

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus  
Bankruptcy Judge  
Sacramento, California

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

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1. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION FOR  
BAL-3 LLC RELIEF FROM AUTOMATIC STAY  
MACERICH VINTAGE FAIRE, L.P. VS. 11-8-17 [117]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The movant, Macerich Vintage Faire, L.P., seeks relief from the automatic stay with respect to a commercial real property in Modesto, California, where the debtor operates a Cinnabon store. The debtor has been leasing the property from the movant. The debtor failed to make pre-petition payments from May through September 2017 to the movant under the lease agreement.

The movant served the debtor with a five-day notice to pay or surrender on September 7, 2017. The notice declared lease termination and forfeiture. The notice expired on September 13. The next day, September 14, the debtor filed this case.

The debtor has no ownership interest in the property. The debtor is a tenant in this nonresidential real property. The debtor is unable to assume the lease for the property because its tenancy interest terminated upon expiration of the five-day notice, pre-petition, on September 13, 2017. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989).

The motion will be granted for cause pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to recover possession of the property as permitted by applicable nonbankruptcy law.

No monetary claim may be collected from the debtor. The movant is limited to recovering possession of the property to the extent permitted by the state court. No other relief will be awarded.

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

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

2.	17-26125-A-11 FIRST CAPITAL RETAIL, GEL-5 LLC	MOTION FOR ORDER AVOIDING PREFERENTIAL TRANSFER, DIRECTING TURN OVER AND MANDATING DELIVERY OF FROZEN FUNDS 11-8-17 [110]
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**Tentative Ruling:** The motion will be dismissed.

The debtor in possession seeks an order avoiding (under 11 U.S.C. § 547) and recovering \$214,932.33 in frozen funds that are in the debtor's First Data Merchant Services credit card processing account. First Data is credit card processing servicer. The funds were frozen pursuant to an August 2, 2017 New York information subpoena with restraining notice (akin to an order of examination lien under California law) served on First Data by creditor MCA Recovery, L.L.C., the assignee of Yellowstone Capital West, which obtained a pre-petition judgment for \$354,137.49 against the debtor.

The motion will be dismissed because it was not served on creditor MCA. While the debtor served MCA's attorney, unless the attorney agreed to accept service in connection with this bankruptcy case, such service is insufficient. See, e.g., Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (B.A.P. 9th Cir. 2004). See Docket 116.

The court also does not understand the role of Yellowstone Capital West in this proceeding. On one hand, the motion says that Yellowstone assigned its judgment against the debtor to MCA prior to the September 14, 2017 petition date. Docket 110 at 3. On the other hand, the motion keeps referring to post-petition contacts between the debtor and Yellowstone, in an effort to resolve the debtor's claim to the subject funds. Docket 110 at 4 ¶ 13.

Service on Yellowstone is deficient because it too was not served with the motion. Purported counsel for Yellowstone also was not served either. See Docket 116.

Service on First Data was also deficient. From the three addresses given for First Data on the motion's proof of service, one is directed to First Data's counsel in violation of Villar, one is not addressed at all in violation of Fed. R. Bankr. P. 7004(b)(3), and while another is directed to First Data's agent for service of process (Corporation Services Company), it is addressed to "Officer." Docket 116 at 2.

Even in the absence of the foregoing service deficiencies, avoidance of the alleged transfer would be denied. The court cannot determine the extent, validity, or priority of an interest in property in connection with a motion. Such relief requires an adversary proceeding. See Fed. R. Bankr. P. 7001(2).

Further, the issue of turnover is not within the scope of 11 U.S.C. § 543(a) & (b), which applies only to custodians defined by section 101(11). It limits custodians to "appointed" "receiver[s] or trustee[s]," "assignee[s] under a general assignment for the benefit of the debtor's creditors," or "trustee[s], receiver[s], or agent[s] under applicable law, or under a contract, . . .

appointed or authorized to take charge of property of the debtor *for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.*" 11 U.S.C. § 101(11) (A)-(C).

First Data does not fit within any of those categories. It is not a trustee or receiver and it is not an agent enforcing a lien against such property or administering the property for the benefit of the debtor's creditors.

Also, to the extent the motion asks the court to avoid a preferential transfer, such relief requires an adversary proceeding. See Fed. R. Bankr. P. 7001

Finally, the relief requested by the debtor might be more properly sought by demanding that a party holding security interest in such property return the debtor to possession pursuant to United States v. Whiting Pools, Inc., 462 U.S. 198, 209-10 (1983) (holding that the IRS must turn over to the debtor under 11 U.S.C. § 542(a) property that it had seized to enforce a tax lien, but which property had not been sold yet).

*"Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale. . . . Until such a sale takes place, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a)."*

Whiting Pools at 211.

Here, First Data is merely holding the funds pursuant to instructions of MCA. See N.Y. C.P.L.R. § 5222(b). In other words, while MCA has some control over the funds, MCA has not gained possession of the funds and applied them to its judgment against the debtor. As such, under Whiting Pools, the funds still belong to the debtor and section 542(a) would still require turnover of those funds to the bankruptcy estate. Notwithstanding the turnover and subject to a subsequent successful avoidance action, MCA's lien against the funds, if any, would remain.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, MOTION FOR  
GL-1 L.L.C. RELIEF FROM AUTOMATIC STAY  
5060 MONTCLAIR PLAZA LANE OWNER, L.L.C. VS. 10-17-17 [62]

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

The movant, 5060 Montclair Plaza Lane Owner, L.L.C., seeks to terminate the automatic stay as well as retroactive, and in rem relief with respect to a commercial real property in Montclair, California, where the debtor operates a store. The debtor has been leasing the property from the movant. The debtor failed to make pre-petition lease payments to the movant from May 2017 onward.

The movant served the debtor with a ten-day notice to pay or quit on July 27, 2017. The notice declared the lease terminated and forfeited. The notice expired and the movant filed an unlawful detainer action against the debtor on August 22, 2017. On September 14, the debtor filed this case. Without the movant knowing of the bankruptcy, it obtained the debtor's default on September 19, 2017.

The debtor has no ownership interest in the property. The debtor is a tenant in this nonresidential real property. The debtor is unable to assume the lease for the property because its tenancy interest terminated upon expiration of the

ten-day notice, pre-petition, on or about August 7, 2017. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989).

Accordingly, there is cause to terminate the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to recover possession of the property in state court.

No monetary claim may be collected from the debtor. The movant is limited to recovering possession of the property to the extent permitted by the state court. No other relief will be awarded.

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

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

The court will deny retroactive relief from stay with respect to the requested "[a]ny postpetition acts taken by Movant." Docket 62 at 8. The court does not grant blanket retroactive relief as to "any" post-petition acts of the movant. The only specific post-petition act mentioned in the motion is the obtaining of the debtor's unlawful detainer action default on September 19, 2017. But, as the motion does not say when and how the movant first learned of this bankruptcy case, the court cannot be certain that the movant did not know of the bankruptcy when it obtained the debtor's default. Retroactive relief will be denied.

In rem relief will be denied as well. The motion, without authority, seeks relief from stay "in any bankruptcy case commenced by or against any debtor who claims any interest in the Premises for a period of 180 days from the hearing of this Motion" and that "[t]he order is binding in any other bankruptcy case purporting to affect the Property filed not later than 2 years after the date of entry of such order." Docket 62 at 8.

The motion does not even cite, much less discuss 11 U.S.C. § 362(d)(4), which this language implicates. Nor is there evidence that section 362(d)(4) applies.

In rem relief will be denied under 11 U.S.C. § 105 as well, as such relief requires an adversary proceeding. Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006).

4.	17-26329-A-11 SHIV SINGH AND POOJA THAKUR	STATUS CONFERENCE 9-23-17 [1]
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**Tentative Ruling:** None.

5.	17-26329-A-11 SHIV SINGH AND POOJA THAKUR	ORDER TO SHOW CAUSE 11-6-17 [41]
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**Final Ruling:** The order to show cause will be discharged and the petition will remain pending.

The debtors did not pay the filing fee for filing an amended master address list. The filing fee in the amount of \$31 due on October 23, 2017 was not timely paid. However, the debtors cured the delinquency on November 16.

6.	16-22654-A-7	MARC LIM	MOTION FOR
	16-2202	RJR-1	SUBSTITUTION OF PARTY FOLLOWING
	CHICK'S PRODUCE, INC. ET AL V. LIM		DEATH OF MARC YOUNG LIM
			5-12-17 [31]

**Final Ruling:** The motion has been voluntarily dismissed. Docket 58.