UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 30, 2020 at 11:00 a.m.

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1. **18-27720-E-13** **DAVID RYNDA**
19-2023

RYNDA V. MACHADO ET AL

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
AMENDED COMPLAINT
10-16-19 [72]

Final Ruling: No appearance at the January 30, 2020 Status Conference is required.

Plaintiff's Atty: Tracy L. Wood
Defendant's Atty:
Armando S. Mendez [Elina Machado]
Unknown [Gabriel Machado]

Adv. Filed: 2/11/19
Answer: none [order granting open extension filed 2/27/19]

1st Amd. Cmplt. Filed: 3/3/19
Answer: none
2nd Amd. Cmplt. Filed: 9/17/19
Answer: none
3rd Amd. Cmplt. Filed: 10/16/19
Answer: Elina M. Machado 11/16/19
Counterclaim Filed: 11/16/19
Answer: none

Notes:
Continued from 1/8/20 to be conducted in conjunction with the hearing on the Plaintiff-Debtor's Objection, Motion to Strike, and Motion for Judgment on the Pleadings.

The Status Conference is continued to Thursday, February 13, 2020 at 11:00 a.m.

2. **18-27720-E-13** **DAVID RYNDA** **OBJECTION TO DEFENDANT'S**
19-2023 **TLW-3** **DEMAND FOR TRIAL BY JURY,**
Atty Steven Schultz **MOTION TO STRIKE**
RYNDA V. MACHADO ET AL **11-18-19 [79]**

Final Ruling: No appearance at the January 30, 2020 Hearing is required.

The Hearing for the Objection to Defendant's Demand for Trial is continued to Thursday, February 13, 2020 at 11:00 a.m.

3. **18-27720-E-13** **DAVID RYNDA** **MOTION FOR JUDGMENT ON THE**
19-2023 **TLW-4** **PLEADINGS**
Atty Steven Shultz **11-18-19 [85]**
RYNDA V. MACHADO ET AL

Final Ruling: No appearance at the January 30, 2020 Hearing is required.

The Hearing for the Motion for Judgment on the Pleadings is continued to Thursday, February 13, 2020 at 11:00 a.m.

4. **17-26125-E-7 18-2030** **FIRST CAPITAL RETAIL, LLC** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT 5-17-18 [39]**

FIRST DATA MERCHANT SERVICES LLC V. MCA RECOVERY, LLC ET AL

Plaintiff's Atty: Randye B. Soref; Andrew Joseph Nazar
Defendants' Atty:
Robert S. McWhorter [MCA Recovery, LLC]
Gabriel E. Liberman [First Capital Retail, LLC]
Jeffrey D. Ganz; J. Russell Cunningham [13th Floor/Pilot, LLC]

Adv. Filed: 3/22/18
Answer: 4/23/18 [First Capital Retail, LLC]
Amd. Cmplt. Filed: 5/17/18
Answer: 7/20/18 [13th Floor/Pilot, LLC]
7/20/18 [First Capital Retail, LLC]
7/20/18 [MCA Recovery, LLC]
Amd. Answer: 8/3/18 [MCA Recovery, LLC]
Cross-Claim Filed [by 13th Floor/Pilot, LLC]: 7/20/18
Answer: none
Cross-Claim Filed [by MCA Recovery, LLC]: 8/3/18
Answer: 8/22/18 [13th Floor/Pilot, LLC]
Amd. Cross-Claim Filed [by 13th Floor/Pilot, LLC]: 8/22/18
Answer: 10/23/18 [MCA Recovery, LLC]

Notes:
Continued from 12/12/19 to allow for a final round of negotiations.

The Status Conference is xxxxxxxxxx

5. **19-25461-E-7** **CYNTHIA SANDERS** **MOTION TO DISMISS NAVIENT**
19-2143 **DW-1** **Pro Se** **12-20-19 [6]**
SANDERS V. DEPT. OF EDUCATION/NAVIENT

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor on December 20, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss Adversary Proceeding is xxxxx.

Department of Education, Navient ("Defendant") moves for the court to dismiss all claims against it in Cynthia Sanders's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 21 which allows the court to add or drop a party at any time, or sever any claim against a party and pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(3) service must be provided within seven (7) days after issuance of summons where service of the Summons and the Complaint must be made by mailing a copy of both documents to the attention of an officer, a managing or general agent or to any authorized agent to receive service of process.

APPLICABLE LAW

Federal Court Jurisdiction and Exercise of Federal Judicial Power

STANDARD FOR A MOTION TO DISMISS

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Calhoun v. United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958).

Incorrect Defendant and Ineffective Service

Under Rule 21 of the Federal Rules of Civil Procedure-- Misjoinder and Nonjoinder of Parties, the rule states that "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."

Under Rule 7004 of the Federal Rules of Bankruptcy Procedure, with regards to Process and Service:

> (a) Summons; Service; Proof of Service.(b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
>
> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 7004(b)(3).

REVIEW OF COMPLAINT

The Complaint states the following grounds:

A. Plaintiff-Debtor filed Chapter 7 Bankruptcy on August 30, 2019.

B. Department of Education, Navient was listed by Plaintiff-Debtor in Schedule F of the petition showing an amount owed of $66,500 as of 7/2019.

C. The debt was incurred to pay educational expenses beginning in 2011.

D. Plaintiff-Debtor's teacher license expired and is not currently certified to teach in California.

E. Re-certification requires continued education costs of about $45,000 and courses are not offered in Plaintiff-Debtor's physical location.

F. Plaintiff-Debtor has been unable to obtain or qualify for income higher than minimum wage because of uncertified status. Plaintiff-Debtor cannot maintain a minimal living standard and repay the loan.

G. Districts no longer hire for more than 30 hours per week unless teacher is certificated.

H. Current part-time work paid at $12-$15 hourly results in $1,178 per month.

I. The inability to find sustainable income paying job is likely to continue for a significant portion of the repayment period.

J. Plaintiff-Debtor's full-time position at a private school that did not require a teaching certificate was eliminated due to downsizing.

K. Plaintiff-Debtor has made a good faith effort to repay the debt.

L. Plaintiff-Debtor filed for bankruptcy because of insolvency not just to discharge student loan debt.

M. Plaintiff-Debtor seeks discharge of at least half of loans due to burdensome hardship and seeks relief under 11 U.S.C. § 523(a)(8).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff named "Dept. Of Education/Navient" as defendant.

B. There is no such legal entity named "Dept. Of Education/Navient."

C. Navient is a servicer of certain United States Department of Education (DoE) Direct Stafford Loans on which Plaintiff is liable.

D. As a servicer of the Plaintiff's DoE Loans only, neither Navient Solutions, LLC, nor any of its other related companies, corporations or entities, has any authority to litigate the discharge of Plaintiff's debt owed to the DoE.

DISCUSSION

Plaintiff has filed a separate motion to dismiss on January 27, 2020 (Dckt. 10) with a January 30, 2020 hearing date that was too late to be added to the calendar. The court will take up Debtor's motion as it seems that Debtor agrees that the cased should be dismissed.

~~The Motion to Dismiss Adversary Proceeding is warranted because xxxx. The Motion is granted.~~

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Dismiss Adversary Proceeding filed by Cynthia Sanders ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Dismiss is granted.~~

6. **17-22887-E-7** **SEAN STODDARD** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
19-2119 **9-20-19 [1]**

CARTER ET AL V. STODDARD

Plaintiff's Atty: Steven H. Schultz
Defendant's Atty: Douglas B. Jacobs

Adv. Filed: 9/20/19
Answer: none

Nature of Action:
Dischargeability - other

Notes:
Continued from 1/8/20 to be conducted in conjunction with the hearing on the Motion to Dismiss this Adversary Proceeding.

The Status Conference is xxxxxxxxxx

7. **17-22887-E-7** **SEAN STODDARD** **CONTINUED MOTION TO DISMISS**
19-2119 **DBJ-5** **ADVERSARY PROCEEDING**
Atty Steven Schultz **10-14-19 [9]**

CARTER ET AL V. STODDARD

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Chapter 7 Trustee, and Office of the United States Trustee on October 14, 2019. By the court's calculation, 107 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is xxxxx.

Sean Robert Stoddard ("Defendant") moves for the court to dismiss all claims against it in Patsy and Monty Carter's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint makes the following general allegations:

A. On June 24, 2016, Debtor performed total ankle surgery on Plaintiff.

B. Plaintiff underwent this surgery after Debtor persuaded her with false/misleading reasons.

C. Debtor performed surgery in negligent manner.

D. His negligence resulted in permanent injuries including Plaintiff's leg being amputated.

E. This was preventable had Plaintiff received proper care and treatment,

F. Plaintiff was unaware of the misconduct or that it cause the injury until June 13, 2017.

G. Debtor filed bankruptcy on April 28, 2017. Debtor failed to list Plaintiff even though he was aware of her complications and knew that she was not an appropriate candidate for surgery. Prior to filing, Debtor was aware of his negligence and fraudulent conduct.

H. Debtor performed many other similar and unnecessary surgeries. Other cases include: Caren Scalla, Deborah Gonzalez, and Darell Morris.

I. Debtor talked Plaintiff into inappropriate surgery that would likely fail. Promises of success were false and misleading.

J. Debtor made representation with the intent to defraud. And induced to act in reliance of these promises for profit. Plaintiff's were unaware of Debtor's false misrepresentations.

K. Debtor falsely assured/negligently assured Plaintiff that she would have a successful outcome. However, Debtor knew that Plaintiff was having severe complications and concealed this information.

L. The misconduct resulted in Plaintiff losing her leg.

M. Trustee held the meeting of creditors on June 7, 2017, and later issued a June 8, 2017 deadline fo filing proofs of claim. Plaintiff was not informed of the deadline and had no knowledge of the bankruptcy case.

O. Plaintiff was not listed as a creditor and therefore did not receive the Notice to File Claims that was sent on June 10. 2017.

P. On June 13, 2017, Plaintiff was informed that she had undergone unnecessary surgery and that a surgical error had occurred. Plaintiff was unaware of the bankruptcy cased at this time.

Q. On August 14, 2017, the court issued a discharge injunction in the bankruptcy case.

R. The last day t file a proof of claim was September 8, 2017. The trustee liquidated the assets, issued a final report on February 22, 2018 and the court set a deadline to file objections to the Final Report. Plaintiff were not listed and thus did not receive notice or copy of any of these documents or deadlines.

S. On April 3, 2018, Plaintiff's Counsel sent a medical and billing request to Debtor. On April 4, Debtor's Counsel contacted Plaintiff's counsel and informed him of the bankruptcy and the discharge. The letter asserted that the alleged injury/conduct occurred pre-petition ad this was discharged. The correspondence included a docket

cover page which reflected the discharge but did not state that Debtor's case was an "asset" case. Prior to this April 2018 communication, Plaintiff did not know of the bankruptcy.

T. On May 18, 2018, the court approved Trustee's Final Report. Plaintiff was not served with this report nor afforded the opportunity to object to the distribution nor were they added as creditor despite Debtor and Counsel having knowledge of the claim.

U. On June 25, 2018, the case was closed by the clerk.

V. On September 6, 2018, Plaintiff filed a lawsuit in Butte County Superior Court for medical practice, negligent credentialing, fraud/deceit, and loss of consortium as a result of the injuries and fraudulent medical services provided Debtor.

W. On May 16, 2018, Debtor's Counsel filed an ex-parte motion t reopen the bankruptcy. Neither Debtor nor Counsel served Plaintiff or their counsel with notice of the motion.

X. Debtor file an Amended Schedule F on May 22, 2019.

Y. On May 28, 2019, Debtor's counsel sent a letter to Plaintiff's counsel alleging the debt had been discharged despite having been omitted from the initial schedules and creditor matrix in an asset case.

Z. Plaintiff never notice of any of the bankruptcy case proceedings and thus was denied due process and were prejudiced by lack of notice. Thus, the debt owed to Plaintiff is excepted from discharge.

AA. Debtor took no action regarding putative creditor Plaintiff and on June 24, 2019 the bankruptcy case was closed again.

BB. Trustee distributed funds to the creditors who had filed a proof of claim by the September 8, 2017 deadline. Plaintiff has no notice and therefore were unable to file a proof of claim or object to the discharge or request for dischargeability prior to the deadline.

As to Claim 1: Objection to Dischargeability of Debt pursuant to 11 U.S.C. §§ 523(a)(3)(A), the Complaint alleges the following:

A. Debtor's schedules did not claim nor identify any debt owed to Plaintiff.

B. In *In re Laczko,* the court held that in order for an omitted debt to be discharged, a creditor must have actual knowledge of the bankruptcy. An exception exists where the case is a "no asset" case.

C. Debtor's bankruptcy case was an "asset" case.

D. Plaintiff had no knowledge of the case until well after the expiration date to file a proof of claim. Debtor was aware of his conduct as part of a deceitful and fraudulent pattern and practice.

E. The court should find that Plaintiff's claim was excepted from discharge for failure to receive timely notice.

As to Claim 2: Objection to Dischargeability of Debt, in the alternative, pursuant to 11 U.S.C. § 523(a)(3)(B), the Complaint asserts the following:

A. Debtor knew that the rankle surgery was contraindicated and that it would fail. Debtor knew it would cause serious injuries to Plaintiff.

B. The Ninth Circuit has held that § 523(a)(2) applies to "loss to the creditor [that] the act of fraud itself created." Finding in *Lee-Benner v. Gergely* (*In re Gergely*), 110 F.3d 1448, 1453 (9th Cir. 1997) that an action for alleged intentional misrepresentation of the need for an amniocentesis test fell under § 523(a)(2), even where debt was not for money obtained by fraud, but for damages resulting collaterally from the alleged fraud.

C. Debtor along with others with wrongful and deceitful intent induced Plaintiff to have surgery with a motive for profit.

D. California Civil Code 3294(c)(3) defines fraud as, "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

E. Debtor caused serious injuries to Plaintiff as a result of his misrepresentations.

F. Thus, under § 523(a)(2)(A) Plaintiff's claims should be excepted from discharge.

G. Debtor convinced Plaintiff the surgery would help her with reckless disregard for the risks the surgery would cause to Plaintiff, including the resulting amputation.

H. The Ninth Circuit has interpreted "willful and malicious" as referring to the wrongful act, done intentionally, which necessarily causes injury and is without just cause or excuse."

I. Pursuant to § 523(a)(6), the willful and malicious injury by Debtor to Plaintiff is grounds for an exception to discharge.

J. Debtor continued to assure Plaintiff that the surgery had been successful and that she was progressing well even though Plaintiff was enduing severe complications.

K. Debtor continued making misrepresentation to plaintiff post-surgery and post-petition.

L. In *In re Franklin*, 726 F.2d 606 (10th Cir. 1984), the Tenth Circuit held that the judgment debt arising from a physician's medical malpractice was the result of willful and malicious injury and was therefore non-dischargeable. In that case, the finding was supported by the physician actions consisting of prescribing medications without checking the patient's history, over induction of anesthesia, and the cover-up of records related to the surgery and the subsequent cardiac arrest.

M. Similar to Debtor in this case, the Franklin physician tried to cover up his mistakes in medical treatment in order to avoid liability.

N. Debtor did not notify Plaintiff of the deadline to file a proof of claim or the deadline to file a request for determination of dischargeability.

O. § 523(a)(3)(B) specifically provides that a creditor who did not receive notice or had actual knowledge of the case in time for such timely filing and request is non-dischargeable.

P. Plaintiff had no notice or knowledge of the case until after the deadline had already passed.

Q. The United States Supreme Court has found that notice is essential to the fundamental requirement of due process and the right to be heard.

R. Because Plaintiff were denied reasonable notice and the opportunity to be heard or receive a distribution, the court should find Plaintiff's debt is non-dischargeable.

As for Claim 3: Objection to Dischargeability of Debt, in the alternative, pursuant to 11 U.S.C. § 523(a)(3)(B), the Complaint asserts the following:

A. In determining whether a creditor's claim arose pre-petition, the Ninth Circuit uses the "fair contemplation test. Under this test, a claim arises when claimant can fairly or reasonably contemplate the claim's existence even if a cause of action has not yet accrued under non-bankruptcy law." *Camelback Constr. v. Castellino Villas, A.K.F. LLC* (*In re Castellino Villas, A.K.F. LLC*), 836 F.3d 1028, 2016.

B. Applying the test to this case would result in finding that Plaintiff could not reasonably or fairly contemplate that a claim against Debtor existed until she was informed of the surgical error on June 13, 2018.

C. The court should find that Plaintiff's claim arose post-petition and thus the debt was not discharged.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing

entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

Section 523 of 11 U.S. Code covers exceptions to discharge, namely:

> (a)A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (3)neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

> (A)if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B)if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

11 U.S.C. § 523(a).

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on January 13, 2020. Dckt. 38. Plaintiff argues that a complaint based on 11 U.S.C. § 523(a)(3)(B) is exempted from operation of section 523(c), it is governed by Rule 4007(b)– which means that a Complaint may be filed at any time. Plaintiff asserts that the rule expressly provides that a closed bankruptcy case maybe reopened without payment of a filing fee in order to determine an action to determine dischargeability.

In *Krakowiak v. Lyman*, 166 B.R. 3333(Bankr.S.D.111.1994), the court held that laches nor estoppel applied to action under 11 U.S.C. § 523(a)(3)(B) and Rule 4007(b), and creditor's non-dischargeability action therefore was not time barred.

Plaintiff points out that though the case was reopened Plaintiff was not served any documents related to the re-opening or the amended schedules. Plaintiff did not receive the Trustee's final report. Plaintiff cannot make a claim to any of the Debtor's assets when the estate had already been fully administered and distributed over a year ago.

As in the Complaint, Plaintiff again argues that they timely filed a complaint objecting to the discharge of alleged debt but were precluded from timely filing a proof of claim due to Debtor's failure to list and notify. Debtor's assertion that Plaintiff should be dismissed for failure to file a proof of claim should not be grounds for dismissal as Plaintiff could not have filed a proof of claim by the 2017b deadline since they were unaware of the bankruptcy case until after it was closed.

Plaintiff again reasserts that under F.R.B.P. 4007(b) there was no deadline for the Plaintiff to file an adversarial proceeding to determine dischargeability.

Finally, because Plaintiff did not receive notice of the amended schedules, adding them to the schedule did not cure the prejudice to Plaintiff and Plaintiff were still denied their right to due process.

DEFENDANT-DEBTOR REPLY

Defendant-Debtor filed a Reply on January 20, 2020. Dckt. 42. Defendant-Debtor reasserts that the Adversary Complaint was untimely because they knew of the bankruptcy as early as April 2017

when they received a letter from Debtor's previous counsel., Michael Hays; the case was filed more than two years after the bankruptcy was closed; and Counsel provided them with knowledge by May 2018 that the bankruptcy case had been reopened but failed to take action. Additionally, the Complaint fails to state a cause of action against Debtor-Defendant under any appropriate subsection of 11 U.S.C. § 523 to contest dischargeability of a debt. Plaintiff's allegation that they were not listed in the original petition is not enough to be excepted from discharge.

Defendant-Debtor points out that although the complaint refers to 11 U.S.C. § 523(a)(2), (a)(4), (a)(6), there are no facts to supports allegations of fraud, defalcation or willful and malicious injury. The Plaintiff's allegations refer to negligent practice of medicine and damages that accrue from a negligence claim are dischargeable.

Thus, Defendant alleges, the Complaint fails to state a cause of claim– no grounds for why the debts should not be discharged; Plaintiff failed to timely file their complaint when given notice that they were listed in the Defendant's re-opened case and as such should be barred from proceeding with this action.

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

I. The Complaint should be dismissed pursuant to F.R.B.P. Rule 7012(b) for failure to state a cause of action.

A. The Adversary Complaint alleges that the grounds for objecting to discharge was the failure to list Plaintiff in the original bankruptcy petition.

B. Plaintiff had notice of the bankruptcy at least by May 28, 2019 when Defendant's Counsel sent them the letter informing them of the bankruptcy.

C. Once the bankruptcy was re-opened and they were listed, Plaintiff had the opportunity to file a complaint objecting to discharge and specifying grounds as enumerated 11 U.S.C. § 523(a)(3)(b), yet they failed to do so.

D. The adversary requests denial of Debtor's discharge under 11 U.S.C. § 523(a)(3)(a) and 11 U.S.C. § 523(a)(3)(b) but neither applies as Plaintiffs had notice to file but failed to do so.

E. Though the Complaint alleges fraud, the complaint does not include a claim for fraud as a reason to deny Defendant's discharge of the debt.

F. Therefore, no cause of action is stated and the adversary should be dismissed under F.R.B.P. 7012(b).

II. The Adversary should be dismissed for Plaintiff's failure to timely file a proof of claim or a Complaint objecting to the discharge of the alleged debt.

A. 11 U.S.C. § 523(a) provides that certain debts are not discharged as matter of law, while other are discharged unless the creditor proves that such debts falls within an exception to discharge (11 U.S.C. § 523(a)(2), (4), (6)). Under these exception, the creditor must bring an adversary in order to determine whether the dent os subject to the discharge. Generally, the deadline to file is within 60 days of the date Section 341 Meeting of Creditors is schdule3d in the case. Form 309 specifies a date by which an adversary complaint must be filed.

B. Plaintiff were not listed in the original petition. They had no actual notice. It was unintentional in Debtor's part since he had no notice that Plaintiff had a claim against him. He became aware of the claim when he was served with the state court complaint.

C. Those assertions do not prevent Plaintiff from having to file timely. Under 11 U.S.C. § 523(a)(3)(b), a debt of a kind specified under 11 U.S.C. § 523 (2), (4), or (6) will not be discharged if the Plaintiff has no notice of the bankruptcy in time to file a proof of claim and a timely request for determination of dischargeability of that debt.

D. The bankruptcy was re-opened on May 16, 2019. Plaintiff were informed by May 28, 2019 and that the time to address their claim started running.

E. Plaintiff waited almost four months to bring the present Adversary. Thus, the complaint should be dismissed.

Declaration of Douglas B. Jacobs

Under penalty of perjury, Defendant's Counsel testifies to the following:

A. Debtor hired Counsel on May 1, 2019 to determine the effect of his Chapter 7 bankruptcy on the pending state court action *Carter v. Stoddard, et.al*.

B. After reviewing the case, he noted that Plaintiff was not listed in the bankruptcy schedules and advised Defendant-Debtor accordingly.

C. On April 23, 2019, Counsel called Plaintiff's Counsel and spoke with him about the need to dismiss the state court action as to Debtor. He informed Respondent about his rights regarding the bankruptcy case and that he should seek competent bankruptcy counsel to understand the process.

D. He followed up the phone conversation with a letter to Plaintiff's Counsel on May 6, 2019. (Exhibit E)

E. Counsel reopened Debtor's bankruptcy case on May 16, 2019, and filed an

amendment to Schedule F on May 22, 2019. (Exhibit B)

F. After being unable to reach Plaintiff's Counsel over the phone again, Counsel sent another letter on May 28, 2019 again stating their request that Debtor be dismissed from the state court action. (Exhibit C).

G. Counsel spoke to Plaintiff's Counsel again on July 25, 2019 and understood him to agree to dismiss Defendant-Debtor in return for Debtor not pursuing any rights against the Carters, and agree to a deposition or testify regarding the other defendants in that matter.

H. Counsel called Plaintiff's Counsel the same day to confirm the arrangement after Defendant-Debtor had agreed to submit to a deposition and to testify (without admitting to any wrong-doing) in the state court action.

I. Counsel again sent a letter to Plaintiff's Counsel on August 5, 2019 after not hearing or receiving the state court dismissal. (Exhibit F)

J. After not receiving any further communications from Plaintiff's Counsel, Defendant filed a motion to hold the Plaintiff and Plaintiff's Counsel in contempt for violating 11 U.S.C. § 524(a).

K. Counsel beliefs that in response to his Motion, Plaintiff's Counsel filed the present adversary– five (5) months after knowledge of the bankruptcy and after discussing with him the limited time to file an adversary after the bankruptcy was re-opened.

L. Plaintiff has failed to follow the Rules of Civil Procedure: they have submitted no summons, failed to personally serve Defendant-Debtor, and have made no attempt to prosecute this matter.

M. Plaintiff has also failed to dismiss the state court matter against Defendant.

Exhibits

In support of the Motion, Defendant filed the following Exhibits:

A. Order of Discharge dated August 14, 2017

B. Amended Schedule F filed on May 22, 2019

C. Correspondence from Counsel to Respondent Schultz dated 5/28/2019

D. Official Form 309A- Notice of Chapter 7 Bankruptcy Case

E. Correspondence from Counsel to Respondent Schultz dated 5/6/2019

Exhibit A- Order of Discharge for Debtor

The Order granted a discharge to Debtor as of August 14, 2017. Dckt. 24.

Exhibit B- Amendment to Schedule F

Counsel filed on May 22, 2019 an Amended Schedule F to add pre-petition creditors, namely– Respondents Patsy Carter and Monty Carter, items 4.7 on page 5 of Schedule F.

Exhibit C- May 28 Letter

May 28 Letter informs Mr. Schultz that as confirmed by Movant, four LLCs owned by Movant are defunct entities and have been legally dissolved or abandoned. Thus, the Complaint would be against Movant individually and dba Norcal Foot and Ankle, and against Oroville Hospital.

The letter also states that Movant was unaware of the debt owed to Respondents when he filed bankruptcy. But proceeds to inform Respondent that lack of knowledge does not affect the fact that all unsecured obligations of a Chapter 7 Debtor are included in the case, whether not listed or known.

Additionally, Counsel informs Respondent that they can challenge the discharge but that it must be brought within a specified time– generally 60 days from the date of the Section 341 Meeting of Creditors hearing. Noting that the only exception he knows to this time-line being if the creditor did not know of the bankruptcy. Counsel mentions that the possible applicable subsection to prevent discharge would be section 523(a) and that bankruptcy court is the appropriate venue for such an action.

Counsel also informs Respondent that the bankruptcy case has been reopened to list their dent and that he does not think that Respondent could win a challenge to the discharge and again suggests that Debtor be dismissed from the action and that they proceed against the hospital.

Finally, Counsel notes that Debtor's was an asset case and as such Respondent Carters would be entitled to a share of the distribution given to unsecured creditors, which Debtor would forward upon Respondent Carter's agreement to dismiss Debtor from the complaint.

Exhibit D- Official Form 309A- Notice of Chapter 7 Bankruptcy Case

The Form is the notice provided which states that the petition has been filed for Debtor with a Meeting of Creditors scheduled for June 7, 2017 and a deadline of August 7, 2017 to object to discharge or challenge whether certain debts are dischargeable.

Exhibit E- May 6 Letter

May 6 Letter to Respondents was sent by Douglas B. Jacobs ("Counsel"), attorney for Movant. The letter informs respondents that Debtor will be re-opening his bankruptcy case in order to include the debt owed to respondents. Counsel informs Respondents that absent a showing of negligent acts as intentional and done with malice, their debt will be treat it as unsecured and discharged. The letter also suggests to Respondents that the best way to proceed would be to dismiss with prejudice the complaint against Movant but that it would allow Respondents to proceed against the other defendants involved.

DISCUSSION

xxxxx

8. **17-27397-E-13** **GEVORG/ARMINE POLADYAN** **MOTION FOR PREVAILING PARTY ATTORNEYS' FEES BY THE LAW OFFICE OF CIANCHETTA AND ASSOCIATES FOR PETER CIANCHETTA, PLAINTIFFS ATTORNEY(S)**
12-19-19 [124]

18-2130 **PLC-1**
Peter Cianchetta
POLADYAN ET AL V. TRIVEDI

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney on Defendant 19, 2019. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Attorney's Fees is xxxxx.

Cianchetta and Associates, the Attorney ("Applicant") for Debtor/Plaintiff Gevorg G. Poladyan and Armine Asatruan,("Client"), makes a Request for Attorneys' Fees as the court granted judgment in favor of the Plaintiffs after trial and as such are prevailing parties.

Fees are requested for the period May 2018, through September 2019. Applicant requests fees in the amount of $30,911.85, which accounts for $30,845.00 in attorneys' fees and $66.85 in costs and expenses.

Defendants - Parties in Interest Opposition

Defendant filed an Opposition to the Motion for Attorneys' Fees on January 15, 2020. Dckt. 133. Defendants oppose on the basis that the state court action was not consumer debt. First, Defendant points out that 11 U.S.C. § 523(d) applies to "dischargeability of a consumer debt" and that 11 U.S.C.

§101(8) defines consumer debt as "debt incurred by an individual primarily for a personal, family, or household purpose." Thus, Defendant argues the fees should be denied because the claim held against Debtor-Plaintiff by Defendant was based on the underlying Probate Action and not a consumer debt.

Debtor-Plaintiff Response

Debtor-Plaintiff alleges that the cause of action was based on a mortgage on Debtor's home and thus the allegation was that the consumer mortgage debt was non dischargeable. Thus, Debtor as prevailing party is entitled to attorneys' fees.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney"free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

Prevailing Party and Attorneys's Fees

11 U.S. Code § 523 provides:

> (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

DISCUSSION

Debtor-Plaintiff asserts that while the underlying debt in question was adjudicated not to exist, the Defendants contended it was a debt of the debtors. Thus, Defendants contended to be creditors of Debtor-Plaintiff. As creditors, they fall under 12 U.S.C. § 523 which provides that if a creditor's debt is discharged in favor of the debtor, the court shall grant judgment in favor of the debtor and a reasonable attorney's fee if the court finds that creditor's position regarding the debt was not substantially justified.

Debtor argues that in determining whether the Defendants were substantially justified in their

prosecution of the debt, the court should look at who prevailed in the various motions in the proceeding. Plaintiffs prevailed twice on motions to dismiss and accomplished narrowing down the causes of action in the Complaint to three causes of action. Ultimately prevailing against Defendants at trial.

Furthermore, at trial, Debtor-Plaintiff showed that Defendants had no knowledge of the facts surrounding the gift of the home in question to Debtor-Plaintiff. Thus, Debtor argues the allegations in the Complaint were mere speculation. The original Complainant, Tapan Trevedi, did not show up at trial. In the Estate of Ortansa Ambrus-Cernat, Sacramento Superior Court Probate Case #34-2015-00177920, Tapan Trevedi, Administrator, valued the claim against plaintiffs at $0.00 (see Exhibit B) on December 17, 2018 but continued to prosecute the claim that the debt existed and was not dischargeable due to fraud.

The court finds that this is a consumer debt even though the action arose from Probate Court. Thus, as prevailing parties on the dischargeability of a consumer debt, Debtor-Plaintiff is entitled to an award of reasonable attorneys' fees.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Adversary Proceeding: Applicant spent 82.80 hours in this category. Applicant prosecuted the adversary proceeding by filing the Complaint; preparing and filing oppositions and motions to dismiss; reviewing and preparing objections; reviewing stipulations; conducting meetings; filing state conference statements; preparing for trial; communicating with Debtor-Plaintiff and opposing counsel; and preparing the present motion.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Cianchetta	74.60	$375.00	$27,975.00
Peter Cianchetta	8.20	$350.00	$2,870.00
Total Fees for Period of Application			$30,845.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $66.85 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage	n/a	$6.85
MSL Deed Fees		$15.00
Photocopies		$45.00
		$0.00
Total Costs Requested in Application		$66.85

FEES AND COSTS & EXPENSES ALLOWED

Fees

~~The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Attorneys' Fees in the amount of $30,845.00 are awarded pursuant to 11 U.S.C. § 523(d)~~

Costs & Expenses

~~Attorneys' Costs in the amount of $66.85 are awarded pursuant to 11 U.S.C. § 523(d)~~

~~Applicant is awarded the following:~~

~~Fees $30,845.00~~
~~Costs and Expenses $66.85~~

The court shall issue an order substantially in the following form holding that:

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion for Attorneys' Fees filed by Cianchetta and Associates ("Applicant"), Attorney for Gevorg G. Poladyan and Armine Asatruan, Debtor/ Plaintiff, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that Cianchetta and Associates is awarded the following attorneys's fees~~

~~Cianchetta and Associates, Attorney for Debtor/Plaintiff~~

~~Fees in the amount of $30,845.00,~~
~~Costs and Expenses in the amount of $66.85~~

As prevailing parties pursuant to 11 U.S.C. § 523(d).