UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 16, 2017, at 10:30 a.m.

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1. **12-34203-E-7** **WATSON VENTURES, LLC** **MOTION FOR ADMINISTRATIVE EXPENSES**
ASF-3 **Pro Se** **1-9-17 [196]**

Final Ruling: No appearance at the February 16, 2017 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 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 9, 2017. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Administrative Expense is granted.

Alan Fukushima, the Chapter 7 Trustee, requests retroactive authorization to pay income taxes of $1,600.00 owed to the Franchise Tax Board for the calendar years ending December 31, 2013, and December 31, 2014.

The Trustee reports that a certified public accountant reported the above tax liability for the 2013 and 2014 tax years (each year $800.00 was owed as the minimum tax). The Trustee paid those taxes on

April 8, 2013, and March 31, 2014, and he alleges that they are reasonable and necessary expenses of the Estate.

DISCUSSION

Section 503(b)(1) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ."

The Trustee having presented sufficient evidence of administrative expenses for 2013 and 2014 tax liabilities, and having requested retroactive allowance of the expenses, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Administrative Expense filed by Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion is granted, and the Trustee is authorized, retroactively, to pay income taxes owed to the Franchise Tax Board of $800.00 for the 2013 calendar year and $800.00 for the 2014 calendar year, which payments were previously made on April 8, 2013, and March 31, 2014, respectively.

2. 13-21893-E-7 HLC-9 **STANISLAV LAZUTKINE** **MOTION TO RECONSIDER AND/OR MOTION TO AMEND JUDGMENT 1-19-17 [222]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditor, Creditor's Attorney, and Office of the United States Trustee on January 19, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Reconsider is denied.

John Roberts, the Chapter 7 Trustee, filed a Motion to Reconsider on January 19, 2017. Dckt. 222. The instant case was filed on February 13, 2013. Dckt. 1.

On November 23, 2016, the Chapter 7 Trustee filed an Objection to Claim of Jenny Pettengill ("Creditor"). Dckt. 202.

On January 12, 2017, a hearing on the Objection was held, and the court set the matter for trial at 9:30 a.m. on March 20, 2017. Dckt. 218.

On January 19, 2017, the Trustee filed this instant Motion to Reconsider claiming that the court's ruling setting the matter for trial violates Federal Rule of Bankruptcy Procedure 9006(b)(1) in that "no motion was made, and no competent evidence of 'good cause' or 'excusable neglect' was offered as required" per the rule.

The Trustee seeks to have the order setting trial vacated, per Rule 60(b), and the court's tentative ruling for the January 12, 2017 hearing sustaining the Trustee's Objection to Claim of Jenny Pettengill adopted.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on February 2, 2017. Dckt. 227. Creditor states that the Trustee has not introduced any new evidence in support of the Motion as is required by Federal Rule of Civil Procedure 60(b), which is made applicable here by Federal Rule of Bankruptcy Procedure 9024. Creditor illustrates that Judge Klein heard the matter on January 12, 2017, and decided that there was sufficient dispute as to material facts so as to warrant an evidentiary hearing.

Creditor accuses the Trustee of demanding a "second bite at the apple" for a more favorable outcome without offering any evidence regarding what was "missed" at the hearing.

Creditor realleges that its opposition at the hearing was clear: "present evidence including Placer County Superior Court's allocation of payments."

Creditor states that a movant has a "heavy burden to establish factual error sufficiently serious enough to merit an amendment." Dckt. 227 (citing *Wallace v. Brown*, 485 F. Supp. 77, 79 (S.D.N.Y. 1979). Additionally, Creditor relies upon caselaw stating that a "movant must show that the court overlooked factual matters or controlling precedent 'that might have materially influenced its earlier decision.'" *Id.* (citing *In re Bird*, 222 B.R. 229, 235 (Bankr. S.D.N.Y. 1998)).

TRUSTEE'S REPLY

The Trustee filed a Reply on February 9, 2017. Dckt. 230. The Trustee states that Creditor's Opposition fails to address the merits of the Trustee's Motion beyond suggesting that the purpose was to impermissibly introduce new evidence. The Trustee stresses, though, that he has not alleged any new facts in the Motion, and he notes that the Opposition does not contest the allegation that there was no evidence of excusable neglect to support the court's January 12, 2017 ruling at the hearing.

The Trustee notes that Creditor has attached new evidence as part of her Opposition, and he objects to its introduction. Even if the court admits the evidence from Superior Court, the Trustee is not sure what the evidence supports because Creditor (in the Trustee's view) has not explained her exact position and defenses to the Trustee's Objection to Claim.

APPLICABLE LAW

Federal Rule of Civil Procedure 59, incorporated by Federal Rule of Bankruptcy Procedure 9023, governs amendments of judgments, and allows a trial court to "open the judgment if one has been entered . . . and direct the entry of a new judgment." Federal Rule of Civil Procedure 59(e) requires that such a motion be brought within twenty-eight days of the entry of judgment.

Federal Rule of Civil Procedure 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463.

DISCUSSION

First, the court has reviewed the Objection to Claim and Creditor's Response. The Trustee set forth the following grounds:

A. Creditor failed to designate what portion, if any, of the claim is entitled to priority under 11 U.S.C. § 507(a), thereby precluding any presumption of validity on its face.

B. Creditor admitted under penalty of perjury that Stanislav Lazutkine ("Debtor") paid the administrative support claim. The Trustee relied upon that admission when determining the amount to accept in a settlement with Corrigan Financial. If Creditor's

claim is allowed in its entirety, then Debtor's creditors will receive nothing, rather than the estimated 30% distribution referenced in the settlement order. Therefore, Creditor is equitably estopped to deny the admission.

C. A $1,000,000.00 payment from Debtor—and acknowledged by Creditor—was paid to cure a finding that Debtor was "guilty of all 11 counts of contempt as referred to in the Order to Show Cause re Contempt that was filed on January 30, 2013." Debtor's case was filed on February 13, 2013, and the payment occurred pre-petition. Therefore, Debtor's payment must have been applied to Creditor's entire claim.

D. The divorce order attached to the claim is not certified and cannot be readily authenticated by the Trustee as genuine or complete. Should it be properly authenticated, though, Creditor's claim still lacks the documentation required to verify the amount owing to Creditor on account of the twelve claim components net of the $9,000.00 per month in uncontested spousal support ordered by the court. Creditor has failed to furnish evidence that the components of the twelve categories of claims are real rather than imagined.

E. Creditor did not articulate how the categories other than the $9,000.00 per month spousal support qualify under the circumstances of the case as being "in the nature of alimony, maintenance, or support" as required by the Code to qualify as a domestic support obligation. The record supports an assumption that third-parties Stacey Nicholas and Captain Enterprises, LLC advanced and then forgave Creditor's living expenses and attorneys' fees.

F. Other than spousal support and attorneys' fees and costs ordered to be paid by the Superior Court directly to Creditor by Debtor (totaling $513,000.00), the balance of the components of the claim would not qualify as domestic support obligations because they are not owed to or recoverable by Creditor. Instead, they are owed to third parties, who for the most part, have waived their claims against Creditor or are against her Estate and not her personally.

Dckt. 202.

Creditor filed a Response that was conspicuously missing any evidence opposing the Objection. *See* Dckt. 216. Creditor failed, or refused, to provide any testimony under penalty of perjury. Instead, Creditor stated that she *intended* to present evidence (including the Superior Court's allocation of payments) to support her claim. Creditor requested an evidentiary hearing.

Motion to Reconsider

In the Motion, the Trustee cites to a number of rules as applicable law, including:

A. Federal Rule of Civil Procedure 59(e), incorporated by Federal Rule of Bankruptcy Procedure 9023;

B. Federal Rule of Civil Procedure 60(b), incorporated by Federal Rule of Bankruptcy Procedure 9024;

C. Federal Rule of Bankruptcy Procedure 9006(b) & (d);

D. Federal Rule of Bankruptcy Procedure 9014(d);

E. Federal Rule of Bankruptcy Procedure 9017;

F. Local Bankruptcy Rule 3007-1(b)(1)(A);

G. Federal Rule of Evidence 601;

H. Federal Rule of Evidence 602;

I. Federal Rule of Evidence 603; and

J. Federal Rule of Evidence 801.

Dckt. 222. Despite all of those references, however, the Trustee does not actually state in the prayer under what governing law relief is being sought. The court cannot determine for the sake of its analysis whether the Trustee seeks relief under Federal Rule of Civil Procedure 59 (allowing for the amendment of a judgment) or under Federal Rule of Civil Procedure 60(b) (allowing for relief from a final judgment).

RULING

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed. App'x 194, 196–97 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

The court notes that Creditor has now submitted the evidence from Superior Court that had been withheld so far in this case. Exhibit 1, Dckt. 228. At the January 12, 2017 hearing, the court was not convinced by arguments of counsel that the matter was ripe for a decision regarding the Trustee's Objection. The Trustee having not introduced any new evidence (just procedural arguments) that the court was incorrect to set this matter for further hearing.

While citing many reasons to avoid an evidentiary hearing and citing to the procedural rule for computing time (Fed. R. Bankr. P. 9006), the Trustee fails to consider the requirement of Federal Rule of Bankruptcy Procedure 9014(d) which requires:

> "(d) Testimony of witnesses. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding."

Though it is common that for most contested matters the parties agree to present testimony by declaration, absent agreement, testimony is presented in the same manner as in an adversary proceeding, which is the same as testimony presented in a district court trial—live and subject to cross examination. As discussed in COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 9014.07 (emphasis added):

> "P 9014.07 Testimony of Witnesses; Fed. R. Bankr. P. 9014(d)
>
> Subdivision (d) of Rule 9014 deals with the manner in which testimony is to be taken in a contested matter. In short, subdivision (d) directs that testimony with respect to disputed material factual issues is to be taken in the same manner as in adversary proceedings.
>
> There is more to this provision than meets the eye. **The Advisory Committee Note 1 expresses a preference for resolving disputed material factual issues with live testimony.** When the Note states that Federal Rule of Civil Procedure 43(a), [2] rather than Civil Rule 43(e), will govern the evidentiary hearing on a dispute involving a material fact, it appears to express a preference for live testimony as opposed to trial by affidavit or declaration. [3] **Rule 43(a) requires that (with limited exceptions), the testimony of witnesses is to be taken orally in open court.** This requirement has the obvious advantage of permitting the judge to observe the appearance and demeanor of witnesses so as to determine more readily the truth or weight to be given to the testimony, thus affording the parties due process. [4] **The preference of the rule makers for live testimony stands in contradistinction to the disfavored Civil Rule 43(e)**, which states that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or disposition." **According to the Advisory Committee, disputed factual matters may be resolved on affidavits, but only "by agreement of the parties.**"
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> Footnote 1. See App. 9014[3] *infra*; and *Official Comm. v. City Nat. Bank, N.A.*, 2011 U.S. Dist LEXIS 51628 at *9 (N.D. Cal. May 13, 2011) .
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> Footnote 2. The entirety of Fed. R. Civ. P. 43 is made applicable to cases under the Bankruptcy Code by Fed. R. Bankr. P. 9017. See ch. 9017 infra.
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> Footnote 3. *In re Smith*, 349 B.R. 28, 31 n.7 (Bankr. D. Idaho 2005) (affidavit submitted in support of motion would not be considered).
>
> Footnote 4. *Khatchikyan v. Hahn (In re Khachikyan)*, 335 B.R. 121, 127 (B.A.P. 9th Cir. 2005) .

Footnote 5. See App. 9014[3] infra. Where the parties do not request a hearing, the court does not abuse its discretion in deciding the matter without holding one. *Tyner v. Nicholson (In re Nicholson)*, 435 B.R. 622, 636 (B.A.P. 9th Cir. 2010) . And a hearing need not be held when there were no material disputed facts. *Caviata Attached Homes, LLC v. U.S. Bank, NA. (In re Caviata Attached Homes, LLC)*, 481 B.R. 34. 45-46 (B.A.P. 9th Cir. 2012) ."

While making passing reference and inferring that the court believe that its "hands were tied" by the comments of the court from the January 12, 2017 hearing, the court is not as dismissive of Federal Rule of Bankruptcy Procedure 9014(d), Federal Rule of Civil Procedure 43, and Federal Rule of Bankruptcy Procedure 9017 (which incorporates Fed. R. Civ. P. 43, 44, and 44.1 into cases under the Bankruptcy Code) as it appears the Trustee is to the clear preference for presentation of live testimony. The actual discussion between the court and the respective counsel for the parties (as opposed to the characterized "inference" drawn by the Trustee) is as follows:

"THE COURT [Hon. Christopher M. Klein]: Well, the question as a matter of procedure is this -- bear with me a moment. It's specified by Federal Rule of Bankruptcy Procedure 9014(d) as in delta. And the question is, are there disputed material factual issues? That's the phrase. So, Mr. Hollister, are there disputed material, factual issues?

MR. HOLLISTER: There are not to my knowledge.

THE COURT: Mr. Hall, what disputed material factual issues are there?

MR. HALL: The objection filed by the Trustee claims that the claim of Ms. Pettengill was entirely satisfied by a payment by Mr. Lazutkine in an amount of a million dollars.

The disputed fact is that that settlement, which was approved specifically, or that payment was approved specifically under a court order signed by Judge Charles Wachob of the Superior Court, indicated that a portion, which I previously disclosed to the Trustee, was in payment of pre-petition domestic support obligation and a portion was in payment of post-petition domestic support obligation.

What the Trustee seeks to do is eliminate the claim in its entirety, rather than that portion which is appropriately eliminated as a payment of pre-petition obligation.

That's an extremely material fact, and it is definitely in dispute, and I will present what I believe is compelling evidence of that status.

MR. HOLLISTER: Your Honor, I know nothing of which he speaks. There's been no opposition filed. There's been a request for a hearing but no opposition filed. There's been no evidence that's been submitted into the record.

> The evidentiary record closed long ago, and I'm hearing this for the first time. I don't know of any order by the Court. I don't know of any of this.
>
> I do know that within the deadline to file objections, there was a request for an evidentiary hearing, but there was nothing to support that request for an evidentiary hearing. And Judge Sargis did take that into account in his tentative ruling directly, I believe, asserting that the time has run and that any objection's been waived at this point.
>
> There's been ample opportunity to bring this before the Court in a timely fashion. We didn't bring it on 44 days notice; we brought it 55 days notice. And I don't have anything to respond to, except Mr. Hall's statements which are completely uncorroborated by an evidentiary record. The time's run."

Transcript, p. 5:12–24, 6, 7:1–9.

In substance, the Trustee argues that the testimony must first be presented in the form of a declaration. Then if the court finds the declaration credible, the court will "allow" the party to assert its rights under Federal Rule of Bankruptcy Procedure 9014(d) to present live testimony as at a trial. In substance, the Trustee argues that he gets to litigate the case twice.

The process by which an evidentiary hearing is conducted for objections to claims and other contested matters is a bit rusty, as most attorneys take advantage of presenting testimony by declaration. While Trustee finds it outrageous that this would be set for an evidentiary hearing, this is similar to every Chapter 13 calendar where a debtor opines that his or home has a value of $X and the creditor asserts (based on the proof of claim filed) that the property has a value of $10X. All of the departments in this District regularly set such matters for evidentiary hearing, setting a discovery deadline (if so requested), the filing of direct testimony statements, and exchange of exhibits.

The Order for Trial is in the same form as all other evidentiary and hearing setting orders, using Local Bankruptcy Rule 9017-1 for the lodging and exchange of direct testimony statements and exhibits prior to the evidentiary hearing. Creditor, not the Trustee, is required to provide the documents first and establish its claim.

The court notes that the "opposition" to the Objection to Claim originally filed by Creditor is marginal, consisting of:

> "Ms. Pettengill intends to present evidence including Placer County Superior Court's allocation of payments to Ms. Pettengill to support her claim (#11) in Lazutkine's bankruptcy. The request for the evidentiary hearing is to adequately explain and prove that Ms. Pettengill's claim is valid."

Opposition, Dckt. 216. While "minimistic pleading" at its best, Judge Klein found there to be an opposition based on there being a determination, by final order, providing for the allocation of payments received by

Creditor to several obligations of Debtor. While presumably a certified copy of that order could have been filed with the Opposition and the matter more easily resolved, apparently there is testimony to go with the order.

Creditor has filed her Evidentiary Hearing Brief which states that Creditor contends that the court order (which appears to be based on a stipulation) provides that a portion of the monies received were applied to "pre-petition amounts." What it provides, what was ordered by the court, and what has been stipulated to by the parties to the state court action will have to be determined at the evidentiary hearing.

Finally, Trustee effectively argues that Creditor's opposition based on the state court order should be treated as a default and Creditor not be allowed to present the state court order. As it is well understood, the law prefers determinations be made on the merits, not default. *See Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). Treating this in a manner similar to a complaint and answer, Trustee has alleged that Creditor was paid in the state court action and Creditor has answered that while some is paid, based on the state court judgment there is still some amount owing. Now, the evidence will be presented on that narrow issue at the evidentiary hearing.

The Motion is denied. The court will determine the Objection to Claim at the March 20, 2017 evidentiary hearing.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Reconsider filed by the Chapter 7 Trustee 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.