UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 2, 2015 at 10:00 a.m.

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1. 14-26702-A-13 TERRY/ELLEN AMOS — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2326 LDH-1 — 12-22-14 [13]
AMOS V. HSBC MORTGAGE SERVICES, INC. ET AL.

Tentative Ruling: The motion will be granted and all claims against Federal National Mortgage Association will be dismissed.

Fed. R. Civ. P. 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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.' . . . 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. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

The Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

A federal court has the obligation to review sua sponte whether it has subject matter jurisdiction under Article III's case-or-controversy requirement. Fed. R. Civ. P. 12(h)(3) (providing that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); Florida Wildlife Fed'n, Inc. v. South Florida Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011); see also Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc., 561 F.3d 1294, 1296 (11th Cir. 2009) (citing 28 U.S.C. § 1447(c)).

"Federal courts are always 'under an independent obligation to examine their own jurisdiction,' . . . and a federal court may not entertain an action over which it has no jurisdiction." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)(citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) and Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)).

Bankruptcy jurisdiction extends to four types of title 11 matters, cases "under title 11," cases "arising under title 11," proceedings "arising in a case under title 11," and cases "related to a case under title 11." See Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006).

The first three types of title 11 matters are termed as core proceedings by 28 U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." Contra Stern v. Marshal, 131 S. Ct. 2594, 2608 (2011) (creating another category of core claims as to which the bankruptcy court

cannot enter final judgment, treated as "cases related to a case under chapter 11"); see also Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165, 2172 (2014).

"Stern made clear that some claims labeled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b). Stern did not, however, address how the bankruptcy court should proceed under those circumstances. We turn to that question now."

Bellingham Insurance at 2172.

28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to– (A) matters concerning the administration of the estate . . . [and] (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

On the other hand, "related to a case under title 11" proceedings are noncore, meaning that the bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1). Given the subject motion, though, consent of the parties is highly unlikely in this case.

Cases "under title 11" are the only ones over which district courts have original and exclusive jurisdiction. As to cases "arising under," "arising in," or "related to title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of bankruptcy case.'" Id.

A proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)).

The plaintiffs, Terry Amos and Ellen Amos, filed the underlying chapter 13 bankruptcy case, Case No. 14-26702, on June 27, 2014. On November 24, 2014, the plaintiffs filed the instant adversary proceeding.

A liberal reading of the complaint reveals eight causes of action, including:

(1) a claim for a violation of the Fair Debt Collection Practices Act,

(2) a claim for a violation of the Home Mortgage Disclosure Act,

(3) a claim for a violation of the Community Reinvestment Act,

(4) a claim for a violation of the Equal Credit Opportunity Act,

(5) a claim for a violation of the Real Estate Settlement Procedures Act,

(6) a claim for a violation of the False Claims Act,

(7) wrongful foreclosure, and

(8) fraud.

The essence of the complaint is a challenge to the propriety of the loan secured by the plaintiffs' residential real property and a challenge to the apparent foreclosure on the property.

The plaintiffs' underlying chapter 13 case was dismissed on December 10, 2014.

The court does not have subject matter jurisdiction over any of the claims asserted by the plaintiffs. None of the claims are core within the meaning of 28 U.S.C. § 157(b)(1).

The claims are not "cases under title 11." None of them invoke a substantive right provided by title 11 or could arise only in the context of the bankruptcy case. See Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)); see also Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006).

The claims are based on federal non-bankruptcy law or state law.

In addition, none of the claims could conceivably affect the administration of the plaintiffs' bankruptcy estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)). The plaintiffs' bankruptcy case was dismissed on December 10, 2014 and there is no longer a bankruptcy estate which the claims could conceivably affect.

Finally, to the extent applicable, the court declines to exercise jurisdiction under Carraher v. Morgan Elec., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992). Accordingly, the motion will be granted and all claims against the movant will be dismissed for lack of subject matter jurisdiction. The motion will be granted.

2. 14-24002-A-11 BELLA PROPIEDAD L.L.C. — MOTION FOR RELIEF FROM AUTOMATIC STAY
SR-1
UNION HOME LOAN, INC. VS. — 1-15-15 [71]

Tentative Ruling: The motion will be granted in part and denied in part.

The movant, Union Home Loan, Inc., seeks relief from the automatic stay as to three real properties, one in Fair Oaks, California, one in Lincoln, California and one in Nevada City, California.

The motion will be denied as to the Lincoln and Nevada City properties for several reasons.

First, the motion states that the debtor claims ownership interest in the Lincoln and Nevada City properties based "[u]pon information and belief."

Docket 71 at 2. The motion even acknowledges that the debtor only "may claim" an interest in the Lincoln and Nevada City properties. Docket 71 at 2. As such, the movant admits that it has no personal knowledge of the debtor's interest in those properties. If the movant is unable to establish even this foundational point - that the debtor holds interest in these properties - the movant has not carried its burden of persuasion that there is an injury in fact and that the automatic stay affects these properties.

To establish standing, a plaintiff must meet both constitutional and prudential requirements. Under the case or controversy requirements of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact element;" (2) the injury must be fairly traceable to the challenged action, known as the "causation element;" and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984).

Second, while the Fair Oaks property is listed in the debtor's schedules, the Lincoln and Nevada City properties are not listed in the schedules.

Third, the Lincoln and Nevada City properties were not pledged by the debtor to secure the subject loan. The movant's loan is secured by the three real properties, but the debtor pledged only the Fair Oaks property as security. The Lincoln and Nevada City properties were pledged as security for the loan by Paula Turtletaub in her capacity as trustee of The Paula Turtletaub 2001 Revocable Trust Dated June 13, 2001.

The sole deed of trust securing the loan obligation is executed by Ms. Turtletaub in both her capacity as manager of the debtor and in her capacity as trustee of the trust. Docket 73 at 13. Page one of the deed of trust states that the debtor is executing the deed only as to "property 1" identified in an addendum to the deed, whereas Ms. Turtletaub as trustee of the trust is executing the deed as to "property 2 and property 3." Docket 73 at 9. Property 1 in the addendum to the deed is identified as the subject Fair Oaks property, whereas properties 2 and 3 are identified as the subject Lincoln and Nevada City properties. Docket 73 at 15.

Hence, the debtor did not assert interest in the Lincoln and Nevada City properties in the deed of trust. As such, those properties were never subject to the automatic stay of 11 U.S.C. § 362(a).

Fourth, the court is not prepared to adjudicate the motion as to the Lincoln and Nevada City properties in an advisory fashion, *i.e.*, in the event they may be subject to the stay.

"'[I]t is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions."' Flast v. Cohen, 392 U.S. at 96 . . . (citing c. Wright, Federal Courts 34 (1963)). The doctrine of justiciability is a blend of constitutional and policy or prudential considerations. Id. at 97. . . ."

Krasnoff v. Marshack (In re General Carriers Corp.), 258 B.R. 181, 190 (B.A.P. 9th Cir. 2001).

Fifth, the motion's assertions as to the Fair Oaks property are somewhat confusing and inconsistent. The motion states that the property secures a loan

owed by the debtor. The debtor is a co-borrower with Ms. Turtletaub in her capacity as trustee of the trust. Under the "approximate principal amount due" to the movant, the motion lists a figure of $270,000. This is the movant's second deed of trust claim against the Fair Oaks property.

Yet, this second priority claim is absent from the debtor's Schedule D and the motion does not explain its absence. Docket 19.

The first deed of trust claim is for approximately $375,000 and is also held by the movant. Docket 74.

The motion also includes a "[s]enior [lien] on Lincoln [p]roperty" for $550,000. Docket 71 at 2-3.

The court does not understand the relevance to the Fair Oaks property of the $550,000 senior lien on the Lincoln property.

The motion also proceeds to add "delinquencies on above indebtedness," including advances to senior lien in the amount of $39,884.36, attorney's fees of $2,500 associated with the subject motion, and $376 of other costs and fees associated with this motion. Docket 71 at 3-4. But, the movant has not identified the senior lien holder to whom the advances were made, *i.e.*, is it the senior lien holder on the Fair Oaks property - namely the movant, as a first deed claim holder, or the senior lien holder on the Lincoln property?

Also, the movant is not an over-secured creditor as to the Fair Oaks property, and it is not entitled to fees and costs for preparing, filing and prosecuting this motion.

The movant's first priority claim on the Fair Oaks property totals approximately $375,000 (the subject of the movant's other stay relief motion) and the movant's second priority claim on the Fair Oaks property totals approximately at least $270,000 (the subject of this motion), for aggregate encumbrances of $645,000. The value of the property is only $540,000, however. Docket 71 at 4; Docket 19.

Finally, 11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective

reorganization will require § 362(d)(2) relief." Timbers at 376.

As outlined above, there is no equity in the Fair Oaks property. The encumbrances total approximately at least $645,000, whereas the value of the property is only $540,000.

The debtor has not come forward to establish necessity to an effective reorganization of the property.

More, this case has been pending since April 18, 2014. The debtor was required to file a plan and disclosure statement by the court no later than August 16, 2014. Docket 47 at 1. The debtor has not filed a plan or disclosure statement, now over five months after that deadline. The court also notes that the debtor has not filed any operating reports since the October 2014 report filed on November 13, 2014. Docket 59.

The court concludes that there is no equity in the Fair Oaks property and there is no evidence that it is necessary to an effective reorganization.

Accordingly, the motion will be granted in part - as to the Fair Oaks property only - pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of that property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of the Fair Oaks property exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

3. 14-24002-A-11 BELLA PROPIEDAD L.L.C. — MOTION FOR RELIEF FROM AUTOMATIC STAY
SR-2 — 1-15-15 [76]
UNION HOME LOAN, INC. VS.

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this

tentative ruling.

The motion will be granted.

The movant, Union Home Loan, Inc., seeks relief from the automatic stay as to a real property in Fair Oaks, California.

11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

The property has a value of $540,000 and it is encumbered by claims totaling approximately at least $645,000. The movant's deed is in first priority position and secures a claim of approximately $375,000.

The debtor has not come forward to establish necessity to an effective reorganization of the property.

More, this case has been pending since April 18, 2014. The debtor was required to file a plan and disclosure statement by the court no later than August 16, 2014. Docket 47 at 1. The debtor has not filed a plan or disclosure statement, now over five months after that deadline. The court also notes that the debtor has not filed any operating reports since the October 2014 report filed on November 13, 2014. Docket 59.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to an effective reorganization.

Accordingly, the motion will be granted as to the Fair Oaks property pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of that property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil

Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9th Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed $750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of $750.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

4. 14-30833-A-11 SHASTA ENTERPRISES — STATUS CONFERENCE
10-31-14 [1]

Tentative Ruling: None.

5. 14-30833-A-11 SHASTA ENTERPRISES — MOTION FOR
DL-1 — RELIEF FROM AUTOMATIC STAY
REDDING BANK OF COMMERCE VS. — 12-8-14 [67]

Tentative Ruling: The hearing on the motion will be continued.

The movant, Redding Bank of Commerce, seeks relief from stay as to 355 Hemsted Drive Redding, California.

Given that the court appointed a chapter 11 trustee in this case only on December 23, 2014, the court will continue the hearing on the motion to provide the trustee with time to evaluate and respond to the motion. Dockets 142 & 143.

6. 14-30833-A-11 SHASTA ENTERPRISES — MOTION FOR RELIEF FROM AUTOMATIC STAY
DL-2 — 12-8-14 [75]
REDDING BANK OF COMMERCE VS.

Tentative Ruling: The hearing on the motion will be continued.

The movant, Redding Bank of Commerce, seeks relief from stay as to 381, 391, 393 and 401 Hemsted Drive Redding, California.

Given that the court appointed a chapter 11 trustee in this case only on December 23, 2014, the court will continue the hearing on the motion to provide the trustee with time to evaluate and respond to the motion. Dockets 142 & 143.

7. 14-31675-A-11 JSR PROPERTIES — MOTION TO DISMISS CASE
DL-2 — 12-29-14 [48]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The hearing on this motion was continued from January 5, 2015 for the debtor to file a response to the motion. The debtor filed a response to the motion on January 20, 2015. Docket 69. An amended ruling from January 5 follows below.

Creditor Redding Bank of Commerce moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that the case was filed in bad faith and the debtor cannot confirm a plan within a reasonable time.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, without limitation, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . [and] (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;." 11 U.S.C. § 1112(b)(4)(A), (F). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtor's business operation is to operate its sole commercial real property in Redding, California, generating average monthly gross income in the amount of $11,078.91. Docket 12 at 5.

Although the debtor has assigned a value of "unknown" in its Schedule A, the movant has proffered an appraisal dated October 14, 2014, just about one month prior to the filing of this case on November 26, 2014, giving the property an

"as is" value of $1,950,000. This valuation assigns a $1,875,000 value for the real property and a $75,000 value for the furnishings, freestanding equipment and personal property on the premises. Dockets 36 at 4 & 46 at 2. The movant's valuation based on the sales comparison approach is between $1.9 million and $2 million. The movant's valuation based on the income capitalization approach is $1,936,500. Docket 36 at 93.

The movant's claim totals approximately $2,768,130.

The court rejects the debtor's 2012 $3,200,000 valuation of the property. That valuation, as made part of the record on the debtor's opposition to the movant's stay relief motion, is based on a summary appraisal report prepared by Donald Hayden and addressed to the movant. Docket 67. It was submitted by the debtor as Exhibit A to the declaration of Antonio Rodriguez in support to the debtor's response to the motion to dismiss. Dockets 67 and 72.

The summary appraisal report attaches only six pages of the actual appraisal, it is not supported by a declaration, it is inadmissible, and it is outdated. There is no declaration from Donald Hayden in the record - on this motion or on the stay relief motion - authenticating the summary appraisal report and the attached portion of the appraisal. The summary appraisal report and the attached portion of the appraisal are inadmissible hearsay. Fed. R. Evid. 802.

More, the appraisal proffered by the debtor is outdated. The summary appraisal report is dated March 8, 2012, meaning that the appraisal was prepared sometime prior to that date. Docket 67, Ex. A at 1.

On the other hand, the movant's appraisal in support of the instant motion is dated October 14, 2014, just about one month prior to the filing of this case on November 26, 2014.

As the debtor's evidence of value is inadmissible and outdated, the court is not persuaded that there is a disputed material fact warranting an evidentiary hearing as to the value of the property.

Further, while the petition does not have the "single asset real estate" box checked, this is a single asset real estate case because the debtor's sole business is to operate its sole commercial real property in Redding, California. 11 U.S.C. § 101(51B) (defining "single asset real estate" as "real property constituting a single property or project . . . which generates substantially all of the gross income of a debtor").

This means that no later than February 24, 2015 (or 90 days after the petition date), the debtor must have:

"(A) . . . filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

"(B) . . . commenced monthly payments that—

"(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

"(ii) are in an amount equal to interest at the then applicable nondefault

contract rate of interest on the value of the creditor's interest in the real estate."

11 U.S.C. § 362(d)(3).

But, the court has denied the debtor's motion to use cash collateral and the court is not persuaded of the debtor's ability to file a plan - let alone a plan with a reasonable likelihood of rehabilitation - within the 90-day deadline of section 362(d)(3).

Without a cash collateral order, the debtor is unable to make the payments contemplated by section 362(d)(3)(B), as such payments are calling for the "interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate."

The court also notes that despite the court's January 5, 2015 denial of the debtor's cash collateral motion, the debtor has not filed another cash collateral motion with the court. Docket 54. This begs the question of how or whether the debtor is planning to operate post-petition.

The court is perplexed at how the debtor will reorganize without a cash collateral order, when the sole source of revenue for the debtor is the movant's cash collateral. The debtor can collect the rents, but it cannot utilize them.

While the debtor appears to have been collecting the rents from the property, that income has been obviously insufficient to service the movant's $2,768,130 claim on the property. As of the petition date, the debtor was in default on the obligation owed to the movant. The court is unpersuaded then that this income will enable the debtor to reorganize the movant's $2,768,130 claim against the property.

Even if the debtor strips down the claim to the value of the property, approximately $1,950,000, the court is still unclear how the debtor will be able to reorganize that debt with the approximately $11,000 in monthly income from the property.

Moreover, stripping down the movant's claim would give the movant a ruling general unsecured claim that, combined with the absolute priority rule, would preclude the debtor from obtaining plan confirmation. Aside from what would be the movant's approximately $768,130 unsecured claim, the debtor has listed another $453,000 of general unsecured claims in Schedule F. Schedule E contains no debt. Docket 1.

The debtor's financial situation is complicated also by the fact that the first 36 months of the initial term under the lease agreement between the debtor and the lessee ends in approximately February 2015. Docket 36 at 117. At that point, the lessee will have the option under the agreement to terminate the lease on a 180-day notice. Id.

With or without the existing lessee, the court is unconvinced that there is a reasonable likelihood of rehabilitation.

The end of the 90-day period of 11 U.S.C. § 362(d)(3) is fast approaching - only approximately three weeks away, while the debtor is not making any payments to the movant and has not established an ability to file a plan that has a reasonable possibility of being confirmed within a reasonable time.

When the 90-day period of section 362(d)(3) ends, this court will be required to grant the movant's stay relief motion, which has been filed already. See 11 U.S.C. § 362(d)(3) (stating that "the court *shall* grant relief from stay"). The debtor's disregard for the issues of section 362(d)(3) qualifies as a continuing loss to or diminution of the estate.

Finally, this case has been pending for approximately two months. Nonetheless, the debtor has not filed any monthly operating reports yet. The monthly operating report for December 2014 was due on January 15, 2015.

The foregoing is cause for dismissal or conversion under section 1112(b)(1).

The court finds it unnecessary to address the bad faith issues raised by the motion.

Finally, as the debtor's real and personal property is overencumbered, and the $104,763 in preferential transfers identified in the statement of financial affairs were made to Shasta Enterprises, which is in its own chapter 11 proceeding, dismissal would be in the best interest of the estate. The motion will be granted and the case will be dismissed.

8. 14-31675-A-11 JSR PROPERTIES — MOTION FOR RELIEF FROM AUTOMATIC STAY
DL-1
REDDING BANK OF COMMERCE VS. — 12-22-14 [32]

Tentative Ruling: The motion will be dismissed as moot.

The hearing on this motion was continued from January 5, 2015 for the debtor to file a response to the motion. The debtor filed a response to the motion on January 20, 2015. Docket 65. The ruling from January 5 is unchanged given the tentative ruling granting the movant's motion to dismiss the case.

The movant, Redding Bank of Commerce, seeks relief from stay as to its collateral consisting of a commercial real property in Redding, California and personal property items located on the premises of the real property.

The motion will be dismissed as moot because the court is granting the movant's motion to dismiss the case. Dismissal of the case automatically dissolves the automatic stay. See 11 U.S.C. § 362(c)(2)(B).

The court notes that the movant is not seeking relief under 11 U.S.C. § 362(d)(4) and it is not seeking retroactive relief from stay.

9. 14-31675-A-11 JSR PROPERTIES — STATUS CONFERENCE
11-26-14 [1]

Tentative Ruling: None.

10. 14-27083-A-11 RCK CONSERVATION CO-OP, L.L.C. — MOTION TO APPROVE LEASES
DBH-7
1-9-15 [121]

Tentative Ruling: The motion will be denied without prejudice.

The debtor in possession is asking the court to approve its entry into two lease agreements.

The motion will be denied because it does not establish that the leases are in the best interest of the estate and the creditors.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to sell or lease property of the estate pursuant to section 363. Section 363(b) allows, then, a debtor-in-possession to sell or lease property of the estate, other than in the ordinary course of business. The lease must be fair, equitable, and in the best interest of the estate. See, e.g., Mozer v. Goldman (In re Mozer), 302 B.R. 892, 897 (C.D. Cal. 2003). Lease of property outside the ordinary course of business requires the estate to show good faith and valid business justification for the lease. See, e.g., 240 N. Brand Partners, Ltd. v. Colony GFP Partners, LP (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996). Good faith "encompasses fair value, and further speaks to the integrity of the transaction." Id.

The motion is devoid of the information needed to decide whether the debtor's entry into the lease agreements is in the best interest of the estate and the creditors. The motion simply asks the court to approve two leases, one with Dana Packard and another one with Peggie Salazar. There is no discussion in the motion about:

- the terms of the leases,
- what the leases are encompassing (which property is being rented, how many acres, on which lot, etc.),
- what activities the lessees will be conducting on the properties subject to the leases,
- the relationship between the debtor and lessees,
- whether this is an arm's length transaction,
- the lessees' abilities to perform under the lease agreements,
- the lessees' creditworthiness,
- what is the fair market value for what the debtor is leasing,
- whether and to what extent the leases will impact the debtor's operation of the property, etc.

The supporting declarations are also unhelpful. They offer only little more information, including the annual lease payments and the number of acres being leased. From this, the court cannot determine whether the leases are in the best interest of the estate and the creditors. Accordingly, the motion will be denied.

11.	14-24088-A-13	HUGO/ALICIA CERVANTES	MOTION TO
	14-2222	WW-1	VACATE DEFAULT AND DISMISS
	LOPEZ ET AL V. CERVANTES ET AL		ADVERSARY PROCEEDING
			1-5-15 [27]

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants and movants, Hugo Cervantes and Alicia Cervantes, request that the court vacate their entries of default and dismiss this adversary proceeding.

The defendants filed the underlying chapter 13 case, Case No. 14-24088, on April 21, 2014. They obtained confirmation of a chapter 13 plan on June 30, 2014. Case No. 14-24088, Docket 28.

The plaintiffs filed this adversary proceeding on July 30, 2014 and a summons was issued on that same date. Dockets 1 and 3. This was the only summons issued in this case. The defendants were served with the summons and complaint on August 4, 2011 and their attorney was served with the summons and complaint on September 30, 2011. Dockets 7 and 16. The certificate of service for the defendants' counsel was not filed by the plaintiffs until November 7, 2014 when they requested the defendants' entries of default.

On November 7, 2014, the plaintiffs filed two requests for entry of default, one for each defendant. Dockets 14 and 15.

On November 10, 2014, the clerk of the court entered the defendants' respective defaults. Dockets 17 and 18. The entries of default required the plaintiffs to apply for a default judgment within 30 days, or by December 10, 2014. Dockets 17 and 18.

On December 8, 2014, the plaintiffs filed a motion for entry of default judgment. Docket 19. That motion was never adjudicated by the court because the plaintiffs did not lodge an order with the court. The plaintiffs then filed another motion for default judgment on December 31, 2014, setting that motion for hearing on February 9, 2015. Dockets 23 and 24.

Fed. R. Bankr. P. Rule 7004(g) prescribes that "if the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ.P."

As Fed. R. Bankr. P. 7004(e) requires service of the summons and complaint within 7 days after the summons is issued, service of the summons and complaint upon the defendants and their attorney in the underlying bankruptcy case was due by August 6, 2014.

Here, however, while service upon the defendants was properly effectuated by mail on August 4, 2014 (Docket 7), the summons and complaint were not served on the defendants' attorney, Mark Wolff, until September 30, 2015. Docket 16.

Obviously, service on the defendants' attorney, as required by Rule 7004(g), was untimely and improper. The summons had expired by the time the plaintiffs served the defendants' attorney.

More, the summons itself requires the defendants "to file a motion or answer to the complaint . . . within 30 days after the date this summons is issued." Docket 3 at 1. The defendants' attorney was not served with the summons and complaint until 62 days after the summons was issued. The summons was issued on July 30 whereas he was not served until September 30.

Thus, service of the summons and complaint was defective and the court should have never entered the defendants' defaults.

Further, the court rejects the plaintiffs' arguments that the defendants' counsel had actual notice of the complaint because he is registered to receive electronic service and he received the complaint electronically when the complaint was filed on July 30.

First, actual knowledge of the filing of the complaint or the complaint itself does not satisfy the due process requirements of Rule 7004(b)(1), (b)(9), and (g). Outside of the service rules of Fed. R. Civ. P. 4, the service rules in

Rule 7004 require that a copy of the summons and complaint be mailed to the defendant and, in the event the defendant is a debtor in a pending bankruptcy, on the defendant's counsel.

Second, while the defendants' counsel may be registered to receive electronic service, such service applies only to service by the court. It does not apply to service by private parties and it certainly does not apply to service as required by Rule 7004. By registering to receive electronic service with the court, the defendants' counsel did not waive the due process requirements of Rule 7004 for all his clients.

Third, even though the defendants' counsel received electronic notice of the filing of the complaint, in their bankruptcy case, this was done by the court and it was not service of the complaint. It was only a notice of the filing of the complaint, as reflected by Exhibit B to the plaintiffs' opposition. Docket 37. This then could never satisfy or replace the service requirements of Rule 7004.

Fourth, even if the electronic notice of the filing of the complaint to the defendants' counsel could satisfy the Rule 7004 service requirement for the complaint, it could never satisfy the Rule 7004 service requirement for the summons. See Fed. R. Bankr. P. 7004(b)(9) and (g). Service of the summons and complaint was defective.

Fifth, while the defendants appeared at the October 15, 2014 status conference hearing in the adversary proceeding, the court does not construe their appearance as waiver of the service requirements under Rule 7004(g). Docket 8. The court cannot conclude that the defendants' appearance at the status conference hearing waived the very service that prevented them from consulting with their attorney prior to appearing at that status conference hearing.

The defendants do not appear to have been in contact with their bankruptcy attorney prior to appearing at that status conference hearing, as he had no reason to alert them about the adversary proceeding, given that he was served with a stale summons and complaint, only on September 30, 2014.

Sixth, the September 16, 2014 confirmation by the defendants' counsel in the bankruptcy case to the plaintiffs' counsel, that he was not representing the defendants in this adversary proceeding, also does not alter the court's conclusion that there was no compliance with Rule 7004(g).

It is true that the defendants' counsel in the bankruptcy case was not representing the defendants in the adversary proceeding as of September 16, 2014. As of September 16, he had not been served with a summons and/or the complaint under Rule 7004(g) or otherwise, and the defendants had not retained him to represent them in this adversary proceeding. If they had retained him, he would have appeared with them at the October 15 status conference hearing. He did not appear with them at the October 15 status conference hearing. Docket 8. Thus, the defendants' counsel did not misrepresent anything to the plaintiffs' counsel when he told him on September 16 that he was not representing the defendants in this adversary proceeding.

The defendants' defaults were entered in error. Hence, the court will vacate them.

However, the court will deny the motion to dismiss the adversary proceeding.

Fed. R. Civ. P. 4(m), made applicable by Fed. R. Bankr. P. 7004(a)(1), requires the service of a complaint within 120 days of its filing. Rule 4(m) provides that:

"*If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.*

But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)."

The court will exercise its discretion under Rule 4(m) and give the plaintiffs 14 days from the February 2, 2015 hearing on this motion to obtain an additional summons and properly serve the defendants, including service in accordance with all applicable requirements of Fed. R. Bankr. P. 7004.

The court is not persuaded that dismissal of the adversary proceeding is warranted, given that both the defendants and their bankruptcy counsel had actual knowledge of this adversary proceeding early in the proceeding and the defendants even appeared at the initial status conference hearing.

The court also takes into account that the defendants' bankruptcy case is still ongoing and is far from over. The court confirmed the defendants' 60-month chapter 13 plan only on June 30, 2014. Case No. 14-24088, Dockets 10 and 28.

Lastly, the plaintiffs complied with the filing of a motion for entry of default judgment within 30 days of the defendants' entries of default. The defendants' defaults were entered on November 10, 2014 and the plaintiffs filed a motion for entry of default judgment on December 8, 2014. Dockets 17, 18, 19.

The plaintiffs' failure to properly bring the motion for default judgment before the court by setting it for a hearing or lodging an appropriate order or their failure to properly serve the motion, is not basis for dismissing the adversary proceeding. They may be grounds for vacating the entries of default - which the court is doing in this ruling - but they are not grounds for dismissal. These objections also do not pertain to the service requirements of Rule 4(m), which is the principal subject of the instant motion.

The court then fails to see how the objections, even if actionable, necessitate dismissal of the adversary proceeding. The motion does not cite any legal authority for dismissing an adversary proceeding due to the plaintiffs' failure to timely file and/or properly serve a motion for default judgment.