UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 19, 2013 at 10:00 a.m.

1.	13-23402-A-11	STEP ONE DEVELOPMENT,	MOTION TO
	LR-3	LLC	DISMISS CASE
			7-18-13 [29]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The debtor moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that it does not have the income to propose and fund a chapter 11 plan. The debtor had hoped that the rental income from a real property in West Sacramento, California would allow it to propose, confirm and fund a chapter 11 plan. But, the debtor has not been receiving the rents from the property. The tenant has not been paying rent. In addition, the debtor has been unable to complete and file monthly operating reports, as the debtor's principal has been taking care of his spouse, who is seriously ill.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." 11 U.S.C. § 1112(b)(4)(A), (F).

The debtor has established cause for purposes of 11 U.S.C. § 1112(b)(1). The debtor admits to not being able to consummate rehabilitation, while incurring administrative expenses, including quarterly fees to the United States trustee. In addition, even though this case was filed on March 13, 2013, the debtor has not filed a single monthly operating report.

The only issue is whether the case should be converted to chapter 7 or dismissed. The debtor's property in West Sacramento has a scheduled value of $1 million, while its encumbrances total only $146,202. Docket 22. And, the debtor has two unencumbered lots of land in Riverside County with a scheduled value of $44,000.

Given this equity in the debtor's real property, given the debtor's inability to operate its West Sacramento property, and given that the debtor is not interested in staying in a chapter 11, the court would typically determine that conversion to chapter 7, rather than dismissal, is in the best interest of the creditors and the estate.

However, the debtor has no priority or general unsecured creditors. Its only creditor is a lien on the West Sacramento property for property taxes by Yolo County. Given this, the court is inclined to dismiss the case.

2. 13-23402-A-11 LR-4 — STEP ONE DEVELOPMENT, LLC — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEE $9,000, EXP. $1,216.56) 7-23-13 [33]

Tentative Ruling: The motion will be granted in part.

Stephen Reynolds, attorney for the debtor in possession, has filed its first and final motion for approval of compensation. The requested compensation consists of $9,000 in fees and $1,216.56 in expenses, for a total of $10,216.56. This motion covers the period from March 11, 2013 through July 16, 2013. The court approved the movant's employment as the trustee's attorney on April 17, 2013. In performing its services, the movant charged an hourly rate of $300.

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) communicating with the debtor about strategy and issues in the administration of the estate, (2) communicating with the U.S. Trustee about various issues, (3) representing the debtor at the IDI and the meeting of creditors, (4) attending court hearings, (5) preparing plan and disclosure statement, (6) discussing claims with creditors, and (7) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved, except for the time entries reflecting services rendered prior to the filing of the petition, including time entries dated March 11 and March 13. The court does not approve compensation for services rendered pre-petition. The movant should determine precisely which time entries reflect pre-petition services and deduct those amounts from the final figure of fees in the order.

3. 12-37724-A-11 DRE-14 — UDDHAV/CHRISTINE GIRI — MOTION TO APPROVE DISCLOSURE STATEMENT 7-11-13 [133]

Final Ruling: The motion will be dismissed because the proponent has not complied with Fed. R. Bankr. P. 2002(b), which requires at least 28 days' notice of the deadline for filing objections to the approval of a disclosure statement. Here, the deadline for filing objections to the approval of the disclosure statement was August 5, 14 days prior to the August 19 hearing on the motion. However, the debtor has given only 25 days' notice of the August 5 deadline. The motion papers were served on July 11, 2013. Docket 135 & 136.

4. 12-37724-A-11 DRE-16 — UDDHAV/CHRISTINE GIRI — MOTION TO USE CASH COLLATERAL 7-11-13 [137]

Tentative Ruling: The motion will be denied without prejudice.

The debtors seek approval to use the cash collateral of EH National Bank and

Nationstar Mortgage. EH holds the first and second deeds of trust on a commercial rental real property in Citrus Heights, California. Nationstar holds a sole deed of trust on a residential rental property on Tupelo Drive in Sacramento, California. The debtors are generating $8,500 monthly from the commercial property and are generating $1,000 monthly from the residential property. The debtor wants to use the cash to pay the mortgage, property taxes, insurance, maintenance and repairs on the properties, and to make adequate protection payments to the two secured creditors.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 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."

If the debtors are making the mortgage payments on the properties pursuant to the terms of the respective notes, the court will not permit the debtors to make adequate protection payments as well. The mortgage payments are adequately protecting the creditors' interest in the cash collateral.

On the other hand, if the debtors are not making the mortgage payments pursuant to the note terms, the court may authorize use of cash collateral, subject to providing adequate protection of the creditors' interest in the cash.

However, the motion does not have sufficient information for the court to determine whether the debtors are making payments under the notes or whether the creditors' interest in the cash would be adequately protected. The motion is missing important information about the creditors' claims and collateral, as well as the precise amounts to be paid from the cash collateral they are seeking to use.

The debtors are proposing to pay $409 a month to Nationstar, as "[m]onthly mortgage payments," but the motion does not say whether this is the amount to be paid under the terms of Nationstar's note. The debtors are proposing to pay $7,500 to EH on account of its two deeds of trust on the commercial property, as "adequate protection payments." Yet, the motion does not say what are the monthly obligations to EH under the presumably two notes securing EH's two deeds of trust.

More important, the motion does not say what are the values of the commercial and residential properties and does not say what are the loan balances to the two creditors.

The debtors have not submitted a budget for the period they are seeking to use the cash collateral. The motion says that "Debtors intend to use cash collateral during plan approval and for the term of the 5 year Chapter 11 Plan." Motion at 3. But, cash collateral use pursuant to 11 U.S.C. § 363 is only for the post-petition period before plan confirmation. After a plan is confirmed, the terms of the plan govern the debtors' relationship with their creditors.

Lastly, the motion gives no accounting of the cash collateral collected by the debtors from the properties thus far. The court understands that the residential property did not have a new tenant until March 20, 2013 and that

the debtors did not start receiving rent from the commercial property until April 2013. However, this motion was filed on July 11 and we are now in the second half of August. The debtors should have collected substantial rents from the properties by now. Yet, there is no accounting of such rents.

Given the foregoing, the court cannot determine whether the creditors' interest in the cash collateral is adequately protected. Accordingly, the motion will be denied without prejudice.

5.	12-37724-A-11 UDDHAV/CHRISTINE GIRI DRE-17 VS. HUNTINGTON NATIONAL BANK	MOTION TO VALUE COLLATERAL 7-15-13 [141]

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 respondent creditor, 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 debtors move for an order valuing their primary residence in Rocklin, California, in an effort to strip off Huntington Bank's second mortgage on the property and treat it as a wholly unsecured claim.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence. It provides that "a plan may- modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's 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. Section 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."

Based on the opinion of a real estate broker, the debtors contend that the property has a value of $330,000 as of October 2, 2012, the petition date for this case. Jewell Decl. The property is subject to two deeds of trust, the first deed in favor of American Servicing Company, securing a claim of $398,000 and the second deed in favor of Huntington National Bank, securing a claim of $111,050.

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

The anti-modification provision in 11 U.S.C. § 1123(b)(5) applies only to secured claims. This means that a wholly unsecured claim on the debtors' primary residence may be avoided. Stated differently, the anti-modification clause of section 1123(b)(5) does not apply to secured creditors holding completely unsecured claims, even if they are secured by the debtor's primary residence. See Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1227 (9th Cir. 2002); see also Lam v. Investors Thrift (In re Lam), 211 B.R. 36, 40-41 (B.A.P. 9th Cir. 1997).

Huntington's second priority claim against the property is wholly unsecured within the meaning of section 506(a)(1) because the estate has no equity in the property, after the deduction of American Servicing Company's first mortgage. Hence, Huntington's second mortgage will be stripped off, making it 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.

6. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO CONVERT CASE 3-12-13 [65]
UST-1

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have violated an order of the court because they paid their counsel fees for unlawful detainer action work without order of this court, the debtors have accomplished nothing since the case was filed was filed five months ago, and there is no reasonable likelihood of rehabilitation.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . (E) failure to comply with an order of the court." 11 U.S.C. § 1112(b)(4)(A), (E).

The order approving the employment of the debtors' counsel D. Randall Ensminger

states: "No compensation is permitted except upon court order following application pursuant to 11 U.S.C. § 330(a)." Docket 30. Nevertheless, Mr. Ensminger admits to receiving $1,250 from the debtors for the eviction of a tenant from one of the debtors' two rental properties.

Stating that "[h]ad they or undersigned counsel realized that court permission was required it would have been requested on an emergency basis," Mr. Ensminger blames ignorance for his failure to obtain a court order approving the payment of the $1,250. Opposition at 4. Mr. Ensminger does not offer to pay back the funds received from the debtors and has made no effort to apply even for retroactive approval of the fees.

The debtors and Mr. Ensminger have violated this court's employment approval order. Docket 30.

Further, the court agrees with the U.S. Trustee that there has been delay by the debtors that is prejudicial to creditors. This case was filed on October 2, 2012. This motion was filed on March 12, 2013. Prior to the filing of this motion, the debtors had not filed any valuation motions and the debtors' two cash collateral motions were dismissed by the court. Dockets 32 & 53.

The debtors filed a plan and disclosure statement on January 30, 2013, but they did not set the approval of the disclosure statement for hearing. Also, the plan and disclosure statement were filed as a single document, a total of six pages in length (Docket 63), even though the debtors are not a small business debtor. Unless the debtors are a small business debtor, they are not allowed to file the plan and disclosure statement as a single document. See 11 U.S.C. § 1125(f)(1).

More, the disclosure statement and plan have gross deficiencies on the face of the six-page document, including, without limitation, conclusory liquidation and feasibility analyses, the classification and treatment of claims is incomplete, no narrative or otherwise history of the debtors' pre-petition financial condition and what precipitated the filing, no future financial projections with stated assumptions, no discussion of how the road construction at the debtors' gas station business has affected the financial affairs of the business and no discussion of how the debtors are planning to confirm a plan given that the road construction hampering business will not be completed until August of 2014 and the debtors' monthly operating reports reflect the debtors' inability to fund a plan.

The March 2013 report reflects that the debtors have netted cumulatively a negative $2,247 during the life of this case. Docket 85.

The February 2013 report indicates that the debtors had netted cumulatively $1,763. Docket 73. According to the February 2013 report, in that month the debtors lost $4,009 and in January 2013 they lost $6,153. Docket 73. The January 2013 report (mislabeled as January 2012) indicates that the debtors had netted cumulatively a negative $3,389. Docket 64.

These figures do not take into account that the debtors have not been paying the mortgage on the gas station property. The gas station business, via the debtors' Lart Group, Inc. operator corporation, is the debtors' principal source of income.

In reviewing the debtors' reports, the court has noticed also that the reports are inconsistent and contain contradictory information. For instance, the

February 2013 report says that in the prior month (January 2013), the debtors lost $6,153, whereas the January 2013 report (mislabeled as January 2012) reflects positive net cash receipts of $3,881 and reflects the prior month's receipts (December 2012) as a negative $6,153. Docket 64. The reports are in need of some serious corrections.

The reports are deficient also in reporting the financials of the debtors' corporation, Lart Group, Inc., which runs the gas station business and makes lease payments to the debtors for use of the gas station property. The debtors use the lease payments to pay the mortgage on the property. As of the time this motion was filed, Lart had not been making any lease payments to the debtors and they had not been making any payments on account of the mortgage on the property. The lack of transparency with respect to Lart's financials is a serious concern because the debtors control whether and when Lart will make lease payments to them individually.

On the other hand, the court does not have evidence of how much income is coming into Lart and where that income is going. The only evidence the court has is that Lart has been operating the gas station business and generating some revenue, albeit not making any lease payments to the debtors, and the debtors have not been paying the mortgage on the property.

It was not until this motion was filed that the debtors agreed to prompt Lart to make "reduced" lease payments to them in the amount of $7,500.

The court does not understand why the debtors are characterizing the $7,500 in lease payments from Lart as "reduced" when the motion states that the lease payments should be in the amount of $5,500, which is the approximate amount of the mortgage on the property.

The lease payments from Lart apparently started on April 3, 2013, apparently for the first time post-petition. The debtors do not say when Lart stopped making lease payments to them pre-petition and when exactly they stopped making the mortgage payments.

The debtors predict that Lart's $7,500 in lease payments can "continue in that amount until the construction is completed and a six month period for business to return to normal is allowed for." Opposition at 2-3.

However, the court is not persuaded that Lart is able to maintain $7,500 lease payments to the debtors, given that Lart did not make lease payments for at least eight months pre-petition and the construction project inhibiting business will not be completed until August of 2014. Motion at 2, 3.

More important, while the court does not have Lart's financials, even if Lart is able to make the $7,500 of lease payments until completion of the construction project, the debtors have not explained why Lart did not make such payments for the eight months pre-petition and for the last six months post-petition. Lart is an entity the debtors own and control. Yet, they have not explained what has changed that Lart is now able to pay $7,500 a month. The construction project is still ongoing.

From the above, the court concludes that the debtors have either not been honest about whether and to what extent Lart has been able to make lease payments to the debtors or Lart is unable to make the asserted $7,500 in payments until the construction project is completed. Either way, there is cause for conversion or dismissal of the case. If the debtors have not been

honest about Lart's operation of the gas station, they have mismanaged the estate. See 11 U.S.C. § 1112(b)(4)(B). If Lart is unable to maintain the lease payments to the debtors, in light of Lart's post-petition failure to make lease payments, there is substantial or continuing loss to or diminution of the estate and an absence of a reasonable likelihood of rehabilitation. See 11 U.S.C. § 1112(b)(4)(A). The debtors have stated that their gas station business will not "return to normal" "until the [two-year] construction is completed and a six month period [after completion of the construction]." Opposition at 2-3; Docket 63 at 2.

In conclusion, the debtors' failure to obey this court's orders, the delay in obtaining plan confirmation, the lack of transparency as to Lart's financials, the lack of explanation as to how Lart is suddenly able to make $7,500 in lease payments, and the nominal positive income reported for the life of this case are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

As the debtors own a rental property with a value of $60,000, free and clear of any encumbrances, the court concludes that conversion to chapter 7 is in the best interest of the creditors and the estate. Schedule A. The case will be converted to a chapter 7 proceeding.

7. 11-30626-A-11 CAL STATE GROWTH FUND — MOTION TO SELL
REC-09 — 7-26-13 [533]

Tentative Ruling: The motion will be granted.

The liquidating trustee under the debtor's confirmed chapter 11 plan requests authority to sell for $46,500 the liquidating trust's unencumbered interest in a real property in Stockton, California to Petra Calderon Vargas and Narciso Salazar. The trust acquired the property in early 2013 via a foreclosure sale.

Although the liquidating trust established by the debtor's confirmed plan provides that the trustee "is not required 'to file any accounting or seek approval of any court with respect to the administration of the Liquidating Trust,'" the trust also provides that "the Trustee may seek approval of the Bankruptcy Court for any such action." Motion at 2.

The sale will generate some proceeds for the trust and the accomplishing of the purposes of the trust, *i.e.*, liquidation of the bankruptcy estate's assets. Hence, the sale will be approved. The sale is not approved free and clear of any liens or interests.

8. 11-30626-A-11 CAL STATE GROWTH FUND — MOTION TO SELL
REC-10 — 7-26-13 [537]

Tentative Ruling: The motion will be granted.

The liquidating trustee under the debtor's confirmed chapter 11 plan requests authority to approve a short sale for a commercial lot of land in Patterson, California. The trust holds a first priority mortgage on the property with a balance of $385,000. The owners are seeking to sell the property for $350,000, as they have been struggling to make the payments, even though the trust recently agreed to lower their interest rate from 13% to 10%.

Although the liquidating trust established by the debtor's confirmed plan

provides that the trustee "is not required 'to file any accounting or seek approval of any court with respect to the administration of the Liquidating Trust,'" the trust also provides that "the Trustee may seek approval of the Bankruptcy Court for any such action." Under the terms of the trust agreement, the trustee is authorized to "'to perform any and all acts necessary or desirable to accomplish the purposes of the Liquidating Trust', including to 'sell, auction, lease, rent, encumber or transfer any Trust Assets, consistent with the purposes of the Liquidating Trust, as the Trustee shall deem advisable.'" Motion at 2.

Pursuant to the sale, the trust will be paid approximately 90% of the trust's claim secured by the property. This will allow the trust to liquidate its interest in the property without having to wait for the right to conduct a foreclosure sale and without the cost of foreclosure. The proposed sale is in the best interest of the trust and the accomplishing of the purposes of the trust, *i.e.*, liquidation of the bankruptcy estate's assets. The court will authorize the trustee to approve the sale.

9. 12-38128-A-11 JANET/FRANCISCO CUBOL — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-2
BMW BANK OF NORTH AMERICA VS. — 7-19-13 [81]

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, BMW Bank of North America, seeks relief from the automatic stay with respect to a 2009 BMW X5. The movant has produced evidence that the vehicle has a value of $31,125 (and $21,553 per Schedule B) and its secured claim is approximately $36,761. This means that there is no equity in the vehicle.

In addition, the debtor has not shown that the vehicle is necessary to an effective reorganization. The debtors have the burden to establish necessity to an effective reorganization, when the moving creditor has shown that its claim is undersecured. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. The debtors have not even responded to this motion.

Moreover, the vehicle is not necessary to an effective reorganization because the debtors have three other vehicles listed in Schedule B, including a 2001 Lexus and a 2006 Toyota.

Further, the debtors have not made four post-petition payments to the movant, even though this case has been pending since October 11, 2012 and they have not

obtained plan confirmation yet. The court concludes that the debtors' failure to make payments to the movant is cause for the granting of relief from stay.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) and (2) 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.

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) is ordered waived due to the fact that the movant's vehicle is being used by the debtor without compensation and is depreciating in value.

10. 08-31231-A-7 LUCY WHITTIER — STATUS CONFERENCE
09-2624 — 9-24-09 [1]
CARROLL V. WHITTIER ET AL

Final Ruling: The hearing on this status conference has been continued to September 16, 2013 at 10:00 a.m. Docket 92.

11. 08-31231-A-7 LUCY WHITTIER — MOTION FOR SUMMARY JUDGMENT
09-2624 WSS-2 — 6-14-13 [74]
CARROLL V. WHITTIER ET AL

Final Ruling: The hearing on this motion has been continued to September 16, 2013 at 10:00 a.m. Docket 92.

12. 13-24841-A-11 PETER ALBERS — MOTION TO SELL O.S.T.
PLC-11 — 7-29-13 [184]

Tentative Ruling: The motion will be disposed as provided in the ruling below.

The debtor in possession requests authority to sell for $7,725,000 the estate's interest in a dairy real property in Dixon, California (APNs 112-060-06, 112-060-07 and 112-060-08), altogether approximately 640 acres, together with other property rights, to Fagundes Dairy. The other property rights part of the sale are:

(i) all irrigation systems, filters, buildings, barns, corrals, residences, other structures, fencing, lift pumps, improvements and fixtures thereon,

(ii) all right, title or interest to all water wells, pumps, pipelines, casings or other related equipment located on the real property,

(iii) all permits, regulatory approvals and governmental consents and entitlements required in order to operate a dairy located on the real property,

(iv) all shipping rights, dairy quotas, base acres, yield, crop history and production rights resulting from or determined in accordance with any state or federal governmental programs as shown on relevant records for the real property, and

(v) all surface water rights (whether under riparian, appropriative or prescriptive water rights, or from any other source), groundwater rights (whether under overlying, appropriative or prescriptive rights, or from any other source), water rights under contractual entitlements for beneficial use on the real property and special district water entitlements and water company stock associated with the real property.

The sale is contingent on the buyer purchasing independently the corn and winter forage feed in the silage pits at the time of closing. The buyer and seller will retain two independent appraisers to estimate the tonnage of feed in the pits. If it is at least 12,780 tons, the agreed purchase price for the feed will be $900,000.

The expected sale closing date is August 30, 2013.

The debtor anticipates that the estate will net approximately $2,866,000 in net proceeds from the sale, after payment of all encumbrances against the property, including outstanding property taxes in the approximate amount of $55,978.48 and a first priority claim on the real property and fixtures in favor of MetLife for $5,327,000, with an additional pre-payment penalty of $376,000. Importantly, MetLife's claim is cross-collateralized with another two parcels of land owned by the debtor. Those parcels are not part of this sale.

11 U.S.C. § 363(b) allows the debtor in possession to sell property of the estate, other than in the ordinary course of business. See also 11 U.S.C. § 1107(a).

The court does not have to approve the sale free and clear of liens because all secured claims will be paid in full from escrow.

According to the debtor, the sale will generate sufficient proceeds to pay all creditors of the estate in full. Hence, the court will approve the sale pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

On August 12, 2013, the debtor filed a supplement to this motion, asking the court to approve a sale of all five parcels to a different buyer. To the extent the debtor wishes to sell the property to a new buyer, that buyer may come to the August 19 hearing and overbid in connection with the two sale motions on for hearing.

On the other hand, if the debtor no longer wishes to proceed with this and the other sale motion, he may dismiss them and go forward with a new motion to sell the five parcels to the different buyer. The court notes that it signed an order shortening the time for the debtor to have a hearing on September 3, 2013 at 10:00 a.m. on a motion to sell all five parcels, seemingly matching the terms of the supplement filed to this motion. The court will not hear that motion on August 19, even though, as mentioned above, the buyer in that motion may overbid in the two sale motions to be heard on August 19.

13. 13-24841-A-11 PETER ALBERS — MOTION TO SELL O.S.T. 7-29-13 [192]
PLC-11

Tentative Ruling: The motion will be disposed as provided in the ruling below.

The debtor in possession requests authority to sell for $2,177,700 the estate's interest in a real property in Dixon, California (APNs 0112-100-050 and 0112-100-060), altogether approximately 158 acres, to the Mitchell Property Trust. The expected sale closing date is August 30, 2013.

The debtor anticipates that the estate will net the entire sales price except the outstanding property taxes in the amount of $3,307.22. Besides the property taxes, the property is encumbered also by a first priority claim in favor of MetLife for $5,327,000, with an additional pre-payment penalty of $376,000. But, the debtor anticipates that MetLife's claim will be satisfied from the sale of the other three parcels of land, corresponding fixtures and other property rights constituting the debtor's dairy property. MetLife's claim is cross-collateralized with the dairy property. Although the dairy property assets are not part of this sale, this sale is contingent on the sale of the dairy property parcels, fixtures and other property rights.

11 U.S.C. § 363(b) allows the debtor in possession to sell property of the estate, other than in the ordinary course of business. See also 11 U.S.C. § 1107(a).

According to the debtor, the sale will generate sufficient proceeds to pay all creditors of the estate in full.

As the debtor expects for MetLife's claim to be satisfied from the sale of the dairy property assets, the court does not have to approve the sale free and clear of liens because all secured claims will be paid in full from escrow. Nevertheless, the sale of the dairy property assets must close and satisfy MetLife's claim prior to the close of this sale. Hence, subject to this condition, the court will approve the sale pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

On August 12, 2013, the debtor filed a supplement to this motion, asking the court to approve a sale of all five parcels to a different buyer. To the extent the debtor wishes to sell the property to a new buyer, that buyer may come to the August 19 hearing and overbid in connection with the two sale motions on for hearing.

On the other hand, if the debtor no longer wishes to proceed with this and the other sale motion, he may dismiss them and go forward with a new motion to sell the five parcels to the different buyer. The court notes that it signed an order shortening the time for the debtor to have a hearing on September 3, 2013 at 10:00 a.m. on a motion to sell all five parcels, seemingly matching the terms of the supplement filed to this motion. The court will not hear that motion on August 19, even though, as mentioned above, the buyer in that motion may overbid in the two sale motions to be heard on August 19.

14. 13-28248-A-11 GLENN BARNEY — STATUS CONFERENCE 6-18-13 [1]

Tentative Ruling: None.

15. 13-28248-A-11 GLENN BARNEY — MOTION TO DISMISS CASE 8-5-13 [57]
DJH-4

Final Ruling: The motion will be dismissed without prejudice because it violates Fed. R. Bankr. P. 2002(4), which requires at least 21 days' notice of

the hearing on a motion to dismiss chapter 11 case. This motion was filed and served on August 5, only 14 days prior to the August 19 hearing.

16. 13-21454-A-11 CAH-22 — TRAINING TOWARD SELF RELIANCE, A CALIFORNIA — MOTION TO EMPLOY 7-22-13 [158]

Tentative Ruling: The motion will be granted in part and denied in part.

The debtor in possession requests approval to employ Keith Cummings as an accountant for the estate. Mr. Cummings will provide the following services to the estate: prepare various financial reports, journals; post to the general ledger and other ledgers as needed; reconcile bank statements; prepare gross receipts, tax reports; post earning records; prepare payroll tax returns, W-2s, W-3s, 1099s, payroll checks, internal financial statements; attend board meetings; discuss and consult on operations and efficiencies of financial data; and assist with other accounting services as needed to operate the business.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including . . . on a contingent fee basis."

Although the court approved Mr. Cummings' employment as accountant for the estate on April 18, 2013 (Docket 99), the court did not approve the compensation arrangement for Mr. Cummings. The debtor contends that he is not a professional within the meaning of 11 U.S.C. § 327(a). Based on this, it asks to compensate him at the agreed fixed monthly rate of $4,067.40 without further court order.

The court will approve the $4,067.40 fixed monthly fee compensation arrangement for Mr. Cummings. The court concludes it is reasonable in light of the services for which he has been retained and the debtor's needs at this time.

But, the court disagrees that Mr. Cummings is not a professional within the meaning of 11 U.S.C. § 327(a). His employment meets one of the tests enumerated in the motion. Motion at 9. It is directly related to the routine maintenance of the debtor's business operations. Mr. Cummings handles the debtor's payroll and attends board meetings. Hence, he is subject to 11 U.S.C. § 327(a).

Nevertheless, as his compensation arrangement is a fixed monthly fee for well defined services, the court is willing to allow Mr. Cummings to receive interim compensation for as long as six months without court order. The court will require that he files an interim compensation motion at least once every six months, as well as a final compensation motion. As usual, such compensation motions shall include his time entries or a sufficiently detailed summary of his services rendered during the applicable period, to allow the court to assess whether his compensation terms are improvident in light of developments not capable of being anticipated at the time of the fixing of such terms. Pitrat v. Reimers (In re Reimers), 972 F.2d 1127, 1128 (9th Cir. 1992) (quoting

In re Confections by Sandra, Inc., 83 B.R. 729, 731 (B.A.P. 9th Cir. 1987)).

Finally, the court will not approve the $3,110.50 in compensation Mr. Cummings received on February 11, 2013. He received this compensation only 10 days after this case was filed and approximately 30 days prior to the effective date of his employment. The motion to employ him was not filed until April 17, 2013 (Docket 95), meaning that his employment would have been effective at the earliest as of March 18, 2013, 30 days prior to the filing of the compensation motion. And, this motion does not address THC Financial's standard for approval of retroactive employment for Mr. Cummings. The motion will be granted in part and denied in part.

17. 12-33158-A-12 GREG HAWES — MOTION TO RECONSIDER 7-18-13 [138]
SAC-10

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 debtor, the chapter 12 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 debtor's counsel is asking the court to reconsider its order of July 16, 2013 (Docket 137) granting in part compensation to the debtor's counsel. See also Docket 136. The motion requested $8,587.50 in fees and $176 in expenses, for a total of $8,763.50, whereas the court deducted $1,725 of fees incurred prior to the petition date. The movant says that the $1,725 in fees were not included in the requested compensation. Hence, he asks the court to approve all fees and costs, totaling $8,763.50.

Given that the $1,725 deducted by the court were not part of the requested compensation and that the entire requested compensation was incurred post-petition, the court will grant this motion and reconsider its July 16 order deducting the $1,725 from the fees. The court will allow all requested fees and costs, totaling $8,763.50.

18. 12-27062-A-11 CECIL PULLIAM — MOTION TO CONFIRM PLAN 4-23-13 [65]

Tentative Ruling: The motion will be granted.

The debtor asks the court to confirm his chapter 11 plan.

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

19. 12-39475-A-7 HENRY OCHOA
13-2023
OCHOA V. OCHOA

ORDER TO
SHOW CAUSE
7-23-13 [17]

Tentative Ruling: The adversary proceeding will be dismissed.

The court issued this order to show cause due to the plaintiff's, Kim Ochoa's, failure to prosecute this proceeding. At the status conference hearing on March 20, 2013, the court directed the plaintiff to file a request for entry of default within 30 days. Docket 11. The plaintiff filed a request for entry of default on April 12, 2013, in the form of two affidavits. Dockets 13 & 14. The court rejected the affidavits, asking the plaintiff to submit EDC forms 3-726 and 3-727. Dockets 15 & 16. The plaintiff has not complied with the notices from the court.

20. 13-22486-A-12 STEVEN SAMRA
MAS-1

MOTION TO
DISMISS CASE
7-10-13 [69]

Tentative Ruling: The motion will be granted in part and the case will be dismissed with prejudice.

Creditor Ag-Seeds Unlimited asks for dismissal with prejudice of this chapter 12 case pursuant to 11 U.S.C. § 349(a) and 11 U.S.C. § 1208(c)(1) and (c)(9).

The debtor opposes the motion, contending that he filed a first amended plan on July 22, 2013, providing for the movant's claim. He asks the court to continue the hearing on this motion to September 3 so it can be heard with the first amended plan confirmation motion.

The court will strike Mr. Coate's joinder to the motion. The civil and bankruptcy rules of procedure do not allow for the joinder of parties to motions or oppositions to motions.

11 U.S.C. § 349(a) governs the dismissal of a case "with prejudice." Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997). Pursuant to 11 U.S.C. § 349(a), "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar discharge, in a later case under this title . . . nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title[.] . . ." 11 U.S.C. § 349(a). "Section 349 establishes a general rule that dismissal of a case is without prejudice, but it also expressly grants a bankruptcy court the authority to 'dismiss the case with prejudice thereby preventing the debtor from obtaining a discharge with regard to the debts existing at the time of the dismissed case, at least for some period of time.'" Id. (quoting 3 COLLIER ON BANKRUPTCY § 349.01, at 349-2-3 (15th ed. 1997)).

"'Cause' under § 349 has not been defined by the Code. A review of the case law indicates that 'egregious' conduct must be present, but that a finding of bad faith constitutes such egregiousness." Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 939 (B.A.P 9th Cir. 1997). "Bad faith, which is generally held to be cause for dismissal of a case under § 1307, is also cause for dismissal with prejudice under § 349(a)." Id. (citing Morimoto v. United States (In re Morimoto, 171 B.R. 85, 86-87 (B.A.P. 9th Cir. 1994).

"To determine bad faith[,] a bankruptcy judge must review the 'totality of the

circumstances.'" Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (quoting In re Goeb, 675 F.2d 1386, 1391 (9th Cir. 1982)).

"The bankruptcy court should consider the following factors in determining bad faith: (1) whether the debtor 'misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;' (2) 'the debtor's history of filings and dismissals;' (3) whether 'the debtor only intended to defeat state court litigation;' and (4) whether egregious behavior is present." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999) (known as Leavitt I).

Yet, a finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

"Multiple or successive filings do not necessarily constitute bad faith." In re Merrill, 192 B.R. 245, 249 (Bankr. D. Colo. 1995) (citing Johnson v. Home State Bank, 501 U.S. 78, 87, 111 S. Ct. 2150, 2156, 115 L. Ed. 2d 66 (1991); In re Rasmussen 888 F.2d 703, 705 (10th Cir. 1989)). "However, a debtor's history of filings and dismissals may be evidence of a debtor's bad faith." Id. (citing In re Oglesby, 158 B.R. 602, 602 (Bankr. E.D. Pa. 1993); In re Earl, 140 B.R. 728, 728 (Bankr. N.D. Ind. 1992)). "When a debtor has serial petitions, dismissal for bad faith may be avoided if the debtor shows a change of circumstances between filings. Id. (citing In re Armwood, 175 B.R. 779, 779 (Bankr. N.D. Ga. 1994); In re Jones, 105 B.R. 1007, 1007 (Bankr. N.D. Ala. 1989)). "Past filings and dismissals are circumstantial evidence of a debtor's motivation and ability to perform obligations under the Code." Id.

On motion to dismiss or to dismiss with prejudice, the debtor bears the burden of proving that the petition was filed in good faith. Leavitt at 940. Even though this rule has been called into question by Ellsworth v. Lifescape Medical Associates (In re Ellsworth), 455 B.R. 904, 918 (B.A.P. 9th Cir. 2011), the Leavitt (known as Leavitt II) decision has not been overturned.

And, while this court is inclined to read Leavitt II and Ellsworth as requiring the moving party to at the least satisfy the burden of going forward in providing sufficient evidence of cause under section 349(a), shifting or triggering the burden of persuasion with the debtor, in this case the evidence with the motion satisfies the burden of going forward, assuming there is one.

The standard by which bad faith must be established is preponderance of the evidence. Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 634 (B.A.P. 9th Cir. 2010). "Proof by the preponderance of the evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not." Id. at 631 (quoting United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994)).

Further, 11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including-

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

. . .

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation."

11 U.S.C. § 1221 requires that "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."

The court concludes that there is cause for dismissal of this case with prejudice under 11 U.S.C. § 349(a). This is the debtor's third bankruptcy case since September 29, 2010. On September 29, 2010, the debtor filed a skeletal chapter 13 case, Case No. 10-45958. The bankruptcy schedules and statements were not filed until October 12, 2010. The debtor filed one original and three amended chapter 13 plans, but he did not obtain confirmation of any of the plans. The court dismissed the case on August 26, 2011 due to the debtor's failure to make payments to the trustee under a proposed plan and his failure to file pre-petition tax returns.

On October 17, 2011, the debtor filed a skeletal chapter 12 bankruptcy case, Case No. 11-44699. The debtor did not file the bankruptcy schedules and statements until October 31, 2011. The debtor did not file a chapter 12 plan until the last day mandated by 11 U.S.C. § 1221, January 17, 2012, 92 days after the order for relief. Plan confirmation was denied on April 5, 2012 and the debtor filed another chapter 12 plan on April 6, 2012. This plan was never set for confirmation hearing. After the filing of a motion to dismiss the case, the debtor filed another chapter 12 plan on February 18, 2013. But, the court dismissed the case on February 25, 2013 "because of unreasonable delay by the debtor that is prejudicial to creditors." Docket 145. A portion of the court's ruling follows below:

"While the debtor complains that AG-Seeds has been violating the automatic stay, preventing him from having a bank account and attempting to influence vendors not to do business with the debtor, the debtor does not explain how this has prevented him from filing and confirming a plan. The motion does not convincingly connect the alleged misconduct of AG-Seeds with the debtor's failure to file a plan. While the motion says that the stay violations have deprived the debtor of income needed to fund a plan, the motion does not identify what income and how much income the debtor has lost as the result of what AG-Seeds has been doing.

"Importantly, the motion also does not reveal why it has taken over one year for the debtor to make such serious allegations against AG-Seeds. It begs the question of why the debtor did not file a motion for violation of the automatic stay or why the debtor did not open a debtor-in-possession bank account if he was worried about AG-Seeds enforcing its judgment against the debtor's account.

"The court notes that the debtor filed an adversary proceeding against AG-Seeds for violation of the automatic stay on January 9, 2013, nine months after the only plan confirmation hearing in this case on April 5, 2012. See Adv. Proc. 13-2011.

"This motion states in a conclusory fashion only that the debtor lost income due to the misconduct of AG-Seeds, which prevented the debtor from preparing and filing a plan. This does not explain the passage of nearly 11 months without a plan.

"And, even though Mr. Cooper was retained recently, the debtor has had the

benefit of other counsel, Peter Cianchetta, who filed the case and filed and prosecuted the confirmation of the debtor's only chapter 12 plan."

Docket 145.

On February 26, 2013, one day after entry of the order dismissing Case No. 11-44699, the debtor filed the instant case. Once again, it was a skeletal filing. The debtor's schedules and statements were not filed until March 12, 2013. And, the debtor did not file a plan until May 28, 2013, 91 days after the order for relief. See 11 U.S.C. § 1221. The court denied confirmation of that plan on July 8, noting several serious issues with the plan. The court ordered the debtor to file another plan no later than July 22 and obtain confirmation of that plan within 45 days of filing. The debtor filed a first amended plan on July 22, setting it for a confirmation hearing on September 3.

The totality of the foregoing amounts to cause under 11 U.S.C. § 349(a). The debtor has been manipulating the Bankruptcy Code by filing consecutive petitions to evade the collection of a non-dischargeable debt.

The movant filed a breach of contract lawsuit against the debtor in state court on December 22, 2008 and obtained a judgment against the debtor on July 8, 2010 for $96,988.20. In the debtor's chapter 13, Case No. 10-45958, the movant obtained a non-dischargeability judgment against the debtor on August 8, 2011. In the subsequent chapter 12 case, Case No. 11-44699, the movant obtained on May 3, 2012 another non-dischargeability judgment against the debtor.

This is the debtor's third reorganization bankruptcy case in less than three years and the debtor has not obtained a single plan confirmation. Also, the debtor's schedules, statements and reorganization plans reflect continuous delay that is prejudicial to creditors. All three petition filings were initially skeletal and plans were filed always on the last possible day or late. This case has been pending for over five months now and the debtor is nowhere near plan confirmation, in spite of spending more than two years prior to this case in reorganization cases.

More, the debtor has come forward with no admissible evidence to explain the serial filings and dismissals and the protracted setting of plan confirmation hearings. The opposition says nothing about a change of circumstances between filings. The opposition has no evidence with it. It simply urges the court to continue the hearing on this motion to September 3 so it can be heard with the first amended plan confirmation motion. The court is unwilling to do this in light of the totality of circumstances described in this ruling.

In addition, when the court denied confirmation of the debtor's original plan in this case on July 8, it concluded that "the court is not persuaded that the debtor is proposing the plan in good faith. See 11 U.S.C. § 1225(a)(3). Ag-Seeds has produced evidence that 'Debtor categorically failed and refused to provide any information regarding land that he was leasing for farming operations, the parties from whom he was obtaining equipment and supplies, his source of financing, the parties to whom he was going to be selling his crops, and parties with whom he was going to be sharing crop proceeds.' Docket 53 paragraph 5." Docket 65.

There is no evidence from the debtor that he has responded to the movant's requests for "information regarding land that he was leasing for farming operations, the parties from whom he was obtaining equipment and supplies, his source of financing, the parties to whom he was going to be selling his crops,

and parties with whom he was going to be sharing crop proceeds." The information is crucial in this case for assessment of the proposed chapter 12 plan's feasibility because, according to his schedules and statements, the debtor owns no real property, has no executory contracts or unexpired leases, and has generated only $34,000 and $20,000 in business income in 2012 and 2011, respectively. Schedules A & G; SFA at 1.

The court determines also that the creditors have been prejudiced by the debtor's nearly three-year delay in obtaining plan confirmation.

Given the totality of the circumstances, the court concludes that the debtor's conduct in the filing and prosecution of this and the other two prior bankruptcy cases amounts to bad faith that is cause for the dismissal of this case with prejudice under 11 U.S.C. § 349(a). The case will be dismissed with prejudice to the debtor filing, or causing to be filed, any subsequent petition for relief under chapters 11, 12 or 13 of Title 11 of the United States Code, in the United States Bankruptcy Court for the Eastern District of California, for a period of two (2) years after entry of the order on this motion. The motion will be granted in part.

21. 12-41197-A-11 JOHN/MARTA SCHULZE — MOTION TO APPROVE DISCLOSURE STATEMENT 5-29-13 [50]
JHH-3

Tentative Ruling: The motion will be granted and the disclosure statement will be approved, subject to the debtor making the changes below.

The statement has the following deficiencies:

(1) The court has not been able to locate a deadline for the filing of objections to proofs of claims.

(2) The disclosure statement does not adequately explain why the debt owed to Admirals Bank is listed as a debt owed by the debtors, when the bank's claim is secured by the Taylor Road property, which is not owned by the debtors but is owned by Road Self Storage LLC, 30% of which entity is owned by the debtors. The debtors do not own the property, their LLC owns it. Is the debt to the bank guaranteed by the debtors?

22. 11-44699-A-12 STEVEN SAMRA — MOTION FOR SUMMARY JUDGMENT 6-19-13 [23]
13-2011 WAC-1
SAMRA V. AG-SEEDS UNLIMITED ET AL

Final Ruling: The motion will be denied without prejudice as it does not comply with Local Bankruptcy Rule 7056-1(a), which mandates that "[e]ach motion for summary judgment or partial summary judgment shall be accompanied by a 'Statement of Undisputed Facts' which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish that fact." There is no statement of undisputed facts with the motion.

23. 11-44699-A-12 STEVEN SAMRA — COUNTER MOTION FOR SUMMARY JUDGMENT 7-10-13 [39]
13-2011 MAS-1
SAMRA V. AG-SEEDS UNLIMITED ET AL

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants, Ag-Seeds Unlimited and Mark Serlin, move for summary judgment on the claim for violation of the automatic stay by plaintiff Steven Samra, the debtor in the now dismissed underlying chapter 12 bankruptcy case. The claims are based on 11 U.S.C. § 362(a)(1) and (2). Although not specifically stated, the complaint invokes 11 U.S.C. § 362(k)(1).

The court notes that the opposition to this counter-motion does not contain a response to the movants' statement of undisputed facts, in violation of Local Bankruptcy Rule 7056-1(b), which mandates that "[a]ny party opposing a motion for summary judgment or partial judgment shall reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in support of that denial." Given this, the court will consider only the movants' statement of undisputed in adjudicating this motion.

Summary judgement is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

11 U.S.C. § 362(a)(1) and (2) provide: "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title."

Actions taken in violation of the automatic stay are void. Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), Inc., 754 F.2d 811, 816 (9th Cir. 1985); O'Donnell v. Vencor Inc., 466 F.3d 1104, 1110 (9th Cir. 2006).

A creditor who has violated the automatic stay is required to reverse any collection efforts that, even though were started pre-petition, resulted in a post-petition collection. The stay requires the creditor to direct a levying officer to return or reverse post-petition collections, such as bank account or wage levy. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed

as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

11 U.S.C. § 362(k)(1) provides that an individual injured by willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." A violation of the stay is willful when the creditor knows of the automatic stay and intentionally performs the action violating the stay. Neither good faith belief that the creditor had a right to the property, nor good faith reliance on the advice of counsel are relevant. Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 482-83 (9th Cir. 1989); Sciarrino v. Mendoza, 201 B.R. 541, 547 (E.D. Cal. 1996).

In determining whether and to what extent to award punitive damages, courts consider the nature of the violations, the amount of compensatory damages awarded, and the wealth of the party who has committed the violations. Prof'l Seminar Consultants, Inc. v. Sino American Tech., 727 F.2d 1470, 1473 (9th Cir. 1984). Punitive damage awards may not be grossly excessive or arbitrary. BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996) (a single-digit ratio between punitive and compensatory damages will satisfy due process); see also State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

A judgment of non-dischargeability allows the judgment creditor to collect against property of the debtor without first seeking relief from stay, as long as the property is not property of the debtor's bankruptcy estate. Watson v. City Nat'l Bank (In re Watson), 78 B.R. 232, 235 (B.A.P. 9th Cir. 1987).

Preliminarily, the court has found no evidence in the record before it that Mr. Serlin acted as an individual, on his own behalf in any of the purported misconduct violating the stay. As outlined below, all actions taken by Mr. Serlin in relation to the plaintiff were taken on behalf of Ag.

The facts giving rise to the instant disputes are as follows. The defendant Ag filed a breach of contract lawsuit against the plaintiff in state court on December 22, 2008. The defendant Mark Serlin represents Ag. Ag obtained a judgment against the plaintiff on July 8, 2010 for $96,988.20. On September 29, 2010, the plaintiff filed a chapter 13 bankruptcy case, Case No. 10-45958. Ag filed a non-dischargeability complaint against the plaintiff on December 20, 2010 and obtained a non-dischargeability judgment against him on August 8, 2011. The bankruptcy court dismissed the plaintiff's chapter 13 case on August 26, 2011. The plaintiff filed another bankruptcy case, a chapter 12, on October 17, 2011, Case No. 11-44699. Ag filed another non-dischargeability complaint against the plaintiff in that case on January 9, 2012. Another non-dischargeability judgment was entered against the plaintiff on May 3, 2012.

The plaintiff filed this adversary proceeding on January 9, 2013. The purported stay violations enumerated in the complaint, fall into three categories. Although the complaint keeps referring to Mr. Serlin in his individual capacity, the court sees no evidence in the record that he acted in his individual capacity or on behalf of himself. All of Mr. Serlin's actions, as described below, were taken on behalf of Ag.

First, Ag obtained two writs of execution against the plaintiff, one on May 9, 2012 and another on May 22, 2012. Complaint, Exs. A & B.

Second, Ag obtained a notice of levy under writ of execution on a money judgment on September 14, 2012. The property to be levied upon included

"Money/items in any and all deposit accounts and safe deposit boxes of Judgment Debtor Steven S. Samra, individually or with others, at Bank of America located at 5001 Laguna Blvd., Elk Grove, CA 95758, pursuant to Code of Civil Procedure §§700.140 and 700.150." The total debt owed to Ag at that time was identified as $138,250.38, with daily interest accruing at $34.49. Complaint, Ex. C.

On information and belief, the plaintiff contends in the complaint that Ag levied (1) the contents of a safety deposit box, including "a gold chain, letters and other sentimental items" and (2) the balances in two of the plaintiff's bank accounts, "collecting at least [$200] from such accounts and causing such accounts to be overdrawn."

Third, on October 22, 2012 Ag filed in the state court action an application and order for appearance and examination of the plaintiff's aunt, Norma Samra. Her examination was set for December 17, 2012. The application specified that "JUDGMENT DEBTOR STEVEN SAMRA HAS CLAIMED THAT HE IS WORKING FOR NKS FARMS, INC. THEREFORE, JUDGMENT CREDITORS BELIEVES HE IS RECEIVING WAGES, COMMISSIONS, OR OTHER RENUMERATION FROM NKS FARMS, INC. AND IS OWED AN AMOUNT IN EXCESS OF $500.00." Complaint, Ex. D.

On or about December 11, 2012, the plaintiff's counsel asked Ag to stop the prosecution of the state court action unless and until Ag obtains relief from the automatic stay in the bankruptcy case. Ag responded that it did not believe that examining a third-party like Ms. Samra violated the stay, but agreed to continue the examination of Ms. Samra. Complaint, Exs. E & F. At the December 17, 2012 state court hearing on the examination of Ms. Samra, that court noted that she did not appear and issued a bench warrant for her arrest, stayed until February 13, 2013. Complaint, Exs. G & H.

Based on the foregoing three categories of purported stay violations, the plaintiff is seeking at least $3.5 million in damages from the movant defendants, including lost profits, emotional distress damages, and punitive damages, and he is seeking attorney's fees and costs for enforcement of the automatic stay.

The underlying chapter 12 case, Case No. 11-44699, was dismissed on February 25, 2013 under 11 U.S.C. § 1208(c)(1) because of unreasonable delay by the debtor that is prejudicial to creditors.

The plaintiff filed another chapter 12 bankruptcy case on February 26, 2013.

As mentioned above, the claim against Mr. Serlin will be dismissed as there is no evidence that he acted as an individual, on his own behalf. All actions taken by Mr. Serlin in relation to the plaintiff were taken on behalf of Ag.

With respect to the claim against Ag, there are genuine issues of material fact as to whether Ag's enforcement of the non-dischargeable state court judgment against the plaintiff was directed at property that was not property of the estate. The evidence from Ag on this point is a self-serving declaration from Mr. Serlin, stating: "Based on the non-dischargeability judgments, my client made efforts to levy on assets which I believed were not property of any bankruptcy estate." Docket 44 ¶ 3. The standard is not what Mr. Serlin believed but what was the actual scope of the enforcement of the judgment.

The underlying bankruptcy case was a chapter 12 proceeding. In chapter 12, property of the estate is defined under 11 U.S.C. § 1207(a), which provides: "Property of the estate includes, in addition to the property specified in

section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first."

11 U.S.C. § 541(a) adds: "The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510 (c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case."

These provisions establish a broad definition of what is property of a chapter 12 bankruptcy estate. For instance, the plaintiff's interest as a chapter 12 debtor in funds located in a bank account, acquired both pre-petition and post-petition, is property of the estate. Yet, Ag sought to enforce its non-dischargeable state court judgment against the plaintiff as to "Money/items in

any and all deposit accounts and safe deposit boxes of Judgment Debtor Steven S. Samra . . . at Bank of America." Complaint, Ex. C.

The instant motion does not explain how a levy on "money/items in any and all deposit accounts and safe deposit boxes" is calculated to enforce the judgment solely against non-estate property of the plaintiff. As the definition of property as to which Ag was attempting to collect makes no effort to exclude in any way the recovery of money/items belonging to the plaintiff's bankruptcy estate, Ag's collection efforts may be interpreted as targeting property of the estate. Based on the above description of the property subject to the levy, the trier of fact could reasonably conclude that Ag was enforcing its judgment as to estate property. Ag has not met its burden of persuasion in demonstrating that no issues of material fact exist.

The scope of enforcement of the judgment is also relevant to whether the violation was willful. As noted above, a violation of the stay is willful when the creditor knows of the automatic stay and intentionally performs the action violating the stay. And, neither good faith belief that the creditor had a right to the property, nor good faith reliance on the advice of counsel are relevant. Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 482-83 (9th Cir. 1989); Sciarrino v. Mendoza, 201 B.R. 541, 547 (E.D. Cal. 1996).

While Ag contends that it believed that it was "free to pursue non-estate assets of Plaintiff," the scope of collection appears to have included estate assets.

Finally, the fact that Ag may not have collected anything from the plaintiff is not dispositive of the claim, as the claim is seeking emotional distress and attorney's fees and costs damages. The attorney's fees and costs are for the plaintiff's efforts to stop the stay violations. See Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010) (limiting the award of attorney's fees and costs pursuant to 11 U.S.C. § 363(k) to damages incurred for legal work necessary to remedy a violation of the stay). The motion will be denied as to the claim against Ag.

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Tentative Ruling: None.