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THE DISTRICT COURT OF GUAM

In Re:

KIM, CHONG C.,
dba AB KON,

Debtor.

MARK HEATH, CHAPTER 7 TRUSTEE,

Plaintiff,

vs.

HYE CHONG KIM,

Defendant.

BANKRUPTCY CASE NO. 13-00099
ADVERSARY PROCEEDING NO. 16-00001

**DECISION AND ORDER
RE DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT AND
PLAINTIFF’S MOTION FOR ORDER
DENYING LEAVE TO FILE
AMENDED COMPLAINT**

Before the court are Defendant Hye Chong Kim’s (“H.C. Kim”) Motion for Summary Judgment, and Plaintiff Mark Heath, Chapter 7 Trustee’s (“Trustee”) Motion for Order Granting Leave to File Amended Complaint. *See* ECF Nos. 8 and 16. On November 21, 2016, the parties appeared before the court for a hearing. After reviewing the parties’ submissions, and relevant caselaw and authority, and having heard argument from counsel on the matter, the court hereby **GRANTS** H.C. Kim’s Motion for Summary Judgment and **DENIES** Trustee’s Motion for Order Granting Leave to File Amended Complaint.

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. The Underlying Bankruptcy.**

3 Defendant H.C. Kim and Debtor Chong C. Kim dba AB Kon (“Debtor”) are married, and
4 own the following parcel of real property:

5 Lot 23, Tract 13105, Tamuning Guam, Suburban, as . . . described in . . .
6 Subdivision Survey Map of Lot R11, Tract 13105, as shown [in] Drawing
7 Number GV-33-09, as L.M. Check Number 173 FY 2006, dated 14 September
8 2006 and recorded on 10 October 2006 under Instrument No. 743930 at Land
9 Management.

10 Compl. Ex. A, ECF No. 2 (“Real Property”). The Real Property was conveyed to Debtor
11 and H.C. Kim through a quitclaim deed. Compl. at ¶ 5, ECF No. 2.

12 On August 9, 2013, Debtor filed a voluntary bankruptcy petition pursuant to Chapter 7 of
13 the United States Bankruptcy Code. *In re Chong C. Kim dba AB Kon*, BK Case No. 13-00099,
14 Vol. Pet., ECF No. 2.

15 Trustee has filed a number of Adversary Proceedings related to Debtor’s underlying
16 bankruptcy.

17 **B. Adversary Proceeding (“AP”) 14-00003.**

18 On July 28, 2014, a proceeding was filed against Kumho Investment Bank and Kumho
19 Life Insurance Company, LTD (“Kumho”). *See Heath v. Kumho*, AP 14-00003, Compl., ECF
20 No. 1. This proceeding involved Trustee’s attempt to avoid a 30,000,000.00 Korean Won
21 (“KRW”)¹ secured mortgage lien held by Korean corporate lender Kumho. *Id.* at ¶¶ 4, 6, 11. An
22 Order Granting Trustee’s Motion to Approve Settlement and Withdrawing his Motions to Strike
23 and Dismiss was entered on November 3, 2015. *See Heath v. Kumho*, AP 14-00003, Order, ECF

24 ¹ The mortgage lien refers to 30,000,000.00 KRW (*see Heath v. Kumho*, AP 14-00003, Compl. Ex. A at 2,
ECF No. 2), yet H.C. Kim’s moving papers in the underlying bankruptcy proceeding (*In re Chong C. Kim dba AB
Kon*, BK Case No. 13-00099, Opp’n Mot. Contempt at 1 ECF No. 126) and in H.C. Kim’s Complaint in Civil Case
No. 16-00033 refer to \$30,000,000.00 (*See H.C. Kim v. Kumho*, CV 16-00033, Compl. at ¶¶ 3-4, 9, ECF No. 1).
The court takes judicial notice, sua sponte, that as of the date of this Order, 30,000,000.00 KRW equals
approximately \$25,539.52 in United States Currency. *See* YAHOO! FINANCE, [http://finance.yahoo.com/currency-
converter/#from=USD;to=KRW;amt=25539.5219](http://finance.yahoo.com/currency-converter/#from=USD;to=KRW;amt=25539.5219) (last visited Nov. 28, 2016).

1 No. 37. The settlement provided that Kumho would receive 30% “of the net proceeds of the
2 Estate’s sale of its own fifty-percent undivided interest in the real property secured by the second
3 mortgage.” *See Heath v. Kumho*, AP 14-00003, Mot. Approve Settlement at 2-3, ECF No. 20.
4 The settlement also provided that H.C. Kim’s interest in the proceeds “shall be subject to offsets
5 due to any debt owed to her secured creditors.” *Id.* at 3.

6 **C. Adversary Proceeding 15-00001.**

7 The second relevant adversary proceeding filed by the Trustee on December 10, 2015,
8 sought to sell the family home and other community property of H.C. Kim and Debtor. *See*
9 *Heath v. H.C. Kim*, AP 15-00001, Compl. at 5, ECF No. 2; *see also Heath v. H.C. Kim*, AP 15-
10 00001, Order at 1-2, ECF No. 33.

11 H.C. Kim moved to dismiss the proceeding for failure to join Kumho as an indispensable
12 party. *See Heath v. H.C. Kim*, AP 15-00001, Mot. Dismiss at 1, ECF No. 6. This court denied
13 the motion, finding (1) that it could afford complete relief amongst the existing parties; (2) that it
14 was immaterial to the sale of the property that H.C. Kim would have to “‘chase down’ Kumho in
15 Korea . . . to file a lawsuit against it” to protect her interest; (3) that Kumho’s ability to protect its
16 interest would not be impaired or impeded if it was not joined; and (4) that Kumho’s absence did
17 not “leave an existing party subject to a substantial risk of incurring double, multiple, or
18 otherwise inconsistent obligations because of the interest.” *See Heath v. H.C. Kim*, AP 15-
19 00001, Order at 2, ECF No. 13.

20 The Trustee subsequently moved for summary judgment. *Heath v. H.C. Kim*, AP 15-
21 00001, Mot. Summ. J., ECF No. 17. This court granted Trustee’s motion in part on August 29,
22 2016, authorizing Trustee’s sale of H.C. Kim’s co-ownership in the Real Property, as well as the
23 sale of certain vehicles. *Heath v. H.C. Kim*, AP 15-00001, Order at 7-8, ECF No. 33. Trustee’s
24

1 request for an Order requiring Debtor and H.C. Kim to vacate the Property within fifteen days²
2 was denied, however, because H.C. Kim indicated she would work out a time frame with the
3 Trustee to vacate the premises and show the Real Property to potential buyers. *Id.* at 8. The
4 parties were ordered to work out an acceptable move-out date. *Id.*

5 **D. Adversary Proceeding 16-00001.**

6 Trustee filed another Adversary Proceeding to Compel Turnover of Property against H.C.
7 Kim on January 29, 2016, which is the subject of the motions at issue. Compl., ECF No. 2.
8 Trustee's Complaint alleges that Debtor's fifty-percent undivided interest in the Real Property is
9 now the property of the estate as defined by 11 U.S.C. § 541, and that H.C. Kim must pay rent
10 for her own fifty-percent undivided interest in the Real Property because she "remains in
11 possession, custody and control of the entire Real Property to the detriment of the bankruptcy
12 estate."³ *Id.* at ¶¶ 6-8. The Complaint also contends that H.C. Kim owes the bankruptcy estate
13 approximately \$72,500.00 in rent for the time period between September 9, 2013, one month
14 after Debtor's bankruptcy petition, and January 1, 2016, the month the Adversary Proceeding
15 was filed. *Id.* at ¶ 9. H.C. Kim has not paid rent to the Trustee despite his requests, but the
16 Complaint does not set forth the substance and timing of such requests. *Id.* ¶ 10.

17 On February 25, 2016, H.C. Kim filed an Answer to the Complaint, raising a number of
18 affirmative defenses including failure to state a claim, statute of limitations, and laches. *See*
19 Answer at 2, ECF No. 5.

20 **1. Motion for Summary Judgment.**

21 H.C. Kim moved for Summary Judgment on April 29, 2016, arguing that the Trustee

22 ² Trustee's Reply Memorandum in Support of his Motion for Summary Judgment requested an order
23 requiring H.C. Kim to vacate the property within fifteen days. *See* Heath v. H.C. Kim, AP 15-00001, Reply in Supp.
Mot. Summ. J. at 2, ECF No. 26.

24 ³ On information and belief, Trustee contends that the property rents at a minimum of \$5,000.00 per month,
which requires H.C. Kim to pay \$2,500.00 per month in rent. Compl. at ¶ 8, ECF No. 2. Trustee represents that this
rent and property may be used, sold, or leased under 11 U.S.C. § 363.

1 cannot demand that she pay rent because she is married to Debtor, and also because she has a
2 joint ownership interest in the property at issue. Mot. Summ. J. at 3, ECF No. 8. In her
3 assessment, she is a co-tenant of Debtor, and a bankruptcy trustee cannot demand rent from
4 Debtor's co-tenant. *Id.*

5 Trustee did not file an Opposition to H.C. Kim's Motion for Summary Judgment until
6 September 6, 2016.⁴ Opp'n Mot. Summ. J. at 1-2, ECF No. 14. The Opposition maintains that
7 recovery of damages in this case is permissible because H.C. Kim's conduct amounts to an
8 ouster. Opp'n Mot. Summ. J. at 3, ECF No. 14. No reply was filed.

9 **2. Motion for Order Granting Leave to File Amended Complaint.**

10 Trustee also moved to amend his Complaint on September 16, 2016. Mot. Am. Compl.,
11 ECF No. 16. The Proposed Amended Complaint includes a second count seeking possession of
12 the property because H.C. Kim's community property interests in the Real Property is part of
13 Debtor's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(2), and also because Guam is a
14 community property jurisdiction.⁵ Mem. P. & A.'s in Supp. of Mot. Am. Compl., Ex. A at ¶¶ 9-
15 15, ECF No. 17.

16 H.C. Kim opposed Trustee's Motion for Leave to File Amended Complaint. Opp'n Mot.
17 Am. Compl. at 5-9, ECF No. 23. H.C. Kim's counsel Vanessa L. Williams ("Williams")
18 represented that as of October 7, 2016, Trustee has not contacted her to work out a time frame
19 for H.C. Kim to vacate and show the Real Property pursuant to the court's August 29, 2016
20 Order in AP 15-00001. Williams Decl. at ¶ 5, ECF No. 24. On October 21, 2016, Trustee filed a

21 ⁴ Trustee's counsel states that he was not aware of the Motion for Summary Judgment because H.C. Kim's
22 prior counsel Attorney William C. Bischoff ("Bischoff") never served his office a copy of the Motion, and never
23 filed a certificate of service for the Motions. *See* Suppl. Decl. Bronze in Supp. Mot. Am. Compl. at ¶ 3, ECF No.
24 26.

⁵ The Proposed Amended Complaint asserts that Debtor and H.C. Kim were married at the time she
received the deed to the Real Property and as of the petition date, which means that H.C. Kim's property interests in
the Real Property are part of Debtor's bankruptcy estate. Mem. P. & A.'s in Supp. of Mot. Am. Compl., Ex. A at ¶
12, ECF No. 17.

1 Reply. Reply to Opp'n Mot. Am. Compl. at 1, 9, 11, 12, ECF No. 25.

2 Trustee's counsel, Jacques G. Bronze ("Bronze"), represents that he attempted to contact
3 Debtor's counsel via telephone on or about September 1, 2016, to discuss a mutually agreeable
4 date for Debtor and H.C. Kim to vacate the Real Property, but that his calls were not returned.⁶
5 Reply to Opp'n Mot. Am. Compl. at 12-13, ECF No. 25; *see also* Suppl. Decl. Bronze in Supp.
6 Mot. Am. Compl. at ¶¶ 4-8, ECF No. 26. Bronze also states that he attempted to contact
7 Williams via email on or about October 10, 2016, to arrange a mutually agreed upon date for her
8 client to vacate the Real Property. Reply to Opp'n Mot. Am. Compl. at 12-13, ECF No. 25; *see*
9 *also* Suppl. Decl. Bronze in Supp. Mot. Am. Compl. at ¶ 8, Ex. A (Email Exchange between
10 Bronze and Williams), ECF No. 26. Williams sent a responsive email on October 11, 2016,
11 indicating they could discuss the matter the following week. Reply to Opp'n Mot. Am. Compl.
12 at 12-13, ECF No. 25; *see also* Suppl. Decl. Bronze in Supp. Mot. Am. Compl. Ex. A (Email
13 Exchange between Bronze and Williams), ECF No. 26.

14 **E. H.C. Kim's Civil Action against Kumho in Civil Case No. ("CV") 16-00033.**

15 Before this court partially granted summary judgment in AP 15-00001 (August 29, 2016),
16 and after its Order denying H.C. Kim's motion to join Kumho in that same proceeding (March
17 29, 2016), H.C. Kim filed a civil suit against Kumho (April 29, 2016). *See H.C. Kim v. Kumho*,
18 CV 16-00033, Compl., ECF No. 1; *see also Heath v. H.C. Kim*, AP 15-00001, Order, ECF No.
19 13, *Heath v. H.C. Kim*, AP 15-00001; *Heath v. H.C. Kim*, AP 15-00001, Order, ECF No. 33.

20 H.C. Kim's Complaint sets forth three causes of action. *See H.C. Kim v. Kumho*, CV 16-
21 00033, Compl. at ¶¶ 17-19, ECF No. 1. The first claim seeks Declaratory Judgment as to "the
22 legal rights and duties of the parties respecting the June, 2008 mortgage; and thus to whom [H.C.

23
24 ⁶ Bronze was off-island from September 5, 2016, through October 5, 2016. Suppl. Decl. Bronze in Supp.
Mot. Am. Compl. at ¶ 5, ECF No. 26.

1 Kim's] 50% of the proceeds of the upcoming Bankruptcy Trustee's sale of her home will go," to
2 exonerate her from liability to Kumho on said mortgage, and "that the June, 2008 mortgage does
3 not any longer, if ever it did, constitute a lien against the property." *Id.* at ¶ 17. The second
4 claim seeks cancellation of the instrument at issue, contended it is void or voidable. *Id.* at ¶ 18.
5 The third claim seeks "a judgment quieting title to the property in her, and in her successors in
6 interest, as against defendant Kumho on its June, 2008 mortgage." *Id.* at ¶ 19.

7 H.C. Kim has been unable to effectuate service on Kumho. *See H.C. Kim v. Kumho*, CV
8 16-00033, Status Report re: Service on Defs., ECF No. 6.

9 **F. Bronze's Motion for Order for Contempt (11 U.S.C. § 105(a)) Against**
10 **Williams.**

11 On October 3, 2016, Trustee filed a Motion for Order of Contempt against Williams
12 pursuant to 11 U.S.C. § 105(a). Mot. Contempt, ECF No. 119. Trustee contends that Williams'
13 prosecution of H.C. Kim's action against Kumho in CV 16-00033 is a willful violation of the
14 automatic stay mandated by 11 U.S.C. § 362. *In re Chong C. Kim dba AB Kon*, BK Case No.
15 13-00099, Mem. Supp. Mot. Contempt at 7, ECF No. 120.

16 **G. Order for Supplemental Briefing.**

17 On November 4, 2016, this court ordered the parties to submit briefs analyzing how
18 Guam community property principles⁷ impact the above referenced motions (Mot. Summ. J.,
19 ECF No. 8; Mot. Am. Compl., ECF No. 16, and the Mot. Contempt, ECF No. 119 in BK Case
20 No. 13-00099). Order at 1-2, ECF No. 28. *In Guam*,⁸ "[p]roperty acquired during marriage by

21 ⁷ The parties were also invited to consider any applicability of 19 G.C.A. § 6106(a), which sets forth the
22 conditions under which spouses must join in "transfers, conveyances or encumbrances or contracts to transfer,
23 convey or encumber any interest in community real property." 19 G.C.A. § 6106(a). This subsection relates to
24 property owned by spouses as joint tenants or tenants in common. *Id.* Although "[p]roperty acquired during
marriage by either husband or wife, or both, is presumed to be community property," 19 G.C.A. § 6105(a), the court
welcomed any clarification regarding the tenancy status of Debtor Chong C. Kim and H.C. Kim with respect to the
real property at issue.

⁸ "The Bankruptcy Code has not supplanted community property law." *In re McSparran*, 410 B.R. 664,

1 either husband or wife, or both, is presumed to be community property.” 19 G.C.A. § 6105(a).
2 Yet it appears that under Guam law, “[n]either spouse’s interest in community property or
3 separate property shall be liable for the separate debt of the other spouse.” 19 G.C.A. § 6103(a).⁹

4 II. APPLICABLE LEGAL STANDARDS.

5 A. Federal Rules of Civil Procedure (“FRCP”) 56.

6 “The court shall grant summary judgment if the movant shows that there is no genuine
7 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FRCP
8 56(a). A fact is material if it might affect the outcome of the suit under the governing
9 substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
10 dispute is “genuine” where “the evidence is such that a reasonable jury could return a verdict for
11 the nonmoving party.” *Id.*

12 A shifting burden of proof governs motions for summary judgment under Rule 56. *In re*
13 *Oracle Corp. Securities Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary
14 judgment bears the initial burden of proving an absence of a genuine issue of material fact. *Id.*
15 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Where, as here, the nonmoving
16 party will have the burden of proof at trial, “the movant can prevail merely by pointing out that
17 there is an absence of evidence to support the nonmoving party’s case.” *Soremekun v. Thrifty*
18 669 (Bankr. D. Mont. 2009).

19 ⁹ Section 6103(a), in its entirety, provides:

20 The separate debt of a spouse shall be satisfied first from the debtor spouse's separate
21 property, excluding that spouse’s interest in property in which each of the spouses owns an
22 undivided equal interest as a joint tenant or tenant in common. Should such property be
23 insufficient, then the debt shall be satisfied from the debtor spouse’s one-half (1/2) interest in the
24 community property or in which each spouse owns an undivided equal interest as a joint tenant or
tenant in common, excluding the residence of the spouses. Should such property be insufficient,
then the debt shall be satisfied from the debtor spouse’s interest in the residence of the spouses.
*Neither spouse’s interest in community property or separate property shall be liable for the
separate debt of the other spouse.*

19 G.C.A. § 6103 (emphasis added).

1 Kim's conduct amounts to an ouster. Opp'n Mot. Summ. J. at 3, ECF No. 14.

2 **1. H.C. Kim's Argument.**

3 H.C. Kim primarily relies on *In re Sontag* to argue that much like "[a] co-tenant cannot
4 demand rent from another co-tenant in possession of jointly held property[,] . . . a bankruptcy
5 trustee cannot demand rent from a co-tenant of the debtor." Mot. Summ. J. at 3, ECF No. 8
6 (citing 151 B.R. 664, 669 (Bankr. E.D.N.Y. 1993)). In that case, the trustee sought a court order
7 requiring the non-debtor ex-spouse to pay the fair market rental value of the property from the
8 date of her husband's petition until she vacated the premises. *In re Sontag*, 151 B.R. at 669. In a
9 disposition proceeding, the New York State court granted her "exclusive occupancy of the
10 property pending the sale and until three days after the closing," but provided no provision for
11 the non-debtor spouse to pay rent to the debtor. 151 B.R. at 669. The bankruptcy court noted
12 that "[o]ccupancy by one of the tenants in common does not, in and of itself, make the occupant
13 liable to the co-tenant for either rental payments or use and occupancy payments." *Id.* (citing
14 *Oliva v. Oliva*, 523 N.Y.S.2d 859, 860 (App. Div. 2nd Dept. 1988)). Additionally, the
15 bankruptcy court acknowledged that "[a] court [can] direct that an ex-spouse maintain her
16 exclusive possession of the marital residence in order to ensure her welfare until the time of sale
17 without continuing the cotenancy." *Id.* There was no court order *In re Sontag* by the state court
18 providing for the non-debtor ex-spouse to pay any sort of rent, but there was an order that
19 provided that she was to "vacate the premises prior to a sale or no later than three days after the
20 closing." *Id.*

21 The court determined that the debtor's petition for bankruptcy did not alter the obligation
22 to permit the non-debtor spouse to remain in the house rent free because the "[t]rustee in a
23 bankruptcy case stands in the shoes of the Debtor, and does not have any greater rights than the
24 Debtor would have if there were no bankruptcy filing." *Id.* (citing *Hays and Co. v. Merrill*

1 *Lynch, Pierce Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3rd Cir. 1989) (“trustee stands in the
2 shoes of the debtor and can only assert those causes of action possessed by the debtor.”).
3 Accordingly, the non-debtor ex-spouse was “not liable to the Trustee for either post-petition rent
4 or use and occupancy of the premises.” *Id.*¹⁰

5 **2. Trustee’s Argument.**

6 Trustee maintains that *In re Sontag* is inapposite because there is no court order in this
7 case granting H.C. Kim exclusive occupancy pending the sale of the property at issue. Opp’n
8 Mot. Summ. J. at 2-3, ECF No. 14. Moreover, Heath stresses that the general rule prohibiting
9 one co-tenant to demand rent from the other is subject to the exception of an ouster. *Id.* at 3
10 (citing *Miller v. Myers*, 46 Cal. 535, 538 (1873)).

11 In *Miller*, which is a rather old case, the Supreme Court of California held that “[i]t is
12 well settled that a refusal, after a proper demand by a tenant in common in possession to admit
13 his cotenant into the possession, is itself an ouster,¹¹ and dispenses with the necessity of further
14 proof on that point.” 46 Cal. at 538. The *Miller* court continued that “[i]t is equally clear that in
15 an action by a tenant in common against his cotenant to be admitted into the possession, a denial
16 in the answer of the plaintiff’s title and right of entry is equivalent to an ouster.” *Id.* Thus, in
17 Heath’s view, H.C. Kim’s denial that she owes rent to trustee “makes it expressly clear that she
18 is claiming the entire property,” and amounts to an ouster which entitles him to recover damages
19 from the time that the ouster began. Opp’n Mot. Summ. J. at 3-4, ECF No. 14 (citing *Miller*, 46
20

21 ¹⁰ H.C. Kim contends the holding of *In re Sontag* is “consistent with common law.” Mot. Summ. J. at 3,
22 ECF No. 8. She cites American Jurisprudence’s summary of Cotenancy and Joint Ownership, which states that “[a]
23 cotenant who enjoys occupancy of a common premises or some part of it is generally not liable to the others for rent,
24 and is not accountable to them for the reasonable value of the occupancy, so long as the other cotenants have not
been ousted or excluded.” 20 Am. Jur. 2d Cotenancy and Joint Ownership § 47 (footnotes omitted).

¹¹ “An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant in
common of his cotenant or cotenants from the common property of which they are entitled to possession.” *Cardoza*
v. Machado, 46 Cal. App. 2d 809, 811–12 (1941) (citations and internal quotations omitted).

1 Cal. at 538).¹²

2 Trustee argues that to defeat his cause of action for turnover of property to the estate
3 under 11 USC § 542(a), the burden is on H.C. Kim to disprove the following elements:

4 [T]hat: (1) the property is in the possession, custody or control of a noncustodial
5 third party; (2) the property constitutes property of the estate; (3) the property is
6 of the type that the trustee could use, sell or lease pursuant to section 363 or that
the debtor could exempt under section 522, and (4) that the property is not of
inconsequential value or benefit to the estate.

7 *In re Labib*, No. 1:05-BK-21422-MT, 2013 WL 5934326, at *4 (Bankr. C.D. Cal. Nov. 5, 2013)
8 (citing 5–542 Collier on Bankruptcy P 542.02 (16th Ed., 2013)) (enumerating the elements of a
9 cause of action for turnover of property to the estate); *see also* Opp’n Mot. Summ. J. at 4, ECF
10 No. 14. It is Trustee’s position that H.C. Kim has failed to meet her burden of presenting facts
11 showing that he is barred from recovering the value of rent from her period of exclusive
12 occupation of the real property. Opp’n Mot. Summ. J. at 4, ECF No. 14.

13 **3. Analysis.**

14 The Seventh Circuit Court of Appeals has analogized the relationship between a Chapter
15 7 trustee and debtors to a “tenancy in common.” *Matter of Szekely*, 936 F.2d 897, 903 (7th Cir.
16 1991). In a tenancy in common, no “tenant can charge the other rent, but either can demand that
17 the property be partitioned between them.” *Id.* “(citing *Massman v. Duffy*, 76 N.E. 2d 547, 551-
18 52 (Ill. App. Ct. 1947). Furthermore, bankruptcy law provides safeguards to those with an

19 ¹² The Supreme Court of California stated that a lawsuit:

20 [I]s the most effective demand the plaintiff could make to be let into possession;
21 and if his title and right of entry be denied, he need make no further proof of the
22 ouster. But an ouster established in this method relates only to the commencement
23 of the action; and if there be no proof of an ouster at a prior date, it will be deemed
to have occurred immediately before the institution of the suit. In that event the
plaintiff can recover in ejectment the value of the use and occupation only from the
commencement of the action, when the ouster is deemed to have occurred. . . The
recovery for use and occupation ought, therefore, to have been limited to that
period, unless there was proof of an ouster at an earlier date.

24 *Miller*, 46 Cal. at 537-38 (“The value of the rents and profits furnishes the measure for determining the amount of
damages . . .”).

1 interest in property a trustee intends to sell. *See In re Payne*, 512 B.R. 421, 422, 431-32 (Bankr.
2 E.D.N.Y. 2014) (denying trustee’s motion to sell the debtor’s residence and to “obtain an order
3 forcibly evicting [d]ebtor and his family from their residence” absent compensation by the
4 trustee adequately protecting the debtor).¹³ *Id.* at 431–32 (citing 11 U.S.C. § 363(e)).

5 In this case, the substance of the Complaint’s prayer for relief “requests that [H.C. Kim]
6 be ordered to account for the rental value of the Real Property, that a judgment be entered against
7 her for the outstanding rental value of the Real Property and such other and further relief as is
8 proper and just.” Compl. at 3, ECF No. 2. This court approved Trustee’s request to sell the
9 property, and ordered the parties to work together to determine an acceptable move-out date.
10 *Heath v. H.C. Kim*, AP 15-0001, Order at 8, ECF No. 33. Thus, the Trustee, Debtor, and H.C.
11 Kim have an interest in the property that is analogous to a “tenancy in common.” *See Matter of*
12 *Szekely*, 936 F.2d 897, 903 (7th Cir. 1991).

13 *In re Sontag’s* reasoning that a trustee cannot demand rent from a co-tenant of debtor is
14 sound and equitable. *See* 151 B.R. 664, 669 (Bankr. E.D.N.Y. 1993). Debtor filed his Petition
15 on August 9, 2013, yet Trustee waited until January 29, 2016, approximately 29 months later, to
16 file an action to recover rent from H.C. Kim.¹⁴ *See In re Chong C. Kim dba AB Kon*, BK Case
17 No. 13-00099, Vol. Pet., ECF No. 2; *see also* Compl., ECF No. 2.

18 ¹³ Section 363(e) provides safeguards to one’s interest in a property “proposed to be used, sold or leased, by
19 the trustee,” specifically:

20 Notwithstanding any other provision of this section, at any time, on request of an entity that has an
21 interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, *the*
22 *court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is*
necessary to provide adequate protection of such interest. This subsection also applies to property
that is subject to any unexpired lease of personal property (to the exclusion of such property being
subject to an order to grant relief from the stay under section 362).

23 11 U.S.C. § 363(e) (emphasis added).

24 ¹⁴ In support of his Motion for Order Granting Leave to File Amended Complaint, Trustee claims to have
delayed filing a turnover action for possession of the property so that the parties can settle the matter. *See* Decl.
Heath at ¶ 4, ECF No. 19. The Declaration does not explain the reason for delaying filing an action for rent.

1 Trustee is incorrect that there is no court order permitting H.C. Kim to remain in the
2 property as *In re Sontag*. See Supp. Reply at 2-3, ECF No. 32. Although it is not related to a
3 disposition proceeding as *In re Sontag*, this court's Order in AP 15-0001 permitted H.C. Kim to
4 remain in the premises pending a mutually agreed upon move-out date. *Heath v. H.C. Kim*, AP
5 15-0001, Order at 8, ECF No. 33. Furthermore, the bankruptcy court *In re Sontag* acknowledged
6 that "[a] court [can] direct that an ex-spouse maintain her exclusive possession of the marital
7 residence in order to ensure her welfare until the time of sale without continuing the cotenancy."
8 See 151 B.R. at 669. This court can likewise permit H.C. Kim to remain in the property, without
9 paying rent, to ensure her welfare and protect her from an untimely and inequitable demand of
10 over \$72,500.00 in back-rent to reside in property that she owned. See *id.*, see also 11 U.S.C. §
11 363(e) (permitting the court to condition Trustee's use, sale, or lease of Debtor's property as is
12 necessary to provide adequate protection of such interest); 11 U.S.C. § 105.¹⁵

13 The court only recently (August 29, 2016) approved Trustee's request to sell the property
14 in AP 15-00001 (which is devoid of any demand for rent by H.C. Kim),¹⁶ and ordered the parties
15 to work out an acceptable move-out date. See *Heath v. H.C. Kim*, AP 15-00001, Order at 8, ECF
16 No. 33. Thus, an ouster has not yet occurred. Consequently, H.C. Kim's Motion for Summary
17 Judgment is **GRANTED** because the action is premature, and is contrary to the general rule that
18 a co-tenant cannot demand rent from another co-tenant.

19 If Debtor and H.C. Kim fail to cooperate with the court's Order in AP 15-00001, then
20 Trustee is encouraged to file a motion for order of contempt, or similar motion for enforcement,
21 in that case following the parties' good faith and reasonable efforts to meet and confer.

22 ¹⁵A court has broad authority to issue orders under 11 U.S.C. § 105. No provision within Title 11 "shall be
23 construed to preclude the court from, sua sponte, taking any action or making any determination necessary or
24 appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *Id.*

¹⁶ Bronze Declaration does not indicate when these purported demands for rent began.

1 **B. Whether Trustee’s Request For Leave to Amend His Complaint Should Be**
2 **Granted.**

3 Trustee also moved to amend his Complaint on September 16, 2016, requesting an order
4 requiring H.C. Kim to “forthwith” surrender possession of the Real Property. Mot. Am. Compl.,
5 ECF No. 16; *see also* Mem. P. & A.’s in Supp. of Mot. Am. Compl., Ex. A at ¶¶ 9-15, ECF No.
6 17.

7 Trustee’s Reply in Support of his Motion for Summary Judgment in AP 15-00001
8 “respectfully request[ed] that [H.C. Kim] be given 15 days to vacate the subject real property.
9 [Trustee] should not have to incur substantial legal fees to file another motion against [H.C.
10 Kim] to force her to vacate the property.” *See Heath v. H.C. Kim*, AP 15-0001, Reply at 2, ECF
11 No. 26.

12 This court denied Trustee’s request in its August 29, 2016 Order. Opp’n Mot. Am.
13 Compl. at 6, ECF No. 23; *see also Heath v. H.C. Kim*, AP 15-00001, Order at 8, ECF No. 33
14 (denying Trustee’s request to order Debtor and Kim to vacate the property within fifteen days,
15 and ordering the parties to work out a time frame to show and vacate the property).

16 The Trustee moved to amend his Complaint seventeen days after this court’s
17 unambiguous Order in AP 15-00001 denying his request to order H.C. Kim to vacate the
18 property within fifteen days. *See Heath v. H.C. Kim*, AP 15-00001, Order at 8, ECF No. 33.
19 H.C. Kim opposed Trustee’s Motion for Leave to File Amended Complaint contending that: (1)
20 the amendment is futile because the claim is barred by res judicata, (2) Trustee’s delay is
21 unjustifiable, (3) Trustee’s proposed Amended Complaint seeks to circumvent this court’s Order
22 in AP 15-00001, which demonstrates bad faith with a dilatory motive, (4) Trustee “squandered
23 numerous opportunities to cure deficiencies” in his Complaint, and (5) leave to amend would be
24 unduly prejudicial. Opp’n Mot. Am. Compl. at 5-9, ECF No. 23.

 On October 21, 2016, Trustee filed a Reply, arguing that: (1) H.C. Kim failed to satisfy

1 the elements of claim preclusion, (2) undue delay, standing alone, is insufficient to deny
2 Trustee's Motion for Leave to File Amended Complaint, (3) H.C. Kim failed to demonstrate that
3 substantial prejudice would result from the proposed amendment, and (4) Trustee unsuccessfully
4 attempted to arrange a date for H.C. Kim to vacate the property. Reply to Opp'n Mot. Am.
5 Compl. at 1, 9, 11, 12, ECF No. 25.

6 Although leave to amend should be granted liberally, there are some limitations. *See*
7 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (citing *DCD Programs,*
8 *Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). For example, leave to amend need not be
9 granted if it "constitutes an exercise in futility." *Id.*; *see also Klamath-Lake Pharm. Ass'n v.*
10 *Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that, while leave to
11 amend shall be freely given, the court need not grant leave for futile amendments). Additional
12 factors that weigh against granting leave to amend include: "undue delay, bad faith or dilatory
13 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
14 allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment."
15 *Foman v. Davis*, 371 U.S. 178, 182 (1962).

16 **1. Whether the Proposed Amendment is Futile.**

17 H.C. Kim argues that the proposed amendment is futile because it is barred by res
18 *judicata*. Opp'n Mot. Am. Compl. at 5, ECF No. 23. The doctrine of "[r]es *judicata*, also
19 known as claim preclusion, bars litigation in a subsequent action of any claims that were raised
20 or could have been raised in the prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244
21 F.3d 708, 713 (9th Cir. 2001) (quoting *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189,
22 1192 (9th Cir.1997)). For the doctrine to apply, there must be: "(1) an identity of claims, (2) a
23 final judgment on the merits, and (3) identity or privity between parties." *Id.*

24 The doctrine of *res judicata* is inappropriate in this case, however, because the Order in

1 AP 15-00001 did not foreclose or adjudicate Trustee’s ability to seek possession of the property
2 in the event that the parties were unable to reach an agreeable, reasonable, and good-faith move-
3 out date. *See Heath v. H.C. Kim*, AP 15-00001, Order at 8, ECF No. 33.

4 Trustee’s proposed claim, however, is premature. Although it might become apparent at
5 some future date that Debtor and H.C. Kim refuse to vacate the property in compliance with this
6 court’s August 29, 2016 Order, such a refusal is not yet apparent.

7 **2. Whether the Proposed Amendment is Unduly Prejudicial.**

8 Permitting numerous Adversary Proceedings against H.C. Kim is unnecessary, dilatory,
9 and prejudicial.¹⁷ “[S]ubstantial or undue prejudice to the non-moving party is a sufficient
10 ground for denial of leave to amend.” *Cureton v. Nat’l Collegiate Athletic Ass’n*, 252 F.3d 267,
11 273 (3d Cir. 2001) (citation omitted). In considering whether amendment is appropriate, a court
12 should consider whether the defendant will be faced with “additional discovery, cost, and
13 preparation to defend against new facts or new theories.” *Id.* (citations omitted). Yet “[a]ny
14 prejudice to the nonmovant must be weighed against the prejudice to the moving party by not
15 allowing the amendment.” *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998)
16 (citation omitted).

17 “[T]he consideration of prejudice to the opposing party” is the factor “that carries the
18 greatest weight,” and is “the ‘touchstone of the inquiry under rule 15(a).’” *Eminence Capital,*
19 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Lone Star Ladies Inv. Club v.*
20 *Schlotsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) (citations omitted); *see also DCD Programs,*
21 *Ltd.*, 833 F.2d at 185. Without “prejudice, or a strong showing of any of the remaining *Foman*
22 factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.” *Id.*

23
24

¹⁷ Additionally, filing numerous adversary proceedings runs contrary to the concern Trustee expressed in AP 15-00001 regarding incurring “substantial legal fees to file another motion against [H.C. Kim] to force her to vacate the property.” *See Heath v. H.C. Kim*, AP 15-0001, Reply at 2, ECF No. 26. Filing a separate proceeding results in far more legal fees than a simple motion for enforcement.

1 (emphasis omitted) (citing *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)).

2 The Proposed Amendment in this case is inappropriate because it would subject H.C.
3 Kim to additional discovery and cost to defend against a theory that this court already addressed
4 in a separate proceeding. See *Cureton*, 252 F.3d at 273 (citation omitted). Although the
5 prejudice to H.C. Kim must be weighed against the prejudice to the Trustee, See *Bell*, 160 F.3d at
6 454, the Trustee is not without recourse. If it becomes clear that H.C. Kim has no intention of
7 arranging an appropriate and good-faith move-out date in compliance with this court's Order,
8 then Trustee should simply file a motion for contempt, or a similar motion for enforcement, in
9 AP 15-00001. This court has the inherent authority to enforce its Order in AP 15-00001, and
10 deems that addressing this issue in AP 15-00001 is within its powers to manage cases in a
11 manner it deems most efficient. See *California Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025,
12 1033 (9th Cir. 2008) (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There is no
13 question that courts have inherent power to enforce compliance with their lawful orders through
14 civil contempt.") (alteration omitted)); see also *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d
15 402, 404 (9th Cir. 2010) (A court's "inherent powers are mechanisms for 'control necessarily
16 vested in courts to manage their own affairs so as to achieve the orderly and expeditious
17 disposition of cases.'" (quoting *Chambers v. NASCO*, 501 U.S. 32, 43 (1991))).

18 The period of reasonableness has not yet lapsed, and a separate proceeding would place
19 unnecessary strain on the parties' and this court's resources.¹⁸ Accordingly, the motion to amend
20 is **DENIED**.¹⁹

21 _____
22 ¹⁸ Additionally, the parties should refrain from leveraging such motions against each other, and should
23 instead work together in good faith. Correspondence between parties' counsel shows Trustee's attempt to condition
24 withdrawal of his Motion to Amend on H.C. Kim's agreement to move out of the property within fifteen days from
the award of a successful bid for purchase of the real property. See Suppl. Decl. Bronze in Supp. Mot. Am. Compl.
at Ex. A (Email Exchange between Bronze and Williams), ECF No. 26.

¹⁹ The decision to grant or deny a motion to amend is within the discretion of this court provided that the
court offers justifications. See *Foman*, 371 U.S. at 182.

1 **IV. CONCLUSION**

2 H.C. Kim’s Motion for Summary Judgment is **GRANTED** because as a cotenant, she is
3 not liable to the Trustee for rent.

4 Additionally, Trustee’s Motion to Amend the Complaint is **DENIED** because this court
5 addressed the issue of possession of the real property at issue in AP 15-00001, and forcing H.C.
6 Kim to litigate this issue in a separate proceeding would be unduly prejudicial. This court retains
7 jurisdiction over the property at issue under AP 15-00001. If H.C. Kim and Debtor fail to vacate
8 the real property at issue, and otherwise fail to act in accordance with this court’s Order Granting
9 in Part, and Denying in Part, Trustee’s Motion for Summary Judgment, then Trustee may bring a
10 motion for contempt, or similar motion for enforcement, in AP 15-00001.

11 The parties should refrain from excessive future filings, and address futures disputes
12 against each other via motions in AP 15-00001 only where absolutely necessary. Furthermore,
13 the parties should meet and confer in good faith before filing future adversarial motions. Any
14 such motion, in this case and related proceedings, should include a declaration by counsel
15 chronicling the parties’ good faith efforts to meet and confer.²⁰

16 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Dec 16, 2016

23 ²⁰ At the hearing, Trustee expressed concern regarding meet and confer requirement. The requirement to
24 meet and confer, however, is not a requirement to resolve the issues on the parties’ own under all circumstances.
Rather, it means the parties should contact each other, and attempt to resolve their dispute in good faith prior to
seeking court intervention.