



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
March 14, 2022

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 09-11241-MKN
	)	Chapter 11
LEON MCKITTRICK (DECEASED),	)	
	)	
Debtor.	)	Date: October 20, 2021
	)	Time: 9:30 a.m.
	)	

**ORDER ON MOTION TO DISMISS BANKRUPTCY CASE  
PURSUANT TO 11 U.S.C. [§] 1112 AND BANKRUPTCY RULE 1016<sup>1</sup>**

On October 20, 2021, the court heard the Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. [§] 1112 and Bankruptcy Rule 1016 (“Dismissal Motion”), brought by secured creditor Fay Servicing, LLC in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND<sup>2</sup>**

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

<sup>2</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

1 On January 30, 2009, Leon McKittrick (“Debtor”) filed a “skeleton” voluntary Chapter  
2 11 petition commencing the above-captioned bankruptcy proceeding. (ECF No. 1).

3 On February 11, 2009, Debtor filed his schedules of assets and liabilities, statement of  
4 financial affairs, and related documents. (ECF Nos. 12-16 and 20).

5 On June 7, 2010, an order was entered confirming Debtor’s Third Modified Plan of  
6 Reorganization Dated March 2, 2010 (“Confirmed Plan”). (ECF No. 542).

7 On August 12, 2010, Debtor filed Exhibit 1 to Amended Order Confirming Debtor’s  
8 Third Modified Plan of Reorganization Dated March 2, 2010. (ECF No. 548).

9 On August 18, 2010, an Amended Order Confirming Debtor’s Third Modified Plan of  
10 Reorganization Dated March 2, 2010, was entered. (ECF No. 549).

11 On August 27, 2010, Debtor’s Third Amended Order Confirming Debtor’s Third  
12 Modified Plan of Reorganization Dated March 2, 2010, was entered (“Plan Confirmation  
13 Order”). (ECF No. 554).

14 On April 22, 2011, an Order Entering Final Decree closing the above-captioned Chapter  
15 11 case was entered. (ECF No. 588).

16 On January 27, 2012, an order was entered vacating the Order Entering Final Decree due  
17 to clerical error, thereby reopening the case. (ECF No. 613).

18 On October 7, 2015, Debtor filed a certification that he had complied with the conditions  
19 for entry of an individual Chapter 11 discharge. (ECF No. 742).

20 On November 7, 2016, Debtor filed a motion for sanctions and civil contempt (“First  
21 Sanctions Motion”) against creditors Bank of America, N.A. (“BOA”), Nationstar Mortgage,  
22 LLC (“Nationstar”), and Select Loan Servicing, LLC, alleging that the Plan Confirmation Order  
23 had been violated. (ECF No. 758).

24 On December 21, 2016, Debtor filed another motion for sanctions and civil contempt  
25 against creditor JP Morgan Chase Bank, N.A. (“Chase Bank”). Alleging that the Plan  
26 Confirmation Order had been violated (“Second Sanctions Motion”). (ECF No. 766).

27 On January 11, 2017, BOA filed its opposition to the First Sanctions Motion. (ECF No.  
28 770).

1 On February 15, 2017, Nationstar filed its opposition to the First Sanctions Motion, along  
2 with the declarations of Michael Hogue, Esq. and Maida Resare. (ECF Nos. 779-781).

3 On February 22, 2017, Debtor filed a reply to Nationstar's opposition. (ECF No. 784).

4 On March 15, 2017, Chase Bank filed its opposition to the Second Sanctions Motion.  
5 (ECF No. 790).

6 On March 22, 2017, Debtor filed a reply to Chase Bank's opposition. (ECF No. 792).

7 On May 12, 2017, Debtor withdrew his First Sanctions Motion without prejudice. (ECF  
8 No. 805).

9 On June 2, 2017, the court entered an order denying the Second Sanctions Motion. (ECF  
10 No. 807).

11 On February 26, 2020, a Suggestion of Death of Debtor was filed indicating that the  
12 Debtor had died on December 26, 2019. (ECF No. 869).

13 On February 27, 2020, counsel for Debtor filed a motion to substitute the Debtor's  
14 brother, Leo McKittrick, as the bankruptcy estate representative for the purposes of completing  
15 the Confirmed Plan ("Substitution Motion"). (ECF No. 870).

16 On April 1, 2020, an order was entered granting the Substitution Motion ("Substitution  
17 Order"). (ECF No. 875).<sup>3</sup>

18 On June 22, 2020, a third motion for sanctions and civil contempt ("Third Sanctions  
19 Motion") was filed on behalf of the Debtor. (ECF No. 877).

20 On June 23, 2020, a motion for entry of discharge and final decree was filed on behalf of  
21 Debtor ("Discharge Motion"). (ECF No. 883). Debtor filed a certificate of mailing attesting to  
22 service by first class mail of the Discharge Motion and accompanying notice of hearing. (ECF  
23 No. 886).

24 On July 15, 2020, creditors Citibank, N.A. ("Citibank") and Shellpoint Mortgage  
25 Servicing as well as Nationstar, filed oppositions to the Third Sanctions Motion. (ECF No. 893  
26 and 895). On this same day, creditor U.S. Bank, N.A. ("U.S. Bank") and Wilmington Savings  
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28 <sup>3</sup> In this order, after the substitution, the actions taken on behalf of the Chapter 11 estate remain attributed to the Debtor.

1 Fund Society dba Christiana Trust, by and through its servicing agent, Fay Servicing, LLC (“Fay  
2 Servicing”), filed responses to the Third Sanctions Motion. (ECF No. 892 and 894).

3 On July 17, 2020, an order was entered granting a stipulation between Debtor and  
4 creditor Rushmore Loan Management Services, LLC (“Rushmore”), to continue the hearing on  
5 the Discharge Motion. (ECF No. 898).

6 On August 12, 2020, Nationstar filed a supplement to its opposition to the Third  
7 Sanctions Motion. (ECF No. 910). On this same day, Rushmore filed its opposition to the Third  
8 Sanctions Motion as well as to the Discharge Motion, which includes a countermotion for  
9 dismissal of Debtor’s Chapter 11 case (“First Dismissal Motion”). (ECF Nos. 911 and 913).  
10 Furthermore, Chase Bank filed its opposition to the Third Sanctions Motion. (ECF No. 915).

11 On October 6, 2020, BOA filed its opposition to the Third Sanctions Motion. (ECF No.  
12 927).

13 On October 16, 2020, Debtor, Rushmore and Community Loan, stipulated to continue the  
14 hearing on the Discharge Motion as well as the First Dismissal Motion. (ECF No. 935). On this  
15 same day, an order was entered granting the stipulation to continue the Discharge Motion and the  
16 First Dismissal Motion, which also continued the hearing on the Third Sanctions Motion. (ECF  
17 No. 936).

18 On November 4, 2020, Community Loan filed its opposition to the Third Sanctions  
19 Motion. (ECF No. 942).

20 On November 4, 2020, Debtor, Rushmore, and U.S. Bank, as servicer to Rushmore,  
21 stipulated to withdraw (without prejudice) Rushmore’s opposition to the Discharge Motion and  
22 the First Dismissal Motion. Additionally, the Third Sanctions Motion was withdrawn without  
23 prejudice as it pertained to Rushmore and U.S. Bank. (ECF No. 943). An order was entered  
24 granting the stipulation the same day. (ECF No. 944).

25 On November 10, 2020, Debtor filed his reply to the various oppositions and responses  
26 filed by BOA, Citibank, Chase Bank, Nationstar, Fay Servicing, with respect to the Third  
27 Sanctions Motion. (ECF No. 945).

1 On November 18, 2020, the court entered an order granting the Discharge Motion. (ECF  
2 No. 949). Thereafter, the court entered an Order of Discharge (“Discharge Order”). (ECF No.  
3 950).

4 On June 2, 2021, Debtor filed a notice of withdrawal on his Third Sanctions Motion  
5 without prejudice. (ECF No. 969).

6 On August 6, 2021, Debtor filed a further motion for sanctions and civil contempt  
7 (“Fourth Sanctions Motion”) that was noticed for hearing on September 8, 2021. (ECF Nos.  
8 979-980).

9 On August 25, 2021, Fay Servicing filed its response to the Fourth Sanctions Motion.  
10 (ECF No. 983).

11 On August 26, 2021, Debtor, BOA, and Fay Servicing, stipulated to continue the hearing  
12 on the Fourth Sanctions Motion to October 13, 2021. (ECF No. 984).

13 On August 30, 2021, the court entered an order granting the stipulation. (ECF No. 985  
14 and 988).

15 On September 15, 2021, BOA filed its opposition to the Fourth Sanctions Motion (“BOA  
16 Opposition”). (ECF No. 989).

17 On September 16, 2021, Fay Servicing filed its opposition to the Fourth Sanctions  
18 Motion (“Fay Servicing Opposition”). (ECF No. 990).

19 On September 16, 2021, Fay Servicing filed another Motion to Dismiss Bankruptcy Case  
20 Pursuant to 11 U.S.C. [§] 1112 and Bankruptcy Rule 1016 (“Second Dismissal Motion”). (ECF  
21 No. 991).

22 On October 6, 2021, Debtor filed replies to both the BOA Opposition and the Fay  
23 Servicing Opposition regarding the Fourth Sanctions Motion. (ECF Nos. 997-98).

24 October 6, 2021, Debtor filed his opposition to the Second Dismissal Motion. (ECF No.  
25 999).

26 On October 11, 2021, Debtor, BOA, and Fay Servicing, stipulated to continue the hearing  
27 on the Fourth Sanctions Motion to October 20, 2021. (ECF No. 1000). The following day, an  
28 order was entered approving the stipulation. (ECF No. 1001 and 1004).

1 On October 20, 2021, the court heard both the Fourth Sanctions Motion and the Second  
2 Dismissal Motion. After arguments were presented, the matters were taken under submission.

3 **DISCUSSION**

4 As previously mentioned, the Debtor died on December 26, 2019. After court  
5 authorization, Debtor's brother substituted into the Chapter 11 case as representative of the  
6 bankruptcy estate. The Substitution Order was entered on April 1, 2020. Thereafter, the Third  
7 Sanctions Motion was filed by the Debtor and noticed for hearing. The following day, the  
8 Discharge Motion was filed and noticed for hearing.

9 On November 18, 2020, the Discharge Motion was granted. On the same day, the  
10 Discharge Order was entered under Section 1141(d)(5). As a result of the Chapter 11 discharge,  
11 the automatic stay expired as to the Debtor under Section 362(c), and the discharge injunction  
12 arose as to the Debtor under Section 524(a)(2).

13 On June 2, 2021, Debtor withdrew the Third Sanctions Motion. On August 6, 2021,  
14 however, Debtor filed the Fourth Sanctions Motion.

15 On September 16, 2021, Fay Servicing filed not only its opposition to the Fourth  
16 Sanctions Motion, but also the instant Second Dismissal Motion.

17 Fay Servicing primarily argues that cause exists under Section 1112(b) to dismiss the  
18 Chapter 11 proceeding because the Debtor died at the end of 2019. See Dismissal Motion at 2-4.  
19 While the Debtor's death is not disputed, there also is no dispute that the Substitution Order is  
20 final and was never appealed. More important, it is well established that the death of an  
21 individual debtor does not preclude the entry of a bankruptcy discharge. Compare In re Stewart,  
22 2004 Bankr.LEXIS 1042 (Bankr. D. Ore. Mar. 2, 2004)(post-confirmation death of Chapter 13  
23 debtor did not preclude further case administration); In re Fogel, 2015 U.S. Dist. LEXIS 113185  
24 (D. Colo. Aug. 26, 2015)(personal representative of deceased Chapter 13 debtor permitted to  
25 seek entry of discharge).

26 Bankruptcy Rule 1016 provides that upon the death or incompetency of an individual  
27 Chapter 11 debtor, the case "may be dismissed; or if further administration is possible and in the  
28 best interest of the parties, the case may proceed and be concluded in the same manner, so far as

1 possible, as though the death or incompetency had not occurred.” See FED.R.BANKR.P. 1016.  
2 Bankruptcy Rule 1016 is consistent with Civil Rule 25, which provides the standard and time  
3 limitations on a motion for substitution when a party dies. See FED.R.CIV.P. 25(a)(1); see also  
4 FED.R.BANKR.P. 1016 advisory committee’s note. Fay Servicing does not dispute that the  
5 Substitution Motion was timely filed nor that the court had discretion to grant the motion.

6 More important, it is readily apparent that Fay Servicing seeks to dismiss the Chapter 11  
7 proceeding as a means to avoid liability under the Fourth Sanctions Motion. As previously  
8 mentioned, Fay Servicing also has filed opposition to the Fourth Sanctions Motion. Because  
9 both the Substitution Order and the Discharge Order are final, further administration of the  
10 Chapter 11 case is unnecessary subject to the matters raised by the Fourth Sanctions Motion.  
11 Whether sanctions are warranted against Fay Servicing or any other parties is immaterial. Under  
12 these circumstances, the court concludes that cause under Section 1112(b) has not been  
13 demonstrated to warrant dismissal of the instant Chapter 11 case. Thus, it is unnecessary to  
14 determine whether dismissal is in the best interests of creditors and the estate. Compare In re  
15 Wallace, 2010 WL 378351, at \*8 (Bankr. D. Idaho Jan. 26, 2010), aff’d, 2011 WL 1230535 (D.  
16 Idaho Mar. 30, 2011) (dismissal of a Chapter 11 case requires a finding of cause before reaching  
17 a determination of best interests of creditors); see also In re Kent, 2008 WL 5047799, at \*6  
18 (Bankr. D. Ariz. Sept. 23, 2008) (“[U]nder Section 1112(b), the Court must first find cause  
19 before considering whether dismissal is in the best interests of the creditors.”).

20 It is a unique situation in any legal proceeding when a plaintiff, defendant, or as in this  
21 case, a debtor, passes away. However, Bankruptcy Rule 1016 allows individual chapter 11 cases  
22 to proceed, so far as possible, as though the death had not occurred. Since April 1, 2020, when  
23 the Substitution Order was entered, that is exactly what Debtor has done—proceed as normal.  
24 Since the case is proceeding as normal, and there are no allegations that Debtor is not complying  
25 with the Confirmed Plan or any other aspects of this bankruptcy proceeding, the arguments by  
26 Fay Servicing under Section 1112(b) are not persuasive.

