

BR 9019  
Compromise  
Settlement

Danielle Lee Wait, Case No. 15-33254-rld7

8/24/16

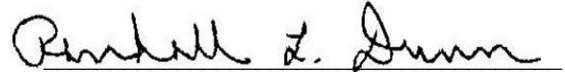
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Applying the factors set forth in Martin v. Kane (In re A & C Properties), 784 F.2d 1377 (9th Cir. 1986), the bankruptcy court approved, over the debtor's objection, the chapter 7 trustee's settlement of debtor's prepetition discrimination claim against her landlord.

P16-4(13)

Below is an Opinion of the Court.



RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
DANIELLE LEE WAIT, ) No. 15-33254-rld7  
Debtor. ) MEMORANDUM OPINION

On July 26, 2016, I held the final evidentiary hearing ("Hearing") on the chapter 7<sup>1</sup> trustee's ("Trustee") motion to settle and compromise claim ("Settlement Motion") and the debtor Danielle Lee Wait's ("Ms. Wait") objections ("Objections") to the Settlement Motion. I had set for hearing at the same time Ms. Wait's motion to convert her bankruptcy case to chapter 13 ("Motion to Convert") and the Trustee's objections thereto, but I deferred consideration of the Motion to Convert pending a decision on the Settlement Motion.

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<sup>1</sup> Unless otherwise indicated, all chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure, Civil Rules 1-86.



1 No. 24.

2           Following the § 341(a) meeting, the Trustee filed an asset  
3 report and objected to Ms. Wait's claim of exemption in the  
4 Discrimination Claim, arguing that the statutory exemptions claimed by  
5 Ms. Wait did not apply. Ms. Wait responded with a request for hearing on  
6 the Trustee's objection to her claimed exemption in the Discrimination  
7 Claim, arguing as follows:

8           [Ms. Wait] has not actually received any damages for  
9 her claim against the named defendant; she may never  
10 receive any such damages; and, if she does eventually  
11 recover for her damages, she does not know, with any  
12 degree of certainty, what the nature of the award will  
13 be. Therefore, there is no purpose in litigating the  
14 validity of a potential exemption at the present time.  
15 However, debtor does believe that, based upon the  
16 nature of her claim in her lawsuit, the exemption  
17 available to her under 11 U.S.C. § 522(d)(11)(D) may  
18 well cover some of any potential award to her and so  
19 she is requesting a hearing to preserve that issue.

20           See Docket No. 21, at 1. Following a hearing, at the parties' request,  
21 the court entered an order abating proceedings on the Trustee's  
22 objections to Ms. Wait's claimed exemptions until further order of the  
23 court. See Docket No. 36.

24           On May 4, 2016, the Trustee filed an application to employ Ms.  
25 Wait's Discrimination Claim attorney as special counsel on a contingent  
26 fee basis, with the attorney entitled to a 35% contingent fee if the  
Discrimination Claim was settled after a lawsuit was filed and a 50%  
contingent fee from any settlement or recovery after appeal. See Docket  
No. 38, at 1. At that time, apparently, no settlement offer was pending.  
See id. No objections were filed, and the application ripened into an  
order.

1           On May 25, 2016, the Trustee filed the Settlement Motion. See  
2 Docket No. 42. In the Settlement Motion, the Trustee proposed to settle  
3 the Discrimination Claim for \$50,000 to be paid in a lump sum by Cal-Am  
4 Properties, with attorneys fees and costs totaling \$17,937.77, leaving a  
5 balance of \$32,062.23 for the bankruptcy estate. As part of the proposed  
6 settlement, Cal-Am Properties would waive any claim in Ms. Wait's  
7 bankruptcy. See id., at 2.

8           Ms. Wait filed the Objections on June 17, 2016. See Docket No.  
9 48. In the Objections, Ms. Wait recognized that the claims filed in her  
10 bankruptcy case, totaling \$21,913.56, would be paid in full from the  
11 settlement, and she would receive a surplus in excess of \$10,000. See  
12 id., at 1. However, she opposed the settlement, arguing that the  
13 Discrimination Claim was "significantly more valuable" than the  
14 settlement amount proposed, and the settlement could not be approved  
15 under Rule 9019 and Ninth Circuit standards. See id., at 2. She noted  
16 that the Oregon Bureau of Labor and Industries ("BOLI") was co-  
17 prosecuting the Discrimination Claim with her, which she believed would  
18 enhance her chances for a favorable outcome. See id., at 3. In the  
19 meantime, Ms. Wait had obtained new counsel and had filed the Motion to  
20 Convert (see Docket No. 45), which the Trustee opposed (see Docket No.  
21 46). In her Objections, Ms. Wait further argued that in light of the  
22 Motion to Convert, she should be allowed to pay her creditors in full and  
23 continue to litigate the Discrimination Claim in chapter 13. See Docket  
24 No. 48, at 4-5.

25           On July 15, 2016, Cal-Am Properties filed a statement ("Cal-Am  
26 Statement") and declaration in support of the Settlement Motion. See

1 Docket No. 54. Cal-Am Properties argued that the settlement proposed by  
2 the Trustee should be approved under the standards set forth by the Ninth  
3 Circuit in Martin v. Kane (In re A & C Properties), 784 F.2d 1377 (9th  
4 Cir. 1986) (hereinafter referred to as "A & C Properties"). Cal-Am  
5 Properties further argued that Ms. Wait's likelihood of success in  
6 prosecuting the Discrimination Claim was more questionable than Ms. Wait  
7 asserted, and even if she prevailed at a trial, resolution of the  
8 Discrimination Claim could drag on for years before creditors would  
9 recover anything.

10           Following a preliminary hearing on July 18, 2016, the Hearing  
11 was scheduled as a final evidentiary hearing to be held on July 26, 2016.  
12 See Docket Nos. 56, 57 and 58. In advance of the Hearing, the parties  
13 stipulated to the admissibility of the Trustee's Exhibits 1-22, provided  
14 that Ms. Wait retained her right to object to the use of Exhibits 14-19  
15 on grounds of materiality or relevance.

16           Cal-Am Properties owns the real property ("Property") on which  
17 Ms. Wait resides as a tenant in a manufactured home that she owns. On or  
18 about November 2010, Ms. Wait and her partner began to be subjected to  
19 persistent harassment from their neighbors at the Property, the McCleans,  
20 based on their sexual orientation. Ms. Wait reported the McCleans'  
21 behavior to Cal-Am Properties on many occasions, but although the  
22 response was "they would take care of it," Ms. Wait alleges that the  
23 harassment continued and is continuing, even though the McCleans no  
24 longer reside on the Property. See Exhibit 1, at 4; Exhibit 6, at 5.  
25 Ms. Wait also alleges that on or about May 31, 2012, Ms. Wait received a  
26 letter from an attorney for Cal-Am Properties stating that if she or her

1 partner complained again, they would be evicted. See Exhibit 1,  
2 particularly at 4-5. Cal-Am Properties has been charged by BOLI with a  
3 discriminatory housing violation under Oregon Revised Statutes ("ORS")  
4 § 659A.421 and Oregon Administrative Rule ("OAR") 839-005-0206(5) ("BOLI  
5 Proceeding"). See Exhibits 1 and 6. Ms. Wait has intervened in the BOLI  
6 Proceeding and seeks damages of \$200,000 plus attorneys fees and costs.  
7 See Exhibit 3, particularly at 9.

8 Cal-Am Properties moved for summary judgment ("SJ Motion") in  
9 the BOLI Proceeding, arguing, among other things, that BOLI exceeded its  
10 authority under ORS § 659A.421 by promulgating its administrative rule,  
11 OAR 839-005-0206(5), "which purports to make property owners liable for  
12 the discriminatory animus and acts of its tenants towards other tenants  
13 **without requiring any showing of unlawful animus on the part of the**  
14 **property owner."** See Exhibit 4, at 1-3 (emphasis in original). The BOLI  
15 Administrative Law Judge denied the SJ Motion. See Exhibit 10. That  
16 decision is on appeal to the Oregon Court of Appeals. See Exhibits 11-  
17 13. My understanding is that trial in the BOLI Proceeding, originally  
18 scheduled to begin on July 27th, has been rescheduled for December 2016.

19 At the Hearing, I heard testimony from the Trustee and Ms.  
20 Wait. The Trustee testified as to his background and experience as an  
21 attorney, and as a chapter 7 trustee since 2005. He further testified  
22 that some time after he filed the application to employ Ms. Wait's  
23 counsel in behalf of the estate with respect to the Discrimination Claim,  
24 he was contacted by Cal-Am Properties to initiate settlement discussions.  
25 He rejected Cal-Am Properties' first settlement overtures as "too low to  
26 consider" but ultimately accepted and proposed approval of Cal-Am

1 Properties' offer to settle the Discrimination Claim for \$50,000. The  
2 Trustee believed that the \$50,000 settlement was beneficial to the estate  
3 because after payment of attorneys fees and costs, the claims of  
4 unsecured creditors would be paid in full, and there would be money left  
5 over for Ms. Wait.

6 The Trustee testified that after reviewing the pleadings with  
7 respect to the Discrimination Claim and discussing the merits of the  
8 claim with the attorney, Mr. Ellis, and Ms. Wait, he considered the  
9 prospects for continuing prosecution of the Discrimination Claim as  
10 uncertain. While Mr. Ellis advised him that potential awards in the  
11 range of \$75,000-\$100,000 were possible in light of experiences in other  
12 cases, success ultimately could not be guaranteed. Cal-Am Properties'  
13 pending appeal might be successful, in which event, litigation of the  
14 Discrimination Claim would have to start over in the circuit court. If  
15 Cal-Am Properties lost at trial, the Trustee was certain there would be a  
16 further appeal. Resolution of the Discrimination Claim through further  
17 litigation could take months, if not years.

18 While the Trustee was not concerned with the difficulty of  
19 collecting a final judgment from Cal-Am Properties, he was concerned that  
20 it would be inappropriate for him to gamble with the creditors' money,  
21 where settlement now for \$50,000 would pay them in full in the short run,  
22 with funds left over for Ms. Wait. Based on the progress of negotiations  
23 with Cal-Am Properties, the Trustee felt that he had extracted the  
24 maximum he could get from them. The process had reached its limit, and  
25 there was no more money to be had from Cal-Am Properties through  
26 negotiation. His ultimate conclusion was that, based on his experience

1 and judgment, the proposed settlement was in the best interest of  
2 creditors.

3 Ms. Wait testified that filing the Discrimination Claim was the  
4 culmination of her having to deal with six years of criminal  
5 discrimination and harassment. In light of the McCleans' terrorizing  
6 behavior, that did not stop even though they had been evicted from the  
7 Property for over a year, she felt trapped in her home. She has made a  
8 claim for \$200,000 against Cal-Am Properties, and she felt that the  
9 proposed settlement for \$50,000 was totally inadequate. Her testimony  
10 was genuine and credible.

11 As noted above, after hearing testimony, I closed the record,  
12 and following argument, I took the matter under advisement.

#### 13 JURISDICTION

14 I have jurisdiction to decide the Settlement Motion under 28  
15 U.S.C. §§ 1334 and 157(b)(2)(A) and (O).

#### 16 DISCUSSION

17 I consider the Settlement Motion under Rule 9019(a) which  
18 provides that, "On motion by the trustee and after notice and a hearing,  
19 the court may approve a compromise or settlement."<sup>2</sup> The Trustee bears the

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20  
21 <sup>2</sup> The settlement of a claim that is an estate asset "is the  
22 equivalent of a sale of the intangible property represented by the  
23 claim." Goodwin v. Mickey Thompson Entertainment Group, Inc. (In re  
24 Mickey Thompson Entertainment Group, Inc.), 292 B.R. 415, 421 (9th Cir.  
25 BAP 2003), citing Myers v. Martin (In re Martin), 91 F.3d 389, 394-95 (3d  
26 Cir. 1996). Consequently, consideration of "section 363 and Rules 6004  
[Use, Sale, or Lease of Property] and 9019(a) **may overlap** when property  
of the estate would be disposed of by way of a settlement." Id.  
(emphasis added). However, in this case, no one has raised any issues  
under § 363 or Rule 6004 with respect to my consideration of the

(continued...)

1 burden of proof to persuade me that the settlement he is proposing is  
2 "fair and equitable" and in the best interests of the estate and should  
3 be approved. A & C Properties, 784 F.2d at 1381, citing In re Hallet, 33  
4 B.R. 564, 565-66 (Bankr. D. Me. 1983).

5 In determining the "fairness, reasonableness and adequacy" of a  
6 proposed settlement, the Ninth Circuit mandates that I consider evidence  
7 presented with respect to four factors:

8 (a) The probability of success in the litigation; (b)  
9 the difficulties, if any, to be encountered in the  
10 matter of collection; © the complexity of the  
11 litigation involved, and the expense, inconvenience  
and delay necessarily attending it; (d) the paramount  
interest of the creditors and a proper deference to  
their reasonable views in the premises.

12 A & C Properties, 784 F.2d at 1381, quoting In re Flight Transp. Corp.  
13 Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied,  
14 \_\_\_ U.S. \_\_\_, 105 S. Ct. 1169 (1985). I analyze the record with respect  
15 to each of those four factors as follows.

16 1. Probability of Success

17 \$50,000 is a substantial settlement. The Trustee testified  
18 that through negotiation, he was able to increase the offer to settle  
19 from Cal-Am Properties significantly until he reached the \$50,000 amount,  
20 but Cal-Am Properties would go no higher. I find material to the  
21 probability of success the fact that BOLI is co-prosecuting the  
22

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23 <sup>2</sup>(...continued)

24 Settlement Motion, and no one, including Ms. Wait, has offered more than  
25 \$50,000 to purchase or settle the Discrimination Claim. Therefore, I  
26 consider approving the Settlement Motion under Rule 9019(a) standards  
only.

1 Discrimination Claim with Ms. Wait. However, measuring "success" for the  
2 Discrimination Claim is relative.

3 The fact that Cal-Am Properties is willing to offer \$50,000 to  
4 settle the Discrimination Claim indicates that it perceives a significant  
5 risk that Ms. Wait and BOLI could be successful if the Discrimination  
6 Claim is litigated to a conclusion. Ms. Wait testified that the \$50,000  
7 proposed settlement amount is inadequate, but she offered nothing other  
8 than her fervent belief to support the likelihood that she would obtain a  
9 \$200,000 recovery.

10 The Trustee testified that he was advised by his special  
11 counsel, Mr. Ellis, that an award of \$75,000-\$100,000 on the  
12 Discrimination Claim was possible in light of experiences in other cases.  
13 However, he also testified that such an award likely would be appealed.  
14 In the event of an appeal, the contingent fee of special counsel would  
15 increase to 50%. Mathematically, the proceeds of final recoveries at  
16 \$75,000 and \$100,000 after litigation would result in the following  
17 approximate distributions:

18	\$75,000 final award	\$100,000 final award
19	\$37,500 attorneys fees (50%)	\$ 50,000 attorneys fees (50%)
20	\$ 437.77 costs <sup>3</sup>	\$ 437.77 costs
21	\$21,913.56 creditor claims	\$ 21,913.56 creditor claims
	_____	_____
22	\$15,148.67 Ms. Wait net	\$ 27,648.67 Ms. Wait net

22 Accordingly, a final award of \$75,000 after fully litigating the  
23 Discrimination Claim would result in an approximate \$5,000 increased  
24 recovery to Ms. Wait, while a final award of \$100,000 would result in an

25 \_\_\_\_\_  
26 <sup>3</sup> Assumes no increase from costs to date, a possible but unlikely  
assumption.

1 approximate \$17,500 increased recovery to Ms. Wait over her recovery if I  
2 approve the Settlement Motion. In other words, a final award after  
3 litigation would have to be very substantially higher than the amount  
4 proposed in the Settlement Motion before Ms. Wait would benefit  
5 materially from litigating the Discrimination Claim fully. The first A &  
6 C Properties factor appears to support approving the Settlement Motion.

7 2. Collection Difficulties

8 The Trustee testified, without contradiction, that he expected  
9 to be able to collect any amount awarded against Cal-Am Properties with  
10 respect to the Discrimination Claim without difficulty. There was no  
11 issue with collection. Accordingly, this factor appears to be neutral  
12 for deciding whether to approve the Settlement Motion.

13 3. Complexity, Expense, Inconvenience and Delay

14 Two substantial complications stand out with respect to  
15 litigating the Discrimination Claim. First, the real alleged wrongdoers  
16 in terms of discriminatory harassment of Ms. Wait and her partner, the  
17 McCleans, are not the targets of the Discrimination Claim. The McCleans  
18 might not have assets that could fund a recovery to Ms. Wait if she  
19 prevailed on claims against them. Cal-Am Properties is the target: it  
20 has assets, but the claims against it are based more on its alleged  
21 inaction in not causing the harassing activities of the McCleans to cease  
22 than on any active discrimination on its part against Ms. Wait and her  
23 partner.

24 Second, Cal-Am Properties has challenged BOLI's authority to  
25 adopt the administrative rule under which it is being prosecuted and has  
26 sought to require litigation of the Discrimination Claim to start over in

1 Oregon circuit court. While the BOLI Administrative Law Judge denied  
2 Cal-Am Properties' SJ Motion, that matter already is on appeal to the  
3 Oregon Court of Appeals and could delay resolution of the Discrimination  
4 Claim for a substantial period of time if Cal-Am Properties prevails on  
5 appeal.

6 The Trustee testified that he believed that Cal-Am Properties  
7 would appeal an adverse determination with respect to the Discrimination  
8 Claim, and final resolution of the Discrimination Claim through  
9 litigation could take months and even years. I find that testimony  
10 credible. Continued litigation would inevitably increase costs and  
11 extend distributions from any recovery into the future. In addition,  
12 there is the risk that continued prosecution of the Discrimination Claim  
13 ultimately could result in no recovery at all. I conclude that the third  
14 A & C Properties factor supports approving the Settlement Motion.

15 4. Paramount Interest of Creditors

16 Under the proposed settlement, creditors would receive payment  
17 of their allowed claims in full in the short term, and Ms. Wait would  
18 receive a distribution in excess of \$10,000, a not insubstantial  
19 recovery. While no creditor appeared at the Hearing to testify in  
20 support of the Settlement Motion, the Trustee did testify that the  
21 proposed settlement was consistent with his duties under § 704(a)(1) to  
22 "collect and reduce to money the property of the estate . . . and close  
23 such estate as expeditiously as is compatible with the best interest of  
24 parties in interest."

25 In contrast, if the Settlement Motion were not approved,  
26 creditors would have to wait months, if not years, to receive any

