UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

May 27, 2014 at 10:00 a.m.

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1. 12-28413-A-7 F. RODGERS CORPORATION — AMENDED MOTION TO ASSIGN AVOIDANCE ACTION AND LITIGATION CLAIMS
CWC-8 — 4-24-14 [614]

Tentative Ruling: The motion will be denied without prejudice.

The trustee is asking the court to approve the estate's assignment of its claims in litigation known as the "Dittmore Litigation," as well as the related avoidance claims against Frank Rodgers, to the state court-appointed receiver for the debtor. The receiver was appointed by the state court after Wells Fargo Bank, as the debtor's largest secured creditor, initiated a pre-petition action against the debtor and other parties to recover the collateral securing its claims.

The avoidance claims pertain to the debtor's assignment of claims in the Dittmore Litigation to Mr. Rodgers in March 2012, approximately one month prior to the filing of this bankruptcy case. In exchange for the assignment, Mr. Rodgers agreed to pay the debtor 20% of the net recovery from the Dittmore Litigation.

Under the agreement with the receiver, the estate will transfer interest in the Dittmore Litigation and the avoidance claims against Mr. Rodgers, to be prosecuted by the receiver. In exchange, the receiver will pay the estate 15% of the net recovery from the Dittmore Litigation.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The motion will be denied because page four of the motion document is missing. There is no page four in the motion. That page seems to contain important information about the background of the proposed assignment.

Nonetheless, even if the motion document had been complete, the court is unwilling to grant the motion as it has some concerns about the execution of the proposed assignment agreement.

While the court understands the trustee's reasons for assigning the claims to the receiver, the court is concerned about the receiver exceeding the authority granted to him by the state court in liquidating assets. The receiver was appointed by the state court to administer only assets that serve as collateral for Wells Fargo Bank's claims. The receiver answers to no one about the administration of other assets.

The court is also concerned about the fact that, even though Wells Fargo Bank is not objecting to this motion, the bank is not a party to this agreement and nothing prevents the bank from later asserting an interest in the 15% net recovery to which the estate would be entitled to under this agreement.

More, the receiver is a fiduciary to the bank and not the bankruptcy estate, complicating the performance of the receiver under this agreement. If the bank later asserts an interest in the 15% net recovery from the Dittmore Litigation, the trustee would have to challenge both the bank and the receiver in state court. The motion does not address these issues. The court is not convinced that the assignment agreement with the receiver is in the best interest of the estate and all creditors of the estate.

2. 13-35329-A-12 KELLY/DEBORA HEISER — MOTION TO VALUE COLLATERAL
SJS-2
VS. THE BANK OF NEW YORK MELLON — 3-10-14 [18]

Tentative Ruling: The motion will be granted.

The hearing on this motion was continued from April 14, 2014 to allow the respondent creditor to obtain its own appraisal of the property. The respondent creditor was required to file his evidence of value no later than May 12, 2014. Docket 33. Nothing has been filed by the creditor.

The debtors are asking the court to strip down the senior mortgage of The Bank of New York Mellon on their real property in Rio Linda, California. The mortgage totals approximately $221,879, whereas the debtors are claiming that the value of the property is $135,000.

11 U.S.C. § 1222(b)(2) allows a chapter 12 debtor to modify the rights of secured claim holders. Unlike chapters 11 and 13 of the Bankruptcy Code, chapter 12 does not contain an anti-modification provision. This means that a chapter 12 debtor may strip down claims secured by his principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is a secured claim only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

A debtor's opinion of value is evidence of value and it may be conclusive in

the absence of contrary evidence. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor contends that the property has a value of $135,000. See Schedule A; see also Docket 20, Heiser Decl. ¶¶ 3, 4. The property is subject to a single mortgage held by The Bank of New York Mellon (serviced by Select Portfolio Servicing according to Schedule D) with a balance of approximately $221,879.

The court has received no evidence refuting the debtor's valuation of the property.

The Bank of New York Mellon's claim will be stripped down to $135,000, representing the value of the property. The Bank of New York Mellon's claim in excess of $135,000 will be an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

3.	13-35835-A-7	GREG MASTERSON	MOTION TO
	14-2091	GMW-1	DISMISS ADVERSARY PROCEEDING
	TAYLOR V. MASTERSON		4-25-14 [8]

Tentative Ruling: The motion will be dismissed as moot.

The defendant, Greg Masterson, the debtor in the underlying chapter 7 case, moves for dismissal under Fed. R. Civ. P. 12(b)(6) of the 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A), (a)(4)(D), (a)(5), (a)(6) and 11 U.S.C. § 523(a)(6) claims brought by the plaintiff, Troy Taylor, in the original complaint filed on March 28, 2014. Docket 1. The defendant asserts that the complaint fails to state a claim upon which relief can be granted.

The motion will be dismissed as moot because the defendant filed an amended complaint on May 16, 2014 (Docket 11), within 21 days after the filing of this motion on April 25. Fed. R. Civ. P. 15(a)(1)(B) (allowing for the filing of an amended complaint as a matter of course within "21 days after service of a motion under Rule 12(b), (e), or (f)." The amended complaint appears to add and alter some of the allegations in the original complaint. As the original complaint - to which this motion pertains - has been superseded, the motion will be dismissed as moot.

4.	12-35955-A-13	MARY DENTON	MOTION TO
	12-2700	RK-1	DISMISS ADVERSARY PROCEEDING
	COUNTY OF YUBA V. DENTON		4-22-14 [17]

Tentative Ruling: The motion will be granted.

The defendant, Mary Denton, who is the debtor in the underlying chapter 13

case, moves for dismissal of the first amended complaint of the plaintiff, County of Yuba, filed on February 27, 2014. Docket 13. The first amended complaint contains two claims, a claim under 11 U.S.C. § 523(a)(15) and a claim under 11 U.S.C. § 523(a)(2)(A).

The defendant argues that the 11 U.S.C. § 523(a)(15) claim should be dismissed because 11 U.S.C. § 1328(a) - listing the debts excepted from a chapter 13 discharge - omits debts specified by 11 U.S.C. § 523(a)(15).

The court agrees. 11 U.S.C. § 1328(a)(2) provides that:

"(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

. . .

(2) of the kind specified in section 507 (a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523 (a)."

11 U.S.C. § 523(a)(15) is conspicuously absent from the enumerated subsections of 11 U.S.C. § 1328(a)(2). This has been interpreted by courts as allowing the discharge of 11 U.S.C. § 523(a)(15) debts in a chapter 13 case. Mele v. Mele (In re Mele), 501 B.R. 357, 368, 368 n.10 (B.A.P. 9th Cir. 2013); In re Nelson, 451 B.R. 918, 925 (Bankr. D. Or. 2011) . "Debts arising from marital property settlement obligations are dischargeable in chapter 13, as they are not in chapter 7." Id. at 368.

The court rejects the plaintiff's contention that "the court should overrule the motion to dismiss the first claim pursuant to 11 U.S.C. § 523(a)(15) because the discharge has not been granted and there may been [*sic*] additional facts learned from discovery exempting the debt from discharge pursuant to 11 U.S.C. § 523(a)(5)." Docket 22 at 8.

The plaintiff has not pleaded a claim under 11 U.S.C. § 523(a)(5). Thus, even if there are facts from discovery suggesting that a claim under section 523(a)(5) would be actionable, no such claim has been asserted.

Additionally, waiting for the debtor to complete all chapter 13 plan payments will not change the merits of the § 523(a)(15) claim. Such debts are dischargeable in chapter 13. And, if the debtor fails to make all plan payments, no discharge of any claims will be entered whether or not the claim under section 523(a)(15) remains pending. Thus, the court will dismiss the section 523(a)(15) claim without leave to amend.

Turning to the 11 U.S.C. § 523(a)(2)(A) claim, the defendant contends that the claim is time barred because it was not in the original complaint filed on December 3, 2012 and the claim does not relate back under Fed. R. Civ. P. 15(c).

Fed. R. Bankr. P. 4007(c) provides that complaints under section 523(c), which includes claims seeking relief under § 523(a)(2), (4) or (6), must be filed "no later than 60 days after the first date set for the meeting of creditors under §341(a)." The meeting of creditors concluded on October 4, 2012, meaning that the Rule 4007(c) deadline for § 523(a)(2)(A) claims expired on December 3, 2012. Although the instant § 523(a)(2)(A) claim was not filed until February 27, 2014, the plaintiff says that the claim relates back to the December 3, 2012 deadline, when the plaintiff filed the sole § 523(a)(15) claim.

Fed. R. Civ. P. 15(c)(1) states that:

"An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; [or] (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading."

Rule 4007 does not allow relation back of the § 523(a)(2)(A) claim and the plaintiff has not identified any other rule or statute permitting the relation back.

As to Rule 15(c)(1)(B), the Supreme Court has addressed the nearly-identical predecessor of that rule, Rule 15(c)(2), in Mayle v. Felix, 545 U.S. 644, 657-664 (2005) (applying the present Rule 15(c)(1)(B) in the context of habeas corpus petition). "[R]elation back depends on the existence of a **common core of operative facts uniting the original and newly asserted claims**." Mayle at 646. The new claim "**does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth**." Mayle at 650, 657. The **original and new claims must, instead, be "tied to a common core of operative facts**." Mayle at 664; see also Habner v. McGrath, 543 F.3d 1133, 1138 (9th Cir. 2008); McKee v. Peoria Unified School Dist., 963 F. Supp. 2d 911, 923 (D. Ariz. 2013).

In addition, the original and amended pleadings must share a common core of operative facts so that **the adverse party has "fair notice of the transaction, occurrence, or conduct called into question**." Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir. 1989); Long v. Ford Motor Co., Case No. CV 07-2206-PHX-JAT, WL 2937751, at *4 (D. Ariz. July 23, 2008); Pelletier v. Pac. WebWorks, Inc., Case No. CIV-S-09-3503 KJM KJN, WL 43281, at *7 (E.D. Cal. Jan. 9, 2012).

In short, the facts giving rise to the underlying dispute are as follows. The defendant and Justin Denton divorced after the appointment of Yuba County's public guardian as conservator for Justin Denton's person and estate in January 2007. During the marital dissolution proceeding, the defendant and Mr. Denton, as represented by the guardian, entered into a marital property settlement agreement that was reduced to a judgment, providing for the division of their community property. The division consisted of the defendant retaining the couple's home in Wheatland, California in exchange for her paying $80,000 to Mr. Denton. The payment was to be deferred until the defendant refinanced the property. After the $80,000 payment was to be made, Mr. Denton was to execute a grant deed transferring his interest in the property to the defendant. The defendant did not refinance the property. When a notice of default was recorded on the property in November 2011, the defendant attempted to short-sell the property. She was unsuccessful and the property was sold in foreclosure in or about March 2012.

In early 2012, the defendant and Mr. Denton via the guardian negotiated the

defendant's need of Mr. Denton's grant deed in order for her to effectuate the short sale. The defendant and Mr. Denton agreed that the defendant would execute a promissory note of $80,000 in exchange for Mr. Denton's grant deed necessary to complete the short sale. The defendant executed the $80,000 note on March 7, 2012 and agreed to make $4,084 in monthly payments to Mr. Denton starting March 31, 2012. The defendant made no payments on account of the note.

While the foregoing facts are in the original complaint, the amended complaint adds allegations of representations by the defendant during her negotiations with Mr. Denton over the necessity of his grant deed. Specifically, the amended complaint refers to several representations concerning the financial condition and intentions of the defendant, including intentions to pay the $80,000 note and not file for bankruptcy. It is these representations that the plaintiff claims were false, made with the intent to deceive and induce reliance, prompting Mr. Denton to execute a grant deed to the defendant, and warranting relief under section 523(a)(2)(A). Docket 13 at 5, 7-8.

There is no common core of operative facts in the original complaint that unites the original section 523(a)(15) claim and the section 523(a)(2)(A) claim in the amended complaint.

The (a)(15) claim is based solely on the defendant's incurring of debt "in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15).

No representations are required, no falsity is required, no intent is required and no reliance is required. On the other hand, those are all required for the pleading of a § 523(a)(2)(A) claim.

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff *justifiably* relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")). False promises of one's intention to perform a contract are potentially actionable under section 523(a)(2)(A).

The type of facts for the two claims is clearly different.

The timing of the facts upon which the claims are based is different as well. The section 523(a)(15) claim is based on the defendant incurring a debt during the course of a marital dissolution proceeding that resulted in a marital property settlement agreement reduced to a judgment entered sometime between February 2007, when the guardian was appointed as a permanent conservator for Mr. Denton, and November 2011, when the notice of default was recorded on the property, prompting the defendant to seek a short-sale remedy. Docket 13 ¶¶ 6, 12.

On the other hand, the section 523(a)(2)(A) claim is based on representations by the defendant made to Mr. Denton's guardian on or about February 28, 2012 and March 2, 2012. Docket 13 ¶¶ 14, 15. Although the motion claims that the

state court judgment was entered in December 2008, the court is relying solely on the complaints filed by the plaintiff, given that this is a motion to dismiss and the court is electing not to consider facts outside the pleadings. Fed. R. Civ. P. 12(d) (providing that "[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"). The court is not considering matters outside the complaints.

The original section 523(a)(15) claim and the new section 523(a)(2)(A) claim do not have a common core of operative facts, and the defendant did not receive "fair notice" of the now alleged promissory fraud in the original complaint. Accordingly, the 11 U.S.C. § 523(a)(2)(A) claim does not relate back to the December 3, 2012 filing date of the original complaint and that claim will be dismissed as untimely. The motion will be granted.

5. 12-35955-A-13 MARY DENTON — STATUS CONFERENCE
12-2700 — 2-27-14 [13]
COUNTY OF YUBA V. DENTON

Tentative Ruling: None.

6. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION FOR
SW-1 — RELIEF FROM AUTOMATIC STAY
ALLY BANK VS. — 4-22-14 [31]

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. 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)(ii). 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. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION FOR
13-2069 LP-9 — SUMMARY JUDGMENT
CARDILLO V. FABIE ET AL — 1-30-14 [17]

Final Ruling: The hearing on this motion will be continued to June 23, 2014 at 10:00 a.m. to give the parties the opportunity to document a settlement.

8. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — STATUS CONFERENCE
13-2069 — 2-25-13 [1]
CARDILLO V. FABIE ET AL

Final Ruling: The conference will be continued to June 23, 2014 at 10:00 a.m.

9. 14-24689-A-11 ROY SMALLY AND VIVI MOTION TO
CAH-2 MITCHELL-SMALLY EXTEND AUTOMATIC STAY
5-8-14 [16]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to extend the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B), as they purportedly filed one prior bankruptcy chapter 13 case that was dismissed.

The motion will be denied for several reasons. First, 11 U.S.C. § 362(c)(3)(B) does not apply because not one but two cases of the debtors were pending within the previous year before the instant case was filed.

On May 1, 2013, the debtors filed a chapter 13 case (Case No. 13-26110). But, the court dismissed that case on July 17, 2013 due to the debtors ineligibility for chapter 13 relief. Case No. 13-26110, Docket 21.

On July 23, 2013, the debtors filed another chapter 13 case (Case No. 13-29665). But, the court dismissed that case on September 27, 2013 for the reasons stated in the court's September 23, 2013 ruling:

"*Final Ruling: The objection will be sustained and the case will be dismissed.*

First, the debtor has failed to make $200 of payments required by the plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

Second, 11 U.S.C. § 521(e)(2)(B) & (C) requires the court to dismiss a petition if an individual chapter 7 or 13 debtor fails to provide to the case trustee a copy of the debtor's federal income tax return for the most recent tax year ending before the filing of the petition. This return must be produced seven days prior to the date first set for the meeting of creditors. The failure to provide the return to the trustee justifies dismissal and denial of confirmation. In addition to the requirement of section 521(e)(2) that the petition be dismissed, an uncodified provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 found at section 1228(a) of BAPCPA provides that in chapter 11 and 13 cases the court shall not confirm a plan of an individual debtor unless requested tax documents have been turned over. This has not been done.

Third, the debtor owes a domestic support obligation. Local Bankruptcy Rule 3015-1(b)(6) provides:

'The debtor shall provide to the trustee, not later than the fourteen (14) days after the filing of the petition, Form EDC 3-088, Domestic Support Obligation Checklist, or other written notice of the name and address of each person to whom the debtor owes a domestic support obligation together with the name and address of the relevant state child support enforcement agency (see 42 U.S.C. §§ 464 & 466), Form EDC 3-086, Class 1 Checklist, for each Class 1 claim, and Form EDC 3-087, Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By The Trustee.'

The debtor failed to deliver to the trustee the Domestic Support Obligation Checklist. This checklist is designed to assist the trustee in giving the notices required by 11 U.S.C. § 1302(d).

The trustee must provide a written notice both to the holder of a claim for a domestic support obligation and to the state child support enforcement agency. See 11 U.S.C. §§ 1302(d)(1)(A) & (B). The state child support enforcement agency is the agency established under sections 464 and 466 of the Social Security Act. See 42 U.S.C. §§ 664 & 666. Section 1302(d)(1)(C) requires a third, post-discharge notice to both the claim holder and the state child support enforcement agency.

The trustee's notice to the claimant must: (a) advise the holder that he or she is owed a domestic support obligation; (b) advise the holder of the right to use the services of the state child support enforcement agency for assistance in collecting such claim; and (c) include the address and telephone number of the state child support enforcement agency.

The trustee's notice to the State child support enforcement agency required by section 1302(d)(1)(B) must: (a) advise the agency of such claim; and (b) advise the agency of the name, address and telephone number of the holder of such claim.

By failing to provide the checklist to the trustee, the debtor has disregarded the rule that it be provided, has breached the duty to cooperate with the trustee imposed by 11 U.S.C. § 521(a)(3) & (a)(4). This is cause for dismissal. See 11 U.S.C. § 1307(c)(1).

Fourth, the debtor owes a priority debt to Solano DCSS but the plan does not provide for payment in full of this claim as required by 11 U.S.C. § 1322(a)(2).

Fifth, the plan's feasibility depends on the debtor successfully prosecuting motions to value the collateral of Marin Mortgage Bankers Corporation in order to strip down or strip off its secured claims from its collateral. No such motions have been filed, served, and granted. Absent successful motions the debtor cannot establish that the plan will pay secured claims in full as required by 11 U.S.C. § 1325(a)(5)(B) or that the plan is feasible as required by 11 U.S.C. § 1325(a)(6). Local Bankruptcy Rule 3015-1(j) provides: 'If a proposed plan will reduce or eliminate a secured claim based on the value of its collateral or the avoidability of a lien pursuant to 11 U.S.C. § 522(f), the debtor must file, serve, and set for hearing a valuation motion and/or a lien avoidance motion. The hearing must be concluded before or in conjunction with the confirmation of the plan. If a motion is not filed, or it is unsuccessful, the Court may deny confirmation of the plan.'

It is unnecessary to address the remainder of the objections."

Case No. 13-29665, Docket 35.

The instant case was filed on May 2, 2014.

Thus, 11 U.S.C. § 362(c)(3) does not apply. Rather, 11 U.S.C. § 362(c)(4) - which is triggered "if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed" - applies.

Yet, the motion does not brief or address 11 U.S.C. § 362(c)(4).

Second, even if the debtors had addressed 11 U.S.C. § 362(c)(4), the motion still would be denied because the debtors have not rebutted with clear and

convincing evidence the presumption that this case was filed not in good faith.

11 U.S.C. § 362(c)(4) provides that:

"(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707 (b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor."

The debtors identify in their motion only one prior bankruptcy case, Case No. 13-29665, contending that the case was dismissed because they were ineligible for chapter 13 relief "due to debtor's secured debt exceeded [*sic*] the cap set under 11 U.S.C. § 109(e)."

However, that case was not dismissed because the debtors were not eligible for chapter 13 relief. That was the reason for the dismissal of the prior chapter 13 case, Case No. 13-26110. Case No. 13-29665 was dismissed because:

- the debtors had failed to make $200 in plan payments (11 U.S.C. § 362(c)(4)(D)(i)(II)),

- the debtors failed to cooperate with the chapter 13 trustee by not providing him with their federal income tax return, as required by 11 U.S.C. § 521(e)(2)(B) & (C), and

- the debtors failed to cooperate with the chapter 13 trustee by not providing him with the Domestic Support Obligation Checklist, designed to assist the trustee in giving the notices required by 11 U.S.C. § 1302(d).

Case No. 13-29665, Docket 35.

The debtors do not address any of the above deficiencies. The filing of the two prior cases has created a presumption that this case was filed not in good faith. The debtors do not explain their failure to make plan payments and do not elaborate on why they failed to cooperate with the chapter 13 trustee in providing him with the tax return and the Domestic Support Obligation Checklist.

The motion is supported by a single declaration from the debtors. Docket 18. The declaration does not even mention the filing of Case No. 13-26110. It makes no effort to explain the deficiencies in the prior cases, including explaining why they filed Case No. 13-26110 when the court concluded that they were ineligible for chapter 13 relief. The debtors were represented by counsel in both prior chapter 13 cases. The debtors have not rebutted with clear and convincing evidence the presumption that this case was filed not in good faith. 11 U.S.C. § 362(c)(4)(D)(i)(I).

The debtors also have not addressed the absence of a substantial change in their financial or personal affairs since the dismissal of the next most previous case under this title. They do not say whether their financial condition has changed in any way. This is important because one of the reasons the last chapter 13 case was dismissed was the debtors' failure to make plan payments. 11 U.S.C. § 362(c)(4)(D)(i)(III).

The debtors have not rebutted the presumptions of 11 U.S.C. § 362(c)(4)(D)(i)(I) & (III) that this case was filed not in good faith. Hence, the court will not continue the automatic stay. The motion will be denied.

10. 12-41197-A-11 JOHN/MARTA SCHULZE — MOTION TO CONFIRM AMENDED PLAN 2-17-14 [116]
JHH-7

Tentative Ruling: The motion will be granted.

The debtors ask the court to confirm their second amended chapter 11 plan filed on February 17, 2014. Docket 116.

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

11. 14-24002-A-11 BELLA PROPIEDAD L.L.C. STATUS CONFERENCE
4-18-14 [1]

Tentative Ruling: None.

12. 14-24002-A-11 BELLA PROPIEDAD L.L.C. MOTION TO
UST-1 DISMISS CASE
4-21-14 [7]

Tentative Ruling: The motion will be denied.

The U.S. Trustee seeks dismissal of this case because the debtor, although a limited liability company, is not represented by counsel. The debtor has filed a response, pointing out that it has retained an attorney and the court approved his employment on May 13, 2014. Docket 32. Given the debtor's retention of counsel, dismissal will be denied.

13. 14-24122-A-11 NGANE PHOMMACHANH STATUS CONFERENCE
4-22-14 [1]

Tentative Ruling: None.