

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

January 9, 2017 at 10:00 a.m.

1. 15-29600-A-11 ANTIGUA CANTINA & GRILL, MOTION
RCO-1 INC. FOR RELIEF FROM AUTOMATIC STAY
CHARLES N. TAVERS VS. 4-28-16 [41]

Tentative Ruling: The motion will be denied without prejudice.

The movants, Charles N. Teavers IRA #887220801 (an undivided 300/625 interest) and Charles N. Travers Money Purchase Plan #887221940 (an undivided 326/625 interest), seek relief from the automatic stay as to the debtor's real property in Sacramento, California.

11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

"(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

"(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwood 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.

According to the movant, the value of the property is \$765,700 and the encumbrances against the property total \$1,207,135. The movant's evidence of value is based on a broker's price opinion and an accompanying declaration of Michael Murphy. Docket 45, Ex. C.

On the other hand, the debtor has submitted its own evidence of value for the property. The debtor's "as is" value of the property is \$2,059,516.95.

The court is not persuaded that the movant has met its burden of persuasion on the value of the property. The declaration in support of the movant's broker's price opinion does not state that Mr. Murphy, the appraiser, inspected the

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inside and outside of the property. His declaration states only that he "prepared a Broker's Price Opinion and value analysis of [the property] for the purpose of arriving at an opinion of value." Docket 45, Ex. C at 1. Further, there is over a \$1 million discrepancy in the two valuations of the property and the movant has filed no reply to the debtor's opposition attempting to reconcile the discrepancy.

The movant has filed additional pleadings in support of the motion, including a reply with exhibits. But, none of the factual assertions in the reply are supported by admissible evidence, such as a declaration. See Local Bankruptcy Rule 9014-1(d)(6). Nor are the exhibits authenticated by a declaration. They are inadmissible hearsay. Fed. R. Evid. 802.

More, the movant's additional pleadings will be stricken, as the court has not reopened the record on the motion. Dockets 83 & 84. The record on this motion closed on May 24, seven days prior to the May 31 initial hearing on the motion. Docket 58.

The request in the reply for adequate protection payments will be denied also because that request is not in the motion. Docket 41 at 3-4. The court will not allow the movant to seek new relief in the reply, depriving the debtor from an opportunity to respond.

The movant has not met its burden of persuasion on value and equity in the property. The motion will be denied.

2. 15-29421-A-12 JERRY WATKINS MOTION TO
CA-6 CONFIRM PLAN
12-4-16 [78]

Tentative Ruling: The motion will be denied.

The debtor seeks confirmation of his chapter 12 plan filed on December 4, 2016. The chapter 12 trustee opposes confirmation.

The motion will be denied for the following reasons.

(1) The court is unconvinced that the debtor is able to perform the plan, given that his payments are already \$394 delinquent.

(2) Although the plan provides for Ocwen Loan Servicing's secured claim in the amount of \$800,000, consistent with Ocwen's January 3, 2017 proof of claim, the order on the debtor's motion to value Ocwen's collateral mandates that "[t]he secured portion of [Ocwen's] 1st Deed of Trust shall be valued at \$0.00." Docket 84. Obviously, the plan's treatment of Ocwen's claim is inconsistent with the order on the valuation motion.

(3) The debtor's various pleadings refer to the proposed plan as a "chapter 13 plan." Yet, this is a chapter 12 case.

(4) The court is unclear from the plan's Additional Provisions what claim, if any, is held by Litton Loan Servicing. Litton is identified as holding the first deed claim on the debtor's only real property. But Ocwen Loan Servicing, not Litton, has filed a proof of claim, claiming a security interest in the property. The court cannot ascertain the relationship, if any, between Litton Loan Servicing and Ocwen Loan Servicing.

(5) The motion's liquidation analysis is far from adequate. The motion states that general unsecured creditors would receive \$25,201.57 in a chapter 7 liquidation, whereas the proposed chapter 12 plan is paying them \$50,000. Docket 78 at 4. However, the court cannot tell from the motion how the debtor arrived at the \$25,201.57 figure.

(6) The motion's good faith analysis is also inadequate. Even though this is the debtor's fourth bankruptcy case since March 31, 2009, the outlined "circumstances beyond [the debtor's] control," including the illness and incarceration problems, explain the debtor's inability to prosecute his prior bankruptcy cases only from August 2013 forward.

(7) More, the motion provides the court with no assurances of the debtor's ability to perform under the subject plan, given his ongoing illness and incarceration.

For example, the motion claims that the debtor has been unable to work as a farmer in part due to him having to wear an ankle monitoring bracelet, given a violation of his probation. The motion says that the debtor has been wearing the bracelet "from January 29, 2015 to present." Docket 78 at 4. The bracelet shows that his incarceration problems will continue to interfere with his ability to perform under a chapter 12 plan in the future.

The motion further admits to the unpredictability of the debtor's income. It states that "[t]he Debtors' [sic] . . . ability to earn . . . is albeit erratic." Docket 78 at 3.

3. 15-29421-A-12 JERRY WATKINS
JPJ-1

MOTION TO
DISMISS CASE
11-21-16 [74]

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

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

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

This case was filed on December 2, 2015, over one year ago. The debtor still has not obtained plan confirmation. The court has held only one substantive hearing on plan confirmation, on October 17, 2016. Docket 70. At that hearing, the court denied confirmation based on the debtor's admission that his plan cannot be confirmed. Id. The remaining hearings on plan confirmation were either continued, dismissed as moot or voluntarily dismissed by the debtor. Dockets 37, 45, 47, 62, 63.

Although the debtor filed an amended chapter 12 plan on December 4, 2016 (Docket 82), this case has been pending for over a year now and the debtor has made it clear that he is not eager to move forward with this case. It is up to the debtor to prosecute confirmation of his chapter 12 plan. The delay has been prejudicial to creditors and it is cause for dismissal. The motion will be granted and the case will be dismissed.

4. 13-35835-A-7 GREG MASTERSON ORDER FOR
14-2091 APPEARANCE AND EXAMINATION
TAYLOR V. MASTERSON (GREG MASTERSON)
11-29-16 [39]

Tentative Ruling: None. The judgment debtor shall appear and be sworn in prior to the 10:00 a.m. calendar and then the judgment creditor may examine the judgment debtor outside the courtroom.

5. 10-21350-A-11 JOHN/SHEILA WALKER MOTION FOR
WW-12 ENTRY OF DISCHARGE
11-28-16 [326]

Tentative Ruling: The motion will be granted.

The hearing on the motion was continued from December 12, 2016 for the debtors to supplement the record. As the debtors have filed two additional declarations in support of the motion, an amended ruling from December 12 follows below.

The debtors ask the court to enter their discharge pursuant to 11 U.S.C. § 1141(d) (5), which provides that:

"In a case in which the debtor is an individual—

"(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

"(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if —

"(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

"(ii) modification of the plan under section 1127 is not practicable; and

"(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that —

"(i) section 522(q) (1) may be applicable to the debtor; and

"(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q) (1) (A) or liable for a debt of the kind described in section 522(q) (1) (B)."

The court cannot grant a discharge under 11 U.S.C. § 1141(d) (5) (A) as the debtors admit to not having completed all payments under their confirmed plan. Docket 328.

But, the court can grant a discharge under 11 U.S.C. § 1141(d) (5) (B). This

subsection requires that the debtors have already distributed to unsecured creditors under the plan not less than the amount that would have been paid to such claimants under a chapter 7 liquidation. The debtors have distributed all payments owed to the unsecured creditors under the plan.

The debtors have also confirmed that section 522(q)(1) is not applicable to either of them and there is no pending proceeding where either of the debtors may be found guilty of a felony as prescribed by section 522(q)(1)(A) or liable for a debt as prescribed by section 522(q)(1)(B). Docket 332. The motion will be granted and the court will enter the debtors' chapter 11 discharge under section 1141(d)(5)(B).

6. 16-27960-A-11 MARCO PALMA STATUS CONFERENCE
12-1-16 [1]

Tentative Ruling: None.

7. 15-23164-A-7 JF MCCRAY PLASTERING, STATUS CONFERENCE
16-2038 INC. 3-2-16 [1]
SMITH V. MCCRAY

Tentative Ruling: None.

8. 15-23164-A-7 JF MCCRAY PLASTERING, MOTION FOR
16-2038 INC. DNL-2 PRELIMINARY INJUNCTION
SMITH V. MCCRAY 11-30-16 [31]

Final Ruling: This motion has been resolved by stipulation. Dockets 51 & 54.

9. 15-23164-A-7 JF MCCRAY PLASTERING, MOTION FOR
16-2038 INC. DNL-3 RIGHT TO ATTACH AND FOR ISSUANCE
SMITH V. MCCRAY OF WRIT OF ATTACHMENT
12-12-16 [44]

Tentative Ruling: The motion will be denied.

The plaintiff, Susan Smith, the chapter 7 trustee in the underlying chapter 7 case, seeks a writ of attachment against: (1) \$36,567 held by Taisei Construction Corporation on account of a receivable owed to the defendant, Shawn McCray, pursuant to an assignment by the debtor to the defendant; (2) real property in Citrus Heights, California serving as a collateral for a loan paid in part by a portion of the subject receivable; and (3) an IRA of the defendant funded in part by a portion of the subject receivable.

The portion of the receivable used to pay the loan secured by the real property and fund the IRA totals \$266,977.28. With the \$36,567 held by Taisei, the aggregate amount of the receivable is \$303,544.28.

The plaintiff is seeking the writ with respect to her causes of action against the defendant under Cal. Civ. Code § 3439.04 & 3439.05 and 11 U.S.C. §§ 544 & 550.

Fed. R. Civ. P. 64, as made applicable here by Fed. R. Bankr. P. 7064, prescribes that:

"(a) [a]t the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides

for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

"(b) *Specific Kinds of Remedies.* The remedies available under this rule include the following--however designated and regardless of whether state procedure requires an independent action:

- "• arrest;
- "• attachment;
- "• garnishment;
- "• replevin;
- "• sequestration; and
- "• other corresponding or equivalent remedies."

"Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees."

Cal. Civ. Proc. Code § 483.010(a) (Emphasis added).

Cal. Civ. Code § 3439.07 provides that:

"(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

"(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

"(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure, or as may otherwise be available under applicable law.

"(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:

"(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or other property of the transferee.

"(B) Appointment of a receiver to take charge of the asset transferred or other property of the transferee.

"(C) Any other relief the circumstances may require."

"Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought."

Cal. Civ. Proc. Code § 484.010.

Under Cal. Civ. Proc. Code § 484.090:

"(a) At the hearing [on the motion for the writ], the court shall consider the showing made by the parties appearing and shall issue a right to attach order,

which shall state the amount to be secured by the attachment determined by the court in accordance with Section 483.015 or 483.020, if it finds all of the following:

"(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

"(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

"(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

"(4) The amount to be secured by the attachment is greater than zero.

"(b) If, in addition to the findings required by subdivision (a), the court finds that the defendant has failed to prove that all the property sought to be attached is exempt from attachment, it shall order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220.

"(c) If the court determines that property of the defendant is exempt from attachment, in whole or in part, the right to attach order shall describe the exempt property and prohibit attachment of the property.

"(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of the additional evidence or points and authorities."

Cal. Civ. Code § 3439.07(a)(2), with Fed. R. Civ. P. 64, permits the use of the California state law prejudgment attachment remedies as to avoidance claims brought under Cal. Civ. Code § 3439.04 & § 3439.05.

The motion will be denied.

First, the relief sought by the plaintiff is redundant as the plaintiff has already obtained a stipulated preliminary injunction enjoining the defendant from selling, assigning, transferring or otherwise dissipating the receivable proceeds—including both the \$266,977.28 and \$36,567 proceeds, as well as the subject real property. Docket 54.

In other words, the plaintiff's interest in those assets is already protected. This attachment cannot be sought for the purpose of recovering on the subject avoidance claims. That purpose has been satisfied already.

Second, the instant motion was not served on Geoffrey Richards, the chapter 7 trustee for the bankruptcy estate of the defendant's mother. Docket 50; Case No. 15-23586-B-7 & Adv. Proc. No. 16-2029. The plaintiff admits that the defendant's real property is the subject of an avoidance litigation brought by Mr. Richards against the defendant here, among others. Adv. Proc. No. 16-2029. The parties in Mr. Richards' avoidance litigation should have been noticed with this motion.

The motion will be denied.

10. 16-21585-A-11 AIAD/HODA SAMUEL
RJ-4

MOTION TO
APPROVE STIPULATION PERMITTING
TRUSTEE SCOTT M. SACKETT TO
ABANDON STATE COURT CLAIM AND THE
SUBSEQUENT APPEAL AS TO BRAKE
MASTERS HOLDINGS SAC, INC.
11-28-16 [400]

Final Ruling: The motion will be granted and the court will order final abandonment of the subject property.

The debtor, Aiad Samuel, seeks approval of a stipulation between him and the chapter 11 trustee for the abandonment of a claim against Brake Masters and an appeal from a state court judgement entered against the debtor, pertaining to the claim.

On December 13, 2016, the court entered an order continuing the hearing on the motion from December 12 to January 9 and authorizing the debtors "to prosecute the claim in state court (Sacramento County Superior Court Case No. 43-2011-00115950 and Third App. Dist Case No. C082083)," pending a proper renoticing of the motion by December 14 and pending an opportunity for parties in interest to file an objection by December 28. Docket 404. The motion was properly and timely renoticed, on December 14, 2016. Docket 407.

As no oppositions or objections have been filed to the motion, the court will order final abandonment of the claim against Brake Masters and resulting appeal, as described above. The motion will be granted.