UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 12, 2013 at 10:00 a.m.

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1. 12-41813-A-11 THOMAS/CARLA EATON — MOTION TO APPROVE DISCLOSURE STATEMENT 9-27-13 [69]
CLH-5

Tentative Ruling: The motion will be denied.

The debtors ask the court to approve their disclosure statement. Docket 69. The U.S. Trustee and creditors U.S. Bank/Select Portfolio Servicing (secured by sole deed on Catherine St. property), Deutsche Bank National Trust Company (secured by first deed on Wells Lane property) and Donald Suetta (secured by second deed on Wells Lane property), however, object to its approval.

The motion will be denied for the following reasons:

(1) When the court denied the last version of the debtors' disclosure statement on June 17, 2013, the court's ruling required that "[f]uture versions of the disclosure statement should be accompanied by a red/black-lined copy of the new version." Docket 52. There is no red/black-lined copy on the docket of the September 27 version of the disclosure statement.

(2) As pointed out by U.S. Bank, the disclosure statement values its collateral at $450,000 but does not state whether and when the debtors will file and prosecute valuation motions. This disclosure deficiency should be corrected as to all real properties.

(3) The disclosure statement does not say who will be paying the taxes and insurance for the debtors' real properties.

(4) The disclosure statement does not say whether and to what extent the debtors are using cash collateral (rents) from the real properties, including the property that is collateral for U.S. Bank's claim.

(5) The disclosure statement does not say how the plan will treat claims for which the holder has made an election under 11 U.S.C. § 1111(b).

(6) The disclosure statement fails to indicate which secured claims, if any have post-petition arrears and how such arrears will be cured.

The disclosure statement should also address the deficiencies identified by the U.S. Trustee. See Docket 84.

The objection of Donald Suetta will be overruled. He argues that the debtors should value the collateral property for his claim prior to approval of the disclosure statement because he needs to make an informed decision as to whether to make an 1111(b) election.

However, while nothing requires the debtors to strip off or strip down a claim prior to the approval of the disclosure statement, Fed. R. Bankr. P. 3014 requires creditors to make the 1111(b) election "at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix." Thus, if Mr. Suetta wants more time to exercise his rights under section 1111(b), it is incumbent upon him to make a motion for extension of the time. The court will not require the debtors to strip off or strip down his claim prior to obtaining approval of their disclosure statement. They must do this before obtaining plan confirmation.

Nevertheless, the court will require the debtors to disclose the value of the property serving as collateral for Mr. Suetta's claim in the disclosure statement. Mr. Suetta is entitled to know the debtors' position on the issue of value.

The court will not address any objections pertaining to plan confirmation. Such objections will be addressed if and when the debtors reach plan confirmation.

2. 12-41813-A-11 THOMAS/CARLA EATON — MOTION TO CONVERT CASE TO CHAPTER 7, ETC 5-30-13 [40]
UST-1

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

The U.S. Trustee moves for conversion to chapter 7 or dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have not filed their operating reports for February, March, and April of 2013, and that they have not filed Form 26 for their Floors to Go Sofa and Loveseats, Inc., business, as required by Fed. R. Bankr. P. 2015.3.

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- . . . (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)(F).

After this motion was filed, the debtors filed the missing operating reports. Dockets 45, 46, 47. The debtors have represented that they will be filing Form 26 "shortly." Docket 58 ¶ 9. The debtors have given no reason for their failure to file timely the reports and form. Mrs. Eaton says that she prepared the reports and "[b]efore the 15th of each month [she] forwarded the report[s] to [her] attorney for review and filing." But, "[a]pparently, the complete reports were not filed by my attorney after [she] forwarded them to her." Docket 58 ¶¶ 6, 7. Beyond this, the debtors do not explain their failure to file the reports timely.

As to Form 26, the debtors say that the corporation's CPA was required to prepare it, "but the documents required were not completed until recently." Docket 58 ¶ 9.

None of the foregoing rises to the level of explanation about why the debtors did not file timely the operating reports and Form 26. The debtors cannot blame their attorney or the corporation's accountant for their defaults. After all, both their personal attorney and the corporation are subject to their direct control. They are liable for the actions or lack of action by their professionals. The court cannot excuse the late filing of the operating reports and the still outstanding Form 26.

The above defaults by the debtors then are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

Conversion to chapter 7 would be in the best interest of the creditors and the estate because the debtors have substantial nonexempt and unencumbered assets that could be administered for the benefit of creditors. Some of the debtors' nonexempt and unencumbered assets include: a backhoe with a scheduled value of $4,000, tractor with a scheduled value of $2,000, $16,550 of nonexempt equity in the debtors' Floors to Go Sofa and Loveseats Inc. business, 1994 Chevy Suburban with a scheduled value of $1,000, 2004 Ford Econoline with a scheduled value of $3,000, $1,475 of nonexempt equity in a 2005 Toyota Tacoma, 1984 Star craft pontoon outboard with a scheduled value of $1,500, 1994 Mastercraft 19' with a scheduled value of $4,000, "Funds seized by sheriff" with a scheduled value of $12,500, and a franchise with Floors to Go with a scheduled value of unknown. The motion will be granted and the case will be converted to chapter 7.

3. 13-22029-A-7 PHILLIP/KEARNEY GLENN — MOTION TO DISMISS]
13-2178 — 10-10-13 [12
STORRS ET AL V. GLENN ET AL

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

The defendant, Phillip Glenn, the debtor in the underlying bankruptcy case, asks for dismissal of the 11 U.S.C. § 523(a)(6) claim in this proceeding, contending that it was filed late and that he did not commit the wrongful act outlined in the complaint, namely, shooting at the plaintiffs' dog and causing them to incur $6,500 in veterinary bills.

The underlying bankruptcy case was filed by the defendant and his spouse on February 15, 2013. The deadline for filing complaints for determining the dischargeability of debts was Tuesday, May 28, 2013. Yet, the subject complaint was not filed until Wednesday, May 29, 2013, one day after the deadline. Accordingly, this proceeding will be dismissed. The motion will be granted.

4. 11-28942-A-11 JAMES/MANUELA NORTON — MOTION TO APPROVE AMENDED DISCLOSURE STATEMENT
MRT-21 — 9-22-13 [272]

Tentative Ruling: As the court has granted the U.S. Trustee's motion to dismiss the case, this motion will be denied as moot.

5. 11-28942-A-11 JAMES/MANUELA NORTON
UST-1

MOTION TO
CONVERT CASE TO CHAPTER 7 ETC
9-19-13 [265]

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

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that: the debtors have not timely filed their monthly operating reports for October 2012 and May and June 2013; and this case has been pending for approximately 2.5 years without an order approving a disclosure statement or confirming a plan.

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; . . . (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), (B), (F). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtors did not file their October 2012 operating report until October 4, 2013, after this motion was filed, and they have not explained why the report had not been filed on time. They also have not explained why their February, May and June 2013 reports were filed late, on March 24, 2013, June 25, 2013, and July 21, 2013, respectively. They merely question the actions of their existing attorney. Docket 280.

But, aside from the issues pertaining to the late-filed operating reports, this case has been pending for 2.5 years without an approved disclosure statement and without a confirmed plan. The debtors are now seeking to replace their counsel because they are obviously dissatisfied with the services of their existing counsel.

The 2.5-year delay to obtain plan confirmation is cause for the granting of this motion. It has taken the debtors 2.5 years to determine that they need new counsel who can complete their relatively simple chapter 11 case. The debtors have five real properties, including four rentals, and have tax debt of less than $4,000. They do not run a business and their source of income is solely from employment - Mr. Norton is an electronic technician and Mrs. Norton is a realtor.

The court is not willing to give the debtors additional time to obtain plan confirmation. 2.5 years is more than sufficient time for the debtors to obtain plan confirmation. The debtors' desire to replace their existing counsel serves as an admission of their inability to obtain plan confirmation during the last 2.5 years this case has been pending. The court is not persuaded that the debtors can confirm a plan in this proceeding.

In reaching this conclusions, the court also notes that their opposition to the motion does not have evidence that they are able to confirm a plan. The only supporting declaration to the opposition, executed by Mrs. Norton, states nothing about the debtors' ability to fund a plan. Their real properties have an aggregate value of $1,914,000, whereas the debt secured by the properties totals approximately $3,040,776. See Schedule A.

As the debtors have listed no unsecured debt in Schedule F, other than the undersecured portion of their real property debt and $396 in medical bills, the court is perplexed at how they will secure an acceptance of the plan by the general unsecured creditors. The absolute priority rule is also an issue as the debtors are retaining property without paying 100% dividend to the general unsecured creditors. The debtors' latest plan offers to pay only a 5.5% dividend to general unsecured creditors. Docket 269 at 18. This is further reason why the court is not persuaded that the debtors are able to confirm a plan, even if the court were to gave them additional time.

Given the foregoing, there is cause for dismissal or conversion under 11 U.S.C. § 1112(b)(1).

As an aside note, the court is strongly suspicious that the debtors have not listed all of their debt in the schedules. For instance, aside from $3,984 in outstanding taxes and $396 in medical bills, the only unsecured debt in the schedules is the under-secured portion of the real property debt. It is difficult for the court to believe that the debtors have no credit card or other consumer unsecured debt.

The debtors' real properties are all overencumbered and their personal property is either exempt or of inconsequential value to the estate. The only personal property of the debtors that is not claimed as exempt is $425 in miscellaneous costume jewelry. Dismissal rather than conversion then is in the best interest of the creditors and the estate. The motion will be granted and the case will be dismissed.

6.	12-38246-A-7 13-2018 CATERPILLAR FINANCIAL SERVICES CORPORATION V. MURRAY	MICHAEL MURRAY MDP-2	MOTION FOR SUMMARY JUDGMENT 10-15-13 [20]

Tentative Ruling: The motion will be denied.

The plaintiff, Caterpillar Financial Services Corporation, seeks summary judgment on its sole 11 U.S.C. § 523(a)(6) claim.

For summary judgment to be granted, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) incorporated by Fed. R. Bankr. P. 7056. 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. The court must evaluate whether there is a genuine issue of material fact with regard to each element of the plaintiff's claim.

To prevail on his 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61; Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001). The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id. A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The undisputed facts are as follows.

The defendant, on behalf of Yubacon, Inc., entered into an agreement to purchase equipment from the plaintiff's predecessor in interest who was given a lien in the equipment. Docket 32 ¶ 1-19. The defendant, as the President and CEO of Yubacon, signed a guaranty making himself personally liable in the case of a default. Docket 35 ¶ 2; Docket 32 ¶ 20. Prior to bankruptcy, the defendant sold the equipment for $24,000. Docket 32 ¶ 35. The lien was not satisfied from the proceeds of the sale. Docket 32 ¶ 39. The plaintiff filed a state court action to recover the property and obtained a judgment but that judgment is unsatisfied. Docket 32 ¶ 21-24.

The intent element of § 523(a)(6) is in dispute. Determining the intent aspect of a malicious injury is a *subjective standard*, focusing on the debtor's state of mind. Su, 290 F.3d at 1144-46. The debtor must have the subjective intent to harm or the belief that harm is substantially certain. Su, 290 F.3d at 1144. The plaintiff must show, based on undisputed facts, that the defendant intended to cause harm to the plaintiff by the sale or that he had knowledge that the sale was substantially certain to cause harm to the plaintiff.

The plaintiff claims that the defendant had personal knowledge of the sale and the lien because of his signature on the key documents and "common sense." Docket 23 at 8-9. It claims also that the defendant had complete control and dominance over the affairs of Yubacon as its sole owner. Docket 23 at 10-11.

On the other hand, the defendant claims that he did not know which of Yubacon's equipment was encumbered because of the size of his business. Docket 35 ¶ 6. He had delegated the job of determining whether equipment to be sold was encumbered to his assistant and the outside broker who eventually marketed and sold the equipment on behalf of Yubacon. Docket 35 ¶ 7. Yubacon had a standard procedure for the defendant's assistant and the broker to determine whether a lien existed and what was the payoff amount, and to pay off the lien after the sale. Docket 35 ¶ 8-10.

The plaintiff's evidence consists of the defendant's signature on the loan documents, the guaranty, and the broker's fee agreement, which all tend to show that the plaintiff had knowledge of the sale and of the plaintiff's secured claim, at least at the point when he signed the purchase and guaranty agreements with the plaintiff. The plaintiff also relies on the defendant's statements that he owns Yubacon and that he gave instructions to Yubacon's employees, to show that he had dominance and control of Yubacon.

However, the foregoing does not resolve the issue of intent, namely, whether the defendant intended Yubacon to sell the equipment without approval of the plaintiff and without paying the plaintiff's claim, and whether he intended the plaintiff to be deprived of the collateral for its claim.

According to the defendant, at the time the subject equipment was sold, he did not know whether the equipment was encumbered, as he was relying on others working for Yubacon to determine this.

From this, the court could infer that the defendant lacked the subjective intent to commit the wrongful act of selling the equipment without the plaintiff's approval and without paying the plaintiff's claim, and lacked the subject intent to harm the plaintiff by depriving it from the collateral for its claim.

Hence, there is a genuine dispute as to whether the defendant had the intent to commit the wrongful act and to harm the plaintiff or its property. The plaintiff has not established that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment is inappropriate.

Lastly, the motion will be denied also because courts are hesitant to grant summary judgment on issues involving motive or intent because such issues are provable only by circumstantial evidence. See, e.g., Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); see also Maffei v. N. Ins. Co. of New York, 12 F.3d 892, 898 (9th Cir. 1993); Morgan Creek Prods., Inc. v. Franchise Pictures L.L.C. (In re Franchise Pictures L.L.C.), 389 B.R. 131, 144-45 (Bankr. C.D. Cal. 2008).

The motion will be denied.

7.	11-24752-A-7 13-2207 HOPPER V. ROGERS	DANIEL ROGERS DNL-2	MOTION TO DISMISS 10-8-13 [26]

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

The plaintiff and trustee in the underlying bankruptcy case, J. Michael Hopper, asks for dismissal of the subject 11 U.S.C. § 727(d)(2) revocation of discharge claim, pursuant to Fed. R. Civ. P. 41(a)(2), as made applicable here by Fed. R. Bankr. P. 7041.

Rule 41(a)(2) provides that "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."

The plaintiff seeks dismissal of the discharge revocation claim because the defendant has now cooperated with the plaintiff, in turning over property of the estate to the plaintiff, including funds in the amount of $10,057.87.

On September 30, 2013, the court granted by a final ruling the plaintiff's motion for default judgment. Docket 23. The plaintiff filed a notice of withdrawal of the motion on October 8, 2013. No order or judgment has been

entered pursuant to the granting of the motion for default judgment. Given this, the court will dismiss this adversary proceeding. This motion has been noticed on the U.S. Trustee. It will be granted.

8. 13-28493-A-12 BUCKHORN RANCH, L.L.C. MOTION FOR
PJR-1 RELIEF FROM AUTOMATIC STAY
TRI COUNTIES BANK VS. 10-1-13 [112]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be dismissed because it is moot.

The movant, Tri Counties Bank, seeks relief from stay as to a ranch property in Beiber, California.

The motion will be denied as moot because the case was dismissed on November 4, 2013, dissolving the automatic stay. 11 U.S.C. § 362(c)(2)(B). And, the movant has not sought relief under 11 U.S.C. § 362(d)(4) or retroactive relief from stay.

The motion will be denied also as unnecessary because the court has determined that the subject ranch property is not owned by the debtor. Docket 110 at 3. The subject property is owned by Charles and Tracy Boggs, the debtor's two members. Given this, the automatic stay of 11 U.S.C. § 362(a) did not attach to the property when this case was filed. Thus, there is no stay for this court to lift with respect to the property.

9. 13-28493-A-12 BUCKHORN RANCH, L.L.C. MOTION TO
PP-2 DISMISS CASE, ETC
10-15-13 [127]

Tentative Ruling: The motion will be denied.

Secured creditor Tom Gifford asks for dismissal with 180-day ban on refiling, for conversion of the case to chapter 7, or for removal of the debtor as a debtor in possession.

The motion will be denied as moot because the case was dismissed on November 4, 2013. The only aspect of this motion that this court will still consider is whether to impose a 180-day ban on refiling. The court is not persuaded that any ban on refiling is necessary as to the debtor. There is no evidence of multiple filings by the debtor. While this court concluded that the debtor's last chapter 12 plan was filed in bad faith (Docket 110) and there is significant litigation outside of bankruptcy between the debtor's members and some of the creditors in this case, the court is not persuaded that this warrants a ban on refiling for the debtor. The motion will be denied.