

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

February 14, 2018 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

| | | | |
|----|-------------------|-----------------|-----------------------------|
| 1. | 17-24617-D-7 | PATRICIA PAYTON | MOTION TO DISMISS ADVERSARY |
| | 17-2200 | DNL-1 | PROCEEDING |
| | PAYTON V. CARELLO | | 1-5-18 [10] |

Tentative ruling:

This is the motion of the defendant, who is also the trustee in the underlying chapter 7 case (the "trustee"), to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1), incorporated herein by Fed. R. Bankr. P. 7012(b), for lack of subject matter jurisdiction; specifically, for lack of standing, and pursuant to Fed. R. Civ. P. 12(b)(7) (Fed. R. Bankr. P. 7012(b)), for failure to join a necessary party. The plaintiff, who is the debtor in the underlying case (the "debtor"), has filed opposition.

The chapter 7 case was filed on July 13, 2017. On September 20, 2017, the debtor filed a motion to compel the trustee to abandon the real property that is the debtor's residence, along with certain bank accounts, all alleged by the debtor to be the sole and separate property of her spouse. The trustee opposed the motion. The court denied the motion on the basis that abandonment was not the right remedy because if the house and bank account are in fact the spouse's separate property,

the bankruptcy estate has no interest in them and there is nothing for the trustee to abandon. The court noted that whether the house and bank accounts are or are not property of the estate is an issue that must be resolved by way of an adversary proceeding.

Two weeks after the court denied the abandonment motion, the debtor commenced this adversary proceeding, in which she seeks a determination that the house and bank accounts are the sole and separate property of her spouse, and therefore, are not property of the bankruptcy estate. The trustee filed this motion to dismiss, claiming the debtor is improperly asserting the rights and interests of another; namely, her spouse, and that she improperly failed to join her spouse, who she claims holds the sole interest in the assets, as a party. The trustee asks that the action be dismissed with prejudice, with any determination of the validity, priority, or extent of the interests of the estate and the debtor's spouse in the house and bank accounts to be reserved for a separate adversary proceeding between them.

The court is making no determination at this time as to whether the debtor has standing because the court is not persuaded that would be an efficient use of the court's resources. The debtor has made it clear to the trustee she disputes the trustee's contention that the assets are property of the estate, and thus, it appears that issue will have to be determined in any event. The court does not understand the trustee's strategy in devoting her efforts to a motion to dismiss, when if that motion is granted, the trustee will need to commence an adversary proceeding of her own. On the other hand, the court does not understand why the debtor appears to be resistant to joining her spouse, as it appears he is a required party under all three tests listed in Fed. R. Civ. P. 19(a)(1) (Fed. R. Bankr. P. 7019).

The court will use this hearing as a status conference and will expect the parties to address how the real issue here - whether the house and bank accounts are or are not property of the estate - may be most efficiently resolved. The court will hear the matter.

2. 14-25820-D-11 INTERNATIONAL MOTION TO SEVER PLAINTIFFS
16-2090 MANUFACTURING GROUP, INC. DMC-13CLAIMS AGAINST DEFENDANTS
MCFARLAND V. CALIFORNIA BANK & CALIFORNIA BANK & TRUST, AND
TRUST ET AL BANK OF AMERICA, N.A. FROM
CLAIMS AGAINST DEFENDANT
JAMESTOWN S'KLALLAM TRIBE
1-17-18 [257]

Final ruling:

The hearing on this motion is continued to March 14, 2018 at 10:00 a.m. No appearance is necessary on February 14, 2018.

3. 17-25421-D-7 MICHAEL HAIGH MOTION TO EXTEND AUTOMATIC STAY
JSO-1 1-9-18 [46]

Final ruling:

This matter is a duplicate of item no. 4. Matter removed from calendar.

4. 17-25421-D-7 MICHAEL HAIGH MOTION FOR RELIEF FROM
JSO-1 AUTOMATIC STAY
MICHAEL HAIGH VS. 1-9-18 [46]

5. 11-30422-D-7 MATTHEW/AMBER PENCE MOTION TO AVOID LIEN OF PACIFIC
STATE BANK
1-12-18 [22]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

6. 17-27729-D-7 CAPRI WILLIAMS ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
1-17-18 [29]

7. 18-20048-D-11 BOB COOK COMPANY LLC STATUS CONFERENCE RE: VOLUNTARY
PETITION
1-3-18 [1]

Final ruling:

This case was dismissed on January 17, 2018. As a result this status conference is removed from calendar as moot. No appearance is necessary.

8. 17-27954-D-7 DAVID/DOLORES CHAVARRIA MOTION TO AVOID LIEN OF
FF-1 PORTFOLIO RECOVERY ASSOCIATES,
LLC
1-12-18 [13]

Final ruling:

This is the debtors' motion to avoid an alleged judicial lien held by Portfolio Recovery Associates LLC ("Portfolio"). The motion will be denied for the following reasons. First, the moving papers, including the motion, notice of hearing, declaration, exhibits, and proof of service, were all filed as a single document, contrary to LBR 9014-1(d)(4) and (e)(3). Second, the moving parties served Portfolio at a post office box with no attention line, whereas service on a corporation, partnership, or other unincorporated association must be to the attention of an officer, managing or general agent, or agent for service of process. Fed. R. Bankr. P. 7004(b)(3), incorporated herein by Fed. R. Bankr. P. 9014(b).

Finally, the moving parties have failed to submit evidence sufficient to demonstrate they are entitled to the relief requested, as required by LBR 9014-1(d)(3)(D). The motion states that the debtors have an interest in the real property known as 7526 Maple Leaf Lane, Sacramento, CA, and that Portfolio holds a judicial lien against the property. Those statements are not supported by the record. According to the debtors' Schedule A/B, they own a 1967 double wide mobile home, but the schedule states, "Debtors do not own the land upon which the Mobile Home Sits On." And they do not own any other real property.

Under California law, the recording of an abstract of judgment with the county recorder of a particular county creates a judicial lien on all real property of the judgment debtor located in that county. Cal. Code Civ. Proc. §§ 697.310(a), 697.340(a). It does not create a lien on personal property. As the debtors own no real property, there is no judicial lien here that is subject to avoidance and the debtors have not established they are entitled to relief under § 522(f)(1)(A).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

9. 16-25460-D-7 GABRIEL/CHRISTINA PAULL MOTION FOR COMPENSATION FOR
SSA-5 STEVEN S. ALTMAN, TRUSTEE'S
ATTORNEY
1-19-18 [70]

10. 15-26465-D-7 SCOTT POMEROY CONTINUED MOTION FOR ENTRY OF
16-2250 GJH-2 DEFAULT JUDGMENT
ROBERTS V. SWEETLAND 4-5-17 [18]

Final ruling:

This adversary proceeding has been dismissed by Notice of Dismissal entered February 5, 2018. As such, the motion will be denied by minute order as moot. No appearance is necessary.

11. 15-26465-D-7 SCOTT POMEROY CONTINUED MOTION TO SET ASIDE
16-2250 LBG-202 7-19-17 [51]
ROBERTS V. SWEETLAND

Final ruling:

This adversary proceeding has been dismissed by Notice of Dismissal entered February 5, 2018. As such, the motion will be denied by minute order as moot. No appearance is necessary.

12. 11-46172-D-12 VIRENDA/SUMAN MISHRA MOTION TO DISMISS ADVERSARY
17-2156 DWE-3 PROCEEDING
MISHRA ET AL V. WELLS FARGO 12-22-17 [82]
BANK, N.A.

Tentative ruling:

This is the motion of defendant Wells Fargo Bank, N.A. (the "Bank") to dismiss the amended complaint of the plaintiffs, who were the debtors in the underlying chapter 12 case (the "debtors"), pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The debtors have filed opposition. For the following reasons, the motion will be denied.

In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

This is the Bank's second Rule 12(b)(6) motion. The first was granted conditionally, with leave to amend; the Bank now moves to dismiss the debtors' amended complaint, filed November 21, 2017. The first motion was granted on the ground that the original complaint was too conclusory to state a claim for relief. In particular, the court stated, "the text of the complaint contains no information about what payments were made through the plan, how they were credited by the Bank, or how they should have been credited." Ruling on DC No. DWE-2, civil minutes for Nov. 8, 2017, DN 72. Thus, the debtors have included considerably more detail in

their amended complaint. While some of the new allegations were probably not necessary to state a claim for relief, others provide clarity as to the payments the debtors claim to have made and the complaint includes exhibits that appear to support the debtors' allegation that the Bank did not properly apply all those payments.

The debtors' confirmed plan (Ex. 7 to their amended complaint) provided for the Bank's claim as follows:

The Monthly Contract Installment Amount to [the Bank] under class 1 is \$1068.08

Debtors shall pay the monthly arrearage payments directly to [the Bank] in the amount of \$400.00 commencing on the sixty first month following December 2011 [or in January of 2017] and continuing thereafter until paid in full and payments will be made on the first of each month.

Compl., DN 74, ¶¶ 23, 24;¹ Debtors' Ex. 7, at 2:11-14, 2:16-19.² The debtors allege that "[p]ursuant to the terms of the Confirmation Order and discharge, on or about January 4, 2017, Plaintiffs began paying Defendant directly." Compl., ¶ 33. They specifically allege they made the ongoing mortgage payments for January 2017 through September 2017, at \$1,100 per month. ¶ 39.

However, they do not specifically allege they began making the arrears payments, at \$400 per month, in January 2017 and do not allege they made those payments regularly each month thereafter. Instead, they allege, they "paid nine (9) post-petition monthly arrears payment[s] of \$400.00 per month, to Defendant via Defendant's counsel, for a total of \$3,600.00." ¶ 47. And although they have filed as exhibits to the complaint copies of the checks for their ongoing mortgage payments for January through September, all dated in those months consecutively, they have not filed copies of their monthly \$400 checks toward the arrears. Finally, although debtor Virenda Mishra refers in a declaration filed as an exhibit to the complaint to "copies of the mortgage payments made directly to [the Bank] on January 4, 2017, February 6, 2017, [and so on, monthly]" (Ex. 16 to the complaint, at ¶ 2), as to the arrears payments, he testifies, "I have also have [sic] presented my attorney with the cashier's check[] in the amount of . . . \$3,600.00 (the \$400.00 per month for the arrears)." Id. at ¶ 3.

The Bank's motion focuses almost entirely on the apparent fact that the debtors did not begin making the \$400 per month payments toward the arrears in the 61st month after December 2011 (or January 2017), as required by the confirmation order, and did not make those payments each month thereafter, but instead made a lump-sum payment representing nine months worth of payments, after the Bank's notice of default and notice of trustee's sale had been recorded, on May 17, 2017 and August 21, 2017, respectively. The Bank concludes from this fact that "the entire Complaint fails and [the Bank's] Notice of Default and Notice of Sale were not improper." Bank's Motion, DN 82 ("Mot."), at 5:13-14.

The problem, for the Bank, is that the complaint alleges the Bank received \$56,427 through the debtors' plan, by way of the chapter 12 trustee; that the debtors completed the plan and received their discharge on April 17, 2017; and that in February of 2017, the debtors began receiving mortgage statements from the Bank showing they were past-due by amounts in excess of \$15,000. The debtors' chapter 12 case was filed on November 3, 2011; thus, the 60th month of their 60-month plan was November of 2016. According to the trustee's payment history, filed as an exhibit

to the debtors' original complaint but not their amended one, the trustee made the ongoing mortgage payment to the Bank, at \$1,068.08 per month, every month through and including November of 2016. The Bank does not contend the trustee was mistaken when he issued his final report, thereby apparently concluding the debtors had satisfactorily completed the plan. If the trustee was correct, then when the debtors completed the plan, they were current except for the \$400 per month to be paid beginning in January of 2017 on the Bank's arrears claim. That claim was for a total of \$4,672, according to the Bank's proof of claim. How then could the debtors have been delinquent by 16 payments, for a total of \$17,333, as of June 6, 2017, as stated in the Bank's reinstatement quote filed as Exhibit 17 to the complaint? How could they have been in default by \$16,122 as of May 17, 2017, as stated in the Bank's notice of default (Ex. 18)?

The debtors' original complaint included a prayer for injunctive relief to stop the Bank's foreclosure. The Bank has since rescinded its notice of default, but the foreclosure process, which the debtors contend was improper, is the source of their damage claims. That is, they claim to have lost their tenant because of the recording of the notice of default and to have incurred attorney's fees for this adversary proceeding. As the notice of default, by its terms, appears to have been based on a delinquency that resulted from the Bank's failure to properly apply payments received under the confirmed plan, as alleged by the debtors, the court concludes the complaint, together with the exhibits to it, are sufficient to plausibly state a claim on which relief can be granted, and the motion will be denied.

The court rejects the Bank's contention that causes of action for damages for violation of § 524(i) of the Code (the debtors' first cause of action) and for contempt (the fourth cause of action) must be brought by motion and not through a complaint. The case cited does not stand for that proposition and the court is aware of no other authority for it. The court also rejects the Bank's claim that § 524(i), governing the willful failure of a creditor to credit payments received under a plan confirmed under the Bankruptcy Code, does not apply here, as a matter of law. The Bank cites § 1228(c)(1), which excepts from a chapter 12 discharge any debt provided for under § 1222(b)(5); that is, any debt on which the last payment is due after the completion of the plan. The suggestion is that because long-term debts are not discharged in chapter 12, subsections of § 524, dealing with the discharge injunction, can never apply. The Bank cites no authority for this proposition and the court is aware of none.

Section 524(i), added to the Code by BAPCPA, has been discussed only rarely by courts within the Ninth Circuit (see e.g., In re Boudreaux, 2012 Bankr. LEXIS 6176, *24-26, 2012 WL 8441316 (Bankr. E.D. Cal. 2012); In re Anderson, 382 B.R. 496, 502-03 (Bankr. D. Or. 2008)), and then, only in the context of what provisions a debtor may include in a plan in the first place, not what remedies are available to him after the fact. In any event, it is difficult to imagine what Congress had in mind in enacting § 524(i) if not to apply it to the improper application of plan payments on a long-term debt.

Clearly, based upon the wording of § 524(i), a creditor that willfully fails to credit payments received under a confirmed Chapter 13 plan shall, to the extent that failure harms the debtor, be in violation of the discharge injunction. The court finds no case law expressly addressing application of § 524(i). Additionally, as with the majority of BAPCPA, legislative history is scarce. Nevertheless, the Senate Report clearly states that "[t]he Committee intends the term 'willful' to

encompass only deliberate refusals to credit payments under circumstances where it is clear that the creditor is aware of its legally binding responsibility to do so."

In re Collins, 2007 Bankr. LEXIS 2487, *11 and n.5, 2007 WL 2116416 (Bankr. E.D. Tenn. 2007), quoting S. REP. NO. 105-253, 105th Cong., 2nd Sess. at *36 (1998). The court concludes that § 524(i) does provide a remedy for that conduct. In fact, it seems likely Congress added the subsection for the very reason that the discharge does not otherwise apply to long-term debt.

The Bank also contends the debtors' cause of action for contempt fails because "the Complaint does not allege facts to establish that the Bank acted "in bad faith, vexatiously, wantonly or with frivolousness, harassment, or an improper purpose." Mot. at 9:2-3. The authority the Bank cites pertains to sanctions under the court's inherent power, which is "a separate and distinct source of authority, which is not displaced by the federal statutes and rules" (In re Deville, 280 B.R. 483, 495 (9th Cir. BAP 2002)), and which "is not a manifestation of contempt power and may be determined without resort to contempt proceedings" Id. at 497. The elements of contempt are that "the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002), citations omitted. The elements are adequately pled in the debtors' complaint.

Finally, the Bank argues the debtors' cause of action for attorney's fees "is not in and of itself a cause of action upon which relief can be sought." Mot. at 8:13-14. "Rather it is a cost remedy for a prevailing party on an action on a contract . . ." Id. at 8:14 (referring to Cal. Civ. Code § 1717). In contrast, the Bankruptcy Rules until recently not only permitted but required a claim for attorney's fees to be pleaded as a cause of action or claim in a complaint. See In re Luchini, 511 B.R. 664, 678 (Bankr. E.D. Cal. 2014), quoting former Fed. R. Bankr. P. 7008(b) ["A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third party complaint, answer, or reply as may be appropriate."]. Rule 7008 was amended in 2014 "to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary." Notes of Advisory Committee on 2014 amendments. The Bank cites no authority for the proposition that a separate cause of action for attorney's fees, although no longer required, is no longer permitted.

For the reasons stated, the motion will be denied. The court will hear the matter.

1 Unless otherwise indicated, all subsequent references to the complaint are to the amended complaint.

2 The total amount of the pre-petition arrears was not set forth in the order; in the plan, it was listed as \$5,760 and in the Bank's filed proof of claim, as \$4,672. The principal amount of the claim was listed in the proof of claim as \$129,062.

13. 17-25279-D-7 JONATHAN VELASQUEZ MOTION FOR COMPENSATION FOR
ADJ-4 ANTHONY D. JOHNSTON, TRUSTEE'S
ATTORNEY
1-12-18 [57]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

14. 17-28181-D-7 OMAR PELAEZ MOTION FOR RELIEF FROM
SC-1 AUTOMATIC STAY
DUKE PARTNERS II, LLC VS. 1-16-18 [25]

15. 10-26088-D-7 SEAM SATH MOTION TO AVOID LIEN OF CHASE
TJW-2 BANK USA, N.A.
1-10-18 [18]

Final ruling:

This is the debtor's motion to value collateral of Chase Bank USA, N.A. (the "Bank"). The motion will be denied because the moving party failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b). The moving party served the Bank to the attention of a named vice president and controller. However, there is no evidence service was made by certified mail, whereas service on an FDIC-insured institution, such as the Bank, must be by certified mail. Rule 7004(h).

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

16. 17-24589-D-7 EDWARD/VERENICE MCTHORN MOTION FOR COMPENSATION BY THE
SCB-3 LAW OFFICE OF SCHNEWEIS-COE &
BAKKEN, LLP FOR LORIS L.
BAKKEN, TRUSTEE'S ATTORNEY(S)
1-17-18 [52]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

17. 17-27805-D-7 DANNIE BITKER MOTION FOR RELIEF FROM
RJ-1 AUTOMATIC STAY AND/OR MOTION TO
ANNETTE BEYER VS. EXTEND DEADLINE TO FILE A
COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
1-27-18 [15]

Final ruling:

This matter was resolved by stipulation of the parties. Matter removed from calendar. No appearance is necessary.

18. 18-20429-D-13 DANIELLE HARRISON MOTION FOR TEMPORARY WAIVER OF
THE CREDIT COUNSELING
REQUIREMENT
1-26-18 [7]

19. 17-20731-D-11 CS360 TOWERS, LLC MOTION TO COMPROMISE
DB-14 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH MICHAEL GILLES
1-19-18 [329]

20. 17-28245-D-7 NEW MEDIA CENTERS MOTION FOR RELIEF FROM
JWC-1 AUTOMATIC STAY
PIONEER BANK, SSB VS. 1-26-18 [28]

21. 15-26465-D-7 SCOTT POMEROY CONTINUED STATUS CONFERENCE RE:
16-2250 COMPLAINT
ROBERTS V. SWEETLAND 12-6-16 [1]

Final ruling:

This adversary proceeding has been dismissed by Notice of Dismissal entered February 5, 2018. As such, the status conference is concluded. No appearance is necessary.

22. 17-20689-D-11 MONUMENT SECURITY, INC. STATUS CONFERENCE RE: 11
VOLUNTARY PETITION
2-1-17 [1]

23. 18-20298-D-11 HILLSIDE HOLDINGS, INC STATUS CONFERENCE RE: VOLUNTARY
PETITION
1-19-18 [1]

24. 17-28245-D-7 NEW MEDIA CENTERS MOTION TO SELL O.S.T.
DNL-2 2-2-18 [38]

25. 15-29890-D-7 GRAIL SEMICONDUCTOR
16-2088
CARELLO V. STERN ET AL

ORDER TO APPEAR FOR EXAMINATION
(DONALD STERN)
2-8-18 [451]

26. 15-29890-D-7 GRAIL SEMICONDUCTOR
17-2183 MHK-1
CARELLO V. MACDONALD FERNANDEZ
LLP ET AL

CONTINUED MOTION TO DISMISS
MACDONALD FERNANDEZ, LLP'S
CROSS-COMPLAINT FOR INDEMNITY
AND CONTRIBUTION
12-18-17 [16]

Final ruling:

This motion has been resolved by stipulated order entered February 6, 2018. As such, the matter is removed from calendar. No appearance is necessary.

27. 15-29890-D-7 GRAIL SEMICONDUCTOR
17-2183
CARELLO V. MACDONALD FERNANDEZ
LLP ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
10-6-17 [1]

Final ruling:

This status conference has been continued to July 19, 2018 by stipulated order entered February 6, 2018. No appearance is necessary on February 14, 2018.