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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re) Case No. 13-91102-E-7
)
DANIEL B. KREVITSKY,)
)
Debtor.)
_____)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION
DEBTOR'S *EX PARTE* MOTION TO VACATE ORDER
DISMISSING CHAPTER 7 CASE

The present case, No. 13-91102, was commenced by Daniel Krevitsky, the Chapter 7 Debtor ("Debtor"), on June 11, 2013. At the time of filing the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss If Documents Are Not Timely Filed. Dckt. 3. The missing documents are identified in the Notice to be: (1) Means Test (Form 22A), (2) Schedules A-J, (3) Statement of Financial Affairs, (4) Statistical Summary, and (5) Summary of Schedules. Dckt. 3. The court granted the Debtor an extension of time to file the missing documents, with all required to be filed

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1 on or before July 10, 2013. Order, Dckt. 26.¹

2 On July 11, 2013, the Clerk of the Court issued an order
3 dismissing the case for failure to file all of the missing
4 documents. Dckt. 29. This is because the Means Test (Form 22A)
5 and payment of a filing fee was not timely delivered to the court.
6 As set forth in the Motion to Vacate the Dismissal, it is argued
7 that they were sent to the Chapter 7 Trustee. The court issued an
8 order to show cause for dismissal of the case for the failure to
9 make payment of the \$30.00 filing fee for the Amended Master
10 Address List filed by the Debtor. Dckt. 27. This order to show
11 cause was dismissed as moot, based on the case having been
12 dismissed for the other defects in the case.

13 **MOTION TO VACATE**

14 The present Motion to Vacate was filed on July 25, 2013.
15 Dckt. 34. The Motion was filed as an *ex parte* motion, with no
16 hearing set and no certificate of service filed with the court. It
17 appears that the Chapter 7 Trustee and U.S. Trustee, as well as
18 creditors, are not aware that the Debtor is attempting to vacate
19 the dismissal of this case. The Motion is not supported by a
20 declaration or other authenticated evidence. The Motion is merely
21 a statement of contentions.

22 The Debtor has filed multiple bankruptcy cases in this
23 District, having successfully completed both a Chapter 7 case and
24

25 ¹ The Debtor's motion for extension of time filed on June 25,
26 2013, states "I believe I have complied with the filing requirements.
27 If I have not been thorough, please provide me with an extension of
28 time or leave to amend." Motion, Dckt. 23. The court granted an
extension of time. On June 25, 2013, the Debtor had filed (1) Summary
of Schedules, (2) Statistical Summary, (3) Schedules A - J,
(4) Statement of Financial Affairs, and (5) Statement of Intention.
Dckt. 24.

Chapter 13 case, receiving discharges in both. These cases and their conclusions are summarized as follows:

Case Number Chapter	Filing Date Dismissal Date Discharge Date	Grounds Upon Which Dismissal Based
13-90494 Chapter 13	Date Filed: March 18, 2013 Date Dismissed: May 28, 2013 No Discharge	Motion to Dismiss based on (1) failure to make plan payments, (2) failure to set hearing on motion to confirm Chapter 13 Plan, (3) Chapter 13 Plan terms unclear, (4) failure to attend First Meeting of Creditors, (5) failure to provide copies of pay advices, (6) failure to provide copy of tax return, and (7) failure to provide Trustee with a Domestic Support Obligation Checklist. 13-90494 Dckt. 78. No Chapter 13 Plan confirmed.
11-92475 Chapter 13	Date Filed: July 11, 2011 Date Dismissed: September 23, 2011 No Discharge	Motion to Dismiss based on (1) failure to file correct version of Chapter 13 Plan, (2) failure to provide Trustee with information for Class 1 Claim secured by Crystal Falls Property, (3) failure to provide Trustee information for a second Class 1 Claim secured by Crystal Falls Property, (4) failure to provide Trustee with information for a third Class 1 Claim secured by the Crystal Falls Property, and (5) failure to provide Trustee copy of tax return. 11-92475 Dckt. 23. No Chapter 13 Plan confirmed.
11-92033 Chapter 13	Date Filed: June 6, 2011 Date Dismissed: June 28, 2011 No Discharge	Notice of Incomplete Filing. Failure to file: (1) Chapter 13 Plan, (2) Means Test (Form 22C), (3) Schedules A-J, (4) Statement of Financial Affairs, (5) Statistical Summary, and (6) Summary of Schedules. 11-92033 Dckt. 3. Motion for extension of time to file documents denied based on the failure to show good cause. 11-92033 Dckt. 14. No Chapter 13 Plan confirmed.
11-91013 Chapter 13	Date Filed: March 22, 2011 Date Dismissed: April 21, 2011 No Discharge	Notice of Incomplete Filing. Failure to file: (1) Chapter 13 Plan, (2) Means Test (Form 22C), (3) Schedules A-J, (4) Statement of Financial Affairs, (5) Statistical Summary, and (6) Summary of Schedules. 11-91013 Dckt. 3. Motion for extension of time to file documents granted. 11-91013 Dckt. 13. No Chapter 13 Plan confirmed.

10-92201 Chapter 7, Voluntary	Date Filed: June 9, 2010 Not Dismissed Discharge Date: October 6, 2010	
99-94575 Chapter 13	Date Filed: October 15, 1999 Not Dismissed Discharge Date: May 26, 2004	
99-91063 Chapter 13	Dated Filed: March 10, 1999 Date Dismissed: August 26, 1999	Motion to Dismiss based on default in Chapter 13 Plan payments.

The Debtor having received his Chapter 7 discharge on October 6, 2010 (Chapter 7 case No. 10-92201 filed June 9, 2010), he cannot obtain a Chapter 7 discharge in any case commenced before June 10, 2018 (11 U.S.C. § 727(a)(8)) or in a Chapter 13 discharge in any case commenced before June 10, 2014 (11 U.S.C. § 1328(f)(1)). While there can be *bona fide* reasons for filing a Chapter 13 case in which no discharge may be granted,² the court cannot divine the *bona fide*, good faith benefits and reasons for prosecuting a Chapter 7 case in which no discharge can be obtained based on the record in this case.

Related To Adversary Proceeding

The Debtor references in his Motion a "related to" adversary proceeding which he desires to prosecute in federal court. Adversary Proceeding 13-9025 was commenced by the Debtor on

² See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012), for a discussion of Chapter 20 "lien striping" through the two-step Chapter 7 - Chapter 13 process.

1 July 12, 2013. The Debtor is suing Deutsche Bank National Trust
2 Company, as Trustee, Aztec Foreclosure Corporation, OneWest Bank,
3 FSB, and an individual named Derrick W. Loomis. The Complaint
4 appears to be a state court complaint for which the caption has
5 been changed, with this court being handwritten in as the name of
6 the court. The Complaint is "verified," which is a California
7 state law procedure which then requires specific admissions and
8 denials of allegations, rather than the state court permitted
9 general denial. The "general denial" is not permitted under the
10 Federal Rules of Civil Procedure and Federal Rules of Bankruptcy
11 Procedure. See Fed. R. Civ. P. 12 and Fed. R. Bank. P. 7012.

12 A survey of the Complaint indicates that the Debtor is
13 asserting a variety of California state law claims though which he
14 seeks a determination that a non-judicial foreclosure was invalid.
15 The legal grounds asserted by the Debtor include: (1) California
16 Civil Code § 2923.6, (2) California Civil Code § 17200, (3) breach
17 of state law covenant of good faith and fair dealing arising under
18 contract, (4) enjoining Defendants from exercising asserted rights
19 under promissory note and deed of trust, (5) California Civil Code
20 § 1752 (state law fraud), (6) declaration of state law rights under
21 note and deed of trust, (7) California Civil Code §§ 2923.6, 2924,
22 and 2932.5, (8) determination under state law the "holder of the
23 note" secured by the deed of trust, (9) California Penal Code
24 § 115, and (10) California Evidence Code § 669. In addition, the
25 Debtor has demanded a jury trial on all issues.

26 Though filing the Adversary Proceeding on July 12, 2013,
27 Schedule B filed by the Debtor on July 25, 2013, does not list any
28 claims against Deutsche Bank National Trust Company, as Trustee, or

1 any other of the Defendants named in the Complaint. No claims or
2 rights of any such are listed on Schedule B or claimed as exempt on
3 Schedule C. Dckt. 24. From the Complaint, it appears that these
4 claims are asserted to have existed prior to the commencement of
5 the case, thereby they would be property of the Chapter 7
6 bankruptcy estate. 11 U.S.C. § 541(a). As property of the estate,
7 it is the Chapter 7 Trustee who has the sole right to prosecute
8 such rights. 11 U.S.C. §§ 707(a), 323. Though a debtor bringing
9 such an adversary proceeding is not immediately fatal on the issue
10 of standing to commence such litigation (Fed. R. Civ. P. 17(a)(3),
11 Fed. R. Bankr. P. 7017), the standing issue must promptly be
12 addressed before the court can proceed with the litigation.

13 Even if the Debtor is the real party in interest, the
14 Complaint raises serious issues of whether the bankruptcy court or
15 district court should exercise the broad grant of jurisdiction and
16 authority given by Congress under 28 U.S.C. §§ 1334 and 157. This
17 jurisdiction was granted to the extent that the issues arise under
18 the Bankruptcy Code, in the bankruptcy case (such as administration
19 of an asset), or relate to the (administration or outcome of a)
20 bankruptcy case. 28 U.S.C. § 1334(a) and (b). However,
21 recognizing this broad reach of federal court jurisdiction,
22 Congress also provided that federal judges may, and in some
23 situations are required to, abstain from hearing matters though
24 federal court jurisdiction under § 1334 may exist. See 28 U.S.C.
25 § 1334(c).

26 As provided in 28 U.S.C. § 1334(c)(1),

27 (1) Except with respect to a case under chapter 15 of
28 title 11, nothing in this section prevents a district
court in the interest of justice, or in the interest of

comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction. See *Stern v. Marshall*, 564 U.S. ____ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

The court shall issue, as it did in the *Pineda* litigation, an order to show cause why this bankruptcy judge does not abstain from any further hearings pursuant to 28 U.S.C. § 1334(c)(1) for Adversary Proceeding 13-9025.

INTERIM ORDER VACATING DISMISSAL

The Federal Rules of Civil Procedure provide for vacating an order or judgment in Rule 60, as incorporated into bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief

1 from a final judgment, order, or other proceeding are limited to:

- 2 (1) Mistake, inadvertence, surprise, or excusable neglect;
- 3 (2) Newly discovered evidence that, with reasonable
4 diligence, could not have been discovered in time to move
for a new trial under Rule 59(b);
- 5 (3) Fraud (whether previously called intrinsic or extrinsic),
6 misrepresentation, or misconduct by an opposing party;
- 7 (4) The judgment is void;
- 8 (5) The judgment has been satisfied, released, or discharged;
9 it is based on an earlier judgment that has been reversed
or vacated; or applying in prospectively is no longer
equitable; or
- 10 (6) Any other reason that justifies relief.

11 Fed. R. Civ. P. 60(b). The court uses equitable principles when
12 applying Rule 60(b) Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT
13 ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A
14 precondition to the granting of such relief is that the movant show
15 that he or she has a meritorious claim or defense. See 12-60
16 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers*
17 *Insurance Company of Florida*, 653 F.3d 1108, 111 (9th Cir. 2011);
18 *Falk v. Allen*, 739 F.2d 461, 462 (9th Cir. 1984) ("We agree with
19 the Third Circuit that three factors should be evaluated in
20 considering a motion to reopen a default judgment under Rule 60(b):
21 (1) whether the plaintiff will be prejudiced, (2) whether the
22 defendant has a meritorious defense, and (3) whether culpable
23 conduct of the defendant led to the default. See *Gross v. Stereo*
24 *Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see
25 also *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839,
26 845 (6th Cir. 1983) (adopting Third Circuit test).")

27 On the one hand, the Debtor did file substantially all of the
28 missing documents. Unfortunately, though very experienced in

1 bankruptcy filings, he argues that he sent one of the documents and
2 filing fee to the Trustee instead of the court. This resulted in
3 the court dismissing the case.

4 The Debtor makes no showing under Rule 60(b) as to why and how
5 he can and will prosecute this Chapter 7 case. It appears that he
6 cannot obtain a discharge. No assets of any value (other than
7 possibly the unscheduled claims asserted in the Adversary
8 Proceeding) exist for the Trustee to administer and use to pay
9 creditor claims. Schedules A and B, Dckt. 24. According to
10 Schedule D, the Debtor asserts that he has no creditors having
11 secured claims (whether such claims asserted are contingent,
12 unliquidated, or disputed). Schedule D, *Id.* The Debtor lists no
13 priority unsecured claims on Schedule E. *Id.* Other than a
14 \$2,500.00 claim of the Internal Revenue Service, all of the other
15 general unsecured claims on Schedule F are listed as "Unknown" and
16 disputed. *Id.*

17 On Schedule I the Debtor lists having \$1,100.02 in gross
18 income from wages, salary, and commissions. His occupation is
19 listed as actor and his employer is Entertainment Partners.
20 However, there are no deductions from his wages for payroll or
21 Social Security Taxes. He also lists \$800.00 in monthly income
22 from roommates for rent and \$400.00 from self employment.
23 Schedule I, *Id.* However, on Schedule J no provision is made for
24 payment of any payroll taxes, self-employment taxes, or Social
25 Security Taxes. The Debtor states that he has monthly food
26 expenses of only \$200.00, nothing for medical or dental expenses,
27 and only \$150.00 for transportation expenses. Schedule J, *Id.*

28 The Statement of Financial Affairs fails to provide the

1 required income information for the current year and the two prior
2 years. The only income shown in response to Question 1 of the
3 Statement of Financial Affairs (Income from employment or operation
4 of business for the current year and two years immediately
5 preceding the current calendar year) is "\$400.....Personal message
6 services." In response to Question 2 of the Statement of Financial
7 Affairs for the same period of time (Income other than from
8 employment or operation of business) the Debtor states
9 "\$800.....Roommate rental 2 rooms income per month." *Id.*

10 In response to Question 4 (Suits and administrative
11 proceedings), the Debtor lists an unlawful detainer action
12 involving Deutsche Bank National Trust Company as an "open"
13 proceeding. *Id.* In response to Question 5 (Repossession and
14 foreclosures) the Debtor identifies a February 27, 2012 foreclosure
15 having been conducted by Deutsche Bank National Trust Company. *Id.*

16 The Debtor has offered nothing to indicate that if the court
17 were to vacate the dismissal, the Debtor could and would properly
18 prosecute this Chapter 7 to some useful and proper (under the
19 Bankruptcy Code) conclusion. However, the court recognizes that
20 the Debtor (notwithstanding his multiple cases) is appearing in *pro*
21 *se* and may not appreciate all of the requirements to vacate an
22 order dismissing a bankruptcy case. The Debtor having chosen to
23 file the present *ex parte* motion, rather than setting it for a
24 hearing, the court was deprived of having the opportunity to
25 conduct a hearing with the Debtor.³

26
27 ³ In addition to wasting time and monetary resources, a debtor
28 who repeatedly files bankruptcy cases also squanders rights under the
Bankruptcy Code. With the 2005 BAPCPA amendments, Congress
statutorily addressed the perceived problem of repeat (non-productive)

1 **RULING**

2 Though little basis has been shown by the Debtor, the court
3 will set a hearing on the motion to vacate the order dismissing the
4 case and an interim order temporarily vacating the order dismissing
5 the bankruptcy case. The court shall also issue an Order to Show
6 Cause why the bankruptcy case should not be dismissed and the
7 interim order allowed to terminate. The hearing shall be conducted
8 at **10:30 a.m. on August 22, 2013.** The interim order vacating the
9 dismissal is based on what may well be only a remote chance that
10 there are rights of the estate which may be at peril.

11 The Debtor shall file and serve any supplemental pleadings on
12 the Chapter 7 Trustee, U.S. Trustee, and creditors on or before
13 **August 15, 2013.** Creditors, the U.S. Trustee, the Chapter 7
14 Trustee, and other parties in interest may present their opposition
15 or responses in court, no written responses required. Local
16 Bankruptcy Rule 9014-1(f)(2).

17 This Decision constitutes the court's findings of fact and
18 conclusions of law pursuant to Federal Rule of Civil Procedure 52
19 and Federal Rule of Bankruptcy Procedure 7052, 9014.

20 The court shall issue a separate order consistent with this
21 Decision.

22 Dated: August 5, 2013

23
24 /s/
25 RONALD H. SARGIS, Judge
26 United States Bankruptcy Court

27 _____
28 bankruptcy filers. As part of this, it created statutory terminations
of certain rights and provisions precluding certain rights under the
Bankruptcy Code from going into effect in the subsequent bankruptcy
case(s).