UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 2, 2016 at 1:30 p.m.

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1. 15-29563-E-13 SHANA WILLIAMS
BHT-1 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-29-15 [14]

DEBTOR DISMISSED: 12/29/2015
CALIFORNIA HOUSING FINANCE AGENCY VS.

Final Ruling: No appearance at the February 2, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 29, 2015. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 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 for Relief From the Automatic Stay is granted.

California Housing Finance ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2328 Knight Way, Sacramento, California (the "Property"). The moving party has provided the Declaration of Mike Aleali to introduce evidence as a basis for Movant's contention that Shana Williams ("Debtor") do not have an ownership interest in or a right to maintain possession of the Property.

Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on July 10,

2015. Based on the evidence presented, Debtor would be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento and received a judgment for possession, with a Writ of Possession having been issued by that court on October 19, 2015. Exhibit 3, Dckt. 19.

Movant has provided a properly authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership, the Judgment and the Writ of Possession. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The instant case was dismissed on December 29, 2015 for failure to timely file documents. Dckt. 13.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) and (2). This section provides:

In relevant part, 11 U.S.C. § 362(c) provides:

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

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
>
> > (1) reinstates–
> >
> > > (A) any proceeding or custodianship superseded under section 543 of this title;
> > >
> > > (B) any transfer avoided under section 522, 544,

> 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) ***revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.***

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of December 29, 2015, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The court shall issue an order confirming that the automatic stay was terminated and vacated as to the Debtor and Property on December 29, 2015.

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 for Relief From the Automatic Stay filed by California Housing Finance (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the court confirms that automatic stay provisions of 11 U.S.C. § 362(a) were terminated as to the Debtor pursuant to 11 U.S.C. § 362(c)(2)(B) and the real property commonly known as 2328 Knight Way, Sacramento, California, pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the December 29, 2015 dismissal of this bankruptcy case filed by Shana Williams, the Debtor.

2. 16-20089-E-13 SMR-1 JEFFREY STEWART AND MADIHAH ALMUSTAFA-STEWART Scott D. Shumaker

MOTION FOR RELIEF FROM AUTOMATIC STAY 1-18-16 [11]

RICO DD, INC. VS.

APPEARANCE OF SID M. ROSENBERG, COUNSEL FOR MOVANT, AND SCOTT D. SHUMAKER, COUNSEL FOR DEBTOR, REQUIRED FOR THIS HEARING ON THE MOTION

NO TELEPHONIC APPEARANCE PERMITTED FOR EITHER COUNSEL

Tentative Ruling: The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, 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.

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 18, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, 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. At the hearing ----------.

The Motion for Relief From the Automatic Stay is denied without prejudice.

Rico DD, Inc. ("Movant") seeks relief from the automatic stay. Jeffrey Stewart and Madihah Almustafa-Stewart, the Chapter 13 Debtors, ("Debtor") oppose, asserting very complex non-bankruptcy legal and factual grounds. The pleadings filed by the respective parties raise more questions than they provide answers (facts and legal basis).

The court begins with the Motion and supporting pleadings.

Review of Motion

As this court has addressed on a number of occasions with other attorneys and parties (and on at least one occasion with Movant's counsel), the Supreme Court has been very clear in requiring that the motion itself must state with particularity the grounds upon which the requested relief is based, as well as the relief itself. Fed. R. Bank. P. 9013, which carries over the language of Fed. R. Civ. P. 7(b). Having a near paperless environment, this court has long established local rules for the preparation of documents to be filed with the court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents has long required that the motion be a separate pleading from the points and authorities, which is a separate pleading from each declaration, which is a separate pleading from the exhibits (which exhibits may be combined into one document filed with the court). This court has noted how initially attorneys were filing one large PDF file, often running more than 200 pages, which combined all of the documents together. This created an unworkable single electronic document for the court. The court was not, and is not, willing to provide free legal services by recasting a parties pleading into separate documents or print out the huge pdf document and then physically separate the combined pleadings into the required separate pleadings.

The "motion" is not a combined document consisting of the pleading title motion, another titled points and authorities, and several declarations, and whatever exhibits the court thinks might stated grounds upon which the relief could be based if the movant had taken the time to correctly draft its pleadings.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

In bankruptcy court, the vast majority of substantive matters are determined on the rapid law and motion calendar. In enacting Federal Rule of Bankruptcy Procedure 9013 and Federal Rule of Civil Procedure 7(b), the Supreme Court has created a higher pleading standard than for a complaint. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 only require that a complaint only provide a "short plain statement" to adequately plead a claim. Given only a twenty-eight to forty-two day notice periods for hearings on motions in bankruptcy court for the determination (or termination) of rights, clear solid pleading is at a premium.

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated With Particularity In The Motion Before The Court

The Motion (Dckt. 11) states with particularity the grounds upon which Movant bases the requested relief:

A. Movant seeks relief from the automatic stay of 11 U.S.C. § 362(a).

B. Movant seeks to pursue state court remedies to recover possession of certain commercial property.

C. The commercial property is located at 3630 Morse Avenue, Sacramento, California.

D. On January 8, 2016, Debtor commenced the instant Chapter 13 bankruptcy case.

E. David Cusick is the Chapter 13 Trustee in Debtor's Chapter 13 case.

F. As a result of the bankruptcy filing, certain (unidentified) acts and proceedings against Debtor are stayed.

G. The motion is filed on the basis of a lack of adequate protection and for cause.

H. Debtor has no equity or interest in the commercial property.

I. Debtor occupies the commercial property as a tenant.

J. Debtor has not offered to cure past defaults.

K. Continuation of the automatic stay will work a real and irreparable harm to the (unidentified) "property owner."

Motion, Dckt. 11.

Except for one reference to Debtor being a tenant, the Motion is not clear as to whether it relates to personal commercial (like trucks, loaders, plows "located at 3630 Morse Avenue") or real property. Most of the "Motion" does not state grounds, but merely legal or factual conclusions, such as : (1) "[Debtor has] no equity or interest in the commercial property," and (2) continuation of the stay "works a real and irreparable harm to the property owner herein." Movant never even pleads that it is the owner of the real or personal property at issue. Rather than saying that it is Movant who would suffer harm, the Motion uses the generic term "property owner."

The Motion fails to state grounds upon which, if there were proper evidence presented, the court could grant relief from the stay. As pleaded, there is a question whether Movant has standing to file the present motion. U.S. Const. Art. III, Section 2, requiring that there be an actual case or controversy between the parties which are before the court.

Movant's response to the above may well be that all the court needs to do is read the Points and Authorities (Dckt. 13) filed in "support" of the Motion and mine whatever grounds the court thinks that Movant should have stated with particularity in the Motion. Four of the six pages of pleadings in the Points and Authorities is a recitation of many facts, some of which might possible be properly stated in the Motion as grounds. But the grounds are not stated in the Motion. It is grossly unfair for Movant to enlist the court to state the grounds upon which Movant relief, effectively joining the "battle" with Movant against Debtor.

In the actual legal points and citations to authorities in the pleading titled "Points and Authorities," Movant merely quotes 11 U.S.C. § 362(d)(2) and cites a case that the court is to use the value of the property at issue, subtract all encumbrances from that value, and then determine if there is any equity in the property for a debtor. Further, the property must be necessary for an effective reorganization even if there is an equity in the property for a debtor. There are no grounds stated for the value of the property, the encumbrances on the property, and how Movant asserts that Debtor has no equity in the commercial property.

The court also note that this is not the first time the court has addressed this defect in pleading with Movant's counsel. In *In re Demyan*,

Bankr. E.D. Cal. 15-26749, the court addressed counsel's deficiencies in complying with the Federal Rules of Bankruptcy Procedure. Civil Minutes, 15-26749, Dckt. 38. Though armed with this knowledge of the Federal Rule of Bankruptcy Procedure and Federal Rule of Civil Procedure, Movant and its counsel have chosen to file pleadings as they wish, without regard to the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and Local Bankruptcy Rules.

Other attorneys regularly and easily comply with the rules and provide the court with a motion that states with particularity the grounds and with particularity the relief requested. This is required by Fed. R. Bankr. P. 9013 and Fed. R. Civ. P. 7(b). This court has noted that attorneys who get tripped up by the application of the rules (rather than the judge giving up and doing the attorney's work to sift from the arguments, conjecture, speculation, citations, and quotations in the points and authorities, the declarations, and exhibits to state the grounds for the attorney) are often wedded to a practice built around treating motions as a mere perfunctory procedural document. Most of the time the "motion" is treated as a mere notice, and the points and authorities written as if it were a appellate brief - stating all of the substantive grounds, legal authorities, and arguments in one document. Trial court law and motion practice is not the same as an appellate brief.

Finally, the court does not have a differential application of the rules based on whether the court "likes" one attorney's writing style and does not "like" another attorney's writing style. Attorneys and parties do not have to guess when the issues and grounds are sufficiently complex or their writing styles significantly lacking that the court will require the them to follow the rules verus when they can just "let it slide and the court will do the work." The uniform application of the rules to all attorneys and parties makes it easy for counsel to practice in this court – there are no secret "gotcha rules."

Testimony Provided Under Penalty of Perjury in Declaration Filed by Movant

A declaration has been provided by Kelly Engineer, who states that he is the Vice President of Movant. Dckt. 15. He testifies that he is the custodian of the books and records of Movant relating to the 3630 Morse Avenue Property. Mr. Engineer provides testimony under penalty of perjury concerning an alleged foreclosure sale on the 3630 Morse Avenue Property by which Leonard R. Perillo Investment I, LLC acquired title to said property. However, Mr. Engineer provides no testimony as to how he would have personal, non-hearsay knowledge of such "fact." He makes reference to a copy of a trustee's deed filed as Exhibit A. Fed. R. Evid. 601, 602. Mr. Engineer does not provide any testimony authenticating Exhibit A and it is not a self authenticating document as permitted pursuant to Federal Rules of Evidence 901 et seq.

Mr. Engineer continues to provide further testimony as to events which occurred concerning the 3630 Morse Avenue Property and litigation involving Movant, but he never gives any testimony as to how he has any personal knowledge concerning those facts. These include the state court proceedings and a stipulation alleged to have been stated on the record. While Mr. Engineer may have been present for all of these events, he fails to provide such testimony under penalty of perjury. Rather than testimony based on Mr. Engineer's personal knowledge, the declaration could well be a document prepared by counsel which Mr. Engineer signed merely because it was told, "this

helps Movant win."

The concern over Mr. Engineer's testimony under penalty of perjury is heightened given that Mr. Engineer provides his legal "opinion" as to various provisions of the Bankruptcy Code - including 11 U.S.C. § 362(a) and 11 U.S.C. § 1301. No testimony is provided as to how Mr. Engineer has the legal knowledge of the Bankruptcy Code to so testify under penalty of perjury.

Mr. Engineer's credibility is further impugned as he continues with his testimony under penalty of perjury to provide the court with his analysis of the stipulation and order entered in the state court. Such stipulation and order speak for themselves. The court has no idea how Mr. Engineer has such legal knowledge and expertise.

Finally, Mr. Engineer has further stated that he has read the Motion for Relief and knows the contents thereof. Further, that if asked to testify, he would testify as to all "facts" alleged therein to be true. The problem is, if Mr. Engineer wants to testify, he does so in his declaration. The court has no idea what Mr. Engineer believes are facts, and what are legal opinions, conclusions, and arguments.

The court does not find Mr. Engineer's testimony in his Declaration to be credible. Rather, it appears to be a document drafted by Movant's counsel, with Mr. Engineer told to sign it, legal conclusions, blanket testimony of whatever is in the Motion, and facts for which no personal knowledge is show, and given to Mr. Engineer to sign without any actual input or creation of his testimony. FN.1.

FN.1. The court notes that for this Motion filed pursuant to L.B.R. 9014-1(f)(2), Movant rushed in and filed "responses" to the Debtor's preliminary Opposition. In choosing to file the Motion pursuant to Local Bankruptcy Rule 9014-1(f)(2), Movant and its counsel are well aware that the court has to first set a briefing schedule for the opposition to be filed and then Movant can reply to that opposition. The additional 25 pages filed by Movant on January 29, 2016 (Dckts. 28, 29, and 30) are not permitted under the Local Bankruptcy Rules and only work to further confuse an improperly pleaded motion, unauthenticated exhibits, and non-credible declaration.

In looking at these additional pleadings, Movant's woes may well be made worse. The court notes that a declaration has now been filed by Sid Rosenberg, Movant's attorney in this Contested Matter. Declaration, Dckt. 29. When an attorney chooses to testify as to substantive matters to advance a client's case, it may result in a waiver of the attorney-client privilege.

Mr. Rosenberg states that as to his testimony he either has personal knowledge or "information and belief," upon which he chooses to testify under penalty of perjury. No basis is provided for a non-expert witness in a federal proceeding providing testimony under penalty of perjury. Fed. R. Evid. 601, 602. Further, Mr. Rosenberg does not disclose when he is testifying based on his personal knowledge and when he has been informed by someone else (who apparently is unwilling to testify under penalty of perjury) and Mr. Rosenberg wants to be a witness because he hopes that such information and belief testimony will help his client in this Contested Matter win. It appears that little of Mr. Rosenberg's purported testimony under penalty of perjury is based on any personal knowledge on his part.

OPPOSITION OF DEBTOR

Having read the above, Debtor may think that the continued existence of this case and use of the automatic stay to fend off Movant in state court is a foregone conclusion. The court having read Debtor's Opposition, such would be a gross misreading of this case, the Bankruptcy Code, and the proper exercise of federal court jurisdiction granted by Congress in 28 U.S.C. § 1334.

The Motion having been filed pursuant to the procedure in Local Bankruptcy Rule 9014-1(f)(2), no written opposition was required. Debtor could have appeared at the hearing and stated the opposition to the court. If the court found the opposition to be raising issues of substance, then the court would set a briefing schedule and the final hearing on the Motion. Debtor elected to file a preliminary written opposition. Dckt. 24. This Opposition is of assistance to the court, and ultimately will be of assistance to the parties.

From the Opposition and a copy of Debtor's state court complaint provided as Exhibit 1, Dckt. 25, the court has a general idea of the fight which underlies this bankruptcy case. In short, Debtor asserts that Movant is an entity affiliated with or part of the creditor which conducted a non-judicial foreclosure sale of the real property commonly known as 3630 Morse Avenue, Sacramento, California. This is apparently a board and care facility operated by a limited liability company identified as Blessing Care, LLC. Debtor Madihah Aminah Almustafa-Stewart works for the limited liability company and lives at the 3630 Morse Avenue Property. Title to the 3630 Morse Avenue Property was held in the name of Blessing Care, LLC. The loan for which the foreclosure sale was conducted was a loan obtained by Blessing Care, LLC. The complaint in the state court action which is provided as Exhibit 1 by Debtor names Blessing Care, LLC and Madihah Aminah Almustafa as joint plaintiffs, each appearing in *pro se*. Finally, the complaint in the state court action alleges that Madihah Aminah Almustafa was the intended beneficiary of the loan and the ownership of the 3630 Morse Avenue Property, and therefore personally asserts interests in such Property and various rights against the lender.

Of significant interest, Debtor alleges that the purported foreclosure sale upon which Movant asserts its seller acquired rights to the Property was conducted in violation of a temporary restraining order issued by the state court judge. However, no explanation is provided that if the order of a state court judge was flaunted, why Debtor has not availed themselves of the opportunity to have the state court judge excoriate the violating party.

The Opposition also advises the court that Debtor intends to have the state court judge reverse orders and rulings in the state court action which were entered pursuant to the stipulation of Debtor. This indicates that there are judgements or orders which otherwise defeat Debtor's contentions that Debtor has an interest in the Property which is subject to the automatic stay.

DENIAL OF MOTION WITHOUT PREJUDICE

As addressed above, Movant has failed to provide the court with sufficient grounds, legal authority, and evidence to grant relief from the automatic stay. Due to the deficiencies, the court denies the Motion without prejudice. The court does not continue the hearing and order supplemental briefing by Movant,

convinced that such supplemental briefing will only further confuse this contested matter. Movant can go back, prepare a motion which states with particularity the grounds upon which relief is based. Movant can then assemble the exhibits and make sure all are properly authenticated as required by the Federal Rules of Evidence. Finally, Movant's witnesses can clearly communicate facts to which they have personal knowledge and counsel can draft a declaration which provides only testimony as permitted by Federal Rules of Evidence 601 and 602.

Debtor has yet filed Schedules in this case (as of the court's January 30, 2016 review of the Docket in preparing for the hearing). Debtor can be prepared to explain to the court why the state court judge is not enforcing the temporary restraining order and the alleged violation thereof. Debtor can also explain to the court what good faith Chapter 13 Plan will be prosecuted and not merely be a free-floating stay pending the outcome of Debtor's efforts to overturn the current rulings in the state court action.

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 Relief From the Automatic Stay filed by Rico DD, Inc. ("Movant") 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 is denied without prejudice.

3. **13-32494-E-13 THEODORE/MOLLY MCQUEEN**
14-2004
G & K HEAVEN'S BEST, INC. V. MCQUEEN ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-4-14 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: C. Anthony Hughes

Adv. Filed: 1/4/14
Answer: 2/5/14

Crossclaim Filed: 2/5/14
Answer: 2/24/14

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury

The Status Conference is xxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 1/28/16 to be heard in conjunction with other matters on the calendar.

FEBRUARY 2, 2016 STATUS CONFERENCE

Xxxxxxxxxxxxxxxxx

4. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2004 CAH-9
G & K HEAVEN'S BEST, INC. V. MCQUEEN ET AL

CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH G & K HEAVEN'S BEST, INC.
12-23-15 [80]

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, 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.

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 36 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, 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. At the hearing ----------.

The Motion For Approval of Compromise is granted.

Theodore and Molly McQueen, the Defendant/Cross-Plaintiff's, requests that the court approve a compromise and settle competing claims and defenses with G & K Heaven's Best, Inc. The claims and disputes to be resolved by the proposed settlement are those arising in Adversary Proceedings Nos. 14-02004 and 14-02027.

Theodore and Molly McQueen and G & K Heaven's Best, Inc. has resolved

these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the parties failed to provide a copy of the Settlement Agreement as an exhibit in support of the Motion):

A. As to Adversary Proceeding No. 14-02004: Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the unsecured balance of Creditor's Claim #4 in the amount of $240,044.53 of which the Parties agreed $105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice. In the event Debtors are not able to complete the Third Amended Chapter 13 Payment Plan, Claim #4 in the amount of $240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6)."

B. As to Theodore and Molly McQueen's cross complaint against G & K Heaven's Best, Inc.: "Debtor reserves the right to pursue claims against Creditor. Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee."

C. "Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the UCC Financial Statement #39225120002 filed with the Secretary of State on August 29, 2013 is void and therefore this adversary proceeding pursuant FRBP 7001(2) and §547 shall be dismissed with prejudice."

G & K Heaven's Best, Inc.'S NON-OPPOSITION

The G & K Heaven's Best, Inc. filed a non-opposition on January 13, 2016. Dckt. 89. The G & K Heaven's Best, Inc. state that the do not oppose the Motion.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the G & K Heaven's Best,

Inc., following the completion of Theodore and Molly McQueen's plan, are fully and completely settled, with all such claims released. G & K Heaven's Best, Inc. has granted a corresponding release for Theodore and Molly McQueen and the Estate.

Probability of Success

Theodore and Molly McQueen states that this factor weighs in favor of settlement because the settlement is reasonable in light of the merits of the case. The G & K Heaven's Best, Inc.'s Claim No. 4 is in the amount of $240,044.53 to which the parties have agreed to pay and accept $105,000.00. Theodore and Molly McQueen further understand that any settlement would be subject to the discretion of the court. Theodore and Molly McQueen asserts that they would rather move forward with completing the Chapter 13 plan, rather than litigating the Adversary Proceeding any further.

Difficulties in Collection

Theodore and Molly McQueen assert that they are making necessary plan payments to the Trustee and plan to finish the plan.

Expense, Inconvenience and Delay of Continued Litigation

Theodore and Molly McQueen argues that litigation would result in significant costs which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Theodore and Molly McQueen estimate that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Theodore and Molly McQueen projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation. Additionally, Theodore and Molly McQueen assert there may be no monetary benefit to the estate and that there is the potential that Theodore and Molly McQueen may lose.

Paramount Interest of Creditors

Theodore and Molly McQueen argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Absence of Written Settlement Agreement

The Parties to this Settlement have been warring since before Theodore and Molly Ann McQueen filed their Chapter 13 bankruptcy case on September 25, 2013. Competing adversary proceedings have been filed by one against the other. Contested matter battles have been fought.

Slowly, the Parties found common ground and worked toward settlement of their disputes. In the Chapter 13 case a bankruptcy plan has been confirmed. 13-32494; Order, Dckt. 238. A companion proposed settlement has been advanced in Theodore and Molly McQueen's Adversary Proceeding against G & K Heaven's Best, Inc.

Rather than having a fully executed settlement agreement, the Parties have

placed the three terms of their settlement in the present Motion. The Parties seek court approval, by which the Order approving the settlement becomes the physical embodiment of the settlement.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate.

However, the McQueens fail to provide a copy of the actual settlement agreement, with the signatures of the parties. Instead, McQueens merely provides the bare-bones terms of the settlement.

While the McQueens do provide evidence that the settlement would be in the benefit of all parties and the G & K Heaven's Best, Inc. filed a non-opposition, the Parties have left the "drafting" of the "Settlement Agreement" to the court to place in the order.

JANUARY 28, 2016 HEARING

At the hearing, the court continued the hearing to 1:30 p.m. on February 2, 2016 (specially set to the court's relief from stay calendar). Dckt. 93. Upon review of the terms stated in the Motion, the court understood the terms of the settlement to be as follows (which are stated in manner in which the court would state in the order):

> **IT IS ORDERED** that the Complaint and Cross Complaint in Adversary Proceeding are stated by the Parties as set forth in the Motion to Approve Compromise (Dckt. 80) and Non-Opposition (Dckt. 89) are settled on the following terms and conditions:
>
> A. For the Complaint in Adversary Proceeding 14-02004, *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:
>
> 1. Upon successful completion of Theodore and Molly McQueen' Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), the unpaid balance of Creditor's unsecured claim, Amended Proof of Claim #4 (which was filed for a total claim of $240,044.53), for which the Parties agreed to pay the secured portion of the claim in the amount of $105,000.00 thorough the confirmed Third Amended Plan, shall be discharged and this adversary proceeding shall be dismissed with prejudice by G & K Heaven's Best, Inc.
>
> 2. In the event Theodore and Molly McQueen, the Debtors, fail to complete the Third Amended Chapter 13 Plan as confirmed, the debt set forth in Amended Proof of Claim No. 4, in the amount of $240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6). Judgment shall be entered on the Complaint upon noticed motion filed by G & K Heaven's Best, Inc.
>
> B. For the Counter Claim in Adversary Proceeding No. 14-

02004; Cross *Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:

1. Theodore and Molly McQueen reserve the right to pursue claims against G & K Heaven's Best, Inc. and Gregory Miller if Theodore and Molly McQueen fail to complete the Third Amended Chapter 13 Plan and the claim set forth in Amended Proof of Claim No. 4 is determined non-dischargeable. The election to pursue such claims shall be made within ninety-days of entry of the default judgment of non-dischargeability for G & K Heaven's Best, Inc., and such election shall be documented by Theodore McQueen or Molly McQueen, or both of them, filing a motion for the bankruptcy court to set a scheduling conference for the Cross Complaint. Any monetary damages from the Cross Complaint, less any court allowed fees and expenses, shall be turned over to the Chapter 13 Bankruptcy Trustee for disbursement through the Chapter 13 Plan.

2. If the Chapter 13 Plan is completed and Theodore and Molly McQueen discharge the unsecured portion of the G & K Heaven's Best, Inc. claim in their Chapter 13 bankruptcy case (Amended Proof of Claim No. 4), Theodore and Molly McQueen shall dismiss the Adversary Proceeding as it relates to their Cross Complaint."

C. For Adversary Proceeding No. 14-02027; Complaint *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Theodore and Molly McQueen's Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), UCC Financing Statement naming "GandK Heaven's Best" as the Secured Party, Document #39225120002, filed with the Secretary of State on August 29, 2013,is deemed void and G & K Heaven's Best, Inc. shall file a termination statement. Upon the filing of the termination statement, Theodore and Molly McQueen, and each of them, shall dismiss this adversary proceeding with prejudice.

IT IS FURTHER ORDERED that the terms of the Settlement of the two Adversary Proceedings are stated in this Order, the Parties agreed and confirmed for the court that there are no further or other terms which either parties asserts exists, and any modifications of the terms of the settlement must be in writing and approved by this bankruptcy court.

The court posted the above language for an order granting the Motion and stating the terms of the settlement on January 27, 2016.

FEBRUARY 2, 2016 HEARING

At the hearing, xxxxxx

5.	**13-32494-E-13 THEODORE/MOLLY MCQUEEN** **14-2027 CAH-9** **MCQUEEN ET AL V. G & K HEAVEN'S BEST, INC.**	**CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH G & K HEAVEN'S BEST, INC.** **12-23-15 [81]**

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, 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.

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 36 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, 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. At the hearing ----------.

The Motion For Approval of Compromise is granted.

Theodore McQueen and Molly McQueen, the Plaintiff-Debtor, requests that the court approve a compromise and settle competing claims and defenses with G & K Heaven's Best, Inc. The claims and disputes to be resolved by the proposed settlement are those arising in Adversary Proceedings Nos. 14-02004 and 14-02027.

Theodore and Molly McQueen and G & K Heaven's Best, Inc. has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the parties failed to provide a copy of the Settlement Agreement as an exhibit in support of the Motion):

A. As to Adversary Proceeding No. 14-02004: Only upon successful completion of Theodore and Molly McQueen's Third Amended Chapter 13 Plan, the unsecured balance of G & K Heaven's Best, Inc. 's Claim No. 4 in the amount of $240,044.53 of which the parties agreed $105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice. In the event Theodore and Molly McQueen are not able to complete the Third Amended Chapter 13 Payment Plan, Claim No. 4 in the amount of $240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6)

B. As to Theodore and Molly McQueen' cross complaint against G & K Heaven's Best, Inc. : Theodore and Molly McQueen reserve the right to pursue claims against G & K Heaven's Best, Inc. . Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee.

C. As to Adversary Proceeding No. 14-02027: Only upon successful completion of Theodore and Molly McQueen' Third Amended Chapter 13 Plan, the UCC Financial Statement No. 39225120002 filed with the Secretary of State will be void.

G & K Heaven's Best, Inc. 'S NON-OPPOSITION

The G & K Heaven's Best, Inc. filed a non-opposition on January 13, 2016. Dckt. 89. The G & K Heaven's Best, Inc. state that they do not oppose the Motion.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the G & K Heaven's Best, Inc. , following the completion of Theodore and Molly McQueen's plan, are fully and completely settled, with all such claims released. G & K Heaven's Best, Inc. has granted a corresponding release for Theodore and Molly McQueen and the Estate.

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Molly Ann McQueen filed their Chapter 13 bankruptcy case on September 25, 2013. Competing adversary proceedings have been filed by one against the other. Contested matter battles have been fought.

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2. In the event Theodore and Molly McQueen, the Debtors, fail to complete the Third Amended Chapter 13 Plan as confirmed, the debt set forth in Amended Proof of Claim No. 4, in the amount of $240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6). Judgment shall be entered on the Complaint upon noticed motion filed by G & K Heaven's Best, Inc.

B. For the Counter Claim in Adversary Proceeding No. 14-02004; Cross *Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:

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C. For Adversary Proceeding No. 14-02027; Complaint *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Theodore and Molly McQueen's Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), UCC Financing Statement naming "GandK Heaven's Best" as the Secured Party, Document #39225120002, filed with the Secretary of State on August 29, 2013,is deemed void and G & K Heaven's Best, Inc. shall file a termination statement. Upon the filing of the termination statement, Theodore and Molly McQueen, and each of them, shall dismiss this adversary proceeding with

prejudice.

IT IS FURTHER ORDERED that the terms of the Settlement of the two Adversary Proceedings are stated in this Order, the Parties agreed and confirmed for the court that there are no further or other terms which either parties asserts exists, and any modifications of the terms of the settlement must be in writing and approved by this bankruptcy court.

The court posted the above language for an order granting the Motion and stating the terms of the settlement on January 27, 2016.

FEBRUARY 2, 2016 HEARING

At the hearing, xxxxxx

6. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2027
MCQUEEN ET AL V. G & K
HEAVEN'S BEST, INC.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-21-14 [1]

Plaintiff's Atty: C. Anthony Hughes
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 1/21/14
Answer: 2/17/14

Nature of Action:
Validity, priority or extent of lien or other interest in property
Recovery of money/property - preference

The Status Conference is xxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 1/28/16 to be heard in conjunction with other matters on the calendar.

FEBRUARY 2, 2016 STATUS CONFERENCE

Xxxxxxxxxxxxxxxxxxx.