

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Thursday, June 24, 2021

Hearing Room 301

1:00 PM

1: -

Chapter

#0.00 You will not be permitted to be physically present in the courtroom. All appearances for this calendar will be via Zoom and not via Court Call. All parties participating in these hearings may connect from the zoom link listed below. This service is free of charge. You may participate using a computer or telephone.

Individuals may participate by ZoomGov video and audio using a personal computer (equipped with camera, microphone and speaker), or a handheld mobile device (such as an iPhone or Android phone). Individuals may opt to participate by audio only using a telephone (standard telephone charges may apply).

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Docket 0

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Tentative Ruling:

- NONE LISTED -

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1:18-11729 Richard Philip Dages

Chapter 7

#1.00 Order to show cause why debtor's counsel should not be ordered to disgorge fees

fr. 3/12/20; 4/30/20; 10/22/20; 3/18/21; 4/8/21; 4/22/21

Docket 136

Tentative Ruling:

The Court will continue this hearing to **1:00 p.m. on September 23, 2021**, to be held with the continued status conference.

Appearances on June 24, 2021 are excused.

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| Party Information |
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Debtor(s):

Richard Philip Dages

Represented By
Jeffrey J Hagen

Trustee(s):

Diane C Weil (TR)

Pro Se

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1:18-11729 Richard Philip Dages

Chapter 7

#2.00 Status conference re: Trustee Diane C. Weil's progress with administration of the estate

Docket 226

Tentative Ruling:

In light of the chapter 7 trustee's status report [doc. 231], the Court will continue this status conference to **1:00 p.m. on September 23, 2021**. The chapter 7 trustee must file and serve a status report **no later than September 9, 2021**.

Appearances on June 24, 2021 are excused.

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| Party Information |
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Debtor(s):

Richard Philip Dages

Represented By
Jeffrey J Hagen

Trustee(s):

Diane C Weil (TR)

Pro Se

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1:21-10736 Top Flight Investments, LLC

Chapter 11

#3.00 Status conference re chapter 11 case

Docket 1

Tentative Ruling:

The parties should address the following:

Deadline to file proof of claim ("Bar Date"): **September 15, 2021.**

Deadline to mail notice of Bar Date: **July 2, 2021.**

The debtor must use the mandatory court-approved form Notice of Bar Date for Filing Proofs of Claim in a Chapter 11 Case, F 3003-1.NOTICE.BARDATE.

Deadline for debtor and/or debtor in possession to file proposed plan and related disclosure statement: **October 15, 2021.**

Continued chapter 11 case status conference to be held at **1:00 p.m. on November 4, 2021.**

The debtor in possession or any appointed chapter 11 trustee must file a status report regarding the debtor's progress toward confirming a chapter 11 plan, to be served on the debtor's 20 largest unsecured creditors, all secured creditors, and the United States Trustee, no later than **14 days** before the continued status conference. The status report must be supported by evidence in the form of declarations and supporting documents.

The Court will prepare the order setting the deadlines for the debtor and/or debtor in possession to file a proposed plan and related disclosure statement.

The debtor must lodge the Order Setting Bar Date for Filing Proofs of Claim, using mandatory court-approved form F 3003-1.ORDER.BARDATE, within seven (7) days.

Party Information

Debtor(s):

Top Flight Investments, LLC

Represented By
Matthew Abbasi

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1:21-10809 RT Development, LLC

Chapter 11

#4.00 Status conference re: chapter 11 case

Docket 1

Tentative Ruling:

The parties should address the following:

Deadline for debtor and/or debtor in possession to file proposed plan and related disclosure statement: **February 28, 2022.**

Continued chapter 11 case status conference to be held at **1:00 p.m. on March 10, 2022.**

The debtor in possession or any appointed chapter 11 trustee must file a status report addressing the debtor's progress to confirming a chapter 11 plan, to be served on the debtor's 20 largest unsecured creditors, all secured creditors, and the United States Trustee, no later than **14 days** before the continued status conference. The status report must be supported by evidence in the form of declarations and supporting documents.

The Court will prepare the order setting the deadlines for the debtor and/or debtor in possession to file a proposed plan and related disclosure statement.

Party Information

Debtor(s):

RT Development, LLC

Represented By
Michael Jay Berger

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1:13-16084 Holly Elizabeth Winzenburg

Chapter 7

#5.00 Order to show cause why Eric B. Gans should not be held in civil contempt for violations of the automatic stay and discharge injunction

fr. 5/20/21

Docket 22

Tentative Ruling:

If the parties have not resolved the matter prior to the continued hearing date of June 24, 2021, the Court will schedule an evidentiary hearing, with witness testimony to be provided in person, in Courtroom 301.

The parties should discuss their availability for the following dates:

June 30 and/or July 1

July 9

July 26, July 27 and/or July 30

August 30 - September 3

Furthermore, the parties should discuss the expected number of witnesses at the evidentiary hearing, expected time for cross-examination to be completed and any other matters related to holding the evidentiary hearing.

May 20, 2021 Tentative Ruling

Having considered the motion for sanctions [doc. 20], the response of Eric B. Gans [doc. 27] and submitted declarations, it is not apparent that Mr. Gans willfully violated the automatic stay and/or violated the discharge injunction. To determine whether Mr. Gans did so, and if sanctions are appropriate, the Court may require an evidentiary hearing.

At such an evidentiary hearing, among other witnesses, the Court would expect the

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CONT... Holly Elizabeth Winzenburg Chapter 7

debtor to produce Elise Gilliam for direct testimony and cross-examination, regarding respondent's provision of the documentation at issue and what Ms. Gilliam and her associates did with any such documentation received from the respondent.

The Court also would require in person direct testimony from Mr. Bodie, Ms. Winzenberg and Mr. Gans, each of whom also would be subject to cross-examination, unless such cross-examination is waived by the opposing party.

Has the debtor's refinancing of her home closed?

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| Party Information |
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Debtor(s):

Holly Elizabeth Winzenburg

Represented By
Brett F Bodie
Ahren A Tiller

Trustee(s):

Diane C Weil (TR)

Pro Se

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1:21-10809 RT Development, LLC

Chapter 11

#6.00 Application for order authorizing debtor to employ general bankruptcy counsel

Docket 18

Tentative Ruling:

The Court will approve the employment of the Law Offices of Michael J. Berger ("Berger") as bankruptcy counsel to the debtor and debtor in possession, conditioned on no further payments being made to Berger through creditors or insiders of the debtor, without prior Court approval.

I. BACKGROUND

On May 3, 2021, RT Development ("Debtor") filed a voluntary chapter 11 petition. Brett P. Miles is Debtor's managing member, sole officer and equity holder [Statement of Financial Affairs, item 28, doc. 17].

On May 18, 2021, Debtor filed an application to employ Berger as its general bankruptcy counsel (the "Application to Employ") [doc. 18]. On May 26, 2021, the United States Trustee ("UST") filed an objection to the Application to Employ (the "Objection") [doc. 27]. In the Objection, the UST contends that Applicant has a conflict of interest based on: (1) Berger receiving a prepetition retainer in the amount of \$18,262.00 and a filing fee advanced in the amount of \$1,738.00 by a secured creditor, Christopher Kreidel (the beneficiary of a sixth deed of trust); and (2) the Application to Employ fails to discuss the terms of this arrangement with Mr. Kreidel and whether Berger understands that its duty is owed to Debtor, and not to Mr. Kreidel.

On June 17, 2021, Debtor filed a reply and supplemental declarations in response to the Objection (the "Reply") [doc. 52]. In his supplemental declaration attached to the Reply, Mr. Miles represents that, on April 25, 2021, he and another individual, Zhang Li (who is not a creditor of Debtor), executed a promissory note, payable to Mr. Kreidel, in the principal sum of \$20,000.00 (the "Note"). Supplemental Declaration of Brett P. Miles ("Miles Decl.") [doc. 52], ¶ 5–6; doc. 52, Exh. A, Note. According to Mr. Miles, although it indicates to the contrary, the Note is not secured by Debtor's real properties. Miles Decl., ¶ 5. Mr. Miles also represents that the loan proceeds are a gift contribution to Debtor, and that he does not seek repayment of those proceeds from Debtor. *Id.*, ¶ 7.

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In his supplemental declaration, Mr. Berger represents that he has no prior connection with Mr. Kreidel, Mr. Miles or Ms. Li and that he does not represent their interests in Debtor's case. Supplemental Declaration of Michael Jay Berger [doc. 52], ¶¶ 5, 8. In addition, in their supplemental declarations, Mr. Miles and Mr. Kreidel represent that they were informed or understand that Berger's sole duty of loyalty and attorney-client relationship is with Debtor. Miles Decl. [doc. 52], ¶ 6; Supplemental Declaration of Christopher Kreidel [doc. 52], ¶ 4.

II. DISCUSSION

A. 11 U.S.C § 327

11 U.S.C. § 327(a) provides that:

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, ***that do not hold or represent an interest adverse to the estate, and that are disinterested persons***, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a) (emphasis added). Under the Bankruptcy Code, a debtor in possession has all of the rights and powers of a trustee, including the right to employ estate professionals under § 327. 11 U.S.C. § 1107(a). The purpose of § 327 "is to assure that a professional employed in the case will devote undivided loyalty to the client." *In re Wheatfield Business Park LLC*, 286 B.R. 412, 417–18 (Bankr. C.D. Cal. 2002).

"Section 327(a) imposes a two-pronged test for the employment of professionals. The professional (1) must not hold or represent any interest adverse to the estate, and (2) must be a 'disinterested person.'" *In re Wheatfield Business Park LLC*, 286 B.R. at 418.

"Section 327(a) prohibits an attorney (or other professional) from representing a debtor in a chapter 11 case if the attorney has or represents an *actual* conflicting interest. This prohibition is absolute, and is not subject to waiver or consent." *Id.* at 420–21 (emphasis in original). "In addition, § 327 also prohibits an attorney from holding or representing a certain level of *potential* conflict of interest. Employment may not be approved where a

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potential conflict creates a meaningful incentive to act contrary to the best interests of the estate and its various creditors." *Id.* at 421.

Case law has defined an "adverse interest" to mean: "(1) possession or assertion of an economic interest that would tend to lessen the value of the bankruptcy estate; or (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is a rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate." *In re AFI Holdings, Inc.*, 530 F.3d 832, 845 (9th Cir. 2008).

The Bankruptcy Code, in pertinent part, defines a "disinterested person" as a "a person that . . . does not have an interest materially adverse to the interest of the estate . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). "A disinterested professional is one that can make unbiased decisions, free from personal interest, in any matter pertaining to the debtor's estate." *In re CIC Inv. Corp.*, 192 B.R. 549, 553–54 (B.A.P. 9th Cir. 1996) (internal quotation marks omitted).

B. Retainer Funded by the Debtor's Creditor

"All facts that may be pertinent to a court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed." *In re Hathaway Ranch Partnership*, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990).

"Courts have taken two approaches when deciding if payment of a bankruptcy retainer by a third-party is a disqualifying interest. Some courts have found that payment of a retainer by a third party is a per se disqualification, while other courts have held that the totality of the circumstances surrounding the retainer payment must be scrutinized before deciding if a disqualifying conflict exists." *In re American Inter. Refinery, Inc.*, 676 F.3d 455, 462 (5th Cir. 2012) (citing *In re Lotus Properties LP*, 200 B.R. 388, 391–96 (Bankr. C.D. Cal. 1996)).

When the retention of counsel for the debtor is funded by the debtor's creditors, courts which assess the totality of the circumstances have followed a five-part test to determine whether there is an actual conflict to disqualify counsel:

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- (1) The arrangement must be fully disclosed to the debtor/client and the third-party payor/insider;
- (2) The debtor must expressly consent to the arrangement;
- (3) The third-party payor/insider must retain independent legal counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client;
- (4) The factual and legal relationship between the third-party payor/insider, the debtor, the respective attorneys, and their contractual arrangement concerning the fees, must be fully disclosed to the Court at the outset of the debtor's bankruptcy representation;
- (5) The debtor's attorney/applicant must demonstrate and represent to the Court's satisfaction the absence of facts which would otherwise create non-disinterestedness, and actual conflict, or impermissible potential for a conflict of interest.

Lotus Properties, 200 B.R. at 393 (citing *In re Kelton Motors, Inc.*, 109 B.R. 641, 658 (Bankr. D. Vt. 1989)).

Regarding the *Kelton* factors, first, Berger has fully disclosed the terms of the arrangement to Debtor, Mr. Miles and Mr. Kreidel. Second, Debtor apparently has consented to the funding mechanism for Berger's retainer. Third, Mr. Miles and Mr. Kreidel are aware that Berger owes a duty of loyalty and retains an attorney-client relationship exclusively with Debtor. [FN1]. Fourth, the identity of the borrowers under the Note has been disclosed, and Mr. Miles and Mr. Kreidel do not seek repayment from Debtor. Finally Mr. Berger has stated that Berger will not represent the interests of the lender and/or borrowers under the Note in Debtor's case and that Mr. Berger has no prior connection with these individuals.

Taking all of this into account, at this point in time, the Court concludes that Berger's employment as general bankruptcy counsel satisfies the pertinent *Kelton* factors.

III. CONCLUSION

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The Court will grant the Application to Employ, conditioned on no further payments being made to Berger through creditors or insiders of Debtor, without prior Court approval.

Debtor must submit the order within seven (7) days.

FOOTNOTE

FN 1. Although Berger has not addressed whether Mr. Miles, Ms. Li and Mr. Kreidel have independent legal counsel, i.e., to represent their respective interests in Debtor's case, given the facts of this case, the Court will not require that they have such counsel, in order for Berger to establish that it is eligible to be employed as general bankruptcy counsel.

Party Information

Debtor(s):

RT Development, LLC

Represented By
Michael Jay Berger

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1:15-12608 Stacie Silver

Chapter 11

#7.00 Debtor's Motion For Entry of Discharge and Entry of Final Decree

Docket 165

Tentative Ruling:

Grant.

Movant must submit the order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

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| Party Information |
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Debtor(s):

Stacie Silver

Represented By
Andy C Warshaw
Richard L. Sturdevant

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1:20-11006 Lev Investments, LLC

Chapter 11

#8.00 Motion For Order Disallowing Claim No. 13 Filed By Michael Leizerovitz

Docket 319

Tentative Ruling:

Grant.

I. BACKGROUND

On June 1, 2020, Lev Investments, LLC ("Debtor") filed a voluntary chapter 11, subchapter V petition. On August 10, 2020, Michael Leizerovitz filed proof of claim no. 13 (the "POC"), asserting an unsecured claim for \$1,316,441.36 against the estate. In an attachment to the POC, Mr. Leizerovitz explained that his claim against the estate is based on the following facts—

On August 3, 2018, Coachella Vineyard Luxury RV Park LLC ("RV Park") executed an unsecured promissory note, in the amount of \$400,000, in favor of Mr. Leizerovitz (the "\$400,000 Note"). RV Park also executed the *Cross-Collateral Promissory Note Secured by Deed of Trust*, in the amount of \$500,000, in favor of Mr. Leizerovitz (the "\$500,000 Note"). On February 6, 2019, RV Park executed an amendment of the \$400,000 Note, agreeing to secure the \$400,000 Note with the collateral securing the \$500,000 Note. On the same day, RV Park executed another instrument promising to pay Mr. Leizerovitz another \$50,000 (the "\$50,000 Note"). As such, as of February 6, 2019, Mr. Leizerovitz believes he was owed a principal balance of \$950,000, plus accrued interest, costs and fees, secured by real property.

The deed of trust securing the instruments above was junior to a deed of trust securing an obligation in favor of Debtor. After RV Park did not meet its obligations to Debtor, Debtor initiated foreclosure proceedings.

Subsequently, RV Park filed a lawsuit in state court; through the lawsuit, RV Park obtained a temporary restraining order precluding the foreclosure sale. However, the state court did not grant a request for a

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preliminary injunction. As a result, on November 6, 2019, the temporary restraining order dissolved.

On November 7, 2019, Debtor's foreclosure trustee conducted a foreclosure sale. Debtor was the successful bidder and acquired title to the real property. On November 8, 2019, Debtor recorded a Trustee's Deed. On May 29, 2020, Debtor recorded a rescission of the Trustee's Deed.

Around the time Debtor was conducting its foreclosure sale, RV Park was negotiating a sale of the real property which, if consummated, would have paid all claims asserted by Mr. Leizerovitz in full. However, as a result of Debtor's wrongful foreclosure, the proposed buyer terminated the proposed transaction and did not express any further interest in acquiring the real property. As a result of the wrongful foreclosure, Mr. Leizerovitz believes he will be unable to recover the amount he is owed.

Attachment to POC, pp. 1-3.

In support of the contention that RV Park was negotiating a sale of the real property, Mr. Leizerovitz attached a joint venture agreement (the "JVA"). POC, Exhibit H. The JVA is dated November 15, 2019 and signed by a representative of Global Finance GFM DOO, a representative of Global Finanz America, Inc (together, the "Global Finance Parties") and the president of RV Park. *Id.* Mr. Leizerovitz is not a party to the JVA. *Id.* Through the JVA, the parties to the JVA agreed that the Global Finance Parties would invest \$200 million to improve, over a period of seven years, the real property owned by RV Park. *Id.* The JVA is silent as to whether any of the funds would be used to pay off liens against the real property.

On May 24, 2021, Debtor filed a motion to disallow Mr. Leizerovitz's claim against the estate (the "Motion") [doc. 319]. In the Motion, Debtor contends that Mr. Leizerovitz has not provided credible evidence that, at the time Debtor initiated foreclosure proceedings, RV Park was negotiating a sale of the real property. As such, Debtor contends that Mr. Leizerovitz's claim that the foreclosure interfered with such a sale is not supported by evidence. In a declaration attached to the Motion, Debtor's principal also contends that Debtor was never informed of any agreement to sell or refinance the real property. Declaration of Dmitri Lioudkouski, ¶ 14.

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On June 9, 2021, Mr. Leizerovitz filed an opposition to the Motion (the "Opposition") [doc. 336]. In the Opposition, Mr. Leizerovitz asserts that: (A) Debtor did not provide sufficient evidence to shift the burden of proof to Mr. Leizerovitz; (B) the declaration of Abraham Gottlieb, attached to the Opposition (the "Gottlieb Declaration"), adequately supports Mr. Leizerovitz's claim; and (C) the parties are litigating these issues in an adversary proceeding before the Court [1:21-ap-01020-VK].

In the Gottlieb Declaration, Mr. Gottlieb, who is the manager of RV Park, states that, in November 2019, he had "an investor that was willing to refinance the [real property] and provide funds for the development of the RV park." Gottlieb Declaration, ¶ 4. Mr. Gottlieb further contends that, with the investment funds, "RV [Park] was going to payoff [Debtor] to prevent the foreclosure or buy the [real property] at the foreclosure sale," but was unable to because of the "early foreclosure" by Debtor. *Id.* Mr. Gottlieb also contends that, in 2018, the value of the real property was \$6.5 million; in support, Mr. Gottlieb attaches a partial lender/purchaser disclosure statement with a loan broker's opinion of value (the "Lender Disclosure Statement"). Gottlieb Declaration, ¶ 5.

Mr. Gottlieb also attaches a past declaration filed in connection with a state court action (the "Past Declaration"), asserting that the declaration sets forth the basis of Mr. Leizerovitz's claim. Gottlieb Declaration, Exhibit 1. In the Past Declaration, Mr. Gottlieb contends that Debtor: (A) did not fully fund the loan to RV Park; (B) failed to convey property in Lake Elsinore to RV Park; and (C) made an excessive payoff demand in connection with the foreclosure. Past Declaration, ¶¶ 4-13. On June 16, 2021, Debtor filed a reply to the Opposition [doc. 344].

II. ANALYSIS

11 U.S.C. § 502(a) provides that a proof of claim is deemed allowed, unless a party in interest objects. Fed. R. Bankr. P. 3001(f) provides that a proof of claim executed and filed in accordance with the rules constitutes *prima facie* evidence of the validity and amount of the claim. *See also* Local Bankruptcy Rule 3007-1(c) ("an objection to claim must be supported by admissible evidence sufficient to overcome the evidentiary effect of a properly documented proof of claim").

"To defeat the claim, the objector must come forward with sufficient evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the

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proofs of claim themselves." *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) (internal citation omitted). "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The ultimate burden of persuasion remains at all times upon the claimant." *Id.* (internal citations omitted). "If the creditor does not provide information or is unable to support its claim, then that in itself may raise an evidentiary basis to object to the unsupported aspects of the claim, or even a basis for evidentiary sanctions, thereby coming within Section 502(b)'s grounds to disallow the claim." *In re Heath*, 331 B.R. 424, 437 (B.A.P. 9th Cir. 2005).

Here, Mr. Leizerovitz bases his claim on a wrongful foreclosure theory. Specifically, Mr. Leizerovitz contends that Debtor's premature foreclosure, in violation of California Civil Code ("CCC") § 2924g(d), resulted in the Global Finance Parties rescinding the JVA, which would have paid Mr. Leizerovitz's claims in full. Pursuant to CCC § 2924g(d)—

The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement shall also set forth the new date, time, and place of sale and the place of sale shall be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given. However, the sale shall be conducted no sooner than on the seventh day after the earlier of (1) dismissal of the action or (2) expiration or termination of the injunction, restraining order, or stay that required postponement of the sale, whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise, unless the injunction, restraining order, or subsequent order expressly directs the conduct of the sale within that seven-day period. For purposes of this subdivision, the seven-day period shall not include the day on which the action is dismissed, or the day on which the injunction, restraining order, or stay expires or is terminated. If the sale had been scheduled to occur, but this subdivision precludes its conduct during that seven-day period, a new notice of postponement shall be given if the sale had been scheduled to occur during that seven-day period. The trustee shall maintain records of each postponement and the reason therefor.

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"This provision provides, in relevant part, that a foreclosure sale may not be conducted within seven days of the expiration or termination of an 'injunction, restraining order, or stay that required postponement of the sale.'" *Fung v. BSI Fin. Servs.*, 2018 WL 1569725, at *5 (N.D. Cal. Mar. 30, 2018) (citing CCC § 2924g(d)).

In the POC, Mr. Leizerovitz asserts that the injunction preventing the foreclosure sale dissolved on November 6, 2019. The seven-day stay under CCC § 2924g(d) would prevent Debtor from conducting a foreclosure sale until November 13, 2019. However, in this case, it appears Debtor conducted the foreclosure sale on November 7, 2019, one day after the expiration of the temporary restraining order. As such, the POC establishes a violation of CCC § 2924g(d). However, as discussed below, neither the POC nor the Opposition prove that Mr. Leizerovitz was damaged by this violation.

To successfully bring a wrongful foreclosure claim pursuant to California law, Mr. Leizerovitz must prove that: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." *Sciarratta v. U.S. Bank Nat'l Assn.*, 247 Cal.App.4th 552, 561–62 (Ct. App. 2016) (internal quotation omitted). "Mere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." *Id.*

"In order to prove it was damaged by the irregularities in the foreclosure sale which dissuaded or prevented a higher bid, the junior lienor would have to produce a ready, willing and able buyer who would have paid the higher price but for the wrongful conduct. Otherwise, damages alleged would be speculative." *FPCI RE-HAB 01 v. E & G Invs., Ltd.*, 207 Cal.App.3d 1018, 1023 (Ct. App. 1989). "It is the burden of the party challenging the trustee's sale to prove such irregularity and thereby overcome the presumption of the sale's regularity." *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 105, 134 Cal. Rptr. 3d 622, 635 (2011).

In the Motion, Debtor does not dispute the violation of CCC § 2924g(d). However, Debtor challenges Mr. Leizerovitz's evidence in support of his claim for damages. In the POC, Mr. Leizerovitz supports his claim for damages by referencing the attached JVA, arguing that Debtor's premature foreclosure under CCC § 2924g(d) prevented the

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Global Finance Parties from performing under the JVA.

As set forth by Debtor, the JVA does not demonstrate that Mr. Leizerovitz suffered damages from the wrongful foreclosure. First, the JVA is dated November 15, 2019. The seven-day stay under CCC § 2924g(d) expired on November 13, 2019, i.e., prior to execution of the JVA. As such, even if Debtor had complied with CCC § 2924g(d), Debtor could have foreclosed on the subject property before RV Park and the Global Finance Parties executed the JVA.

To the extent Mr. Leizerovitz asserts that Debtor's premature foreclosure interfered with the pre-November 15, 2019 negotiations of the JVA, the testimony by Debtor's principal indicates that Debtor was unaware of any such negotiations. However, even if Debtor was aware of the negotiations, the JVA does not establish that the Global Finance Parties were a "ready, willing and able buyer" of the subject property. The JVA is silent as to whether the Global Finance Parties' investment would be used to pay off the liens against the subject property, such as Mr. Leizerovitz's lien. The JVA also does not establish that the Global Finance Parties would purchase the subject property; instead, through the JVA, the Global Finance Parties would invest \$200 million towards improvement of the subject property, such as by building a hotel, luxury RV parking facilities and a 100-unit apartment building. These terms do not indicate that the Global Finance Parties would have, for example, overbid Debtor at a foreclosure sale.

In light of the above, the Motion successfully shifts the burden of proof to Mr. Leizerovitz, who has the ultimate burden of persuasion on his claim. *Lundell*, 223 F.3d at 1039. Mr. Leizerovitz does not meet this burden. In the Opposition, Mr. Leizerovitz provides a declaration by Mr. Gottlieb, in which Mr. Gottlieb contends that "an investor" was willing to refinance the subject property. This testimony is hearsay. Mr. Leizerovitz has not provided a declaration by a representative of Global Finance Parties with personal knowledge about the purported transaction. In addition, even Mr. Gottlieb does not contend that the foreclosure caused the Global Finance Parties' decision to back out of the JVA; instead, Mr. Gottlieb merely testifies that "RV [Park] was unable to [pay off Debtor] because of the early foreclosure by [Debtor]." Gottlieb Declaration, ¶ 4.

The Past Declaration also does not serve as adequate proof of the validity of Mr. Leizerovitz's claim. Mr. Leizerovitz has not articulated how the testimony regarding funding of the loan to RV Park or the unrelated transaction related to the Lake Elsinore property impacted Mr. Leizerovitz's lien. With respect to the testimony regarding

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Debtor's excessive payoff demand, Mr. Gottlieb testified that Debtor's excessive demand prevented RV Park from finding investors willing to provide financing. However, once again, there is no evidence that, but for Debtor's allegedly excessive demand, an investor would have refinanced the subject property. Mr. Leizerovitz has not presented a declaration from a "ready, willing and able buyer who would have paid the higher price but for the wrongful conduct. Otherwise, damages alleged would be speculative." *FPCI RE-HAB 01*, 207 Cal.App.3d at 1023. Mr. Gottlieb's testimony is speculative.

Finally, Mr. Gottlieb testifies that, in 2018, the subject property was worth \$6.5 million. Notwithstanding the fact that Mr. Gottlieb is not the proper party to authenticate the Lender Disclosure Statement, the Lender Disclosure Statement does not qualify as competent evidence of the value of the property. The Lender Disclosure Statement does not identify the loan broker or set forth the loan broker's qualifications to estimate the value of the subject property. In addition, the Lender Disclosure Statement provides that "[a]n estimate of fair market value is to be determined by an independent appraisal," and that the broker must provide "objective data upon which the broker's estimate is based." Neither the Lender Disclosure Statement nor any other evidence provided by Mr. Leizerovitz contains any such objective data or an independent appraisal by a qualified appraiser. [FN1]. As such, the Lender Disclosure Statement does not prove the value of the subject property.

In light of the above, Mr. Leizerovitz has not met his burden of proving that he suffered damages from Debtor's premature foreclosure of the subject property. Consequently, the Court will disallow Mr. Leizerovitz's claim against the estate. [FN2].

III. CONCLUSION

The Court will grant the Motion.

Debtor must submit an order within seven (7) days.

FOOTNOTES

1. Moreover, the foreclosure occurred in November 2019. Even if the Lender Disclosure Statement proved the value of the property, the statement, dated in 2018, does not relate to the relevant time period.

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2. In the Opposition, Mr. Leizerovitz asks the Court to deny the Motion and adjudicate these issues in connection with adversary proceeding no. 1:21-ap-01020-VK. However, the issues in that adversary proceeding are different from the issues raised in the Motion, and this decision will not impact the substantive issues raised in the adversary proceeding.

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| Party Information |
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Debtor(s):

Lev Investments, LLC

Represented By
David B Golubchik
Juliet Y Oh

Trustee(s):

Caroline Renee Djang (TR)

Pro Se

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#9.00 Motion For Order Disallowing Claim No. 5 Filed By FR, LLC

Docket 314

Tentative Ruling:

Grant.

I. BACKGROUND

On June 1, 2020, Lev Investments, LLC ("Debtor") filed a voluntary chapter 11, subchapter V petition. On July 18, 2020, FR L.L.C. ("FR") filed proof of claim no. 5 against the estate (the "POC"), asserting a secured claim in the amount of \$195,621.39. FR indicated its claim was based on an investment, and secured by a "constructive trust" against Debtor's real property. As support for its claim, FR attached: (A) a statement of itemization; (B) a redacted bank account statement showing a deposit, from an unidentified source, of \$119,000; and (C) a buyer's/borrower's settlement statement from sale of real property (the "Closing Statement").

On June 5, 2020, FR removed a state court action against Debtor and other defendants to this Court (the "Adversary Proceeding") [1:20-ap-01060-VK]. On January 15, 2021, Plaintiff filed a second amended complaint (the "SAC") [1:20-ap-01060-VK, doc. 52]. Through the SAC, Plaintiff requested declaratory judgment that: (A) Debtor holds net sale proceeds from the sale of Debtor's real property (the "Sale Proceeds") in a resulting trust for the benefit of Plaintiff; (B) Plaintiff's interest in the Sale Proceeds is not property of Debtor's bankruptcy estate; and (C) Plaintiff is entitled to payment from the Sale Proceeds in an amount equal to the proportion of the amount Kevin Moda (Plaintiff's alleged assignor) allegedly made available, in order for Debtor to acquire title to the real property.

On February 16, 2021, Debtor filed a motion to dismiss the SAC (the "Motion to Dismiss") [1:20-ap-01060-VK, doc. 53]. On April 21, 2021, the Court held a hearing on the Motion to Dismiss. At that time, the Court issued a ruling granting the Motion to Dismiss without leave to amend (the "Dismissal Ruling") [1:20-ap-01060-VK, doc. 62].

On May 20, 2021, Debtor filed a motion to disallow FR's claim against the estate (the

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"Motion") [doc. 314]. Debtor supported the Motion with a declaration by Dmitri Lioudkouski, Debtor's manager (the "Lioudkouski Declaration"). In the Lioudkouski Declaration, Mr. Lioudkouski testifies that: (A) Mr. Lioudkouski is the only person with authority to cause Debtor to enter into any agreements, including financing agreements; (B) Mr. Lioudkouski never authorized Debtor to enter into any financial agreement or transactions with Mr. Moda or FR; and (C) Debtor never engaged in any business dealings with FR or Mr. Moda, or authorized a third party to do so. Lioudkouski Declaration, ¶¶ 5-6. Mr. Lioudkouski also testifies that Debtor has no record of any amounts which may be owed to FR or Mr. Moda. Lioudkouski Declaration, ¶ 7.

On June 10, 2021, FR filed an opposition to the Motion (the "Opposition") [doc. 340]. In support of the Opposition, FR provided a declaration by Kevin Moda, as the managing member of FR (the "Moda Declaration"). In the Moda Declaration, Mr. Moda contends that Yevgeniya Lisitsa approached him about investing in real estate, and represented to Mr. Moda that he would own a proportional equity interest in the real estate and share in the profits generated by the real estate. Moda Declaration, ¶ 1. Mr. Moda further states that he is "informed and believe[s]" that Ms. Lisitsa approached him on behalf of Debtor, and that Mr. Moda invested \$119,000 which Ms. Lisitsa used to acquire the real estate, on Debtor's behalf. Moda Declaration, ¶¶ 2-3. On June 16, 2021, Debtor filed a reply to the Opposition [doc. 343].

II. ANALYSIS

11 U.S.C. § 502(a) provides that a proof of claim is deemed allowed, unless a party in interest objects. Fed. R. Bankr. P. 3001(f) provides that a proof of claim executed and filed in accordance with the rules constitutes *prima facie* evidence of the validity and amount of the claim. *See also* Local Bankruptcy Rule 3007-1(c) ("an objection to claim must be supported by admissible evidence sufficient to overcome the evidentiary effect of a properly documented proof of claim").

"To defeat the claim, the objector must come forward with sufficient evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) (internal citation omitted). "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The ultimate burden of persuasion remains at all times upon the claimant." *Id.*

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(internal citations omitted). "If the creditor does not provide information or is unable to support its claim, then that in itself may raise an evidentiary basis to object to the unsupported aspects of the claim, or even a basis for evidentiary sanctions, thereby coming within Section 502(b)'s grounds to disallow the claim." *In re Heath*, 331 B.R. 424, 437 (B.A.P. 9th Cir. 2005).

Here, Debtor provided evidence that is, by probative force, equal to that of the allegations in FR's proof of claim. Specifically, Mr. Lioudkouski testified that is the only one with authority to bind Debtor to financing agreements or obligations, that he never entered into any such agreement with Mr. Moda or FR and that Debtor has no record of any such transaction with Mr. Moda or FR. Given the scant evidence in support of the POC (i.e., a redacted, unauthenticated account statement that does not identify FR or Mr. Moda as the depositor and the Closing Statement, which also does not identify FR or Mr. Moda anywhere in the statement), the testimony by Mr. Lioudkouski serves to shift the burden to prove the validity of its claim to FR.

The evidence provided by FR in connection with its Opposition does not meet this burden. The only evidence provided by FR to is the Moda Declaration. [FN1]. The Moda Declaration is inadequate to prove, by a preponderance of the evidence, that FR has a valid claim against the estate. In the Moda Declaration, Mr. Moda testifies only that *Ms. Lisitsa* approached him about investing in real property. This testimony does not demonstrate that *Debtor* or *the estate* is liable to Mr. Moda and/or FR.

Mr. Moda does not have personal knowledge about the remaining statements in the Moda Declaration. For instance, Mr. Moda's testimony that he is "informed and believe[s] that Ms. Lisitsa approached [Mr. Moda] on behalf of Debtor" lacks foundation and is not substantiated by a party with personal knowledge, such as Ms. Lisitsa. In addition, Mr. Moda would not have personal knowledge regarding whether "Ms. Lisitsa used [the funds] to acquire the [real property] on behalf of Debtor."

In the Opposition, FR contends that the Motion "creates a disputed material factual issue that should be decided at an evidentiary hearing." Opposition, p. 3. However, under *Campbell*, once the Motion shifted the burden of proof to FR, FR had an obligation to provide competent evidence via the Opposition. *Lundell*, 223 F.3d at 1039. FR did not provide any such evidence and, as a result, the Court does not need an evidentiary hearing to hold that FR did not meet its burden of proving the validity of its claim. FR's additional argument that it "can assert several legal theories to recovery payment from

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Debtor" also is unpersuasive. FR had an obligation to assert such theories, and support them with evidence, in an effort to satisfy its burden of proof in connection with its Opposition. FR did not, and FR's several hypothetical, unsupported claims against Debtor are not a basis to expend resources on an evidentiary hearing.

As conceded by FR, the Court already dismissed, through the Adversary Proceeding, FR's claims related to whether FR held a security interest in the Sale Proceeds and/or other assets of the estate. FR concedes that, in light of the dismissal of the Adversary Proceeding, it no longer has a secured claim against the estate. Through the Motion, Debtor successfully shifted the burden of proving the validity of FR's claim to FR. FR did not meet that burden, and the Court will disallow FR's unsecured claim against the estate.

III. CONCLUSION

The Court will grant the Motion.

Debtor must submit an order within seven (7) days.

FOOTNOTES

1. FR also attaches the unverified SAC. The allegations in the SAC do not hold any evidentiary value.

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| Party Information |
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Debtor(s):

Lev Investments, LLC

Represented By
David B Golubchik
Juliet Y Oh

Trustee(s):

Caroline Renee Djang (TR)

Pro Se

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1:21-10844 Michael Chulak

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#10.00 Status Conference re: Chapter 11, Subchapter V Case

Docket 1

***** VACATED *** REASON: Case converted on 6/2/21 [doc. 30].**

Tentative Ruling:

- NONE LISTED -

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| Party Information |
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Debtor(s):

Michael Chulak

Represented By
Michael R Totaro

Trustee(s):

Andrew W. Levin (TR)

Pro Se