UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 21, 2017 at 10:00 a.m.

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1. 17-20604-A-11 RUBEN S VELASQUEZ M.D., INC.
ORDER TO APPEAR AND SHOW CAUSE WHY A PATIENT CARE OMBUDSMAN SHOULD NOT BE APPOINTED
1-31-17 [4]

Tentative Ruling: The hearing on this order to appear and show cause will be continued to March 6, 2017 at 10:00 a.m.

The court issued this order for the debtor to show cause why a patient care ombudsman should not be appointed. The bankruptcy petition indicates that the debtor operates a health care business within the meaning of 11 U.S.C. § 101(27A).

11 U.S.C. § 333(a)(1) provides that:

If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

The term "health care business" means "any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for— (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care." 11 U.S.C. § 101(27A).

However, given that the United States Trustee has a pending motion to dismiss the case (DCN UST-1) set for hearing on March 6, the court is inclined to continue the hearing on this order to March 6 at 10:00 a.m.

2. 10-36150-A-11 16-2005 FRANK V. CHASE HOME FINANCE, LLC ET AL
KARIN FRANK
KYL-2
MOTION TO DISMISS ADVERSARY PROCEEDING
12-27-16 [85]

Tentative Ruling: The motion will be granted in part and denied in part.

JPMorgan Chase Bank, a defendant in this proceeding, the successor in interest to Chase Home Finance, another defendant in this proceeding, seeks dismissal of the two causes of action, a claim for damages for automatic stay violations and a claim for anticipated discharge injunction violations, pleaded in the amended

complaint filed on November 14, 2016. Docket 79.

The plaintiff and debtor in the underlying chapter 11 bankruptcy case, Karin Frank, opposes dismissal.

Sometime prior to June 21, 2010, CHF made a loan to a third party, not identified in the complaint, and secured that loan with a senior lien on a real property identified as 7056 Shady Grove Street Los Angeles, California. The plaintiff became an owner of the property and subsequently filed the underlying chapter 11 bankruptcy case on June 21, 2010.

The plaintiff obtained confirmation of her amended chapter 11 plan on April 18, 2011. The order confirming the plan was entered on April 18, 2011. Case No. 10-36150, Docket 343. About the same time, CHF merged into JPMorgan and the subject loan came to be held by JPMorgan.

JPMorgan, and allegedly CHF prior to merging into JPMorgan, began refusing to accept plan payments from the plaintiff on account of the claim secured by the property as provided by the confirmed plan. Twelve payments were refused, starting on May 13, 2011 and ending on August 25, 2014. Docket 79 at 5.

JPMorgan also allegedly attempted to collect pre-petition delinqunnt payments from the plaintiff. It refused to acknowledge the plaintiff's confirmed chapter 11 plan. It instituted non-judicial foreclosure against the property. JPMorgan's actions eventually led to emotional distress, the loss of tenants, and vandalism to the property.

On January 12, 2016, the plaintiff filed this proceeding. On August 25, 2016, the court entered the plaintiff's chapter 11 discharge. Case No. 10-36150, Docket 501. The plaintiff filed a first amended complaint on November 14, 2016, asserting that:

(1) the defendants violated the automatic stay from the date the petition was filed, June 21, 2010, through the entry of the discharge on August 25, 2016, causing damages to the plaintiff; and

(2) the defendants "will continue to conduct their actions in blatant disregard of the [discharge injunction]."

Docket 79 at 10-13.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*To survive a motion to dismiss, a complaint must contain sufficient factual*

matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"*First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

Preliminarily, as CHF no longer exists, because it merged into JPMorgan in or about May 2011, JPMorgan, as successor in interest to CHF, is the only viable defendant.

The claim for the violation of the discharge will be dismissed because all alleged misconduct identified by the complaint predates its entry. According to the first amended complaint, JPMorgan's misconduct (foreclosure activities and/or rejection of plan payments) spanned May 2011 through August 2014, and damages continued to accrue through January 2016, whereas the plaintiff's discharge was not entered until August 25, 2016. Docket 79 at 5-8. That claim will be dismissed without prejudice and without leave to amend.

The court finds it unnecessary to address other grounds for dismissal of the discharge violation claim.

Next, the court rejects JPMorgan's contention that the stay/plan violation claim should be dismissed because the plan confirmation iis not binding on JPMorgan because its predecessor in interest, CHF, was not properly served with the disclosure statement, amended chapter 11 plan, or the notices on the hearing to approve the disclosure statement and confirm the plan. Specifically, JPMorgan complains that CHF was not served at the address on its proof of claim or care of its attorney, Steven Lawrence, who filed a request for special notice on behalf of CHF.

First, this is not a motion for summary judgment, where evidence referencing information outside the pleadings can be admitted. See Fed. R. Civ. P. 12(d) (prescribing "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56"). See also S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

As there has been no discovery conducted in this proceeding, the court is unwilling to convert this motion into a summary judgment motion.

Second, even if the court were to consider the evidence proffered by JPMorgan, improper service on CHF does not automatically relieve JPMorgan from the the requirement that it obey the confirmed plan. JPMorgan must still make a motion in the bankruptcy case, seeking relief from the plan confirmation order to challenge the effectiveness of the plan. See 11 U.S.C. § 1144, Fed. R. Civ. P. 60(b).

Third, JPMorgan, nor any other creditor may no longer set aside the confirmation order. Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to relieve a party from an order or judgment for:

"(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."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

Further, section 1144 requires that a motion to revoke the confirmation order be made within 180 day after the entry of the confirmation order. That deadline has long since expired. Further, such a motion may be made only if confirmation was procured by fraud.

The order confirming the plaintiff's chapter 11 plan was entered in the underlying case on April 18, 2011. Case No. 10-36150, Docket 343. Even if CHF was not served properly with the disclosure statement, plan, and/or notices on the hearings on disclosure statement approval and plan confirmation, CHF was

properly served via its counsel with the notice of entry of the plan confirmation order. Steven Lawrence, and thus CHF, was served with the notice of entry of the plan confirmation order on April 20, 2011. Case No. 10-36150, Docket 345.

In other words, CHF and its successor in interest, JPMorgan, knew or should have known of the plan confirmation order as of nearly six years ago, but they have done nothing to seek relief from that order during this time.

It is too late to seek relief from the order confirming the plan. Not only has the one-year period of Rule 60(c) has expired, but the passage of nearly six years without any action by JPMorgan is beyond unreasonable.

Next, the court rejects the assertion that there are no facts to support the willful nature of the alleged stay violations. JPMorgan contends that it stopped seeking to foreclose on the property "after Plaintiff finally attempted to give actual notice to the correct parties [in June 2011] that the [s]ubject Loan was involved in her bankruptcy proceedings." Docket 86 at 16 (file pages).

A violation of the stay is willful when the creditor knows of the automatic stay and intentionally performs the action violating the stay. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002). "In determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003).

JPMorgan's alleged stay violations went beyond foreclosure activities. They included refusal to accept plan payments and other attempts to collect on the pre-petition claim secured by the property, such as telephone calls. Docket 79 at 5.

JPMorgan does not say that it stopped refusing to accept plan payments or stopped telephoning the debtor to collect on the pre-petition claim. Nor is JPMorgan arguing that it reversed its improper collection efforts.

A creditor who has violated the automatic stay is required to reverse any collection efforts. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

JPMorgan admits that the plaintiff properly gave notice to CHF in June 2011 of the loan being "involved in the bankruptcy proceeding[]." Docket 86 at 16 (file pages).

Also, as noted earlier, CHF and JPMorgan knew or should have known of the plan confirmation order as of nearly six years ago, when the notice of entry of the plan confirmation order was served on Steven Lawrence, counsel for CHF, on April 20, 2011.

JPMorgan is not denying that Steven Lawrence received notice of entry of the plan confirmation order in late April 2011 and later received the subsequent notices from the plaintiff about the subject loan in June 2011. Docket 86 at 17 (file pages).

Yet, in nearly six years, JPMorgan has done nothing to comply with the plan confirmation order. According to the complaint, the rejection of plan payments continued through August 2014. Docket 79 at 5.

The court disagrees with the motion's contention that the facts must *demonstrate* the violation was willful. The facts alleged in the complaint are not evidence and they do not have to demonstrate anything. They are mere allegations to be proven on a summary judgment motion or at trial.

The facts in the complaint plausibly assert that the nature of the stay violations was willful.

Finally, the court will not address the evidentiary defects raised in the motion as to the causation and damages allegations. This is a motion to dismiss and the court does not weigh the complaint's allegations as evidence. The alleged damages sustained due to tenants moving out, vandalism and/or emotional distress are plausibly based on JPMorgan's ongoing and prolonged refusal to comply with the plan.

The motion will be granted in part and denied in part.

3. 10-36150-A-11 KARIN FRANK — STATUS CONFERENCE
16-2005 — 11-14-16 [79]
FRANK V. CHASE HOME FINANCE, LLC, ET AL.,

Tentative Ruling: None.

4. 16-21585-A-11 AIAD/HODA SAMUEL — STATUS CONFERENCE
3-15-16 [1]

Tentative Ruling: None.