

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

February 18, 2015 at 2:30 p.m.

1. [14-31202](#)-E-13 DANILO/BRANKA POLJAK STATUS CONFERENCE RE: COMPLAINT
[14-2332](#) 12-2-14 [[1](#)]
U.S. TRUSTEE V. POLJAK ET AL

Final Ruling: No appearance at the February 18, 2015 Status Conference is required.

Plaintiff's Atty: Judith C. Hotze
Defendant's Atty: unknown

Adv. Filed: 12/2/14
Answer: none

Nature of Action:
Injunctive relief - other

The Status Conference is continued to 2:30 p.m. on April 1, 2015.

Notes:

Entry of Default and Order Re: Default Judgment Procedures [Danilo Poljak] filed 1/23/15 [Dckt 11], to be set for hearing

Entry of Default and Order Re: Default Judgment Procedures [Branka Poljak] filed 1/23/15 [Dckt 13], to be set for hearing

FEBRUARY 18, 2015 STATUS CONFERENCE

The Defendants' defaults having been entered and the time for the Plaintiff to file a motion for entry of default judgment not having expired, the Status Conference is continued.

2. [10-26415-E-13](#) IGNACIO/ANNA ADAM
[14-2145](#)
ADAM ET AL V. SUNTRUST
MORTGAGE, INC.

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
5-29-14 [[1](#)]

Final Ruling: No appearance at the February 18, 2015 Status Conference is required.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: unknown

Adv. Filed: 5/29/14
Reissued Summons: 10/2/14

Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property
Declaratory judgment

The Status Conference is continued to 2:30 p.m. on April 1, 2015.

Notes:

Continued from 12/3/14 to afford the Plaintiff the opportunity to file and have heard a motion for entry of default judgment. Motion for entry of default judgment to be filed on or before 12/19/14.

Ex Parte Application for Default Judgment filed 12/19/14 [Dckt 23]; not set for hearing

[PGM-1] Motion for Default Judgment filed 1/12/15 [Dckt 26], set for hearing 2/26/15 at 1:30 p.m.

FEBRUARY 18, 2015 STATUS CONFERENCE

The Plaintiff's motion for entry of default judgment set for hearing on February 26, 2015, the Status Conference is continued.

3. [13-23119](#)-E-13 CYNTHIA MCDONALD
[14-2210](#)
MCDONALD V. JPMORGAN CHASE
BANK, N.A. ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-21-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Amy M. Spicer

Adv. Filed: 7/21/14
Answer: none

Nature of Action:
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Continued from 1/21/15 for One Final Time. Court to set the deadline for all parties to file an answer or responsive pleading after conducting the continued status conference.

FEBRUARY 18, 2015 STATUS CONFERENCE

JANUARY 21, 2015 STATUS CONFERENCE

For the October 15, 2014 Status Conference the court provided the parties with a detailed review of the Complaint and issues as perceived by the court. It appears that the dispute is over \$1,435.01.

This Adversary Proceeding was commenced on July 21, 2014. The court has continued the Status Conference and afforded the parties a significant amount of time to engage in good faith settlement discussions. Though 184 days has passed since the filing of the Complaint, the parties do not give the court any indication that they are proceeding in good faith to resolve this (apparently very, very, very modest dollar amount dispute).

Rather, on January 15, 2015, the Parties filed a Stipulation to further extend the time for Defendant to respond to the Complaint. Stipulation, Dckt. 14. The basis for requesting the further extension of time is stated as "The Parties are engaged in on-going settlement discussion in an attempt to resolve this adversary proceeding without litigation. The Parties have agreed to extend the time for Defendants' response to the complaint to and including February 27, 2015." *Id.* ¶ D. As identified in the stipulation, this is the Parties **Fourth** request for extension of time for Defendant to respond to the Complaint. This is exactly the same language (except for the date for the extension) used in the Stipulation filed on December 12, 2014 (Dckt. 12), almost identical to the Stipulation filed on October 14, 2014 (Dckt. 9), and similar to the general request made in the Stipulation filed on August 22, 2014 (Dckt. 7).

It appears that notwithstanding the efforts of the parties over the past

six months, these matters cannot be resolved by agreement and litigation is necessary.

OCTOBER 15, 2014 STATUS CONFERENCE

Plaintiff states that the parties have stipulated to allow Defendant until September 30, 2014 to file a response to the Complaint. This was granted in light of the Parties engaging in settlement negotiations. The Plaintiff requests that the court continue the Status Conference for a sufficient amount of time for the Parties to conclude the settlement discussions.

As of the court's October 12, 2014 review of the Docket (twelve days after the deadline stipulated to for a response to the Complaint) no answer or responsive pleading has been filed. No motion for further extension of time to respond to the Complaint has been filed. Defendant has not appeared in this Adversary Proceeding.

The Complaint was filed on July 21, 2014. The October 15, 2014 Status Conference is eight-six (86) days after the Complaint was filed. The Complaint, with exhibits, is fifty-two (52) pages. The Complaint itself is thirteen (13) pages long. The Complaint states the following Causes of Action:

I. First Cause of Action Objection to the JPMorgan Chase Bank Proof of Claim.

A. The substance of this Objection is that Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. misstates the claim because it lists the following information,

- 1. Principal Balance.....\$187,774.58
- 2. Arrearage.....\$ 22,403.04
- 3. Which Amounts Total.....\$210,177.62.

B. However, JPMorgan Chase Bank, N.A. has filed the claim for the lesser amount of \$204,873.32, which is \$5,300.00 than the total of the principal amount and arrearage.

C. The amount of the Proof of Claim and the total of the Principal Balance and Arrearage cannot be reconciled.

D. This difference which "cannot be reconciled" is sufficient to disallow the Proof of Claim.

II. Second Cause of Action for Violation of California Rosenthal Act.

A. It is asserted that Plaintiff misapplied non-specific payments made by Plaintiff in 2012 and 2013, and that by misapplying the payments Defendant violated the Rosenthal Act.

B. It is asserted that the Proof of Claim filed is a "misrepresentation of the debt," and such misrepresented Proof of Claim is a violation of the Rosenthal Act.

III. Third Cause of Action for Negligence.

- A. It is alleged that JPMorgan Chase Bank, N.A. had a duty to file a Proof of Claim in Plaintiff's bankruptcy case which "has some semblance of accuracy."
- B. JPMorgan Chase Bank, N.A. violated the duty to file such proof of claim when it filed Proof of Claim No. 2 in Plaintiff's bankruptcy case.

IV. Fourth Cause of Action for Fraud and Intentional Misrepresentation (Cal. Civ. §§ 1572, 1709, and 1710)

- A. It is alleged that when JPMorgan Chase Bank, N.A. filed Proof of Claim No. 2 it knew that the information therein was false. It is alleged that the Bank misapplied payments made by Plaintiff.

V. Fifth Cause of Action for Violation of Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 et seq.).

- A. JPMorgan Chase Bank, N.A. misapplied nonspecified payments made by Plaintiff for the loan upon which Proof of Claim No. 2 is based.

VI. Sixth Cause of Action for Breach of Contract

- A. It is alleged that JPMorgan Chase Bank, N.A. has breached the terms of the contract (promissory note) with Plaintiff. The breach of contract arises from misapplying nonspecified payments made by Plaintiff.

VII. Seventh Cause of Action for Conversion.

- A. It is alleged that JPMorgan Chase Bank, N.A. misapplying nonspecified payments made by Debtors to the Bank on the loan constitutes a conversion of said monies.

VIII. Eight Cause of Actions for Attorneys' Fees.

- A. Pursuant to a nonspecified term of the Note and Deed of Trust and the California Civil Code, Plaintiff is entitled to attorneys' fees.

Recently the court addressed an adversary proceeding in which the Plaintiff-Debtor was represented by counsel for Plaintiff in this case and Nationstar Mortgage, LLC, in which similar claims were asserted. Adv. Pro. 14-2187. In considering a motion to dismiss the first amended complaint in that case, the court reviewed the contention that because the amount of the secured claim stated on the proof of claim form was less than the amount of the principal balance and arrearage. In that Adversary Proceeding the court noted that merely adding the principal balance to the arrearage (which includes the missed monthly payments) would not necessarily accurately state the amount of the claim. This is because the missed monthly payments each contain a small principal payments. Attempting to add the principal balance and the arrearage, as done by Plaintiff, would necessarily overstate the amount of the claim (double counting a portion of the principal).

Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. is attached as Exhibit 2 to the Complaint. The amount of the claim is stated to be \$204,873.32. Included as Proof of Claim No. 2 is the Mortgage Proof of Claim Attachment [Form 10(Attachment A)]. The information on Attachment is,

- A. Principal.....\$187,774.58
- B. Interest Due as of Commencement.....\$ 15,356.30
- C. Pre-petition Fees and Expenses.....\$ 2,707.17

- D. Total Claim Computed From Part 1 and
Part 2 of Attachment.....\$205,838.05

Though less than Plaintiff's Principal + Arrearage Calculation, it is still higher than the \$204,403.04 amount stated by JPMorgan Chase Bank, N.A. on the Proof of Claim (Section 4).

From a review of the Proof of Claim attachment the court cannot readily identify the \$1,435.01 overstated amount.

To avoid the parties incurring what appear to be otherwise avoidable legal expenses, the court grants Defendants a final open extension of time to file an answer or other responsive pleading to the Complaint. The court shall set the deadline for the filing of such pleadings after the February 18, 2015 continued Status Conference, if one is necessary.

4. [08-24727-E-13](#) JAE LEE AND KI CHUNG
[14-2272](#)
LEE ET AL V. HFC ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
9-16-14 [[1](#)]

Final Ruling: No appearance at the February 18, 2015 Status Conference is required.

Plaintiff's Atty: Mark A. Wolff
Defendant's Atty: Austin Beardley

Adv. Filed: 9/16/14
Answer: 10/31/14

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

The Adversary Proceeding having been dismissed by Stipulation of the Parties, the Status Conference is removed from the calendar.
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Notes:

Continued from 12/16/14. No settlement documents filed by the parties.

5. [11-27845-E-11](#) IVAN/MARETTA LEE
[14-2060](#)
LEE ET AL V. SELECT PORTFOLIO
SERVICING, INC. ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
2-20-14 [[1](#)]

Final Ruling: No appearance at the February 18, 2015 Status Conference is required.

Plaintiff's Atty: Raymond E. Willis
Defendant's Atty:
Sanford Shatz [Select Portfolio Servicing, Inc.]
Adam N. Barasch [Bank of America, N.A.]

Adv. Filed: 2/20/14
Answer: none

Nature of Action:
Injunctive relief - other
Declaratory judgment

All Defendants having been dismissed pursuant to Stipulations with the Plaintiff, the Status Conference is removed from the Calendar.
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Notes:

Continued from 12/16/14 as a follow up date to ensure that all of the proper dismissals have been filed.

FEBRUARY 18, 2015 STATUS CONFERENCE

The Complaint names the following defendants: Select Portfolio Servicing, Inc. and Bank of America, N.A. Dckt. 1. By Stipulation of the Parties, Select Portfolio Servicing, Inc. was dismissed from this Adversary Proceeding. Dckt. 43. By further Stipulation, Bank of America, N.A. was dismissed from this Adversary Proceeding. Dckt. 46.

The Complaint having been dismissed as to all named defendant's, and all Parties having stipulated to such dismissals, this Adversary Proceeding has been concluded.

The Clerk of the Court may close the file for this Adversary Proceeding.

6. [13-31975-E-13](#) JACK/LINDA GANAS
PLC-3

CONTINUED OBJECTION TO NOTICE
OF MORTGAGE PAYMENT CHANGE
AND/OR MOTION FOR ATTORNEY'S
FEES
11-13-14 [[55](#)]

No Tentative Ruling: The Objection to Notice of Mortgage Payment Change 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).

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.

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 13 Trustee, Creditor, and Office of the United States Trustee on November 13, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Mortgage Payment Change 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 respondent 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 Objection to Notice of Mortgage Payment Change is xxxxx.

Jack and Linda Ganas ("Debtors") filed the instant Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees [CCP 1717] on November 13, 2014. Dckt. 55.

Debtors state that Wells Fargo Bank, N.A. filed Proof of Claim No. 4 on January 15, 2014 where they claimed an arrearage existed at the time of the bankruptcy filing. The escrow shortage they listed was \$529.34 as of the petition date. On October 28, 2014, Wells Fargo Bank, N.A. filed a Notice of Payment Change. The documents submitted with their Notice of Mortgage Payment

Change state that there was an escrow shortage on the date of the petition of (\$8,977.23). Debtors argue that this pre-petition shortage was not listed on Wells Fargo's Proof of Claim and is unsupported by any explanation on an amended proof of claim or on the Notice of Mortgage Payment Change.

Wells Fargo Bank, N.A.'s Notice of Mortgage Payment Change requests that the current escrow payment change from \$167.74 to \$348.05.

Debtors allege that the inconsistencies are the result of pre-petition arrearage escrow amounts not being properly credited in the analysis which result in the pre-petition arrearage also being paid post-petition, thereby resulting in a duplicate payment. The deed of trust only provides for payment of collection fees in to protect their security interest as stated in paragraph 18 of the deed of trust note attached to Proof of Claim 4.

Debtor additionally requests that the court grant reasonable attorney's fees pursuant to California Civil Code § 1717.

DECEMBER 16, 2014 HEARING

At the hearing, the court continued to 2:30 p.m. on February 18, 2015 to be heard in conjunction with the Status Conference in Adversary case number 14-2080-E. Dckt. 67.

WELLS FARGO BANK, N.A.'S OPPOSITION

Wells Fargo Bank, N.A. filed an opposition to the instant Objection on February 4, 2015. Dckt. 68. Wells Fargo Bank, N.A. objects on the following basis:

1. Debtors' objection should be overruled because it lacks merit as it fails to accurately represent Wells Fargo Bank, N.A.'s escrow analysis and has failed to establish an inconsistencies with Wells Fargo Bank, N.A. Proof of Claim.

Debtors misstate the escrow shortage as provided in Wells Fargo Bank, N.A.'s Notice. Debtors contend that the escrow shortage totals \$8,977.23. However, the quoted amount is the actual escrow balance, not the escrow shortage. The correct escrow shortage is \$1,998.08 (Notice, pg. 6). The reason for this escrow shortage was that Wells Fargo Bank, N.A. made several post-petition tax and hazard disbursements on the subject loan. As the Debtors have misinterpreted the escrow analysis, their premise that the Notice is inconsistent with Wells Fargo Bank, N.A.'s Proof of Claim is misrepresented.

Furthermore, Debtors contend that inconsistencies between the Notice and Proof of Claim are the result of pre-petition arrearage escrow amounts not being properly credited to Debtors' account. The alleged result of pre-petition escrow amounts not being properly credited is pre-petition arrears are being collected post-petition, resulting in a duplicate payment. However, there are no inconsistencies between the Proof of Claim and the Notice. In addition the Debtors have not offered any evidence the pre-petition arrearage escrow amounts not being properly credited to their account. As provided in the Proof of Claim, the pre-petition escrow shortage is \$529.34. This amount was not included in the post-petition escrow analysis. It was included on the Notice as a negative balance since it was claimed in the pre-petition arrears

and also notes that "an escrow adjustment of \$529.34 is scheduled to be repaid through the bankruptcy."

2. Debtors' Objection is substantially related to the adversary proceeding and should be continued until the Adversary Proceeding is concluded. The sole remaining cause of action is Debtors' objection to Wells Fargo Bank, N.A.'s Proof of Claim. Specifically, Debtors are alleging that the pre-petition accounting regarding the loan is incorrect. The resolution of this matter directly relates to the issues raised in the instant Objection. Wells Fargo Bank, N.A.'s counsel and Debtor's counsel are working towards a potential resolution of the Adversary Proceeding which will likely result in a global resolution of the Objection. Wells Fargo Bank, N.A. requests that the court continue the hearing so that the parties may reach a global resolution regarding Debtor's Adversary Proceeding and Objection.

Objection to Notice of Mortgage Payment Change

Wells Fargo Bank, N.A. filed Proof of Claim 4 on January 1, 2014. In the Proof of Claim, Wells Fargo Bank, N.A. states that the "Escrow shortage or deficiency" as of the petition date is \$529.34.

Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change on October 28, 2014. The Notice states the following:

- 1. Date of payment change: 12/1/2014
- 2. New total payment: \$1,138.35
- 3. Part 1: Escrow Account Payment Adjustment:
 - a. Current escrow payment: \$167.74
 - b. New escrow payment: \$348.05

The Notice of Mortgage Payment Change also has attached an escrow statement that, in part, outlines the Debtors' escrow account history. In relevant part, for September 2013, the statement provides:

Payments to escrow			Payments from escrow		Escrow balance	
Date	Projected	Actual	Projected	Actual	Projected	Actual
Sep. 2013	\$164.01	\$348.54	\$0.00	\$0.00	\$772.50	(\$8,977.23)

A review of the Objection, Proof of Claim No. 7, and the Notice of Mortgage Payment Change shows that there is no evidentiary basis for the substantial increase in escrow shortage. Wells Fargo Bank, N.A. does not explain how they calculated the escrow shortage to determine that, at the time of the petition, the (\$529.34) listed on the Proof of Claim 4 (filed on January 15, 2014) is actually (\$1,998.23) as listed on the Notice of Mortgage Payment Change (filed on October 28, 2014).

While Wells Fargo Bank, N.A. gives generic, nonspecific answers such

as "several post-petition tax and hazard disbursements on the subject loan" were the cause of the recalculated escrow shortage, Wells Fargo Bank, N.A. gives no evidence or specifics of how the escrow shortage nearly quadrupled in amount. Instead, Wells Fargo Bank, N.A. attempts to shift the burden onto the Debtors.

The Escrow Analysis attached to the Notice of Mortgage Payment Change provides the following information. Page 4 of the Escrow Analysis provides the actual payments made during the period July 2013 through August 2014, and estimates for September - November 2014. Through August 2014, Wells Fargo Bank, N.A. reports receiving actual escrow payments totaling \$3,921.70. For these fourteen months, escrow payments of \$2,296.98 (14 x \$164.07 a month) were required.

For the period December 2014 through November 2015, Wells Fargo Bank, N.A. projects disbursements from escrow for taxes and insurance to total \$2,178.50. Escrow Analysis, pg. 3. During that period, monthly escrow payments of \$181.54 would be required. This portion of the Escrow Analysis states, "Scheduled escrow payment \$181.54." *Id.*

However, Wells Fargo Bank, N.A. then states on page 1 of the Escrow Analysis that the monthly principal and interest payment is \$790.30 and the Escrow payment will be \$348.54. The court cannot identify the basis for the additional \$167.00 a month in escrow payments for the twelve months through November 2015 - which total \$2,004.00 (12 x \$167.00).

Wells Fargo Bank, N.A.'s response concentrates on the fact that the pending Adversary Proceeding deals with the treatment and calculation of the pre-petition payments has a direct effect on the outcome of the instant Objection. As part of this foundational argument, Wells Fargo Bank, N.A. does not provide any specific pieces of evidence or explanation as to how the escrow shortage was calculated and instead just points to the same information the court initially reviewed at the first hearing on the Objection.

Attorneys' Fees

As to the Debtor's request for attorney's fees under California Civil Code § 1717, the Debtor has not pleaded with particularity under Local Bankr. R. 9013 to justify such relief.

In support for attorney fees, the Objection states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. California Civil Code Section 171 provides for attorney fees for the prevailing party whenever there is an attorney fee provision, there has been notice and a hearing, wherein the reasonable attorney's fees shall be fixed by the Court.

The Objection does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 for attorneys' fees because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the code section. This is not sufficient.

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.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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).

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."

While the Debtor's counsel does provide for a time sheet, the Debtor failed to provide the specific contract provisions that justify an award for attorneys' fees nor does Debtor provide how the applicable statute applies to the instant case. The court does not have the resources to fill-in the blanks for Debtor and Debtor's counsel. Therefore, the court denies the Debtor's request for attorneys' fees. If Debtor's counsel wishes to be compensated for the instant Objection, Debtor's counsel may make a motion within 14 days of the issuance of this ruling for compensation, specifically and particularly citing the grounds and basis for attorneys' fees. Debtor's counsel is not permitted to include fees for the motion for compensation.

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 Objection to Notice of Mortgage Payment Change filed by Debtors 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 Objection to Notice of Mortgage Payment Change filed on October 28, 2014 by Wells Fargo Bank, N.A. is xxxxxx

7. [13-31975-E-13](#) JACK/LINDA GANAS
[14-2080](#)
GANAS ET AL V. WELLS FARGO
BANK, N.A.

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
3-14-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Eddie R. Jimenez

Adv. Filed: 3/14/14
Answer: none

Nature of Action:
Recovery of money/property - other
Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Continued from 12/3/14. The Parties reporting that this Adversary Proceeding is being resolved.

8. [14-25376-E-7](#) KEVIN/BREE SEARS
[13-2284](#)
ADAMS V. SEARS

PRE-TRIAL CONFERENCE RE:
COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT
9-4-13 [[1](#)]

Final Ruling: No appearance at the February 18, 2015 Pre-Trial Conference is required.

Plaintiff's Atty: Arthur J. Pollock
Defendant's Atty: Douglas B. Jacobs

Adv. Filed: 9/4/13
Answer: 9/24/13

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny

The Pre-Trial Conference is continued to 2:30 p.m. on April 1, 2015.

Notes:

Continued from 12/3/14

Scheduling Order -
Initial disclosures by 11/30/13
Close of Discovery 10/15/14 [amd scheduling order 7/2/14]
Dispositive motions heard by 11/15/14 [amd scheduling order 7/2/14]
Plaintiff's pretrial statement two weeks prior to pretrial conference
Defendant's pretrial statement one week prior to pretrial conference

Stipulation to Modify Pretrial Scheduling Order filed 10/15/14 [Dckt 23]; Order denying filed 12/5/14 [Dckt 27]

FEBRUARY 18, 2015 PRE-TRIAL CONFERENCE

The hearing on Plaintiff's motion to dismiss the Defendant-Debtor's Chapter 13 case is set for hearing on March 19, 2015. Dismissal of the bankruptcy case will render the present Adversary Proceeding moot. The court continues the Pre-Trial Conference until after the hearing on the motion to dismiss.

9. [14-22679-E-13](#) DENNIS FLORES
[14-2193](#)
FLORES V. NATIONSTAR MORTGAGE,
LLC ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-1-14 [[1](#)]

Plaintiff's Atty: Mark Lapham
Defendant's Atty: Adam Barasch

Adv. Filed: 7/1/14
Answer: none

Nature of Action:
Recovery of money/property - preference
Recovery of money/property - fraudulent transfer
Validity, priority or extent of lien or other interest in property
Dischargeability - willful and malicious injury
Injunctive relief - other
Declaratory judgment

Notes:

Continued from 12/11/14 to allow the Defendant to file a responsive pleading and the real parties in interest to prosecute this Adversary Proceeding.

Joint Stipulation to Extend Responsive Pleading Deadline for Defendants filed 1/9/15 [Dckt 45]; Order approving filed 1/11/15 [Dckt 47], deadline extended to 2/23/15

10. [11-41387-E-13](#) STEVE/ROBIN GRIGSBY
[14-2340](#)
GRIGSBY ET AL V. WELLS FARGO
BANK N.A.

STATUS CONFERENCE RE: COMPLAINT
12-11-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Austin P. Nagel

Adv. Filed: 12/11/14
Answer: none

Nature of Action:
Declaratory judgment
Dischargeability - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

SUMMARY OF COMPLAINT

This Adversary Proceeding is to obtain clear title to real property after the completion of the Chapter 13 Plan. Plaintiff-Debtor alleges that Defendant's claims, secured pursuant to a second deed of trust, was valued by the court to be \$0.00 as a secured claim. Plaintiff-Debtor alleges that the Chapter 13 Plan has been completed. Therefore, Plaintiff-Debtor seeks a determination that Defendant's deed of trust is void and does not encumber Plaintiff-Debtor's property.

Plaintiff-Debtor also seeks damages pursuant to California Civil Code § 2941(b), alleging that Defendant has not complied with its statutory duties to reconvey the deed of trust and clear title to the property of that void lien.

SUMMARY OF ANSWER

Defendant admits and denies the specific allegations in the Complaint. Defendant also states twelve affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2, 3, Dckt. 1. In its answer, Wells Fargo Bank, N.A., Defendant, admits the allegations that this Adversary Proceeding "arises out of and is related to" the Plaintiff-Debtor's bankruptcy case in which the confirmed Chapter 13 Plan provides for the Defendant's claim. Answer ¶¶ 1, Dckt. 7. Defendant denies the allegations of the Paragraph 2 that this is a core proceeding. Answer ¶ 2. To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2, 3, Dckt. 1. In its answer, Wells Fargo Bank, N.A., Defendant, admits the allegations that this Adversary Proceeding "arises out of and is related to" the Plaintiff-Debtor's bankruptcy case in which the confirmed Chapter 13 Plan provides for the Defendant's claim. Answer ¶¶ 1, Dckt. 7. Defendant denies the allegations of the Paragraph 2 that this is a core proceeding. Answer ¶ 2. To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

- b. Initial Disclosures shall be made on or before -----, 2015.
- c. Expert Witnesses shall be disclosed on or before -----, 2015, and Expert Witness Reports, if any, shall be exchanged on or before -----, 2015.
- d. Discovery closes, including the hearing of all discovery motions, on -----, 2015.
- e. Dispositive Motions shall be heard before -----, 2015.
- f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- p.m. on -----, 2015.

Tentative Ruling: The Objection to Certification of Debtor was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on February 5, 2015. By the court's calculation, 13 days' notice was provided.

The Objection to Certification of Debtor was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 Objection to Certification of Debtor is sustained.

Guillermo Torres ("Creditor") filed the instant Objection to the Certification of Debtor under 11 U.S.C. § 362(l). The Creditor is seeking an order terminating the automatic stay of 11 U.S.C. § 362 so the creditor may continue execution of judgment for possession of the real property commonly known as 352 Silva Street Turlock, California.

Paula Virgen ("Debtor") filed a Chapter 7 petition on February 3, 2015. The Creditor states that relief under 11 U.S.C. § 362(l) is proper because Creditor had a judgment for possession and Debtor had no right to cure the default under state law.

Creditor argues that a writ of execution for possession was issued and

was scheduled to be executed on February 5, 2015. Debtor filed this bankruptcy petition alleging deposit of rent and a right to cure under state law and the sheriff's office has stayed execution of the writ for possession under 11 U.S.C. § 362(1).

APPLICABLE LAW

11 U.S.C. § 362(b)(22) states:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay-. . .

(22) subject to subsection (1), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

11 U.S.C. § 362(1) states:

(1)(1) Except as otherwise provided in this subsection, subsection (b) (22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the

lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

- (3) (A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.
- (B) If the court upholds the objection of the lessor filed under subparagraph (A)--
- (I) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and
- (ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)--

- (A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and
- (B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).
- (5) (A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

- (B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify--
 - (I) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and
 - (ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.
- (C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.
- (D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

DISCUSSION

A review of the Debtor's petition shows that the Debtor checked the box that states "Landlord has a judgment against the debtor for possession of debtor's residence," listing Creditor as the landlord. Dckt. 1. However, the Debtor does not check any of the other boxes which states that the Debtor has applicable nonbankruptcy law that would permit the Debtor to cure the monetary default, that the Debtor has included with the petition a deposit for the rent that would become due during the 30 days after filing, and that the Debtor served the landlord with the certification.

As permitted by 11 U.S.C. § 362(1), a party may object to the certification. Here, the Creditor has filed such an objection arguing that the Debtor does not have a nonbankruptcy right to cure the default and that the Debtor has not followed the procedures outlined in 11 U.S.C. § 362(1). While the Creditor misstates the fact that the Debtor certified that there is applicable nonbankruptcy law since the Debtor did not check the box on the petition, the Debtor does have the burden of proving that Debtor has the legal opportunity to cure the default. The Debtor has failed to do so and has not filed any response to the instant Objection.

The court notes that the Creditor is seeking the court to make a ruling that no nonbankruptcy law is applicable that would allow the Debtor to cure the default. This declaration of rights exceeds the relief which may be requested under 11 U.S.C. § 362(1). The court may, on an objection under § 362(1), determine that the relief from the stay provided under 11 U.S.C. § 362(b)(22)

is effective. If the court were to consider the other requested declaration of rights and interests, this Contested Matter would have to be converted to an adversary proceeds (see Federal Rule of Bankruptcy Procedure 7001) and ultimately, at a much later date, a determination made on the 11 U.S.C. § 362(1) issue. The court will not do that *sua sponte* in this Contested Matter.

Therefore, because the Debtor has not shown that there is applicable nonbankruptcy law where Debtor would be permitted to cure the entire monetary default that gave rise to the judgment of possession after the judgment for possession was entered, the objection is sustained. In sustaining the objection, 11 U.S.C. § 362(b)(22) shall apply immediately and relief from the stay provided under § 362(a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property and the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

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 Objection to Certification of Debtor filed by Creditor 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 Objection is sustained and the provisions of 11 U.S.C. § 362(b)(22) that there is no automatic stay with respect to any acts by Guillermo Torres, and his agents, attorneys, representatives, and assigns, to enforce a judgment for possession of the real property commonly known as 352 Silva Street Turlock, California, apply immediately, with no further relief from the automatic stay provided under § 362(a)(3) required.

IT IS FURTHER ORDERED that the clerk of the court shall immediately serve upon the Creditor and the Debtor a certified copy of the court's order upholding the Creditor's objection, as provided in 11 U.S.C. § 362(1)(3)(B).