UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 10, 2014 at 1:30 p.m.

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1. 11-29307-E-7 SHAWN/KARA NELSON
PLG-4

CONTINUED MOTION TO AVOID LIEN OF STOHLMAN AND ROGERS, INC.
4-17-14 [115]

CONT. FROM 6-3-14, 5-15-14

Tentative Ruling: The Motion to Avoid Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties 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 to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on April 17, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties 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 to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's decision is to deny the Motion to Avoid a Judicial Lien.

JUNE 10, 2014 HEARING

The court continued the hearing to allow Counsel for Debtor to file a Rule 2016(b) statement regarding any attorneys fees to be collected, if any. On June 3, 2014, Counsel Stuart Price filed the statement stating,

"PLG will never be paid directly from the debtors. If the

short sale closes, PLG will be paid from the proceeds of the sale. The amount will not be known until the final HUD is prepared, but is likely to be somewhere between $2000 and $5000 for efforts and costs associated with reopening case and prosecuting 8 lien avoidance actions."

Disclosure of Attorney Compensation, Dckt. 198.

11 U.S.C. § 330 requires attorneys to seek approval and authorization for attorneys fees and costs. However, Counsel has not sought approval or authorization of these attorney fees from the short sale of the property. No compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

On June 5, 2014, Stohlman and Rogers, Inc. filed an opposition and statement of disputed facts. This Opposition is:

A. Stohlman & Rogers, Inc. does not consent to resolution of any factual matter pursuant to Federal Rule of Civil Procedure 43(c), as incorporated by Federal Rule of Bankruptcy Procedure 9017.

B. Stohlman & Rogers, Inc. asserts that the following factual matters are in dispute:

1. Whether Debtors are receiving an indirect monetary benefit by payment of attorneys' fees from the sales proceed;

2. Whether the indirect monetary benefit to Debtors exceed the amount of the exemption claimed in the property that is the subject of this Motion;

C. Stohlman & Rogers, Inc. directs the court to the following evidence:

1. Debtors' Supplemental Declaration filed May 16, 2014, Dckt. 179,

a. Debtors not receiving any portion of the sale proceeds;

2. Disclosure of Compensation of Attorneys for Debtors filed on June 3, 2014, Dckt. 198;

a. Price Law Group will never be paid directly from the Debtors. If the short sale closes, Price Law Group will be paid from the sales proceeds. The amount is projected to be between $2,000 and $5,000.

b. The Disclosure of Compensation of Attorney states that the source of payment is "Debtor" and "Other."

REVIEW OF MOTION

Debtor seeks to avoid a judgment in favor of Stohlman and Rogers, Inc. for the sum of $40,082.68. The abstract of judgment was recorded with Placer County on November 24, 2008. That lien attached to the Debtor's residential real property commonly known as 3613 Westchester Drive, Roseville, California.

OPPOSITION

Creditor Stohlman & Rodgers, Inc. dba Lakeview Petroleum Company ("Creditor") opposes the motion on the basis that Debtors are not entitled to avoid the judgment because the exemption asserted to be impaired by the lien is not valid and must be disregarded. Creditor states that pursuant to Federal Rule of Bankruptcy Procedure 1009(a), schedules must be amended before the case is closed. Creditor states that Debtor cannot, without the court finding valid cause, allow the amendment to Schedule C.

REPLY

Debtors filed a response, stating that the authority cited to by Creditor is not analogous to this case nor is it binding on this court. Debtors argue that they are entitled to amend their Schedule C, that Creditor is not prejudiced by this amendments and that Debtors have not acted in bad faith.

DISCUSSION

The present Motion was filed on April 17, 2014. The purported reason for the Motion is that the Debtors have discovered they can now do a short sale, but do not provide the court with any statement as to why or how expending the time and effort to conduct a short sale, after completing their Chapter 7 bankruptcy case, is in their own self-interest.

It is clearly stated in the Motion that the Debtors are not to receive any proceeds from the sale. The parties to be paid are (1) the creditor with a lien on the property and (2) Price Law Group for helping in completing the short sale. For the creditor, it avoids having to foreclose on the property, be responsible for the property, engaging the services of a real estate broker, marketing the property, further insuring the property, repairing the property, and then closing a sale of the property as the seller.

From the evidence presented, it appears that the Debtors are a non-party to the present motion, with only the senior lien creditor, the real estate agent, and the Price Law Group having any real economic interest in the property and the outcome of this Motion. In this light, the court is being turned into nothing more than a simple tool which is used to short-circuit the state foreclosure laws, with there being little, if any, federal legal significance to the present Motion.

While this picture is painted bleakly for the Debtors, Stohlman and Rogers, Inc. fairs little better. At the first hearing on this Motion, Stolhman and Rogers, Inc. advised the court that it had no idea of what the property was worth, did not know if there was any value to its lien position, and could not state how and why its opposition bore any positive economic reality as to any case or controversy it had with the Debtors. It was clear at

that hearing, and is clear from the supplemental pleadings, that Stolhman & Rogers, Inc. is merely participating to derail any possible short-sale. While Stolhman & Rogers, Inc. has the right not to agree to any voluntary release of its lien, like the creditor, it seeks to turn this court into its tool in pummeling the Debtors (and the Price Law Group) into submission.

This Chapter 7 case was filed on April 14, 2011. At that time the Debtors stated under penalty of perjury the following with respect to the property and liens at issue:

A. Westchester Property FMV.....$800,000.00
B. Onewest Bank (1st DOT).....($852,929.00)
C. CIC Consumer Services (2nd DOT).....($155,923.00)

D. Equity for Debtors/Estate.....($208,852.00)

Schedule A and D, Dckt. 1 at 18 and 25. On November 16, 2011, the Debtors elected to convert this case from Chapter 13 rehabilitation to a Chapter 7 liquidation. The Debtors obtained their discharge and the case quietly closed in February 2012. Dckt. 99.

In April 2014, the Debtors filed a flurry of motions to avoid judicial liens on the Westchester Property. Dckts. 110, 115, 120, 125, 130, 135, 140. The Debtors also amended Schedule D to add the following additional secured claims:

E. Capital One, 2008 Jdgt Lien.....($ 58,155.53)
F. Stohlman & Rogers, Inc. 2008 Jdgt Lien.....($ 40,082.68)
G. Nella Oil Co. 2008 Jdgt Lien.....($ 15,714.64)

H. No. Cal. Collection 2009 Jdgt Lien.....($ 35,241.34)
I. Citibank NA 2010 Jdgt Lien.....($ 23,853.09)
J. Citibank NA 2010 Jdgt Lien.....($ 3,406.28)
K. Installed Bld Prod 2011 Jdgt Lien.....($ 3,213.62)
L. Capital One Bank 2011 Jdgt Lien.....($ 6,526.61)

Filed April 17, 2014, Dckt. 146. The Debtors also amended Schedule C to include an exemption in the Westchester Property in the amount of $1,000.00. *Id.*

Issue One - May the Debtor Amend the Schedules to Claim an Exemption After the Case has Been Closed.

Federal Rule of Bankruptcy Procedure 1009(a) states

> (a) General right to amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

The Bankruptcy Appellate Panel for the Ninth Circuit determined that "[f]or the purposes of filing amendments, there is no difference between an open case and a reopened case, and [a debtor in a reopened case does] not need the court's permission to amend." *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 394 (B.A.P. 9th Cir. 2003). The BAP panel disagreed with the notion that a Debtor must show excusable neglect under Rule 9006 to amend an exemption schedule after the bankruptcy case has been closed. The court finds this argument persuasive.

This court allowed the case to be reopened by motion, noticed to all creditors in this case. *See* Order, Dckt. 104. Therefore, the case is now reopened and Federal Rule of Bankruptcy Procedure 1009(a) applies, allowing schedules to be amended before the case is again closed. Creditor's concerns do not warrant the imposition of a requirement for court approval that is not supported by the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

The United States Trustee filed a Statement Regarding Whether A Trustee Should Be Appointed in this Reopened Case, stating that there being no assets of the estate for a Trustee to administer, the UST does not intend to seek permission to appoint a Chapter 7 trustee in this reopened case.

No other argument has been presented by counsel.

In a discussion reminiscent of 1990 American politics, verbal fencing has ensued in this litigation over when a "reopened case" is a case "before the case is closed--" or when does "open" mean "open." That is not to say "interesting" legal issues do not arise, but time and money spent in addressing "interesting" issues should correlate to the value to the parties and not be a situation of theoretical arguments.

The Westchester Property was disclosed on the Schedules and reviewed by the Chapter 7 Trustee. That Property was not otherwise administered by him and was abandoned to the Debtors upon the closing of the case. 11 U.S.C. § 554. The U.S. Trustee noted this in her response stating that based on the present pleadings, investigation, meeting with the parties in interest, and review of the file, it was not the U.S. Trustee's intention to reappoint a trustee in this case.

In light of the facts of this case and the discussion presented in *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 394 (B.A.P. 9th Cir. 2003), the Debtors may file their Amended Schedule C to claim the $1,000.00 exemption. As noted in the unpublished decision, *Corbett v. Salven (In re Corbett)*, 2014 Bankr. LEXIS 1883 (B.A.P. 9th Cir. 2014), merely because Schedule C may be amended does not mean that the Debtor has the automatic right to keep the exemption. Here, the U.S. Trustee has noted that she did not see a basis for "reeling back in" the property (and challenging the claim of exemption).

ISSUE OF PARTIES BEFORE THE COURT

While a large number of pleadings have been filed in the name of the Debtors, there has been little, if any, allegation or evidence as to why the pleadings are being filed by the Debtors and their interest in the pleadings. The Price Law Group has filed the pleadings as "counsel for the Debtors," but it has been shown that (1) there is no demonstrated benefit for the Debtors,

(2) the Debtors will not receive any proceeds from the sale, (3) the Price Law Group is not being paid by the Debtors, and (4) the Price Law Group will be paid by the creditor from the creditor's portion of the sales proceeds.

While "carve-outs" from a creditor's collateral are a time honored tradition in bankruptcy court, there is always a corresponding benefit or gain for the debtor or bankruptcy estate in undertaking the activities necessary to achieve the conclusion which the creditor seeks to have accomplished. When a bankruptcy trustee negotiates a carve-out solely to get paid his or her fees, the question arises as to whether the trustee is acting for the benefit of the estate or the creditor.

For the avoidance motion before this court, it is the creditor who is seeking to have the Stohlman and Rogers, Inc. judgement lien avoided. Counsel appears to be filing all of the pleadings and engaging in this litigation to obtain payment of $1,000.00 to $5,000.00 from the creditor. There is nothing for the Debtor – showing that the claim of a $1,000.00 exemption is truly illusory. If the Debtor were recovering their $1,000.00 exemption, a court could well see a balance between the creditor's interests, the Debtors' interests, and the conduct of counsel to advise and represent the Debtors to recover that exemption amount from a short-sale.

It appears that the parties before the court fail to present an actual case or controversy arising under federal law to be determined by this court. United States Constitution Article III, Section 2. No rights, interests, or benefits of the Debtors have been shown to be at issue. Rather, it is a dispute between the senior lien holder, who has the right to foreclose, and a junior judgment lien creditor. It is the lender who is attempting to use the Debtors' right to avoid a lien to protect an exemption to avoid complying with the legal and economic realities of foreclosing on real property in California.

Therefore, the motion is denied.

The court recognizes that in denying the motion that the short sale advanced by the creditor will fail. That represents a failure of the parties and their counsel to reasonably address the legal and economic rights and interests of all the parties – not a failure of the legal system or the Bankruptcy Code.

MINUTES FROM JUNE 3, 2014 HEARING

At the May 15, 2014 hearing, the objecting Creditor asserted not only its argument that a debtor does not have the ability to amend schedules after a case had been closed and reopened pursuant to Federal Rule of Bankruptcy Procedure 1009(a) without leave of the court. Further, that allowing the avoiding of a lien without the reappointment of a Chapter 7 trustee to review the amendment to Schedule C and assert an objection was improper.

The court has continued the hearing to allow the parties to address issues concerning the avoidance of the lien and whether the reappointment of a trustee is necessary.

At the hearing the court addressed to Creditor the question as to whether there was any value in the Property for its junior lien. Creditor stated that it had no opinion as to the value of the property it would present

to the court, and it appeared that it does not have any opinion that the Property at issue has sufficient value to provide for its debt by virtue of its junior lien on the Property. The court expressed concern that this may been an opposition based on theory as opposed to any real, practical economic issues.

The Debtors stated that after the bankruptcy case was closed, and the Property encumbered by Creditors junior judgment lien was abandoned by the Trustee to the Debtors by operation of law, 11 U.S.C. § 554(c), an agreement was reached with beneficiary of the senior deed of trust for the Debtors to conduct a short sale. The Debtors believe that by conducting a short sale, rather than allowing the beneficiary of the deed of trust conducting a non-judicial foreclosure sale, the Debtors will improve their credit score. (The court expresses no opinion on whether such a short sale, in light of the other derogatory information on the Debtors' credit report and having filed a recent Chapter 7 bankruptcy case, on this credit improvement theory.) Presumably, as a real life business matter, the beneficiary under the deed of trust appreciates the Debtors assisting in a "owner" sale of the collateral rather than an REO post-foreclosure sale.

In addition to input from the Parties, the court requests that the U.S. Trustee weigh in on whether post-abandonment of the Property pursuant to 11 U.S.C. § 544(c) and the reopening of this case, reason exists for the reappointment of a Chapter 7 trustee to review the amended schedules to claim an exemption in this Property and for the avoidance of this creditor's lien. If possible, the court requests that the U.S. Trustee file with the court and serve on counsel for the Debtors and Counsel for Stohlman and Rogers, Inc. a statement as to whether the U.S. Trustee is seeking the reappointment of a trustee, has determined that the U.S. Trustee does not intend to so do in this case, or is in the process of reviewing this issue.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
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> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Avoid the judgment lien of Stohlman and Rogers, Inc. is denied.