UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 7, 2017 at 10:00 a.m.

1.	17-23205-A-12 BLL-1 COUTO BROTHERS	DANNY SMITH AND SUSAN KELLOGG VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 6-28-17 [8]

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, Couto Brothers (a California general partnership), seeks relief from the automatic stay as to real property in Orland, California under 11 U.S.C. § 362(d)(1), (d)(2) and 362(d)(4). The property consists of two contiguous parcels, one located in Glenn County and the other located in Tehama County.

The property has a value of $516,500 (per Schedule A) and it is encumbered by claims totaling approximately $1,049,100, consisting of:

— outstanding property taxes in the approximate amount of $11,973 ($7,237 to Glenn County and $4,736 to Tehama County);

— a mortgage for approximately $833,086 in favor of the United States Department of Agriculture Service Agency;

— a mortgage for approximately $144,040 in favor of the movant (no payments being made; loan matured on February 1, 2014); and

— a judicial lien for $60,000 in favor of Rodolfo Raygosa.

Docket 1, Schedule D.

The movant's deed is in an unspecified junior priority position.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that it can be administered for the benefit of creditors. The debtor's Schedule I discloses no income from the property. Docket 1, Schedule I. The property is the

debtors' only real property. There is no evidence that it is necessary to a reorganization.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

Finally, the court will grant relief under 11 U.S.C. § 362(d)(4), which prescribes that:

"*On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .*

"*with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either-*

"*(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or*

"*(B) multiple bankruptcy filings affecting such real property.*"

In November 3, 2016, the debtors filed a chapter 12 bankruptcy case (Case No. 16-27323), which was dismissed on April 20, 2017 because the debtors never filed a plan. The subject property was listed as an asset in that case.

The court's ruling dismissing the case provided:

"*11 U.S.C. § 1221 provides: 'The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.'*

"*This case was filed on November 3, 2016. The 90-day plan filing deadline ended on February 1, 2017. The debtors had not filed a plan by that date. The debtors also did not ask the court to extend the deadline, prior to its expiration.*

"*Given the debtors' breach of the 90-day plan filing deadline, cause for dismissal exists. The motion will be granted and the case will be dismissed.*"

Case No. 16-27323, Docket 36.

The debtor filed this case 20 days later, on May 10, 2017. Nearly three months after the petition date, no chapter 12 plan has been filed in this case.

Given the debtors' prior case, their failure to file a plan in the prior case, the dismissal of the prior case, their filing of this case only within few days of the dismissal of the prior case, their continued failure to file a plan despite what transpired in the prior case, and the lack of income from the subject property, tend to prove a scheme to delay, hinder or defraud the movant in the enforcement of its claim against the property. This scheme involves multiple bankruptcy filings affecting the property which the debtors have failed to diligently prosecute. Accordingly, relief under 11 U.S.C. § 362(d)(4) is warranted.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

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 not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

2. 13-35308-A-7 DOROTHY PARENT — MOTION FOR SUMMARY JUDGMENT
15-2229
FUKUSHIMA V. SWENDEMAN — 7-10-17 [137]

Tentative Ruling: The motion will be denied.

The plaintiff, Alan Fukushima, the trustee in the underlying chapter 7 bankruptcy case, moves for a new partial summary judgment against the new defendant in this proceeding, Cynthia Swendeman, pursuant to the court's prior partial summary judgment awarded on November 14, 2016 against Cynthia Swendeman's predecessor in interest, her deceased mother, Dorothy Swendeman. Dockets 72 & 74.

The plaintiff filed this proceeding on November 30, 2015, seeking to avoid Dorothy Swendeman's lien. That lien is based on a recorded abstract of judgment in the chain of title of real property that is part of the bankruptcy estate. Pursuant to a motion for summary judgment by the plaintiff, the court granted partial summary judgment on November 14, 2016, avoiding the subject judicial lien. Docket 53. Dorothy Swendeman unsuccessfully opposed the motion. Dockets 63-68.

On December 16, 2016, Dorothy Swendeman's counsel filed a notice of death of Dorothy Swendeman, informing all parties in interest that Dorothy Swendeman had passed away. Docket 96.

On January 30, 2017, the court granted the plaintiff's Fed. R. Civ. P. 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman. Dockets 116 & 119. On February 13, 2017, the plaintiff filed an amended complaint, adding Cynthia Swendeman, both in her personal capacity and as trustee of a Swendeman family trust, as a defendant. Docket 120.

This motion was filed on July 10, 2017. The plaintiff represents that his causes of action against Cynthia Swendeman are identical to those against Dorothy Swendeman, and he is thus seeking a summary judgment against Cynthia Swendeman, based on the summary judgment entered against Dorothy Swendeman.

The motion will be denied. The court will not re-adjudicate the plaintiff's prior summary judgment motion. That motion was filed on October 7, 2016 and

heard on November 14, 2016. The order on the motion was entered on November 17, 2016. Dockets 53, 72, 74. That motion has been already adjudicated. The court entered an order granting it in part. Dockets 72 & 74. When the court granted the plaintiff's Rule 25 motion, substituting Cynthia Swendeman in the place of her deceased mother Dorothy Swendeman, Cynthia Swendeman became a defendant in this proceeding subject to any prior adjudications against Dorothy Swendeman. There is no need to relitigate what was already litigated with respect to Dorothy Swendeman.

On the other hand, if someone thinks that the court's order on the plaintiff's prior summary judgment motion should not have been entered, a motion to vacate that order should be made. As of now, however, that order stands. Dorothy Swendemen's successor succeeds to the state of the litigation as of the date of her substitution in this case.

As a final note, the court reminds the parties to use docket control numbers in compliance with Local Bankruptcy Rule 9014-1(c).

3. 13-35308-A-7 DOROTHY PARENT — CONTINUED STATUS CONFERENCE
15-2229 — 2-13-17 [120]
FUKUSHIMA V. SWENDEMAN

Tentative Ruling: Appearances required for trial setting.

4. 17-24884-A-7 SAINI TRUCKING INC. — MOTION FOR
FWP-1 — RELIEF FROM AUTOMATIC STAY O.S.T.
GAIL-JEAN MCGUIRE VS. — 7-31-17 [11]

Tentative Ruling: The motion will be granted.

The movant, Gail-Jean McGuire and Doug McGuire, seeks relief from the automatic stay to proceed in state court with its personal injury claims against the debtor and other non-debtor defendants. Recovery will be limited to available insurance coverage, if any.

Given that the movant would not seek to enforce any judgments against the debtor or the estate and will proceed against the debtor only to the extent its claims can be satisfied from the debtor's insurance proceeds, the court concludes that cause exists for the granting of relief from the automatic stay. The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to allow the movant to prosecute the claims against the debtor, but not to enforce any judgments against the debtor or the estate other than against available insurance coverage, if any.

No fees and costs are awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived.

5. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO
FWP-23 — APPROVE COMPENSATION OF CHAPTER 11 TRUSTEE
7-10-17 [845]

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 creditors, the debtors, the chapter 11 trustee, the U.S. Trustee, 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 chapter 11 trustee, Scott Sackett, has filed his first interim motion for approval of compensation. The requested compensation consists of $230,987.82 in fees (reduced for compliance with the statutory cap of 11 U.S.C. § 326(a): from $243,601.50 in actual fees incurred at the movant's hourly rate) and $1,144.69 in expenses, for a total of $232,132.51.

This motion covers the period from May 10, 2016 through March 31, 2017. This case was filed on March 15, 2016. The court approved the chapter 11 trustee's appointment on May 10, 2016. The movant provided 889.60 hours of services to the estate. The movant's hourly rate for the services was $325.

The court is satisfied that the requested compensation does not exceed the cap of 11 U.S.C. § 326(a).

The movant's compensation is subject to 11 U.S.C. § 330(a), which permits only reasonable compensation for actual and necessary services rendered by the movant. See Gill v. Wittenburg (In re Fin. Corp. of America), 114 B.R. 221, 224-25 (B.A.P. 9th Cir. 1990). The 11 U.S.C. § 330(a) criteria includes an assessment of the nature of services, extent of services, value of services, time spent on services, and cost of comparable services. Tiffany v. Gill (In re Fin. Corp. of America), 946 F.2d 689 (9th Cir. 1991).

The movant's disbursement during the subject compensation period was $6,924,594. This means that the cap under 11 U.S.C. § 326(a) on the movant's compensation as chapter 11 trustee is $230,987.82 ($1,250 (25% of first $5,000) + $4,500 (10% of next $45,000) + $47,500 (5% of next $950,000) + $177,737.82 (3% on anything above $1 million). Hence, the requested compensation of $230,987.82 does not exceed the cap of 11 U.S.C. § 326(a).

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation:

(1) obtaining access to the estate's real properties,

(2) inspecting and investigating the value of the properties,

(3) retaining professionals to assist in the administration of the estate,

(4) obtaining documents related to the operation of the properties,

(5) analyzing financial documents related to the operation of the properties,

(6) gathering information for the creation of operating budgets,

(7) negotiating with secured creditors about the enforcement of their claims, adequate protection payemtns, payment of the property's operating expenses, continued use of cash collateral,

(8) implementing a marketing and sales program for the estate's shopping center properties,

(9) reviewing documents pertaining to the debtors' St. Mena and St. Marcorious, L.L.C.,

(10) investigating the encumbrances and value of the residential real properties,

(11) assessing existing insurance and options for unascertained insurance,

(12) evaluating and implementing repairs and maintenance at the properties,

(13) evaluating a refinancing option for reorganization of the debt on the shopping centers,

(14) operating, managing, and preparing the shopping centers for sale,

(15) communicating with numerous creditors about the case,

(16) analyzing unsecured creditor claims, including the claim of Brakemasters,

(17) addressing fines by Sacramento County based on code violations,

(18) addressing various issues, such as insurance and repair issues, resulting from a fire at Stockton Boulevard shopping center,

(19) reviewing offers for the purchase of the shopping centers,

(20) cooperating with potential buyers in due diligence and other sale issues,

(21) communicating with the estate's professionals,

(22) attending numerous court hearings.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. This is especially true given that the debtors have been uncooperative in virtually all administrative actions undertaken by the trustee. The compensation will be approved.

6. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO APPROVE COMPENSATION OF OTHER PROFESSIONAL
FWP-24 — 7-17-17 [855]

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 creditors, the debtors, the chapter 11 trustee, the U.S. Trustee, 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 chapter 11 trustee, Scott Sackett, on behalf of Sackett Corporation, the company retained to manage the debtors' shopping center real properties, has filed a second interim motion for approval of compensation for services rendered by SC from January 1, 2017 through March 2017. The requested compensation consists of $9,389.50 in fees and $0.00 in expenses.

This case was filed on March 15, 2016. The court approved the chapter 11 trustee's appointment on May 10, 2016. SC's retention by the trustee was approved by the court on August 29, 2016. Docket 239. SC's fees are $650 a month or 5% of the gross rents from the properties, whichever is greater. See Docket 146.

The fees for the Power Inn and Stockton Boulevard properties are $650 a month for three months (January through March 2017) for each property. The fees for the Sacramento Avenue property are $5,489.50 for that same period, based on gross rental revenue for each month during that period, of $38,930, $34,930, and $35,930, correspondingly.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." SC's services included assisting the trustee with the management of the debtors' three shopping centers, including, without limitation, administering the leases at the properties, collecting rents, administering service contracts, and preparing income and expense statements.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The compensation will be approved.

7. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO USE CASH COLLATERAL AND FOR REPLACEMENT LIENS
FWP-6 — 7-24-17 [871]

Tentative Ruling: The motion will be conditionally granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the rental of a shopping center in Rio Linda, California ($8,268.40 in rents monthly), for the period of August 1, 2017 through October 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. 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 August 1, 2017 through October 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 and U.S. Bank as secured creditors, the motion does not say what are the secured claims against the properties.

Only the United States and JPMorgan Chase Bank are asserting interest in cash.

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 especially true with respect to the shopping center at this time, given the substantial flood damages it sustained recently and the trustee's efforts to remedy such damages. The proposed use of cash collateral 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, 794. 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.

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.

8. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO USE CASH COLLATERAL, REPLACEMENT LIENS AND FOR ADEQUATE PROTECTION
FWP-6 — 7-18-16 [170]

Tentative Ruling: This motion is duplicative of another motion to use cash collateral, DCN FWP-6.

9. 14-31890-A-11 SHAINA LISNAWATI — MOTION FOR ENTRY OF DISCHARGE
JHH-15 — 7-24-17 [315]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtor asks the court to enter a 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).*"

This case was filed on December 6, 2014. The order confirming the debtor's chapter 11 plan was entered on August 4, 2016.

All payments under the plan have been completed. And, the debtor has produced evidence indicating that 11 U.S.C. § 522(q)(1) is not applicable. There is no pending proceeding where the debtor may be found guilty of a felony demonstrating that the filing of this case was an abuse of the Bankruptcy Code (section 522(q)(1)(A)) or the debtor may be found liable for a debt of the kind specified in section 522(q)(1)(B). Docket 317. Accordingly, discharge will be entered pursuant to section 1141(d)(5)(A). The motion will be granted.

Therefore, no earlier than 10 days after the hearing on this motion, the clerk shall enter the debtor's discharge. See 11 U.S.C. § 1141(d)(5)(C).