

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus

Bankruptcy Judge

Sacramento, California

May 4, 2017 at 10:00 a.m.

1.	13-23517-A-7	TRACY GATEWAY, LLC	MOTION FOR
	15-2055	MW-3	APPROVAL OF STIPULATION FOR
	FUKUSHIMA V. SUTTER CENTRAL		PROTECTIVE ORDER
	VALLEY HOSPITALS		4-6-17 [115]

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 plaintiff and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The defendant, Sutter Central Valley Hospitals, seeks approval of a stipulation with the plaintiff, Alan Fukushima, the chapter 7 trustee in the underlying bankruptcy case, for a protective order over the defendant's production of confidential, proprietary and/or private information to the plaintiff in discovery. The stipulation provides for the designation, challenge of designation, disclosure, and ultimate destruction of such information.

Fed. R. Civ. Proc. 26(c), as applicable here via Fed. R. Bankr. P. 7026 provides that:

"(1) **In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a

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specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs."

The court agrees that good cause exists for the protective order, in order to allow the production of the defendant's tax records, while protecting the private information of the defendant's donors. Accordingly, the motion will be granted and the stipulation will be approved.

By approving the stipulation, the court is not determining that it contains all required protections for non-parties, under applicable nonbankruptcy law.

2. 17-21729-A-11 AMERICAN RIVER DETAIL STATUS CONFERENCE
AUTO BODY 3-16-17 [1]

Final Ruling: No appearances. The status conference is dropped from calendar as the case was dismissed on March 28, 2017.

3. 17-21177-A-11 MONACO MOTEL L.L.C. MOTION TO
MTB-1 DISMISS CASE
3-24-17 [15]

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

Creditor Christopher Mitchell, trustee of the Christopher Dale Mitchell 2003 Trust, moves for dismissal of the case, asserting lack of good in the filing of the case, mismanagement of the estate, and substantial or continuing loss and diminution with no likelihood of rehabilitation.

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." 11 U.S.C. § 1112(b)(4)(A), (B).

The above instances of cause are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

This case was filed on February 26, 2017. The debtor owns a single real property, a motel, known as the Monaco Motel, located in South Lake Tahoe, California. The property is subject to two loans.

The senior secured lien is held by PCD Asset Group. It secures a claim in the approximate amount of \$1.2 million and is secured by the motel in this case and another motel real property, known as the Loan Pine Motel, owned by an affiliated entity, Loan Pine Motel, L.L.C. The Loan Pine Motel, L.L.C., is owned by the same individual, Syed Chowdaury, who owns the debtor.

The junior secured lien is held by the movant. It secures a claim in the approximate amount of \$708,273 and it is also secured by both motels.

The motion is based on three facts.

First, the City of South Lake Tahoe has issued to the debtor a Notice and Order to Repair or Abate. The Notice and Order identifies 50 items, some with multitude sub-parts, such as: gas line issues, disrepair (doors, floors, windows, exposed wiring, leaks, insulation, paint, toilet tanks, faucets, shower drains, etc.), lack of carbon monoxide detectors, pest infestation, permitting issues (as to food preparation areas and other items, etc.), lack of proper labeling and signs, presence of mold, frequent overloading of circuit breakers, presence of abandoned vehicles, etc. Docket 19, Ex. D.

The Notice and Order was issued post-petition on March 17, based on a pre-petition inspection of the motel, on February 15. It determines that "the unlawful conditions . . . constitute a public nuisance . . . pos[ing] a substantial danger to the health, safety, and general welfare of the occupants, the surrounding community, and the public. Docket 19, Ex. D at 1.

Second, the debtor has not been paying the claims secured by the property or the property taxes, despite generating approximately \$130,000 from the motel a year.

Third, this case was filed five days before a scheduled foreclosure.

There is evidence in the record that the property is being mismanaged. For 2016, the debtor reported to the City of South Lake Tahoe that \$132,848 in revenue was generated by the property. Docket 19, Ex. E; Docket 27, Ex. 3. For 2015, that figure was \$134,319. Docket 27, Ex. 3. Notwithstanding this, the debtor had only \$200 on hand when this case was filed on February 26, 2017; \$100 in the bank and \$100 in cash. Docket 1, Schedule A/B; Docket 23 at 4.

Further, the debtor has made statements under the penalty of perjury that are inconsistent with the findings in the Notice and Order. The debtor stated in the petition that the property does not need immediate repair. It also stated that the property does not pose, and it is not alleged to pose threat of, imminent or identifiable hazard to public health or safety. Docket 1, Item 12.

The Notice and Order is based on an inspection that took place only 11 days before this case was filed. Nevertheless, 11 days later, the debtor stated that the property does not need immediate attention and it does not pose or is alleged to pose threat of public health or safety.

The pest infestation, leaks, and mold are definite health hazards, especially given the expected presence of food in the rooms. Based on the city's Notice and Order notes, at least some rooms are equipped with small refrigerators and microwaves. See, e.g., Docket 19, Ex. D at 6.

The lack of carbon monoxide detectors, the overloading of the circuit breakers, and the exposed wiring are threats to the safety of the occupants. Obviously, these conditions existed on the petition date, yet the debtor found it convenient not to report them. The debtor then has misrepresented material facts in the petition about the condition of the property.

The foregoing is evidence that the debtor has been mismanaging the property and it is now mismanaging the estate. The debtor's response to the city's Notice

and Order is that it is merely "the result of a NEW ordinance by the City to make motel units rented to monthly tenants more like apartments." Docket 25 at 2. However, the conditions described in the Notice and Order make the property uninhabitable by anyone, long or short term occupants.

Additional evidence of mismanagement is the fact that the debtor has not been paying property taxes, occupancy taxes, income taxes and park association fees, despite generating substantial revenue from the motel. In Schedule D, the debtor has listed outstanding property taxes to El Dorado County in the amount of \$11,500. In Schedule E, the debtor has listed: \$25,000 in unpaid occupancy taxes to the City of South Lake Tahoe; \$7,500 in taxes to the California Franchise Tax Board; \$10,000 in taxes to the IRS; and \$60,000 in association fees to Lakeside Park Association. Docket 1.

The court does not believe the debtor's explanation that it did not pay taxes intentionally, pursuant to an agreement it had with the movant. Except for the debtor's word, the court has no evidence of an enforceable agreement between the debtor and the movant. This agreement, if any, was not reduced into writing.

Even if this agreement exists, the debtor is colluding with one creditor (the movant) to hinder, delay, or defraud other creditors (El Dorado County, the City of South Lake Tahoe, IRS, California Franchise Tax Board, Lakeside Park Association). This is bad faith.

If the only reason the debtor did not pay creditors, including El Dorado County, was at the request of the movant, why does it not have on hand the money that was not paid to these creditors?. Yet, despite generating over \$130,000 of revenue from the property in 2016, the debtor has only \$200 on hand.

The debtor is being untruthful with the court in other respects as well. While it reported having only \$200 on hand, the debtor's opposition claims that the debtor passed the city's April 18 inspection.

But, there is nothing in the record from the city that this is true. The debtor's representation of what transpired at the April 18 inspection is inadmissible hearsay. Fed. R. Evid. 801(c), 802.

More important, the debtor could not have redressed the numerous 30-day deficiencies identified by the city's Notice and Order, between the February 26 petition filing date and the April 18 inspection date, with the \$200 on hand. This leaves the debtor with only one source of income to correct those deficiencies - post-petition revenue from the motel.

The debtor has sought no permission to use cash collateral since the case was filed. If the debtor indeed corrected the deficiencies in time for the April 18 inspection, the debtor has used cash collateral without consent of the creditor and without court permission.

The totality of the foregoing evidences mismanagement of the estate, bad faith on the part of the debtor in filing and prosecuting this bankruptcy petition, and no prospect of rehabilitation. This is cause for dismissal or conversion to chapter 7.

The case will be dismissed given the extensive deficiencies discovered by the City of South Lake Tahoe, given that the debtor will not receive a discharge in

chapter 7, given that the movant also owns the first priority claim against the property, through the PCD Asset Group, and given the absence of other assets that could be sold for the benefit of unsecured creditors.

4. 17-21177-A-11 MONACO MOTEL L.L.C. STATUS CONFERENCE
2-26-17 [1]

Tentative Ruling: None.

5. 16-21585-A-11 AIAD/HODA SAMUEL MOTION TO
FWP-6 USE CASH COLLATERAL
7-18-16 [170]

Tentative Ruling: The motion will be conditionally granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the lease of a shopping center in Rio Linda, California (\$8,268.40 in rents monthly), for the period of May 1, 2017 through July 31, 2017. This center was brought into the estate in April 2017 from a substantive consolidation with a limited liability company. See Docket 765.

The other three estate shopping centers have been sold. The sales closed in March 2017, prior to the April 30, 2017 expiration of this court's last cash collateral order. Docket 727 at 2. The trustee seeks to use rental income to pay for, among other things, the maintenance, security, insurance, ground keeping, and utilities of the center. The trustee is currently marketing the center for sale. He believes its value exceeds its encumbrances. The property is encumbered by a single lien of the United States, in the approximate amount of \$1,216,652.74.

The chapter 11 trustee also seeks permission to use cash collateral generated from the rent of the remaining two residential real properties (209 Prairie Circle (rented at \$825 a month) and 148 Estes Way (rented at \$1,000 a month)), for the period of May 1, 2017 through July 31, 2017. The other four residential properties were abandoned by the trustee months ago. The trustee proposes to use the rental income, of up to \$2,000.00 a month per property, to maintain their condition. Beyond identifying JPMorgan Chase Bank as a secured creditor, the motion does not say what are the secured claims against the properties.

11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed use of cash collateral will preserve the going concern of the shopping center and two residential properties, allowing the trustee to continue operating them, pending further administration. This is in the best interests of the creditors and the estate.

The proposed budget here is similar to the budgets pursuant to which the court has authorized prior use of cash collateral. See, e.g., Dockets 109, 150, 174, 203. The trustee proposes to grant the secured creditors replacement liens in further generated cash collateral and other cash of the estate. This includes replacement liens to the United States on cash (approximately \$99,000) from accounts against which the United States was attempting to satisfy its judgment

on the petition date. The replacement liens, to the extent applicable, shall not attach to the part of the further cash collateral designated as a "carve-out" for administrative expenses.

The trustee anticipates that the secured creditors will stipulate to the proposed cash collateral use.

Given that the secured creditors will be stipulating to the cash collateral use and given that the proposed budget is substantially similar to the budget of the estate's prior cash collateral requests, the motion will be conditionally granted as to the shopping center and residential properties.

The granting of the motion is subject to the court hearing from the secured creditors and subject to the trustee providing evidence on the value of the shopping center. Even though the motion states that there is equity in the center, there is nothing in it stating what is its value.

By authorizing cash collateral use, the court is not approving the compensation of estate professionals, even if such compensation is accounted for in the cash collateral budget.

6. 16-21585-A-11 AIAD/HODA SAMUEL

CONTINUED STATUS CONFERENCE
3-15-16 [1]

Tentative Ruling: None.