

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

June 15, 2017 at 10:00 a.m.

1. 17-20903-A-7 CHANELLE HENLEY 17-2079 LEWIS V. HENLEY	ORDER TO SHOW CAUSE 5-30-17 [10]
---	--

Tentative Ruling: The adversary proceeding will be dismissed.

This order to show cause was issued because of the plaintiff's apparent failure to diligently prosecute this proceeding. The complaint was filed by Doris Lewis on May 12, 2017. It is a handwritten letter. A summons was issued on May 17. A certificate attesting that the summons and complaint were served has not been filed.

Further, the plaintiff has not paid the \$350 filing fee. See Dockets 6 & 8. The plaintiff also has not amended the complaint to comply with Fed. R. Bankr. P. 9004-1 and Local Bankruptcy Rule 9004(b), stating the elements of the asserted causes of action. Docket 6.

2. 87-20156-A-7 DALE/ANNA ATKINS 87-2153 SDW-5 FIBERGLASS REPRESENTATIVES ET AL V. ATKINS VS. JAMES BARRETT	MOTION TO AVOID LIEN OR FOR DETERMINATION THAT THE REAL PROPERTY MAY NOT BE SOLD 4-28-17 [97]
---	---

Tentative Ruling: The motion will be denied.

Dale Atkins seeks to halt the enforcement of this court's May 2, 2017 order (Docket 105) authorizing James Barrett, an assignee of plaintiff Fiberglass Representatives, Inc., to sell real property in Vallejo, California, in order to satisfy the judgment entered in this case in 1988. In order to do so, Mr. Atkins seeks to avoid Mr. Barrett's judicial lien and/or determine that the property may not be sold because of Mr. Atkins' exemption. Dockets 97 and 106.

The motion will be denied because Dale Atkins has appealed this court's orders (Dockets 104 and 105) permitting the sale of the property. Therefore, such orders are subject to the exclusive jurisdiction of the appellate court.

"The principle that a timely notice of appeal immediately transfers jurisdiction to the appellate court is a judge-made doctrine that is designed to promote judicial economy and to avoid the confusion and ineptitude resulting when two courts are dealing with the same issue at the same time. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L. Ed. 2d 225 (1982); [Marino v. Classic Auto Refinishing, Inc. (In re Marino)], 234 B.R. 767, 769 (B.A.P. 9th Cir. 1999)]; 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 303.32[1] (3rd ed. 1999). The trial court cannot take actions 'over those aspects of the case involved in the appeal.' Griggs, 459 U.S. at 58, 103

June 15, 2017 at 10:00 a.m.

S.Ct. 400.

"The focus is on whether the trial court is being asked to alter the status quo with respect to the appeal. Thus, a trial court cannot enter an order that supplements the order on appeal because such supplementation would change the status quo. McClatchy Newspapers v. Central Valley Typographical Union, 686 F.2d 731, 734-35 (9th Cir. 1982)."

Hill & Sanford, L.L.P. v. Mirzai (In re Mirzai), 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999).

The doctrine of exclusive appellate jurisdiction prevents this court from adjudicating any stays with respect to the orders authorizing the sale, other than a request for stay pending the appeal. The movant has not requested a stay pending appeal.

Moreover, the lien avoidance request makes no sense.

A debtor's right to avoid a judicial lien on exemption-impairment grounds is determined as of the petition date. In re Chiu, 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001) (citing In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992)); see also In re Kim, 257 B.R. 680, 685 (B.A.P. 9th Cir. 2000).

Here, however, both the property and judgment against the property postdate the filing of this case. Anna Atkins and Dale Atkins filed the underlying chapter 7 case on January 12, 1987. Sometime during 1988, the Atkins purchased the subject real property. After a two-day trial in October 1988, this court entered a money judgment on November 15, 1988, for \$282,000 against Anna Atkins in favor of Fiberglass, which then assigned the judgment to Mr. Barrett. The debt was declared nondischargeable. Anna Atkins filed a notice of appeal. The appeal was dismissed on July 6, 1990. Docket 96 at 1-2.

Given the inapplicability of the petition date as a reference for determining the exemption amount, *"the homestead character of the property is determined as of the date of attachment of the judgment lien. For already-owned property, attachment occurs at the time the lien is created. For after-acquired property, attachment occurs on the date of purchase."* SBAM Partners v. Cheng Miin Wang, 164 Cal. App. 4th 903, 908 (2008).

Under Cal. Civ. Proc. Code § 703.050(a):

"The determination whether property is exempt or the amount of an exemption shall be made by application of the exemption statutes in effect (1) at the time the judgment creditor's lien on the property was created or (2) if the judgment creditor's lien on the property is the latest in a series of overlapping liens created when an earlier lien on the property in favor of the judgment creditor was in effect, at the time the earliest lien in the series of overlapping liens was created."

The Atkins purchased the property sometime in 1988 and the judgment was entered on November 15, 1988. While the court has not been informed when the abstract of judgment was recorded, recordation obviously did not take place before the bankruptcy case was filed because the judgment was not entered until after the case was filed.

Further, the court did not authorize sale of the property based on a judicial lien, much less a lien held by Mr. Barrett. The court permitted Mr. Barrett to

sell the property based on a California statute authorizing creditors to hold a surviving spouse liable for debt of the deceased spouse. Docket 96 at 11; Cal. Prob. Code § 13550. Avoiding a lien will not somehow undo an order granting Mr. Barrett's sale application.

The movant's request to stop the sale because of Mr. Atkins' exemption claim also makes no sense. Mr. Barrett has argued pursuant to Cal. Prob. Code § 13551(c) that he is entitled to one-half of the equity in the property. Based on that argument, the court entered an order permitting Mr. Barrett to sell the property.

In other words, Mr. Atkins' separate property interest in the property, to which his exemption claim applies, is not subject to the levy of Mr. Barrett. Under Cal. Prob. Code § 13551(c), Mr. Barrett is seeking to enforce the judgment only against "[t]he separate property of the decedent," Anna Atkins. The court has been cited no authority permitting Mr. Atkins to apply his exemption against the separate property interest of Anna Atkins.

Conversely, Cal. Prob. Code § 13554(a) prescribes that "any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse." Thus, Mr. Barrett may enforce the judgment against the separate property interest of Anna Atkins in the same manner as it could have been enforced against her if she were still alive. Her separate property interest, however, cannot be subject to an exemption claimed by Dale Atkins. He may exempt his interest only.

Finally, even if Mr. Atkins' exemption rights are somehow implicated, there is a well-defined procedure under California law for the assertion of an exemption against a property that has been levied. Via such procedure, Dale Atkins does not have to move to halt the sale.

Cal. Civ. Proc. Code § 703.030(a) says that "[a]n exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment."

Cal. Civ. Proc. Code § 703.030(b) further says that "[e]xcept as otherwise specifically provided by statute, property that is described in this chapter or in any other statute as exempt without making a claim is not subject to any procedure for enforcement of a money judgment."

Cal. Civ. Proc. Code § 703.510 states that:

"(a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

"(b) If property that is exempt without making a claim is levied upon, it may be released pursuant to the exemption procedure provided in this article."

Cal. Civ. Proc. Code § 703.520(a) prescribes that "The claimant may make a claim of exemption by filing with the levying officer a claim of exemption together with a copy thereof. The claim shall be made within 10 days after the date the notice of levy on the property claimed to be exempt was served on the judgment debtor."

Then, as mandated by Cal. Civ. Proc. Code § 703.540, "[p]romptly after the

filing of the claim of exemption, the levying officer shall serve both of the following on the judgment creditor personally or by mail:

"(a) A copy of the claim of exemption.

"(b) A notice of claim of exemption stating that the claim of exemption has been made and that the levying officer will release the property unless, within the time allowed as specified in the notice, both of the following are filed with the levying officer:

"(1) A copy of the notice of opposition to the claim of exemption.

"(2) A copy of the notice of motion for an order determining the claim of exemption."

It is then the creditor who has to file a motion with the court, if he opposes the exemption.

"Within 10 days after service of the notice of claim of exemption, a judgment creditor who opposes the claim of exemption shall file with the court a notice of opposition to the claim of exemption and a notice of motion for an order determining the claim of exemption and shall file with the levying officer a copy of the notice of opposition and a copy of the notice of motion."

Cal. Civ. Proc. Code § 703.550.

The motion will be denied.

3. 12-27062-A-11 CECIL PULLIAM
GEL-2

MOTION FOR
ENTRY OF DISCHARGE
6-1-17 [145]

Tentative Ruling: The motion will be denied without prejudice.

The debtor asks the court to enter his 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 motion asks for discharge under section 1141(d) (5) (A) .

The debtor has shown that he has completed all payments under the plan. The debtor will continue to pay long term claims, such as the claim secured by his real property. The debtor then satisfies section 1141(d) (5) (A) .

Nevertheless, discharge cannot be entered because there is no evidence as to whether the debtor satisfies section 1141(d) (5) (C) .

He has confirmed that section 522(q) (1) (A) is not applicable to him. Docket 147. But, the debtor has not produced evidence on whether he owes a debt of the type outlined in section 522(q) (1) (B) . Nor has he demonstrated that there is no pending proceeding of the type described in section 1141(d) (5) (C) (ii) . The debtor’s declaration is silent on those points. Docket 147. The motion will be denied.

4.	10-32769-A-11 PATRICIA MCELROY GEL-2	MOTION FOR ENTRY OF DISCHARGE 6-1-17 [405]
----	---	--

Tentative Ruling: The motion will be denied without prejudice.

The debtor asks the court to enter his 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 motion asks for discharge under section 1141(d) (5) (A).

The debtor has shown that she has completed all payments under the plan. The debtor will continue to pay long term claims, such as the claim secured by her real properties. The debtor then satisfies section 1141(d) (5) (A).

Nevertheless, discharge cannot be entered because there is no evidence as to whether the debtor satisfies section 1141(d) (5) (C).

She has confirmed that section 522(q) (1) (A) is not applicable to her. Docket 407. But, the debtor has not produced evidence on whether she owes a debt of the type outlined in section 522(q) (1) (B). Nor has she demonstrated that there is no pending proceeding of the type described in section 1141(d) (5) (C) (ii). The debtor's declaration is silent on those points. Docket 407. The motion will be denied.

5. 17-21973-A-12 JOSE/MARIA PIMENTEL MOTION FOR
FWP-1 RELIEF FROM AUTOMATIC STAY
DIVERSIFIED FINANCIAL SERVICES, L.L.C. VS. 5-18-17 [33]

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the debtor and the trustee, 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 movant, Diversified Financial Services, L.L.C., seeks relief from the automatic stay with respect to a 1999 1020 Kirby truck mounted mixer and a 1994 Freightliner truck vehicle.

The debtors have not made at least four pre-petition and two post-petition payments to the movant. And, the debtors have told the movant that they intend to surrender the property. Docket 37 at 3. This is cause for the granting of relief from stay.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d) (1) to permit the movant to repossess its collateral, dispose of it pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

According to the movant, the property has a value of \$15,000 and its secured claim is approximately \$20,032. Docket 37 at 3.

Because the movant has not established that the value of its collateral exceeds

the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived due to the fact that the movant's vehicle is being used by the debtor without compensation and it is depreciating in value.

6. 17-21973-A-12 JOSE/MARIA PIMENTEL MOTION TO
JLG-1 DISMISS CASE
5-16-17 [27]

Final Ruling: The motion will be dismissed without prejudice because it has not been noticed on all creditors, in violation Fed. R. Bankr. P. 2002(a)(4). See Dockets 4 & 32.

7. 16-21585-A-11 AIAD/HODA SAMUEL MOTION FOR
FWP-25 ADMINISTRATIVE EXPENSES
5-8-17 [789]

Tentative Ruling: The motion will be denied.

The chapter 11 trustee seeks authority to pay \$8,686 in management fees as an administrative expense, relating to the St. Mena and St. Marcorious, L.L.C., incurred by MBI Consulting Group, Inc. (\$8,036) and Sackett Corporation (\$650) prior to the April 6, 2017 consolidation of that entity with the estate. See Docket 767, Substantive Consolidation Order; see also Docket 765, Substantive Consolidation Ruling.

The motion will be denied because the court cannot authorize the payment of claims incurred prior to the consolidation as administrative expenses. As the claims were incurred when St. Mena and St. Marcorious was not part of the bankruptcy estate, the claims are pre-petition claims. They should be paid along with all other pre-petition claims against the estate.