UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 3, 2013 at 10:00 a.m.

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1. 12-30911-A-11 VILLAGE CONCEPTS, INC. COUNTER MOTION TO CONVERT CASE 7-22-13 [165]
DNL-4

Tentative Ruling: The motion will be granted.

The chapter 11 trustee asks the court to convert the case to a chapter 7 proceeding. He says that the income the debtor generates is not sufficient to pay the debtor's ten employees, manager, professionals and ultimately creditors. The income is barely sufficient to pay only the debtor's ten employees.

The debtor opposes the motion, stating that the debtor's "principal is prepared to fund a plan with a substantial cash contribution and requests the opportunity to do so." Docket 178 at 6.

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; (B) gross mismanagement of the estate; (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public; (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors; (E) failure to comply with an order of the court; (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 . . . (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief." 11 U.S.C. § 1112(b)(4)(A)-(F), (I).

Preliminarily, this motion is brought as a countermotion. But, it is unclear from the record what is this motion counter to, as there are no other pending motions in the case on this calendar.

The motion will be granted. The chapter 11 trustee has established that there is no reasonable likelihood of rehabilitation and a substantial or continuing loss to or diminution of the estate exists. The income the debtor generates is barely sufficient to pay only the debtor's ten employees, let alone paying the debtor's manager (also known as the debtor's principal), professionals and ultimately creditors. Docket 167 at 2.

The declaration of the debtor's principal filed in opposition to the motion,

offering to fund a plan with a substantial cash contribution, is not helpful in persuading the court that chapter 11 reorganization is viable.

First, the court reminds the debtor's counsel, James Brunello, who filed the declaration in opposition to the motion, that he was retained to represent the debtor's bankruptcy estate. He was not retained to represent the debtor, aside from the entity charged to administer the bankruptcy estate, or the debtor's principal.

Second, the court appointed a chapter 11 trustee precisely because it found that the debtor's principal had a serious conflict of interest in administering the debtor's bankruptcy estate. As the court ruled on the motion to appoint a trustee:

"The court agrees with the movants that the debtor's principals, President Mark Weiner and Secretary Nancy Weiner, have serious conflicts of interest in managing the debtor's business and administering the debtor's estate for the benefit of the debtor's creditors. Mark and Nancy Weiner are also the trustors, trustees and beneficiaries of the revocable Kopp Family Trust, which is listed as the sole shareholder of the debtor. Docket 32, Amended SFA, question 21b; Ex. A to Motion at 67-68."

Docket 130 at 2.

"The appointment of a trustee is in the best interest of the estate's creditors. The Weiners have a substantial conflict of interest in operating the debtor's business, given that they own and control the businesses from which the debtor generates revenue. This conflict is not merely a potential conflict, it is an actual conflict of interest.

"The Weiners' pre-petition transfer of $4.2 million in debtor assets to the debtor's 100% shareholder, a trust controlled and owned solely by the Weiners, without the debtor receiving consideration, except for the assumption of still unpaid debt in the amount of nearly $3 million ($1.9 million owed to Union Bank plus $1.06 million other debt) and the forgiveness of unidentified debt of approximately $1 million owed to the trust, indicates to the court that the Weiners have no regard for the debtor's creditors.

"The Weiners transferred 83% or $4.2 million of the debtor's $5.041 million in pre-transfer assets to themselves and promised to pay over $3 million in debt for the debtor by assuming it, but they did not pay it despite collecting the profits generated from the transferred mobile home parks.

"More, after the Weiners received the transfer of the debtor's interest in the Ione and Redding parks, the Weiners' once again transferred that interest in the parks to other entities, Park Village Corporation and Indian Villages Estates LLC. See Ex. B to Motion."

Docket 130 at 3.

"The court makes no determination about whether the avoidance of the June 2009 transfer would be beneficial to the bankruptcy estate at this time or whether there is an actionable fraudulent conveyance claim as to the transfer. From the terms and timing of the transfer, however, the court infers the Weiners' intent and readiness to transfer assets from one of their entities to themselves and/or entities they own or control, without regard for the transferor entity's creditors, such as the movants who asserted their claims against the debtor at that time. As any avoidance action pertaining to the June 2009 transfer would

have to be asserted against the Weiners, whether individually, via their trust and/or via their other entities, the court does not have faith that the Weiners will evaluate the prosecution of the avoidance action with the best interest of the debtor's creditors in mind."

Docket 130 at 3-4.

"The Weiners' conflict of interest is further bolstered by the failure of three of their parks to pay all post-petition management fees to the debtor. According to the motion, three of the parks have not been paying management fees to the debtor regularly. As noted above, as of the time this motion was filed, the debtor had reported to having collected management fees from the Railroad Flat park only for five of the last eight post-petition months, it had reported to having collected management fees from the Susanville park only for six of the last eight post-petition months, and it had reported to having collected management fees from the Forest Ranch park only for two of the last eight post-petition months. This is concerning especially because the Weiners own 100% interest in the Railroad Flat and Susanville parks and 50% interest in the Forest Ranch park, with the other 50% owned by the Weiners' son, Samuel Weiner."

Docket 130 at 4.

Given the foregoing, the court is not convinced that the debtor's principal can be trusted on his promise to make "a substantial cash contribution."

Third, even if this court had not concluded that the debtor's principal has a conflict of interest in administering the debtor's estate, the debtor's principal had the opportunity to make a cash contribution to fund a plan in this case for approximately 11 months prior to the appointment of the chapter 11 trustee. This case was filed on June 8, 2012. The motion for the appointment of the chapter 11 trustee was heard on April 19, 2013. The order appointing the trustee was entered on April 24, 2013. Dockets 130 & 131.

Finally, the debtor's principal will not be deprived of the opportunity of making a cash contribution to the debtor's estate to pay creditors, if the case is converted to chapter 7. A chapter 7 trustee may seek substantive consolidation of the assets and liabilities of the debtor and the debtor's principal.

Given the evidence in support of the motion and given the chapter 11 trustee's opinion that conversion of the case would be in the best interest of the estate, the motion will be granted and the case will be converted to chapter 7.

2. 12-30911-A-11 VILLAGE CONCEPTS, INC. STATUS CONFERENCE
13-2212 7-10-13 [7]
FLEMMER V. NEWELL ET AL

Tentative Ruling: None.

3. 12-30911-A-11 VILLAGE CONCEPTS, INC. MOTION TO
13-2212 PP-1 DISMISS AND FOR MANDATORY AND
FLEMMER V. NEWELL ET AL PERMISSIVE ABSTENTION
8-6-13 [11]

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

The defendants in this proceeding, Brian R. Katz, as trustee for the Harold O.

Newell Trust, and Zandee Newell and Marianne Newell, in their individual capacities, ask the court to dismiss the claims in this proceeding, contending that the plaintiff, David Flemmer, as the chapter 11 trustee in the underlying chapter 11 bankruptcy case, does not have standing to prosecute the subject claims because the claims were assigned by debtor Village Concepts, Inc. to the debtor's principals and the principals have pending usury claims against the defendants in state court. In the alternative, the defendants are asking the court to abstain from adjudicating the claims.

The plaintiff opposes the motion, contending that the assignment of the claims involved only the usury interest claim, while the other two avoidance claims were not assigned by the debtor. Also, the plaintiff says that the assignment is void as it took place post-petition, outside the debtor's ordinary course of business and without court approval.

Rule 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012(b), permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

Although a court must take all factual allegations in the complaint as true, the court is not bound to accept as true legal conclusions couched as factual allegations. Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss under Rule 12(b)(6). Caviness at 812 (quoting Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)).

Dismissal for lack of standing is proper under Rule 12(b)(6). Harris v. Amgen, Inc., 573 F.3d 728, 732 n.3 (9th Cir. 2009).

28 U.S.C. § 1334(c)(2) provides that this court "shall" abstain from hearing a proceeding based on state law claims, "related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section," if "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." Williams v. Shell Oil Co., 169 B.R. 684, 688, 690-91 (S.D. Cal. 1994). This is mandatory abstention.

"Mandatory abstention requires a finding of the following elements: (1) a timely motion; (2) a purely state law question; (3) a non-core proceeding that is merely a proceeding related to a bankruptcy case; (4) no basis for federal jurisdiction apart from the bankruptcy case; (5) a pending action in state court; (6) the state court action can be timely adjudicated; (7) appropriate jurisdiction exists in the state forum."

Schulman v. California State Water Resources Control Board (In re Lazar), 200 B.R. 358, 370 (Bankr. C.D. Cal. 1996).

28 U.S.C. § 1334(c)(1) provides that "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." This is discretionary abstention.

In the Ninth Circuit, the factors that a court must consider when deciding whether to apply discretionary abstention include: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties. Christensen v. Tuscon Estates, Inc. (In re Tuscon Estate, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990).

Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

The facts giving rise to this dispute are as follows. The debtor filed the underlying bankruptcy case on June 8, 2012. In September 2012, the defendants sued the debtor's principals, Mark and Nancy Weiner, in state court. The Weiners had personally guaranteed a $550,000 note executed by the debtor. In that litigation, the Weiners countered with usury interest claims. In January 2013, the Weiners started a second lawsuit in state court, against the defendants, asserting a usury interest claim on a $50,000 note executed by the debtor. In June and July 2013, after the defendants challenged the Weiners' standing to assert the usury interest claims, the Weiners revealed that the debtor had assigned its usury interest claims against the defendants to the Weiners on April 17, 2013. This court appointed a chapter 11 trustee in the debtor's bankruptcy case on April 24, 2013. The hearing on the motion to appoint a trustee was held on April 19, 2013, two days after the debtor assigned the usury interest claims to the Weiners. See Dockets 130 & 131. The plaintiff initiated the instant adversary proceeding on June 26, 2013, asserting three claims against the defendants, one claim for usury interest and two avoidance claims pursuant to 11 U.S.C. §§ 544(b), 548(a)(1)(A), 550 and Cal. Civ. Code § 3439.05.

Although the motion asks for dismissal of the entire action, this aspect of this aspect of the motion actually concerns only the usury interest claim. It says nothing about the avoidance claims. And, the motion offers no evidence that the debtor assigned the avoidance claims to the Weiners. Hence, the standing argument makes no sense as to the avoidance claims. The motion has not established any basis for dismissal of the avoidance claims.

The motion has not established any basis for abstention as to the avoidance claims either. The motion does not brief how abstention applies to the avoidance claims. And, while there is a pending state court proceeding, that proceeding does not include any avoidance claims by the debtor's bankruptcy estate, which is still the only party with standing to prosecute such claims. More, the avoidance claims do not involve purely state law questions. They are brought under 11 U.S.C. §§ 544, 548 and 550. Hence, the court recognizes no basis for this court's abstention as to the avoidance claims.

Turning solely to the usury interest claim, the plaintiff does not have standing to prosecute that claim. The claim was assigned by the debtor to the Weiners. While the assignment was made post-petition and without court approval, the assignment is not void, it is voidable, meaning that if improper it must avoided and recovered, as prescribed by 11 U.S.C. §§ 549(a) and 550(a), respectively, before the plaintiff may prosecute the claim on behalf of the debtor's bankruptcy estate. Avoiding the usury interest claim will take an adversary proceeding. See Fed. R. Bankr. P. 7001(1). The plaintiff has not avoided and recovered the claim for the benefit of the bankruptcy estate. Thus, he does not have standing to prosecute the claim on behalf of the estate at this time. As such, the usury interest claim will be dismissed without prejudice.

4. 13-29522-A-11 MELVIN CURTACCIO — STATUS CONFERENCE 7-19-13 [1]

Final Ruling: The status conference will be dropped from calendar as the case was dismissed on August 6, 2013.

5. 10-44128-A-11 TIMOTHY/SHANNON COXEN — MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY (FEES $85,100, EXP. $2,300.46) 8-1-13 [224]
IIF-20

Final Ruling: The movant has provided only 24 days' notice of the hearing on this motion. The motion papers were served on August 10, 2013. See Docket 228. Nevertheless, the notice of hearing for the motion requires written opposition at least 14 days before the hearing, in accordance with Local Bankruptcy Rule 9014-1(f)(1). Motions noticed on less than 28 days' notice of the hearing are deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing. Accordingly, the motion will be dismissed.

6. 12-24831-A-7 RANDEEP DEOL — MOTION TO WITHDRAW AS ATTORNEY 8-5-13 [18]
13-2094 AGT-1
CARELLO V. DEOL

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 plaintiff, the defendant, 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.

Attorney Aristides Tzikas asks for permission to withdraw as counsel for the defendant, who is also the debtor in the underlying bankruptcy case. The movant has been unable to locate the defendant. His attempts to contact her have been unsuccessful.

Local Bankruptcy Rule 2017-1(e) provides that "Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit."

"The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court." American Economy Ins. Co. v. Herrera, No. 06CV2395-WQH, 2007 WL 3276326, at *1 (S.D. Cal. Nov. 5, 2007) (quoting Irwin v. Mascott, 2004 U.S. Dist. LEXIS 28264 (N.D. Cal. December 1, 2004), citing Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir.1982)). Factors considered by courts ruling on the withdrawal of counsel are (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. Herrera, at *1 (citing Irwin, 2004 U.S. Dist. LEXIS 28264 at 4).

California Rule of Professional Conduct 3-700 provides that:

"(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring

any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client
(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
(b) seeks to pursue an illegal course of conduct, or
(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

The movant has been unable to locate the defendant and he has been informed that she has left the country. The defendant has not returned several telephone calls placed by the movant to her.

As the defendant has been unresponsive to the movant, she has rendered it unreasonably difficult for him to carry out his duties as her attorney and represent her effectively. This is cause for permitting the withdrawal of the movant pursuant to California Professional Conduct Rule 3-700(C)(1)(d). The court will permit his withdrawal from this adversary proceeding. The motion will be granted. The granting of this motion does not affect the movant's representation of the defendant in the bankruptcy case.

7. 13-24841-A-11 PETER ALBERS — MOTION TO SELL O.S.T. 8-12-13 [206]
PLC-13

Final Ruling: The motion will be dismissed as moot as the court approved a sale of the subject property at the August 19, 2013 hearing on the debtor's other sale motions.

8. 13-21454-A-11 TRAINING TOWARD SELF RELIANCE, A CALIFORNIA — MOTION TO USE CASH COLLATERAL 8-2-13 [174]
CAH-30

Tentative Ruling: The motion will be conditionally granted.

The debtor is asking for permission to continue using the cash collateral of SMS Financial XXIII, LLC and the IRS, from September 1, 2013 until December 31, 2013, in accordance with the cash collateral use terms prescribed by this court in its July 30, 2013 order, permitting use of cash collateral from February 1, 2013 until August 31, 2013. See Docket 171.

The court does not have evidence whether and to what extent the debtor's actual budget from February 1, 2013 until August 31, 2013 has conformed to the budget previously submitted with the court. Thus, the court cannot tell whether the debtor has been able to keep in line with the budget proposed to the court. This is important as it determines the veracity of the debtor's proposed budget from September 1, 2013 until December 31, 2013.

Nevertheless, in the court's prior approval of the debtor's use of the cash collateral of SMS and the IRS, the two creditors had stipulated to the use. Hence, provided that SMS and the IRS continue to stipulate to the debtor's use of cash of collateral until December 31, 2013, the court will approve such stipulations pursuant to the same budget the debtor attached to the court's July 30, 2013 order. Docket 171.

9. 11-46663-A-7 ANTHONY GRADEN — MOTION TO AVOID JUDICIAL LIEN 7-25-13 [50]
BSH-3
VS. CHEVRON FEDERAL CREDIT UNION

Final Ruling: This motion has been voluntarily dismissed by the movant. Docket 82. The court will grant no relief requested in the voluntary dismissal.

10. 11-46663-A-7 ANTHONY GRADEN — AMENDED MOTION TO AVOID JUDICIAL LIEN 7-30-13 [72]
BSH-4
VS. EAGLE CREDIT UNION

Final Ruling: This motion has been voluntarily dismissed by the movant. Docket 84. The court will grant no relief requested in the voluntary dismissal.

11. 13-22486-A-12 STEVEN SAMRA — MOTION TO CONFIRM CHAPTER 12 PLAN 7-22-13 [78]
WAC-2

Final Ruling: The hearing on this motion will be continued to September 16, 2013 at 10:00 a.m., given the health condition of the debtor's counsel, the continuance of the hearing on Ag-Seeds Unlimited's dismissal motion to September 3, and to preserve the sequence in which the two motions were filed.