a)(4) and 523(a)(2). After filing an answer to the complaint without asserting any counterclaims, the defendant died. See Notice of Death, Case No. 16-22654, Docket 139. The plaintiffs have reached a global settlement with the defendant's heirs, and potential substitute parties in this action. The settlement includes withdrawal of the pending motion for substitution (Docket 58) in addition to this adversary proceeding.

As the plaintiffs no longer desire to prosecute the action, the court will dismiss it pursuant to Rule 41(a)(2). The motion will be granted.

10. 16-22654-A-7 MARC LIM — STATUS CONFERENCE
16-2202 — 10-10-16 [8]
CHICK'S PRODUCE, INC. ET AL V. LIM

Final Ruling: Given the dismissal of the adversary proceeding, the conference is adjourned.