# UNITED STATES BANKRUPTCY COURT
# EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Bakersfield Federal Courthouse
510 19th Street, Second Floor
Bakersfield, California

**PRE-HEARING DISPOSITIONS**

**DAY: WEDNESDAY**
**DATE: JANUARY 4, 2017**
**CALENDAR: 10:30 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

**GENERAL DESIGNATIONS**

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

**ORAL ARGUMENT**

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

**COURT'S ERRORS IN FINAL RULINGS**

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

1. 16-10401-A-7 NATHAN/ROSALINA CURTIS
16-1060
LOANME, INC. V. CURTIS
DAVID BRODY/Atty. for pl.
ORDER #16 CONTINUING TO 3/8/17

PRETRIAL CONFERENCE RE: COMPLAINT
5-31-16 [1]

**Final Ruling**

Pursuant to Order, ECF #16, the pretrial conference is continued to March 8, 2017, at 10:30 a.m.

2. 16-13254-A-7 VANESSA HOOKER
16-1104
J.A., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITE V.
MARK WHITTINGTON/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: COMPLAINT
11-23-16 [1]

**No tentative ruling.**

3. 15-13991-A-7 JERAD/ALICE SANDERS
16-1003
DELANO VINE VALLEY, INC. V. SANDERS ET AL
NICHOLAS ANIOTZBEHERE/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: AMENDED COMPLAINT
5-25-16 [29]

**Final Ruling**

Because the adversary proceeding is being transferred to Judge W. Richard Lee for trial purposes, the pretrial conference is continued to February 24, 2017, at 9:00 a.m. in Department C, Courtroom 12, 2500 Tulare Street, Fresno, California.

4. 15-13991-A-7 JERAD/ALICE SANDERS MOTION FOR SUMMARY JUDGMENT
16-1003 NEA-2 1-5-17 [57]
DELANO VINE VALLEY, INC. V.
SANDERS ET AL
NICHOLAS ANIOTZBEHERE/Atty. for mv.
RESPONSIVE PLEADING

**Tentative Ruling**

**Motion:** Summary Judgment on § 727(a)(4)(A) Claim and Affirmative Defenses
**Notice:** LBR 9014-1(f)(1); written opposition required
**Disposition:** Denied
**Order:** Civil minute order

Plaintiff Delano Vine Valley, Inc. ("Delano Vine") has filed a complaint against Defendants Jerad R. Sanders and Alice M. Sanders, the debtors in the underlying bankruptcy case. The complaint brings claims under §§ 727(a)(3), 727(a)(4)(A), 727(a)(5), 523(a)(2)(A), 523(a)(2)(B). The court previously ruled on a motion to dismiss the claims in this matter, granting the motion in part and denying the motion in part and dismissing several but not all of the claims. The complaint was amended and the First Amended Complaint remains pending. The Sanderses have filed an answer and raised several affirmative defenses.

Delano Vine now moves for summary judgment on one of its claims, the § 727(a)(4)(A) claim. It also moves for summary judgment on the affirmative defenses raised by the Sanderses in their answer.

**SUMMARY JUDGMENT STANDARDS**

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.*

"Where the non-moving party [e.g., a plaintiff] bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* (citation omitted). The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which [the factfinder] could reasonably render a verdict in the non-moving party's favor." *Id.*

When the moving party has the burden of persuasion at trial (e.g., a plaintiff on claim for relief or a defendant as to an affirmative defense), the moving party's burden at summary judgment is to "establish beyond controversy every essential element of its . . . claim. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). In such a case, there is no need to disprove the opponent's case "[i]f the evidence offered in support of the motion establishes every essential element of the moving party's claim or [affirmative] defense." James M. Wagstaffe, William W. Schwarzer & Hon. A. Wallace Tashima, *Federal Civil Procedure Before Trial* ¶ 14:126.1 (rev. 2017).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

**DISCUSSION**

Delano Vine's Claim under § 727(a)(4)(A)

An objection to discharge under § 727(a)(4)(A) requires the plaintiff to prove that (1) the debtor made a false oath (or account) in connection with his own bankruptcy case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010). As to the first element, "[a] false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath." *Id.* As to the second element, a fact is material "if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." *Id.* at 1198.

Delano Vine has not met its burden of production or persuasion on this claim because the majority of the evidence submitted in support of the motion has not been authenticated. "An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4), *incorporated by* Fed. R. Bankr. P. 7056; *see also Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). "A trial court can only consider admissible evidence in ruling on a motion for summary judgment. Authentication is a condition precedent to admissibility." *Orr*, 285 F.3d at 773 (citations omitted) (internal quotation marks omitted). The Ninth Circuit "ha[s] repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." *Id.*

The authentication requirement may be met by "[t]estimony that an item is what it is claimed to be." Fed. R. Evid. 901(b)(1). Any testimony used to authenticate a document under Rule 901(b)(1) is subject to the requirement that the "authenticating witness" have personal knowledge. Fed. R. Evid. 602. "In a summary judgment motion, documents authenticated through personal knowledge must be attached to an affidavit that meets the requirements of [former Rule 56(e) and current Rule 56(c)(4)] and the affiant must be a person through whom the exhibits could be admitted into evidence." *Orr*, 285 F.3d at 773–74 (footnotes omitted) (citation omitted) (internal quotation marks omitted) (Rule 56(c)(4) now contains the requirements formerly expressed in Rule 56(e)).

"A document can be authenticated [under Rule 901(b)(1)] by a witness who wrote it, signed it, used it, or saw others do so." *Id.* at 774 n.8 (alteration in original). However, "[c]onclusory affidavits that do not affirmatively show personal knowledge of specific facts are insufficient." *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (alteration in original) (quoting *Casey v. Lewis*, 4 F.3d 1516, 1527 (9th Cir. 1993)).

In this case, the promissory notes and deeds used to support the motion have not been authenticated by a witness who drafted them, signed them, or saw others do so. They have not been authenticated by any other means.

Moreover, the deposition attached as Exhibit H has not been authenticated properly to be admissible evidence. "A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent. Ordinarily, this would have to be accomplished by attaching the cover page of the deposition and the reporter's certification to every deposition extract submitted. It is insufficient for a party to submit, without more, an affidavit from her counsel identifying the names of the deponent, the reporter, and the action and stating that the deposition is a 'true and correct copy.' Such an affidavit lacks foundation even if the affiant-counsel were present at the deposition." *Orr*, 285 F.3d at 774 (footnote omitted) (citations omitted) (internal quotation marks omitted).

Without such evidence, the "undisputed material facts" are unsupported by evidence. The memorandum and the statement of undisputed facts evidence fails, moreover, to cite any evidence supporting existence of

a false oath. The only authenticated document is Exhibit G, which contains the reporter's certification. The court's review of that document does not reveal that it contains any evidence supporting a false oath in connection with the Sanderses' bankruptcy case that was made knowingly and fraudulently.

In addition, the motion and memorandum in support (and the statement of undisputed facts) fail to cite to particular portions of this deposition of Alice Sanders (Exhibit G) to support the material facts. Fed. R. Civ. P. 56(c)(1) requires parties to support factual positions at summary judgment by citing to particular parts of materials in the record. "The court need consider only the cited materials." Fed. R. Civ. P. 56(c)(3). By inference, the court need not consider materials not cited. *See id.* "Because a district court has no independent duty "to scour the record in search of a genuine issue of triable fact," it may rely on the parties to "identify with reasonable particularity the evidence" that either supports or precludes summary judgment. *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010). The Ninth Circuit precedent on this issue is consistent with "the majority view that the district court may limit its review to the documents submitted for the purposes of summary judgment and *those parts of the record specifically referenced therein*." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001) (emphasis added). For example, "even if an affidavit is on file, a district court need not consider it in opposition to summary judgment unless it is brought to the district court's attention in the opposition to summary judgment." *Id.* at 1029.

The Statement of Undisputed Facts further does not comply with Local Rule 7056-1, which requires such a statement to "enumerate discretely each of the specific material facts relied upon in support of the motion and *cite the particular portions* of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish that fact." LBR 7056-1(a) (emphasis added).

In short, Delano Vine has failed to meet its burden of production and burden of persuasion for this summary judgment motion. Its motion has not provided admissible evidence establishing all essential elements of its § 727(a)(4)(A) claim.

Affirmative Defenses

Delano Vine requests summary judgment on the Sanderes' affirmative defenses. The Sanderses' Answer sets forth seven affirmative defenses. The Sanderses have the burden of persuasion at trial on the affirmative defenses.

The Sanderses' first affirmative defense is failure to state a claim. Answer to 1st Am. Compl. at 7 ¶ 1, ECF No. 39. While it is true that a majority of the claims were originally dismissed in the ruling on the Sanderses' motion to dismiss, and some were not, the First Amended Complaint has not been the subject of a Rule 12(b)(6) or Rule 12(c) motion. "A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). "Rule 12(h)(2)(C) permits a defendant to raise the defense of failure to state a claim upon which relief can be granted at trial. But that defense remains a denial—or negative defense—not an affirmative defense." *Ingram v. Pac. Gas & Elec. Co.*, No. 12-CV-02777-JST, 2014 WL 295829, at *3 (N.D. Cal. Jan. 27, 2014).

The court will not grant summary judgment on this defense as this is not the most appropriate procedural mechanism to evaluate the sufficiency of the pleadings. *See* Fed. R. Civ. P. 12(b)(6), (c), (h), *incorporated by* Fed. R. Bankr. P. 7012(b). The defense of failure to state a claim is preserved and may be raised in any pleading, by a motion under Rule 12(c), or at trial under Rule 12(h)(2). Fed. R. Civ. P. (c), (h)(2). The correct procedure for addressing a negative defense framed improperly as an affirmative defense is set forth in *Ingram v. Pac. Gas & Elec. Co.*, No. 12-CV-02777-JST, 2014 WL 295829, at *3 (N.D. Cal. Jan. 27, 2014).

The second affirmative defense is also not truly an affirmative defense. Answer to 1st Am. Compl. at 7 ¶ 2. It constitutes a denial that the Sanderses have committed any actions or omissions that would cause their debts to be nondischargeable under any section of the Bankruptcy Code. This is also a denial or negative defense as discussed in the section on the first affirmative defense. The correct procedure for addressing a negative defense that is not technically an affirmative defense set forth in *Ingram*, No. 12-CV-02777-JST, 2014 WL 295829, at *3. Summary judgment is not the appropriate procedural mechanism to rule on this issue.

The third affirmative defense is that Delano Vine's claims are barred by the statute of limitations. The argument presented is persuasive and does show that summary judgment should be granted against the Sanderses on this affirmative defense. This adversary proceeding was timely filed under Rules 4004(a) and 4007(c) as it was brought before the 60-day deadline after the first date set for the § 341 meeting. But a statute of limitations defense could also theoretically be raised in response a nondischargeability claim by attempting to eliminate the liability that the plaintiff seeks to determine nondischargeable. Because the motion does not address this aspect of the statute of limitations, and only addresses the statute of limitations for filing adversary proceedings under § 727 and § 523, the court cannot grant summary judgment as to this affirmative defense.

The fourth, fifth, sixth and seventh affirmative defenses are estoppel, failure to mitigate damages, unclean hands, and failure to account for all payments received. In essence, Delano Vine offers only a conclusory argument that each of these affirmative defenses is not supported by law or fact and that the affirmative defenses are unrelated to any specific cause of action in the complaint.

Although some of fourth through seventh affirmative defenses appear unrelated to the claims brought, this lack of relatedness does not provide the court with a basis to grant summary judgment in favor of Delano Vine. And stating that a pleading is "not supported by law or fact" is a conclusory and blanket statement that does not suffice to warrant summary judgment in Delano Vine's favor on these defenses. James M. Wagstaffe, William W. Schwarzer & Hon. A. Wallace Tashima, *Federal Civil Procedure Before Trial* ¶ 14:135-37 (rev. 2017). Instead, a movant should demonstrate the absence of such evidence and identify the parts of the record which bears out this absence. *Id.* at ¶ 14:136. The argument should state specifically why the opposing party does not have admissible evidence of an essential fact. *Id.* at 14:137.1.

Evidentiary Objections to Defendants' Declarations

Lastly, because the court did not consider the evidence offered by the Sanderses in ruling on the motion, the court need not rule on the evidentiary objections raised by Delano Vine, ECF No. 72.

**CIVIL MINUTE ORDER**

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

Delano Vine Valley, Inc.'s motion for summary judgment has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing,

IT IS ORDERED that the motion is denied.

| | | | |
|---|---|---|---|
| 5. | 15-13991-A-7<br>16-1016<br>NUNEZ AG, INC. V. SANDERS ET AL<br>TERRENCE EGLAND/Atty. for pl.<br>ECF ORDER NO. 39 CONTINUING TO 4/5/17 | JERAD/ALICE SANDERS | PRETRIAL CONFERENCE RE: AMENDED COMPLAINT<br>4-15-16 [15] |

**Final Ruling**

Pursuant to Order, ECF #39, the pretrial conference is continued to April 5, 2017, at 10:30 a.m.