

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

July 27, 2017, at 10:30 a.m.

1. <u>16-27854</u> -E-11 TBG-3	GARY STEINGROOT Stephan Brown	MOTION TO USE PROPERTY NUNC PRO TUNC PURSUANT TO 11 U.S.C. § 363(B) O.S.T. 7-20-17 [<u>67</u>]
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**APPEARANCE OF STEPHAN BROWN, ESQ.,
AND EDWARD SMITH, ESQ., ATTORNEYS FOR DEBTOR IN
POSSESSION, AND EACH OF THEM,
REQUIRED AT THE HEARING**

NO TELEPHONIC APPEARANCES PERMITTED

Tentative Ruling: 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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on July 21, 2017. By the court's calculation, 6 days' notice was provided. The court required 6 days' notice. Dckt. 66.

The Motion to Use Property Nunc Pro Tunc was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

July 27, 2017, at 10:00 a.m.

The Motion to Use Property Nunc Pro Tunc is granted.

Gary Steingroot (“Debtor in Possession”) filed this bankruptcy case on November 19, 2016. Debtor in Possession’s Motion states the following grounds for relief with particularity:

- A. “In June 2017, Shaun Farrell, as the realtor for Debtor in Possession, advised Debtor in Possession that installing new flooring would assist in selling the real property at 1055 Hutley Way, Granite Bay, California 95746 (‘the Property’).”
- B. “Debtor in Possession intends to file a Chapter 11 Plan that will pay all known creditors in full from the proceeds of the sale of the Property.”
- C. “The current flooring would be an obstacle in selling the home, and should be replaced.”

Though 243 days have passed since the filing of this bankruptcy case, no plan to simply provide for the sale of the Hutley Way property has been filed by Debtor in Possession. While stating that there will be such a plan, no such simple plan has been advanced by Debtor in Possession in this case.

- D. “Pursuant to 11 U.S.C. Section 363(b), Debtor in Possession requests an order authorizing the use of the cash of the estate outside of the ordinary course of business.”

On its face, the Motion states that the grounds for retroactive relief are nothing more than “trust us, it is of benefit to the bankruptcy estate.” There are no grounds relating to any error by the fiduciary debtor in possession and how such improper use of property of the estate occurred by the fiduciary. The grounds are merely, Debtor in Possession did it, and it is good, therefore the court shall now say it is allowed.

The points and authorities cite the court to a decision from the Bankruptcy Court for the Eastern District of California stating that “retroactive” relief may be granted approving a professional’s services. The points and authorities also cites to the test used for such retroactive relief, which includes stating the reason for the failure to obtain prior court approval. The Motion does not discuss any grounds explaining the failure in this case, though.

The Declaration of Shaun Farrell states that he has been hired by Debtor in Possession. The declaration states that Mr. Farrell believes that the flooring is “substandard for a home at this price point” and not replacing it “would likely be an obstacle to selling the home.” Dckt. 69 at 2.

The Declaration of Stephan Brown states:

- A. “In the morning of July 18, 2017, I was advised by the Office of the US Trustee that use of cash by Debtor in Possession requires court approval.”

- B. “In the afternoon of July 18, 2017, I was informed that just under \$10,000 was paid to Home Depot by Debtor in Possession for the flooring materials and installation.”

Dckt. 70.

Conspicuously absent is any declaration by Debtor in Possession. Presumably, he used the \$10,000.00 to buy flooring materials and could provide testimony as to how such an error on his part could have occurred. He appears to be screened by the real estate agent and by his counsel, however.

APPLICABLE LAW

As a preliminary matter, Debtor in Possession is seeking a “retroactive authorization” rather than nunc pro tunc authorization. The Ninth Circuit has noted that nunc pro tunc approval is not the proper name for seeking retroactive authorization of actions in a bankruptcy case. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). Nunc pro tunc amendments are usually used to correct errors in the record and are extremely limited in scope. *Id.* The Ninth Circuit noted that while it is more accurate to call such after-the-fact authorizations “retroactive approvals,” it is customary, but not necessarily correct, to refer to them generically as nunc pro tunc in bankruptcy practice. *Id.* The two names stand for the same set of standards and can be used interchangeably. *See, e.g., Atkins v. Wain*, 69 F.3d 970, 974–78 (9th Cir. 1995) (alternating between using nunc pro tunc and “retroactive approval” when determining whether a law firm had established exceptional circumstances allowing them to be paid for services to debtor not approved by the court).

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor’s estate. *In re Harbin*, 486 F.3d at 522. Retroactive approvals should only be used in “exceptional circumstances.” *Atkins*, 69 F.3d at 974.

Section 363(b) of the Bankruptcy Code permits Debtor in Possession to “use, sell, or lease, other than in the ordinary course of business” property of the estate. 11 U.S.C. § 363(b)(1).

REVIEW OF SCHEDULES AND OTHER DOCUMENTS FILED IN THIS BANKRUPTCY CASE

On Schedule A, Debtor lists having an interest in only one real property—that being the Huntley Way property with a value of \$750,000.00. Dckt. 16, at 3. On Schedule C, Debtor claims a \$75,000.00 homestead exemption in the Huntley Way property as being his residence. *Id.* at 10. On Schedule D, Debtor lists creditors having \$460,359.01 in claims secured by the Huntley Way property. *Id.* at 12. On Schedule E/F, Debtor lists having no priority unsecured claims and \$105,399.79 in general unsecured claims. *Id.* at 18.

Suntrust Mortgage filed Proof of Claim No. 1 in this case corroborating Schedule D, stating a secured claim of \$455,042.01. No other secured or unsecured claims have been filed in this bankruptcy case.

On Schedule I, Debtor lists having net income (before taxes) from his business of \$2,356.63 per month. *Id.* at 22. On Schedule J, Debtor states under penalty of perjury that his monthly expenses are (\$3,560.94) per month, yielding a negative monthly income of (\$1,204.31). *Id.* at 24. On both Schedules I and J, Debtor states under penalty of perjury that he anticipates no changes in his income or expenses.

Notably, Debtor makes no provision for paying state or federal income or self-employment taxes. On the Statement of Financial Affairs, Debtor states under penalty of perjury that his business is a sole proprietorship.

DISCUSSION

Here, Debtor in Possession wants to use cash outside of the ordinary course of business to make improvements to the Hutley Way property before listing it on the market for sale. Debtor in Possession argues that all known creditors will be paid from the sales proceeds, and the improvements to the floor will help with that sale.

Mr. Farrell has assured the court that the flooring improvements to the Hutley Way property will increase the property's sales price significantly. If that is the case, then based upon that assurance, the court authorizes the first \$10,000.00 of any net proceeds from selling the property to be paid to the Estate, before (and free of) the payment of any administrative expense or broker's commission or fee.

The court shall issue a minute order substantially in the following form holding that:

Order Granting Motion to Use Property Nunc Pro Tunc

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Use Property Nunc Pro Tunc having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and Debtor in Possession is authorized retroactively to pay \$10,000.00 to Home Depot for flooring materials and installation of those materials at 1055 Hutley Way, Granite Bay, California.

IT IS FURTHER ORDERED that the first \$10,000.00 of any proceeds from a sale of the Huntley Way property shall be paid to the Estate, free and clear of any administrative expense, broker's commission, or fee.