

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: TUESDAY
DATE: JANUARY 10, 2017
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [16-12321](#)-A-7 RIGOBERTO/CORINNA AVINA CONTINUED STATUS CONFERENCE RE:
[16-1089](#) COMPLAINT
FAMILIES AND SCHOOLS TOGETHER 9-13-16 [[1](#)]
FEDERAL CREDIT UNION V. AVINA
RUSSELL REYNOLDS/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

2. [15-14833](#)-A-7 FRED ALLEN MOTION FOR PARTIAL SUMMARY
[16-1035](#) FW-1 JUDGMENT
STERLING PACIFIC LENDING, INC. 12-7-16 [[29](#)]
V. ALLEN
PETER FEAR/Atty. for mv.

Tentative Ruling

Motion: Summary Judgment

Notice: LBR 9014-1(f) (1); written opposition required

Disposition: Denied

Order: Civil minute order

Plaintiff Sterling Pacific Lending, Inc. ("Sterling Pacific") moves to summarily adjudicate the nondischargeability of a debt, reserving only the issue of damages for trial. Defendant Fred Allen ("Allen") has not filed opposition to the motion.

THE COMPLAINT

As pled, on August 1, 2014, plaintiff Sterling Pacific lent money to Verde Agribusiness, LLC ("Verde") to develop 120 acres of land in Yolo County. First Amended Complaint ¶¶ 9-11, June 15, 2016, ECF # 16. Verde intended to plant the acreage with nut trees. Complaint at 9. The loan was secured by the real property. Complaint at ¶ 11. Allen and Jeffrey Kemmer ("Kemmer") guaranteed the loan. Complaint at ¶ 12. The loan matured on September 1, 2015, Verde, Allen and Kemmer breached the loan by failing to pay it off when it matured. Complaint at ¶ 13.

Between September 1 and October 10, 2015, Sterling Pacific and Verde, acting through Allen and Kemmer, negotiated an extension of the loan agreement. Complaint at ¶¶ 13, 15-19. As a part of those negotiations, Allen and Kemmer made (false) representations to Sterling Pacific about: (1) the status of development and the funds necessary to complete the project; (2) the amount of debts owed other creditors; and (3) the existence of an interested buyer for the property. Based on those representations, Sterling Pacific agreed to extend the term of the loan. Complaint at ¶ 19.

As of September 1, 2015, Sterling Pacific "possessed valuable collection remedies which it could have exercised in the event of default, including, but not limited to, (i) the assessment of the 'maximum rate' of interest allowed; (ii) assessment of late fees; (iii) liquidated damages for each missed payment; (iv) commencement of foreclosure proceedings . . ." Complaint at ¶ 20.

On December 18, 2015, Allen filed a petition under Chapter 7 of the Bankruptcy Code. Complaint ¶ 6.

Sterling Pacific seeks to except from discharge Allen's guarantee of the Verde loan. It proceeds under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(B). It does so exclusively on misrepresentations made when Allen and Kemmer negotiated the loan extension. Complaint at ¶¶ 25, 29-30, 33, 36, 42.

LAW

The court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bank. P. 7056. Where a motion for summary judgment is unopposed, the court may deem the facts undisputed and grant the motion if the undisputed facts show the movant's entitlement to judgment. Fed. R. Civ. P. 56(e)(2)-(3); See *Beard v. Banks*, 548 U.S. 521, 527 (2006). The converse is also true. An unopposed motion for summary judgment may not be granted where the moving party fails to sustain its burden of proof. Adv. Comm. Note to FRCP 56(e) ("Summary judgment may not be granted by default even if there is a complete failure to respond to the motion"). Where, as here, the plaintiff would bear the burden of proof at trial, it also bears the burden of showing entitlement decision by summary judgment. *Calederone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

The elements necessary to except a debt from discharge based on fraud are well known to this court. Section 523(a)(2)(A) excepts debts obtained by fraud upon a showing of "(1) misrepresentation(s), fraudulent omission(s), or deceptive conduct; (2) knowledge of the falsity or deceptiveness of such representation(s), omission(s), or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor; and (5) damage to the creditor proximately caused by its reliance. *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir.2010); *In re Weinberg*, 410 B.R. at 35." *In re Shannon*, 553 B.R. 380, 388 (9th Cir. BAP 2016).

"Section 523(a)(2)(B) excepts debts from discharge where the debt was 'obtained by-...(B) use of a statement in writing-(i) that is materially false;(ii) respecting the debtor's or an insider's financial condition;(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and(iv) that the debtor caused to be made or published with intent to deceive...." *In re Candland*, 90 F.3d 1466, 1469 (9th Cir. 1996), as amended (Oct. 2, 1996).

Where the fraud that forms the basis of discharge exception litigation occurred in conjunction with the extension of the maturity date of loan, proximate cause requires that creditor show "that it had valuable collection remedies at the time it agreed to renew its commitment to the debtor, and that those remedies later became worthless." *In re Siriani*, 967 F.2d 302, 305 (9th Cir. 1992), as amended (June 29, 1992) (11 U.S.C. § 523(a)(2)(B); *Antioch Community Federal Credit Union v. Pagnini (In re Pagnini)*, 2012 WL 5489032 (9th Cir. BAP November 13, 2012) (11 U.S.C. § 523(a)(2)(A); *Hillsman v. Escoto (In re Escoto)*, 2015 WL 2343461 (9th Cir. BAP May 15, 2015) (11 U.S.C § 523(a)(2)(A).

DISCUSSION

Sterling Pacific moves for summary judgment based solely on 20 Requests for Admission, which are deemed admitted by the Allen's failure to respond to them. Fed. R. Civ. P. 36(a)(3).

The complaint alleges four categories of collection rights Sterling Pacific lost as a result of the misrepresentations "(i) the assessment of the 'maximum rate' of interest allowed; (ii) assessment of late fees; (iii) liquidated damages for each missed payment; (iv) commencement of foreclosure proceedings . . ." Complaint at ¶ 19.

Sterling Pacific has not made an adequate showing of the nexus between the representation and its alleged loss. The inadequate showing comes in two flavors. The first is actual causation. The problem is that the Requests for Admission, on which the summary judgment is based, are not confined to the period, i.e. September 1, 2015, through October 10, 2015, when the extension was negotiated. Rather, each of the Requests for Admission tied to a misrepresentation are directed at the period from August 1, 2014, through October 1, 2015. Exh. A (Request for Admission Nos. 1-7) in Support of Motion for Summary Judgment, December 7, 2016, ECF # 35. As a result, the court is unable to ascertain whether the misrepresentations have a causal link to the decision to extend the maturity date of the loan. This alone would preclude granting summary judgment.

The second deficiency is proximate cause. The Requests for Admission (now deemed fact) make no reference to the monetary value of the maximum interest rates, late charges, liquidated damages or foreclosure of the property. So the now admitted facts do not demonstrate that some or all of these rights are no longer available to Sterling Pacific or that the monetary values attached to those rights are now worth less. *Cho Hung Bank v. Kim (In re Kim)*, 163 B.R. 194 (9th Cir BAP 1993) ("Essentially the [*Siriani*] court took the view that proximate damages could be calculated by comparing what would have been the value of the creditor's collection remedies on the date of the extension to the value of such remedies at the end of the extension or renewal period.").

Request for Admission No. 17, which purports to address the proximate cause problem, does not do so. It is true that a Request for Admission may encompass ultimate facts. Fed. R. Civ. P. 36(a)(1)(A); see *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 937 n. 4 (9th Cir. 1994). Request for Admission No. 17 provides, "Admit that your representations were the proximate cause of Plaintiff's damages." But the word "representation" in the Request for Admission is a defined term and means "those matters set forth in Requests for Admission nos. 1 through 7." Exh. A at p. 5, ¶ 10 in Support of Motion for Summary Judgment, December 7, 2016, ECF # 35. Request for Admissions No. 1-7 each refer to a timeframe of August 1, 2014, through October 9, 2015. This encompasses both the original decision to lend credit and also the loan extension. As a result, Sterling Pacific has not carried its burden on proximate cause and the motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Sterling Pacific Lending, Inc.'s motion for summary judgment has been presented to the court. Having considered the motion, and all supporting papers,

IT IS ORDERED that the motion is denied.

3. [15-14834](#)-A-7 JEFFREY KEMMER MOTION FOR PARTIAL SUMMARY
[16-1031](#) FW-1 JUDGMENT
STERLING PACIFIC LENDING, INC. 12-7-16 [[30](#)]
V. KEMMER
PETER FEAR/Atty. for mv.

Tentative Ruling

Motion: Summary Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Denied

Order: Civil minute order

Plaintiff Sterling Pacific Lending, Inc. ("Sterling Pacific") moves to summarily adjudicate the nondischargeability of a debt, reserving only the issue of damages for trial. Defendant Jeffrey Kemmer ("Kemmer") has not filed opposition to the motion.

THE COMPLAINT

As pled, on August 1, 2014, plaintiff Sterling Pacific lent money to Verde Agribusiness, LLC ("Verde") to develop 120 acres of land in Yolo County. First Amended Complaint ¶¶ 9-11, June 15, 2016, ECF # 16. Verde intended to plant the acreage with nut trees. Complaint at 9. The loan was secured by the real property. Complaint at ¶ 11. Fred Allen ("Allen") and Kemmer guaranteed the loan. Complaint at ¶ 12. The loan matured on September 1, 2015, Verde, Allen and Kemmer breached the loan by failing to pay it off when it matured. Complaint at ¶ 13.

Between September 1, and October 10, 2015, Sterling Pacific and Verde, acting through Allen and Kemmer, negotiated an extension of the loan agreement. Complaint at ¶¶ 13, 15-19. As a part of those negotiations, Allen and Kemmer made (false) representations to Sterling Pacific about: (1) the status of development and the funds necessary to complete the project; (2) the amount of debts owed other creditors; and (3) the existence of an interested buyer for the property. Based on those representations, Sterling Pacific agreed to extend the term of the loan. Complaint at ¶ 19.

As of September 1, 2015, Sterling Pacific "possessed valuable collection remedies which it could have exercised in the event of

default, including, but not limited to, (i) the assessment of the 'maximum rate' rate of interest allowed; (ii) assessment of late fees; (iii) liquidated damages for each missed payment; (iv) commencement of foreclosure proceedings . . . " Complaint at ¶ 20.

On December 18, 2015, Kemmer filed a petition under Chapter 7 of the Bankruptcy Code. Complaint ¶ 6.

Sterling Pacific seeks to except from discharge Kemmer's guarantee of the Verde loan. It proceeds under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(B). It does so exclusively on misrepresentations made when Allen and Kemmer negotiated the loan extension. Complaint at ¶¶ 25, 29-30, 33, 36, 42.

LAW

The court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bank. P. 7056. Where a motion for summary judgment is unopposed, the court may deem the facts undisputed and grant the motion if the undisputed facts show the movant's entitlement to judgment. Fed. R. Civ. P. 56(e)(2)-(3); See *Beard v. Banks*, 548 U.S. 521, 527 (2006). The converse is also true. An unopposed motion for summary judgment may not be granted where the moving party fails to sustain its burden of proof. Adv. Comm. Note to FRCP 56(e) ("Summary judgment may not be granted by default even if there is a complete failure to respond to the motion"). Where, as here, the plaintiff would bear the burden of proof at trial, it also bears the burden of showing entitlement decision by summary judgment. *Calederone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

The elements necessary to except a debt from discharge based on fraud are well known to this court. Section 523(a)(2)(A) excepts debts obtained by fraud upon a showing of "(1) misrepresentation(s), fraudulent omission(s), or deceptive conduct; (2) knowledge of the falsity or deceptiveness of such representation(s), omission(s), or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor; and (5) damage to the creditor proximately caused by its reliance. *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir.2010); *In re Weinberg*, 410 B.R. at 35." *In re Shannon*, 553 B.R. 380, 388 (9th Cir. BAP 2016).

"Section 523(a)(2)(B) excepts debts from discharge where the debt was 'obtained by-... (B) use of a statement in writing-(i) that is materially false;(ii) respecting the debtor's or an insider's financial condition;(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and(iv) that the debtor caused to be made or published with intent to deceive...." *In re Candland*, 90 F.3d 1466, 1469 (9th Cir. 1996), as amended (Oct. 2, 1996).

Where the fraud that forms the basis of discharge exception litigation occurred in conjunction with the extension of the maturity date of loan, proximate cause requires that creditor show "that it had valuable collection remedies at the time it agreed to renew its commitment to the debtor, and that those remedies later became worthless." *In re Siriani*, 967 F.2d 302, 305 (9th Cir. 1992), as amended (June 29, 1992) (11 U.S.C. § 523(a)(2)(B); *Antioch Community Federal Credit Union v. Pagnini (In re Pagnini)*, 2012 WL 5489032 (9th

Cir. BAP November 13, 2012) (11 U.S.C. § 523(a)(2)(A); *Hillsman v. Escoto (In re Escoto)*, 2015 WL 2343461 (9th Cir. BAP May 15, 2015) (11 U.S.C § 523(a)(2)(A)).

DISCUSSION

Sterling Pacific moves for summary judgment based solely on 20 Requests for Admission, which are deemed admitted by the Kemmer's's failure to respond to them. Fed. R. Civ. P. 36(a)(3).

The complaint alleges four categories of collection rights Sterling Pacific lost as a result of the misrepresentations "(i) the assessment of the 'maximum rate' of interest allowed; (ii) assessment of late fees; (iii) liquidated damages for each missed payment; (iv) commencement of foreclosure proceedings . . ." Complaint at ¶ 19.

Sterling Pacific has not made an adequate showing of the nexus between the representation and its alleged loss. The inadequate showing comes in two flavors. The first is actual causation. The problem is the Requests for Admission, on which the summary judgment is based, are not confined to the period, i.e. September 1, 2015, through October 10, 2015, when the extension was negotiated. Rather, each of the Requests for Admission tied to a misrepresentation are directed at the period from August 1, 2014, through October 1, 2015. Exh. A (Request for Admission Nos. 1-7) in Support of Motion for Summary Judgment, December 7, 2016, ECF # 35. As a result, the court is unable to ascertain whether the misrepresentations have a causal link to the decision to extend the maturity date of the loan. This alone would preclude granting summary judgment.

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Request for Admission No. 17, which purports to address the proximate cause problem, does not do so. It is true that a Request for Admission may encompass ultimate facts. Fed. R. Civ. P. 36(a)(1)(A); see *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 937 n. 4 (9th Cir. 1994). Request for Admission No. 17 provides, "Admit that your representations were the proximate cause of Plaintiff's damages." But the word "representation" in the Request for Admission is a defined term and means "those matters set forth in Requests for Admission nos. 1 through 7." Exh. A at p. 5, ¶ 10 in Support of Motion for Summary Judgment, December 7, 2016, ECF # 35. Request for Admissions No. 1-7 each refer to a timeframe of August 1, 2014, through October 9, 2015. This encompasses both the original decision to lend credit and also the loan extension. As a result, Sterling Pacific has not carried its burden on proximate cause and the motion will be denied.

7. [15-10966](#)-A-7 RODNEY HARON CONTINUED STATUS CONFERENCE RE:
[15-1124](#) COMPLAINT
HAWKINS V. HARVEYS TAHOE 10-18-15 [[1](#)]
MANAGEMENT COMPANY, INC.
DISMISSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

8. [15-10966](#)-A-7 RODNEY HARON CONTINUED STATUS CONFERENCE RE:
[15-1127](#) COMPLAINT
HAWKINS V. PARIS LAS VEGAS 10-18-15 [[1](#)]
OPERATING COMPANY, LLC
DISMISSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

9. [16-11674](#)-A-7 JEFF/MICKI PRINS CONTINUED STATUS CONFERENCE RE:
[16-1094](#) COMPLAINT
MANFREDO V. PRINS 9-27-16 [[1](#)]
HILTON RYDER/Atty. for pl.

Final Ruling

The status conference is continued to March 22, 2017, at 10:00 a.m. In the event that the case has not been dismissed or a judgment entered, not later than 14 days prior to the continued hearing, the parties shall file a joint status report.

10. [16-11674](#)-A-7 JEFF/MICKI PRINS CONTINUED STATUS CONFERENCE RE:
[16-1095](#) COMPLAINT
MANFREDO V. BALAKIAN ET AL 9-27-16 [[1](#)]
HILTON RYDER/Atty. for pl.

Final Ruling

The status conference is continued to March 22, 2017, at 10:00 a.m. In the event that the case has not been dismissed or a judgment entered, not later than 14 days prior to the continued hearing, the parties shall file a joint status report.

11. [15-11079](#)-A-7 WEST COAST GROWERS, INC. STATUS CONFERENCE RE: COMPLAINT
[16-1101](#) A CALIFORNIA CORPORATION 10-26-16 [[1](#)]
HAWKINS V. RDX, INC.
HAGOP BEDOYAN/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.