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: **WEDNESDAY**
DATE: **JANUARY 27, 2016**
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. 13-17444-A-7 A & A TRANSPORT, CO., INC. — CONTINUED STATUS CONFERENCE RE: COMPLAINT
15-1072 — 6-2-15 [1]
MANFREDO V. ADAMS
DAVID JENKINS/Atty. for pl.

No tentative ruling.

2. 14-15856-A-7 SOHIL ESCHEIK — STATUS CONFERENCE RE: COMPLAINT
15-1029 — 3-16-15 [1]
NEXTGEAR CAPITAL, INC. V. ESCHEIK
MATTHEW QUALL/Atty. for pl.
DISMISSED, RESPONSIVE PLEADING

No tentative ruling.

3. 11-17165-A-7 OAKHURST LODGE, INC., A CALIFORNIA CORPORATION — CONTINUED STATUS CONFERENCE RE: COMPLAINT
15-1017 — 2-11-15 [1]
OAKHURST LODGE, INC. V. FIRST-CITIZENS BANK & TRUST
DONNA STANDARD/Atty. for pl.

[This matter will be called subsequent to First-Citizens Bank & Trust's motion to dismiss, FCB-1.]

No tentative ruling.

4. 11-17165-A-7 OAKHURST LODGE, INC., A CALIFORNIA CORPORATION — CONTINUED MOTION TO DISMISS FIRST-CITIZENS BANK & TRUST COMPANY
15-1017 — 8-6-15 [24]
OAKHURST LODGE, INC. V. FIRST-CITIZENS BANK & TRUST
AARON MALO/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding, Rule 12(b)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part, denied in part
Order: Civil minute order

Defendants First Citizens Bank & Trust Company ("FCB") and Total Lender Solutions, Inc. ("TLS") move under Rule 12(b)(6) to dismiss the complaint filed by plaintiff Oakhurst Lodge, Inc. ("OLI"), which initiated this adversary proceeding. OLI contends that the defendants violated the stay of 11 U.S.C. § 362 by foreclosing and reselling to Oakhurst Lodge, LP ("OLL") a motel located at 40302 Highway 41, Oakhurst, California ("the lodge") and, on that basis, filed an

adversary proceeding for quiet title, cancellation of instruments, constructive trust, intentional infliction of emotional distress and negligent infliction of emotional distress. *Oakhurst Lodge, Inc. v. First-Citizens Bank & Trust Company et al.*, No. 2015-01017 (Bankr. E.D. Cal. February 11, 2015). OLI opposes FCB and TLS' motion to dismiss.

FACTS

The Debt

As pled, in the early 1980s, OLI acquired the lodge located at 40302 Highway 41, Oakhurst, California. Compl. ¶ 18.

In 2008, OLI borrowed money from Temecula Valley Bank and from FCB. Those loans were secured by first and second deeds of trust, respectively, against the lodge. Complaint ¶¶ 11-12; Combined Disclosure Statement and Plan §§ 6.02-6.03, filed November 9, 2011, ECF # 7; Fed. R. Evid. 201. Later, FCB acquired Temecula Valley Bank. Compl. ¶ 11.

Chapter 11 Bankruptcy

In June 2011, OLI sought the protections of the bankruptcy court by filing a petition under Chapter 11. Compl. ¶ 16.

In November 2011, OLI filed a Combined Disclosure Statement and Plan. Plan, filed November 9, 2011, ECF # 79; Fed. R. Evid. 201. Three articles of the plan are significant here. First, Article V "Treatment of Claims and Interests Under the Plan." treats the FCB loans and deeds of trust. Section 6.02 [sic] of Article V addressed the loan originally made by Temecula Valley Bank and treated it in "Class 2.2-First Citizens Bank & Trust Company (First)." Class 2.2 provided:

> 6.02.1 Class Description. Class 2.2 consists of the secured claim of First Citizens Bank & Trust Company ("First Citizens"). Debtor estimates the amount of the claim as of the date of filing to be $2,306,600. This claim is secured by a first deed of trust on the real property owned by Debtor in Madera County, APN's 064-062-035 and 064-062-034.
>
> 6.02.2 Impairment and Voting. This class is impaired under the Plan; consequently, the holders are entitled to vote on the Plan.
>
> 6.02.3 Treatment. The Class 2.2 claim will be modified as follows: (1) the claim shall accrue interest at the rate of six percent (6%) per annum after the Effective Date of the Plan, (2) payments on the claim shall be reamortized over 22 years, (3) beginning in the month following the Effective Date of the Plan, principal and interest payments shall be $15,755.80 per month, and (4) the maturity date shall be May 2, 2033 (the contractual maturity date for the loan) at which time the entire principal balance shall be due and owing. The Class 2.2 Claim holder shall

> retain its lien(s) until all class 2.2 payments required by this Plan have been made.

Section 6.03 of the plan focused on the loan originally made by FCB and treated it in "Class 2.3-First Citizens Bank & Trust Company (Second)." Class 2.3 provided:

> 6.03.1 Class Description. Class 2.3 consists of the secured claim of First Citizens Bank & Trust Company. Debtor estimates the amount of the claim as of the date of filing to be $780,830.32. This claim is secured by a second deed of trust on the real property owned by Debtor in Madera County, APN's 064-062-035 and 064-062-034.
>
> 6.03.2 Impairment and Voting. This class is impaired under the Plan; consequently, the holders are entitled to vote on the Plan.
>
> 6.03.3 Treatment. The Class 2.3 claim will be modified as follows: (1) the claim shall accrue interest at the rate of six percent (6%) per annum after the Effective Date of the Plan, (2) payments on the claim shall be reamortized over 22 years, (3) beginning in the month following the Effective Date of the Plan, principal and interest payments shall be $5,333.65 per month, and (4) the maturity date shall be May 2, 2033 (the contractual maturity date for the loan) at which time the entire principal balance shall be due and owing. The Class 2.2 Claim holder shall retain its lien(s) until all class 2.3 payments required by this Plan have been made.

Second, Article VI is titled "Implementation of the Plan." Section 7.03 [sic] of Article VI reserves the debtor's right to pursue claims, including post-confirmation stay violations (as has been alleged here):

> 7.03 Preservation of Claims and Rights. Except as expressly set forth herein, nothing in this Plan shall be deemed to constitute a waiver of the powers of the Debtor as a debtor in possession under the Bankruptcy Code, the Bankruptcy rules [sic] or the Local Rules and *the Debtor and the Reorganized Debtor as applicable shall retain after the Confirmation Date and after the Effective Date all powers granted by the Bankruptcy Code, the Bankruptcy Rules and Local Rules . . . .Except as otherwise provided in the Plan or the Confirmation Order, the Debtor and the Reorganized Debtor reserve any and all of their Claims and rights against any and all third parties, whether such Claims arose before, on or after the Petition Date, the Confirmation Date, the Effective Date and/or the Distribution Date.* (emphasis added).

Third, and finally, Article XIV is titled "Effect of Confirmation." Most significant for the purposes of this adversary proceeding is

Section 15.01 [sic] of Article XIV. It provided:

> Revesting of Assets. *Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered.* As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the Bankruptcy Code and the Bankruptcy Rules, other than the obligations set forth in this Plan. (emphasis added).

The plan also defined the date when the discharge would issue. Section 15.02 [sic] provided:

> Discharge. Except as provide [sic] in the Plan or the Confirmation Order, the rights afforded under the Plan and the treatment of Claims and Equity Interests under the Plan are in exchange for and in complete satisfaction, discharge, and release, of all Claims. Pursuant to 11 U.S.C. § 1141(d)(5), after Debtor has completed all payments under the Plan, Debtor will be discharged from all Claims and other debts that arose before the Effective Date, and all debts of the kind specified in Section 502(g), 502(h) or 502(i) of the Bankruptcy Code . . . . Debtors shall bring a motion for entry of discharge and shall supply evidence in support of that motion demonstrating that Debtor has completed all payments under the Plan and has otherwise met the requirements for entry of discharge.

In February 2012, the court confirmed OLI's chapter 11 plan. Order Confirming Debtor's Plan of Reorganization, filed February 29, 2012, ECF # 124; Fed. R. Evid. 201. Section 6.02, 6.03, 7.03, 15.01 and 15.02 were not modified by the confirmation order. FCB approved the form of the confirmation order by its then attorney Reid H. Everett.

Neither FCB, nor TLS, ever sought stay relief against OLI or against the estate to foreclose on the lodge. Fed. R. Evid. 201.

OLI has never sought, nor received, a discharge. Fed. R. Evid. 201.

FCB Foreclosure

In July 2012, FCB substituted TLS as the trustee under the two deeds of trust and caused a Notice of Default to be recorded. Compl. ¶¶ 4, 13 and Exh. 5.

In early October 2012, FCB and TLS recorded a Notice of Sale. Compl. ¶ 14 and Exh. 6. The sale was noticed for late October 2012.

In December 2012, at FCB's request, TLS conducted a Trustee's sale of the lodge. Compl. ¶ 15 and Exh. 7. FCB was the successful bidder.

In early January 2013, FCB commenced an unlawful detainer action against OLI. *First Citizens Bank & Trust Company v. Oakhurst Lodge, Inc.*, No. MCV062330 (Madera County Superior Court January 4, 2013). Compl. ¶ 19(E).

Conversion to Chapter 7

Still later in January 2013, upon the motion of the United States Trustee the case was converted to Chapter 7. Motion to Dismiss or Convert, filed Nov. 8, 2012, ECF #141; Order Converting Case, filed Jan. 11, 2013, ECF # 174; Fed. R. Evid. 201. Robert Hawkins was appointed the trustee. Appointment of Robert Hawkins, January 15, 2013, ECF # 179; Fed. R. Evid. 201.

In February 2013, Hawkins filed a "Notice of Intent to Abandon" the lodge. Notice of Intent to Abandon, filed Feb. 14, 2013, ECF # 182; Fed. R. Evid. 201. Creditors and other parties in interest were given 15 days to object to the abandonment. Receiving no objection, Hawkins filed a Notice of Abandonment fifteen days later. Notice of Abandonment, filed March 1, 2013, ECF # 187; Fed. R. Evid. 201.

In mid-April 2013, OLI, though represented by counsel, filed two objections to the abandonment. Objection to Abandonment (unsigned), filed Apr. 18, 2013, ECF # 194; Objection to Abandonment (signed), filed Apr. 18, 2013, ECF # 194; Fed. R. Evid. 201. Because these objections were filed 53 days after the property was abandoned, they were of no force or effect.

Dismissal of Chapter 7

When OLI failed to provide documents and to attend the meeting of creditors, Hawkins moved to dismiss the case. Motion to Dismiss, filed Apr. 18, 2013, ECF # 189; Fed. R. Evid. 201.

In May 2013, Hawkins filed a Report of No Distribution. Rpt. of No Distrib., filed May 31, 2013; Fed. R. Evid. 201.

In early June 2013, the case was dismissed and closed soon thereafter. Compl. ¶ 16; Order Dismissing Case, filed June 1, 2013, ECF # 16; Order Closing Case, filed June 19, 2013, ECF # 223; Fed. R. Evid. 201.

Post-closure Events

One year later, in June 2014, OLI recorded a lis pendens against the lodge. Comp. ¶ 5.

In August 2014, FCB sold the lodge to OLL. Compl. ¶¶ 5, 17.

In early 2015, OLI moved to reopen its bankruptcy. Motion to Reopen, filed Feb. 11, 2015, ECF # 224; Fed. R. Evid. 201. That order was later revoked. Order to Show Cause, filed September 28, 2015, ECF # 227; Order, filed Nov. 24, 2015, ECF ECF # 236; Fed. R. Evid. 201.

PROCEDURE

In June 2013, OLI brought suit against FCB. *Oakhurst Lodge, Inc. v. First-Citizens Bank & Trust Company et al.*, No. MCV063473 (Madera County Superior Court January 26, 2013). First Citizens Bank & Trust Company's Request for Judicial Notice, Exh. 1, filed August 6, 2015, ECF # 26; Fed. R. Evid. 201. OLI pled causes of action for quiet

title, cancellation of instruments, injunctive relief, and constructive trust, all emanating from FCB's alleged violation of the stay. Compl. ¶¶ 16, 21, in *Oakhurst Lodge, Inc. v. First-Citizens Bank & Trust Company et al.*, No. MCV063473 (Madera County Super. Ct. Jan. 26, 2013). FCB filed a demurrer to the complaint, which the Madera County Superior Court sustained with leave to amend. First Citizens Bank & Trust Company's Request for Judicial Notice, Exhs. 3 & 4, filed August 6, 2015, ECF # 26; Fed. R. Evid. 201.

In October 2014, OLI filed its First Amended Complaint. First Citizens Bank & Trust Company's Request for Judicial Notice, Exh. 5, filed August 6, 2015, ECF # 26; Fed. R. Evid. 201. FCB demurred again and the court sustained that demurrer with leave to amend. First Citizens Bank & Trust Company's Request for Judicial Notice, Exhs. 6 & 10, filed August 6, 2015, ECF # 26; Fed. R. Evid. 201.

In April 2015, OLI filed its Second Amended Complaint. First Citizens Bank & Trust Company's Request for Judicial Notice, Exh. 11, filed Aug. 6, 2015, ECF # 26; Fed. R. Evid. 201. And again, FCB demurred, which the court appears to have sustained with leave to amend. First Citizens Bank & Trust Company's Request for Judicial Notice, Exh. 12 & 14, filed Aug. 6, 2015, ECF # 26; Fed. R. Evid. 201.

Insofar as this court is aware, the Madera Superior Court action remains unresolved.

DISCUSSION

Legal Standards

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Rooker-Feldman Doctrine

"The *Rooker-Feldman* doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments." *Reusser v. Wachovia Bank*, N.A., 525 F.3d 855, 858–59 (9th Cir. 2008) (citing *Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007)); see also *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482–86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923). The Ninth Circuit has "recognized that [t]he clearest case for dismissal based on the *Rooker–Feldman* doctrine occurs when a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008) (alteration in original) (quoting *Henrichs*, 474 F.3d at 613 (9th Cir. 2007)) (internal quotation marks omitted).

The Ninth Circuit has further held that *Rooker-Feldman* applies not only to claims directly contesting the merits of a state court judgment, but also to "de facto appeals" that in essence seek review of state court judgments. *Id.* at 859. A de facto appeal seeks adjudication of a claim or issue that would effectively "undercut the state ruling." *Id.* Thus, the *Rooker-Feldman* doctrine prevents a federal trial court from having subject matter jurisdiction over such adjudication. *See id.*

Ordinarily, the *Rooker-Feldman* doctrine has "little or no application to bankruptcy proceedings that invoke substantive rights under the Bankruptcy Code or that, by their nature, could arise only in the context of a federal bankruptcy case." *See Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 871 (9th Cir. 2005). However, the bankruptcy court's determination of substantive rights under the Bankruptcy Code should be distinguished from a review of the merits of a state court judgment that would undercut the state court judgment. *See Roussos v. Michaelides (In re Roussos)*, 251 B.R. 86, 95 (B.A.P. 9th Cir. 2000).

The *Rooker-Feldman* doctrine has no application to this proceeding. OLI does not request relief from a state-court judgment. OLI does not attack or seek review of a state court judgment that will be undercut by a ruling by this court in the plaintiff's favor.

Instead, OLI invokes substantive rights under the Bankruptcy Code that by their nature only arise in the context of a bankruptcy case. "[B]y virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay. The States cannot, in the exercise of control over

local laws and practice, vest State courts with power to violate the supreme law of the land. Thus, the *Rooker-Feldman* doctrine is not implicated by collateral challenges to the automatic stay in bankruptcy. A bankruptcy court simply does not conduct an improper appellate review of a state court when it enforces an automatic stay that issues from its own federal statutory authority." *In re Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000) (footnotes and citations omitted) (internal quotation marks omitted).

Accordingly, the bankruptcy court has exclusive jurisdiction to decide the issue whether the defendants violated the stay, and the effect of such violations. The *Rooker-Feldman* doctrine would not preclude this court from having the final authority regarding enforcement of the automatic stay—despite the existence of a countervailing state court determination on the issue.

Stay Violation

OLI has not expressly brought a claim for contempt based on a stay violation. But because a stay violation is alleged as the factual basis of each of the causes of action pled, *see* Compl. ¶¶ 16, 19(A),(D), 22, 23, 26, 30-32, the court will address the question whether OLI has, in fact, pled a violation of the stay, 11 U.S.C. § 362.

Preliminary Considerations

The resolution of this matter depends on three fundamental principles of bankruptcy law. First, the scope and applicability of the stay under 11 U.S.C. § 362 are matters within the sole and exclusive jurisdiction of the federal courts. 28 U.S.C. §§ 157(b)(2)(G), 1334(a); *In re Gruntz v. City of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1083 (9th Cir. 2000) (en banc); *Yellow Express, LLC v. Dingley (In re Dingley)*, 514 B.R. 591, 597 (9th Cir. BAP 2014). State courts lack concurrent jurisdiction over the scope and applicability of the stay. *Dingley*, 514 B.R. at 597. The *Gruntz* court stated: "In sum, by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." *Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000) (footnote and citation omitted) (internal quotation marks omitted).

Second, conversion, dismissal or closure of the case does not moot the stay violation or deprive this court of jurisdiction. *Davis v. C.G. Courington (In re Davis)*, 177 B.R. 907 (1995) (dismissal of underlying case does not moot stay action for damages flowing from the violation and does not deprive the court of jurisdiction). One bankruptcy treatise explains this principle in the dismissal context: "Dismissal of a bankruptcy case after the stay has been violated does not undo or vacate the violation. The right of the debtor/bankruptcy estate to pursue the violator for damages *survives* dismissal. [*In re Davis* (9th Cir. BAP 1995) 177 BR 907, 911-912—bankruptcy court retains jurisdiction over claim for violation of stay; *In re Johnson* (10th Cir. BAP 2008) 390 BR 414, 419—damages caused by willful violation of automatic stay "do not evaporate once the stay is no longer in force"]." March, Ahart & Shapiro, California Practice Guide: Bankruptcy § 8:875 (Rutter Group 2015).

Third, and finally, a confirmed plan binds all parties. 11 U.S.C.

§ 1141(a). But more importantly, neither conversion, nor dismissal, changes the binding nature of the plan. *In re Laing*, 31 F.3d 1050, 1051 (10th Cir. 1994). As one commentator notes, "Most courts hold a confirmed plan is *res judicata* as to debtor and creditor rights under the plan, even where the Chapter 11 case is not consummated and is subsequently converted to another Chapter. [*In re Laing* (10th Cir. 1994) 31 F3d 1050, 1051 (conversion to Chapter 7); but see *Matter of Silver Mill Frozen Foods, Inc.* (BC WD MI 1982) 23 BR 179, 183—where plan provided for conversion upon default, creditors not limited to plan provisions but were entitled to all Chapter 7 rights and protections]." March, Ahart & Shapiro, *supra*, §§ 5:1962, 5:2294.

Automatic Stay's Nature and Effect

In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The stay has two distinct parts: (1) an in personam component, which protects the debtor, 11 U.S.C. § 362(a)(1), (6)-(7); and (2) an in rem component, which protects property of the estate, 11 U.S.C. § 362(a)(2)-(5). The particular acts that are prohibited by the stay are described in 11 U.S.C. § 362(a), which provides:

"Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a

taxable period ending before the date of the order for relief under this title." 11 U.S.C. § 362(a).

Ninth Circuit authority is clear; acts taken in violation of the stay are void. "The Ninth Circuit follows the majority view in holding that acts in violation of the automatic stay are void (not merely voidable). [See *In re Gruntz* (9th Cir. 2000) 202 F3d 1074, 1081-1082—because judicial proceedings in violation of stay are void, bankruptcy court not obligated to extend full faith and credit to such judgments; *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n* (9th Cir. 1993) 997 F2d 581, 586—actions taken by state agency to dissolve debtor corporation while stay was in effect were void]. "Void" acts have no force or effect and cannot be cured or ratified. As a result, the debtor/estate does not have to take any action to "undo" the act. [*In re Schwartz* (9th Cir. 1992) 954 F2d 569, 571]." March, Ahart & Shapiro, *supra*, § 8:35. An exception exists for good faith purchasers. "Exception—postpetition real property transfers to "good faith purchasers": The Code excepts from the automatic stay transfers that are "not avoidable under section 544 and … not avoidable under section 549." [11 USC § 362(b)(24); ¶8:760]A debtor's postpetition transfer of real property of the bankruptcy estate to a good faith purchaser without knowledge of the bankruptcy falls within the scope of this exception. [In re Tippett (9th Cir. 2008) 542 F3d 684, 688-690—debtors' unauthorized postpetition sale of real property to BFP not void (but transfer would have been avoidable under § 549 had trustee recorded bankruptcy petition in county where real property was located). . . ." Id. at 8:37.

Duration of the Automatic Stay

The duration of the stay is well-known:

"Except as provided in subsections (d), (e), (f), and (h) of this section—
(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2) the stay of any other act under subsection (a) of this section continues until the earliest of--
(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied . . . ."

11 U.S.C. § 362(c)(1).

Duration of the In Personam Stay as to OLI

As to OLI, the stay arose on the petition date, June 22, 2011. It evaporated when the Chapter 7 case was dismissed on June 1, 2013. Order Dismissing Case, filed June 1, 2013, ECF # 220.

Duration of the In Rem Stay as to the Lodge

As to the lodge, which was property of the estate, *see* 11 U.S.C. § 541(a), the stay arose on the petition date, June 22, 2011, and evaporated no earlier than March 1, 2013, when trustee Hawkins abandoned it. *See* 11 U.S.C. § 362(c)(1). Notice of Abandon., filed Mar. 1, 2013, ECF # 187. Since the alleged violations appear to have

occurred while OLI remained in Chapter 11, the court need not decide whether the Chapter 7 trustee's abandonment on March 1, 2013, 11 U.S.C. §§ 362(c)(1), 554(a), trumps the terms of the confirmed Chapter 11 Plan § 15.01, which provide that property of the estate does not re-vest until discharge.

Two matters warrant discussion. First, contrary to FCB's argument, confirmation did not vest the property in OLI. Section 1141 of the Bankruptcy Code provides, "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1141(b). Here, the plan did provide otherwise. Chapter 11 plan § 15.01 ("Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered. . . .) As a consequence, plan confirmation did not lift the stay. Second, no discharge ever issued so as to trigger re-vesting under § 15.01 of the plan. As a consequence, it was only when trustee Hawkins abandoned the property that it left the estate. 11 U.S.C. § 554(a); Feb. R. Bankr. 6007(a).

Acts That Violate the Stay

No exception to the applicability of the automatic stay under 11 U.S.C. §§ 362(b), (e), (f) or (h) is applicable here. Further, this court issued no order modifying the stay under 11 U.S.C. § 362(d).

This court is able to articulate at least five alleged acts that, if true, probably violated the in personam stay, the in rem stay, or both during the applicable periods in which the stay remained in effect: (1) recordation of the Notice of Default-July 10, 2012; (2) recordation of the Notice of Sale-October 9, 2012; (3) conducting the trustee's sale and FCB's acquisition of title-December 14, 2012; (4) commencement and prosecution of an unlawful detainer action-starting January 4, 2013; and (5) retention of the lodge between the trustee's sale on December 14, 2012, and, at least, the trustee's abandonment on March 1, 2013. Other violations may also exist.

As a consequence, OLI has pled a violation of the stay. 11 U.S.C. § 362.

<u>First Cause of Action: Quiet Title</u>

FCB argues that no quiet title action will lie because it transferred title to OLL prior to the OLI filing the adversary proceeding. Memorandum of Points and Authorities VI(A), filed August 6, 2015, ECF # 25.

The argument fails because (1) FCB held title between the date of the trustee's sale (December 14, 2012) at which FCB acquired title and the date FCB sold the property to OLL (August 14, 2014); and (2) OLI seeks to quiet title as of the trustee's sale (December 14, 2012). Compl. ¶¶ 5, 15, 19(D). It is unquestionably true that a quiet title action will not lie against a defendant who does not and, as of the date on which a determination is sought, did not have an interest in the property. *West v. JP Morgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 802-803 (2013) (beneficiary was not the successful bidder at the foreclosure sale). That is not the case here. FCB was the successful bidder. Compl. ¶ 15 & Exh. 7. As a result, OLI has stated a cause of action for quiet title and the motion will be denied as to the first cause of action.

Second Cause of Action: Cancellation of Instruments

Aside from arguments that no stay existed, FCB offers no argument addressing the second cause of action for cancellation of instruments. As a result, OLI has stated a cause of action for cancellation of instruments and the motion will be denied as to the second cause of action.

Third Cause of Action: Constructive Trust

FCB advances the same argument that it brought to challenge OLI's first cause of action for quiet title, i.e., that no cause of action will lie because it transferred title to OLL prior to the date that OLI filed the adversary proceeding. Mem. P. & A. VI(B), filed Aug. 6, 2015, ECF # 25.

"The creation of a constructive trust requires that: (1) there be a res—some property or interest in property, which includes real property, a promissory note, or cash; (2) the plaintiff has a right to the res; and (3) the defendant acquired the res wrongfully." 12 Miller & Starr, *California Real Estate* § 40:116 (4th ed.). FCB's acquisition of title by foreclosure sale on December 14, 2012, in violation of the stay, if proven, would satisfy each of these three elements.

That FCB sold the property to OLL prior to the date OLI filed this adversary proceeding does not remove FCB's liability, if proven because a constructive trust may attach to proceeds. *Shahood v. Cavin*, 154 Cal. App. 2d 745, 750, 316 P.2d 700 (2d Dist. 1957) (proceeds from sale of the property); 12 Miller & Starr, *California Real Estate*, Constructive and Resulting Trusts, Requirements to Enforce the Trust § 40:116 (4th ed.). Because FCB sold the property to OLL, Compl. ¶ 5 & Exh. 1 (grant deed for consideration), the proceeds of the sale would be subject to a constructive trust, if the lodge itself would otherwise have been subject to it. As a result, OLI has adequately pled the requisites for the remedy of constructive trust, and the motion will be denied as to the third cause of action.

Fourth and Fifth Causes of Action: Intentional/Negligent Infliction of Emotional Distress

FCB argues that OLI has failed to state a cause of action upon which relief can be granted. It argues that (1) the cause of action for intentional infliction of emotional distress fails to plead the underlying facts as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and (2) the negligent infliction cause of action does not plead duty or breach, as required by *Slaughter v. Legal Process & Courier Serv.*, 162 Cal. App. 3d 1236, 1249 (1984). Mem. P & A. at 9-11, filed Aug. 6, 2012, ECF # 25. This court agrees that the complaint fails to state at cause of action but for reasons other than those specified by FCB.

Contempt Is OLI's Remedy

Stay violations must be addressed by an adversary proceeding under 11 U.S.C. § 362(k) or a motion for civil contempt, Fed. R. Bankr. P. 9020. *In re Hackard & Holt*, 2014 WL 4966563 * 7 (Bankr. E.D. Cal. Oct. 3, 2014). Unlike individuals, who hold a cause of action under § 362(k), corporations and partnerships are limited to enforcing the

stay and remedying violations of the stay through contempt proceedings. "Corporations/partnerships not eligible: An "individual" means a natural person. Thus, a debtor that is a corporation, partnership or other 'artificial entity' is not eligible for § 362(k) damages. (However, a corporate or similar debtor could seek damages for contempt under 11 USC § 105(a)[citation omitted] [*In re Goodman* (9th Cir. 1993) 991 F2d 613, 619-620; *In re Just Brakes Corporate Systems, Inc.* (8th Cir. 1997) 108 F3d 881, 884-885; *In re Spookyworld, Inc.* (1st Cir. 2003) 346 F3d 1, 7-9." March, Ahart & Shapiro, *supra*, § 8:872). "As discussed, § 362(k) damages are awardable only to an 'individual' [citation omitted]. Thus, civil contempt is the exclusive remedy for corporations, partnerships and other 'nonindividual' debtors who suffer injury from a stay violation." *Id.* at § 8:914.

Confining debtors or the trustee to either § 362(k) or contempt, rather than allowing injured parties to proceed under 11 U.S.C. § 105(a) or common-law remedies is entirely consistent with applicable Ninth Circuit law. *Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 14-15 (9th Cir. BAP 2002) ("Debtor was appropriately awarded actual damages for the stay violation under § 362(h), and therefore the statutory remedy was Debtor's exclusive remedy."); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002) (regarding private action to enforce discharge injunction, "§ 105(a) authorizes only such remedies as are 'necessary or appropriate to carry out the provisions of this title'"). Because OLI was a corporation its remedy would ordinarily be for civil contempt.

Contested Matter vs. Adversary Proceeding

Ordinarily, civil contempt is prosecuted as a contested matter. Federal Rule of Bankruptcy Procedure 9020 provides, "Rule 9014 [contested matters] governs a motion for an order of contempt made by the United States trustee or a party in interest." In most instances, a party may not pursue civil contempt by an adversary proceeding. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186 (9th Cir. 2011). But exceptions exist.

Exception No. 1: Where an Adversary Proceeding is Otherwise Required

One exception to the *Barrientos* rule is where a single set of operative facts requires an adversary proceeding, Fed. R. Bankr. P. 7001, and also gives rise to civil contempt; in such cases, the civil contempt may be raised by adversary proceeding. *Jahr v. Donald R. Frank (In re Jahr)*, 2012 WL 3205417 (9th Cir. BAP 2012).

Here, an adversary proceeding would be required. "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: (1) *a proceeding to recover money or property*, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002; (2) *a proceeding to determine the validity, priority, or extent of a lien or other interest in property*, other than a proceeding under Rule 4003(d) . . . . (7) *a proceeding to obtain* an injunction or *other equitable relief*, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief . . . (9) *a proceeding to obtain a declaratory judgment relating to any of the foregoing* . . . ." Fed. R. Bankr. P. 7001(a)(1)-(2),(7),(9). OLI's pleadings include claims for quiet title and cancellations of instruments, which easily qualify under Rule 7001 as

matters for which an adversary proceeding would be required. And for that reason alone, civil contempt may be sought in the adversary proceeding.

Alternatively, joinder may occur under Federal Rule of Civil Procedure 18 (joinder of claims), incorporated by Federal of Civil Procedure 7018. And while joinder of claims is ordinarily not proper in contested matters, such as a contempt proceeding, this court may order that the joinder rules be applicable. Fed. R. Bankr. P. 9014(c) (omitting Rule 7018 but providing that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order. . . ."). And the court would so order if necessary in this case.

Exception No. 2: No Prejudice

Additionally, absent prejudice civil contempt may be raised by adversary proceeding. *In re Oh*, 2008 WL 8448837 *9 (9th Cir. BAP April 16, 2008). As that court stated:

"While such proceedings may be initiated by motion pursuant to Fed. R. Bankr. P. 9020, there has been no prejudice to Wesley in receiving the more elaborate procedures of an adversary proceeding. This rule also disposes of Wesley's contention that the debtor's adversary proceeding was procedurally improper. The Ninth Circuit has held that contempt sanctions may be awarded even in circumstances where a debtor has failed to file a formal claim for such damages. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir.2002). 'So long as a party is entitled to relief, a trial court must grant such relief despite the absence of a formal demand in the party's pleadings.' *Id.* The debtor's claim for violation of the discharge injunction was properly raised before, and considered by, the bankruptcy court." *Id.*

Here, neither FCB, nor TLS, raise the procedural question, nor argue prejudice. And this court is unable to articulate how the use of an adversary proceeding, which offers the defendants, greater and not lesser protections, prejudices them. As a result, the matter is properly raised in an adversary proceeding.

But because OLI has plead the common law torts of intentional infliction of emotional distress and negligent infliction of emotional distress, and not civil contempt, the court will grant the motion with leave to amend the complaint to plead a cause of action for civil contempt.

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.

First-Citizens Bank & Trust Company and Total Lender Solution's motion to dismiss has been presented to the court,

IT IS ORDERED that the motion is granted as to the fourth and fifth causes of action (intentional infliction of emotional distress and

negligent infliction of emotional distress);

IT IS FURTHER ORDERED that Oakhurst Lodge, Inc. shall have 21 days from the service of this civil minute order to file and serve an amended complaint and redline copy, comparing the amended complaint in the adversary proceeding to the original copy;

IT IS FURTHER ORDERED that all defendants, including Oakhurst Lodge, LP, shall file a responsive pleading or further motion to dismiss not later than 21 days after service of the amended complaint or, in the alternative, expiration of the deadline to do so;

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if the defendant(s), fail to respond within the time specified herein Oakhurst Lodge, Inc. shall forthwith and without delay seek the entry of default of the non-responding party; and

IT IS FURTHER ORDERED that except as expressly provided otherwise herein, the motion is denied.

5. 15-11593-A-7 BRIAN LUONG
15-1095
AMERICAN EXPRESS BANK, FSB V. LUONG
KEN WHITTALL-SCHERFEE/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-23-15 [1]

Final Ruling

At the suggestion of the parties, the matter is continued to March 9, 2016, at 10:00 a.m.