

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

February 25, 2016 at 10:30 a.m.

1. [15-21449](#)-E-7 BALBIR/SAWARNJIT SEKHON MOTION FOR COMPENSATION FOR
MPD-4 Mikalah R. Liviakis MICHAEL P. DACQUISTO, TRUSTEE'S
ATTORNEY
1-18-16 [[119](#)]

Final Ruling: No appearance at the February 25, 2016 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, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on January 18, 2016. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees 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 non-responding parties 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 Professional Fees is granted.

Michael P. Dacquisto, the Attorney ("Applicant") for John Reger the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period July 9, 2015 through February 25, 2016. The order of the court approving employment of Applicant was entered on July 14, 2015. Dckt. 92. Applicant requests fees in the amount of \$8,885.00 and costs in the amount of \$128.75.

STATUTORY BASIS FOR PROFESSIONAL FEES

February 25, 2016 at 10:30 a.m.

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Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up

a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including 341 meeting examination, asset analysis and recovery, asset disposition, employment applications, and fee applications. The estate has \$35,406.73 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

341 Meeting: Applicant spent 3.5 hours in this category. Applicant assisted Client with extensive examination of the Debtors at their 341 meeting concerning sale of the motel, the carry back note and related matters, areas where Reger needed legal assistance. Applicant also reviewed emails to and from Debtors' counsel and Reger concerning materials needed for the 341 meeting.

Efforts to Assess and Recover Property of the Estate: Applicant spent 11.0 hours in this category. Applicant reviewed the paperwork filed in this case while it was in chapter 13 before conversion to chapter 7; obtained and reviewed the escrow file for the sale of the motel; reviewed paperwork filed in multiple recent prior bankruptcies filed by the Debtors; performed legal research on setoff issues raised by the Debtors concerning the value of the carry back note; and briefly reviewed amended schedules B and C.

Asset Disposition: Applicant spent 6.9 hours in this category. Applicant prepared an agreement to sell the Debtors' non exempt interest in the carry back note back to the Debtors and an LLC controlled by their son, and dealt with Debtors' counsel concerning the content of that agreement; prepared DCN: MPD-3, a motion to approve sale of the note; appeared at the court hearing on DCN: MPD-3 (which was granted); and briefly reviewed a report of sale prepared by Reger concerning the Debtors' buy back of non exempt equity in a vehicle.

Employment and Fee Applications: Applicant spent 4.8 hours in this category. Applicant prepared DCN: MPD-1, an application to approve employment, as well as DCN: MPD-2, a second application to approve employment after the court did not approve DCN: MPD-1 (done at no charge to the estate), and of DCN: MPD-4, this Motion. Because this Motion is set on 28 days notice and I am hopeful it will be granted without a hearing I have not included any time for appearing at the court hearing on.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

| Names of Professionals and Experience | Time | Hourly Rate | Total Fees Computed Based on Time and Hourly Rate |
|--|-------------|--------------------|--|
| Michael P. Dacquisto | 22.6 | \$350.00 | \$7,910.00 |
| Michael P. Dacquisto | 2.6 | \$375.00 | \$975.00 |
| Michael P. Dacquisto | 1 | \$0.00 | \$0.00 |
| Total Fees For Period of Application | | | \$8,885.00 |

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$128.75 pursuant to this applicant.

The costs requested in this Application are,

| Description of Cost | Per Item Cost, If Applicable | Cost |
|---|------------------------------|-----------------|
| MPD-3 Copies | \$0.10 | \$26.10 |
| MPD-3 Postage | \$24.50 | \$24.50 |
| MPD-3 Court Call Fee | \$30.00 | \$30.00 |
| MPD-1 Copies | \$0.10 | \$2.10 |
| MPD-1 Postage | \$0.75 | \$2.25 |
| MPD-4 Copies | \$0.10 | \$20.80 |
| MPD-4 Postage | \$23.00 | \$23.00 |
| Total Costs Requested in Application | | \$128.75 |

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$8,885.00 pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate Funds in a manner consistent with the order of distribution in a Chapter 7 case.

Costs and Expenses

The First and Final Costs in the amount of \$128.75 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Estate Funds in a manner consistent with the order of distribution in a Chapter 7.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

| | |
|--------------------|------------|
| Fees | \$8,885.00 |
| Costs and Expenses | \$ 128.75 |

pursuant to this Application as first and final fees pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an 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 Fees and Expenses filed by Michael P. Dacquisto ("Applicant"), Attorney for the 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 Michael P. Dacquisto is allowed the following fees and expenses as a professional of the Estate:

Michael P. Dacquisto, Professional Employed by Trustee

Fees in the amount of \$ 8,885.00
Expenses in the amount of \$ 128.75,

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$8,885.00 and costs of \$128.75 approved pursuant to prior Interim Application are approved as first and final fees and costs pursuant to 11 U.S.C. § 330.]

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate Funds in a manner consistent with the order of distribution in a Chapter 7 case.

No Tentative Ruling: The Motion for Contempt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Contempt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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.

The Motion for Contempt is xxxxxx.

J. Michael Hopper, the Chapter 7 Trustee, filed the instant Motion for Contempt on December 23, 2015. Dckt. 129. The Trustee seeks an order holding Janet Robinson ("Debtor") in contempt for failing to comply with the court's order directing the Debtor to turn over, among other things, certain real property located at 725 Acacia Avenue, Richmond, California and the post-petition rents for the Acacia Property, and certain real property generally located at 681 8th Street, Richmond, California.

The Trustee requests compulsory sanctions in an amount no less than \$2,500.00 per day or the Debtor be incarcerated until such time as the Debtor complies with the court's order.

Trustee alleges that Debtor's Amended Schedule B, filed April 8, 2015, disclosed for the first time the Debtor's one-sixth interest in the probate estate of her father. At that time, Debtor represented the 8th Street Property as the sole asset of the probate estate, and never disclosed the Debtor's interest in the Acacia Property.

At the second meeting of creditors, the Debtor confirmed that she had an interest in the 8th Street Property, and stated that the Subject Property was generating \$1,275.00 in rental income, and monthly mortgage payments approximated in the amount of \$268.00. At the fourth, and final, meeting of Creditors, the Debtor failed to provide any of the requested documentation and information related to the other purported owners of the 8th Street Property.

Trustee asserts that as part of its investigation, a public record search was caused to be performed. The public record reflected that, on the petition date, the 8th Street Property was solely in the Debtor's name. The same day the Grant Deed for the 8th Street Property was recorded, a Grand Deed was recorded that reflects that Julietta C. Robinson conveyed to Debtor and five other individuals the Acacia Property. Public records reflect that the title to this property remains in the Debtor's name.

Trustee notes that on September 3, 2015, this court entered an order granting the Trustee's motion to sell the 8th Street Property. Dckt. 90.

Trustee alleges that to date, Debtor has not provided any documentation or information related to the 8th Street Property, the post-petition rents collected, the Acacia Property, and the owners of the Acacia Property from the Debtor's counsel.

OCTOBER 29, 2015 TURNOVER ORDER

On October 29, 2015, the court granted the Trustee's Motion for Turnover and ordered the following:

IT IS ORDERED that the Motion for Turnover of Property is granted.

IT IS FURTHER ORDERED that Janet L. Robinson ("Debtor"), shall deliver on or before noon on November 20, 2015, possession of the property, including:

1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

(the "Property") with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

IT IS FURTHER ORDERED that the monies turned over shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15th Street, Sacramento, California 95811.

Dckt. 114.

APPLICABLE LAW

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

Once an alleged contemnor's noncompliance with a court order is established, the burden shifts to the alleged contemnor to produce sufficient evidence of its inability to comply to raise a question of fact. *In re Icenhower*, 755 F.3d 1130, 1139 (9th Circuit 2014)(internal citations and quotations omitted).

DISCUSSION

From the information provided for by the Trustee and a review of the instant case, the Debtor failed to comply with the court's order and turnover:

1. All post-petition rents collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

Pursuant to the court's order, the Debtor had until noon on November 20, 2015 to turnover the properties, rents, and accounting to the Trustee. As testified by the Trustee in his declaration, the Debtor failed to comply. The Trustee testifies that on November 25, 2015, the Debtor's counsel provided a narrative response explaining that expenses the Debtor incurred related to the 8th Street Property apparently offset any rents collected. Dckt. 131. However, the Trustee states that no documentation was provided in support and no information or documentation was provided relating to the Acacia Property.

The Trustee states that through his counsel, on November 29, 2015 and December 7, 2015, attempted to obtain a substantiative response and compliance with the court's order. The Debtor's counsel responded on December 8, 2015 stating that the Debtor was not "tech savvy" and that the Debtor required an additional week. The Trustee allowed for an extension until December 14, 2015. However, the Debtor has still failed to comply.

It is apparent from the facts around this case that the Debtor has wilfully failed to comply with the court order to turnover the property. The Trustee offered the Debtor an additional 24 days to comply with the court's specific order. To date the Debtor was failed to take advantage of this extension. Rather, the Debtor and Debtor's counsel provided a "narrative" of how the rent monies were used and claim the Debtor's lack of computer knowledge as reasons for failing to comply. This is unacceptable.

JANUARY 7, 2016 HEARING

At the hearing counsel for Ms. Robinson appeared and consented to the entry of the Order. Counsel for Ms. Robinson and the Trustee stated that they were working on providing the information and the granting of the motion and the continued hearing was consistent with their efforts.

The court issued the following order:

IT IS ORDERED that the Motion for Contempt is granted.

IT IS FURTHER ORDERED that Janet L. Robinson ("Debtor"), shall deliver on or before noon on January 21, 2016, possession of the property, including:

1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8th Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

(the "Property") with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

IT IS FURTHER ORDERED that if the Debtor fails to turnover the Property by noon on January 21, 2016, the Debtor shall be sanctioned **\$250.00** per day until the Debtor has turned over the Property.

IT IS FURTHER ORDERED that the sanctions shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15th Street, Sacramento, California 95811.

IT IS FURTHER ORDERED that further hearing on the Motion shall be conducted at 10:30 a.m. on February 25, 2016, for the court to consider:

- A. The effectiveness of the \$250.00 a day corrective sanctions;
- B. Issuance of an order computing the amount of the corrective \$250.00 sanction to the date of the

February 25, 2016 at 10:30 a.m.

hearing if the Debtor failed to comply with the turnover order;

- C. Whether the court should order incarceration as a corrective sanctions;
- D. Whether the court should order the corrective sanction of the dismissal with prejudice of this bankruptcy case if the Debtor does not comply with the prior turnover over by a future specified date; and
- E. Such other sanctions as proper.

Dckt. 138.

FEBRUARY 23, 2016 HEARING

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, **xxxx**

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 Contempt filed by 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 for Contempt is **xxxxxx**

3. [14-29284-E-7](#) CHARLES MILLS
DNL-14

CONTINUED OBJECTION TO DEBTOR'S
CLAIM OF EXEMPTIONS
11-30-15 [[314](#)]

No Tentative Ruling: The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *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 Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on November 30, 2016. By the court's calculation, 59 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The objection to claimed exemptions is [overruled/sustained and the exemptions are disallowed in their entirety].

The Chapter 7 Trustee, Kimberly Husted ("Trustee"), opposes Charles Mills' ("Debtor") claim of exemption against: (1) real property identified as 9285 Pinehurst Drive, Roseville, California 95747 (the "Pinehurst Property") claimed as exempt pursuant to California Code of Civil Procedure § 704.730; (2) sports items, including jerseys, football helmets, autographed sports equipment, and similar items identified in Debtor's Amended Schedule B (the "Sports Items") claimed as exempt pursuant to California Code of Civil Procedure § 704.020; (3) an antique slot machine, claimed as exempt pursuant to California Code of Civil Procedure § 704.020; (4) a Wurlitzer juke box, claimed as exempt pursuant to California Code of Civil Procedure § 704.020; and

(5) a Go-Kart, claimed as exempt pursuant to California Code of Civil Procedure § 704.020.

As discussed infra, Debtor does not oppose Trustee's objection as to the Wurlitzer juke box or the antique slot machine, and argues that the Go-Kart is not property of the estate, and therefore not entitled to an exemption.

Trustee's remaining objections are as follows:

1. The Pinehurst Property was not Debtor's principal dwelling at the time of the petition date, and therefore is not entitled to the exemption under California Code of Civil Procedure § 704.730. Debtor's original and amended petitions identify Debtor's street address as 201 Rua Esperanza, Lincoln, California 95648 (the "Rua Esperanza Property"), and do not identify prior addresses. Debtor's 2012 tax return similarly identifies the Rua Esperanza Property as Debtor's home address, and claims rental income from the Pinehurst Property. Debtor's Amended Schedule B further identifies the Rua Esperanza Property as the location for all of Debtor's personal property.

On July 7, 2014, Yvonne Rego ("Rego") started working with Debtor, and moved into the Rua Esperanza Property, where she resided until October 10, 2014. Rego states that during this period, she observed Debtor and his family coming and going, and that Debtor's vehicles and substantial personal belonging were at the Rua Esperanza Property. Rego states further that she would come over for coffee with Debtor and his wife, and that she observed large social gatherings at the Rua Esperanza Property. Rego's friend, Leanne Hammond, was also present at the Rua Esperanza Property on several occasions and states that it was apparent Debtor and his family were living there. See Rego Declaration, Dckt. 316; Leanne Hammond Declaration, Dckt. 317.

During the period of September 2014 and October 2014, Joey Alexander, Caleb Scribner and his family, and Jessie Morgan resided at the Pinehurst Property. During this time, neither Debtor nor his family resided at the Pinehurst Property. See Joey Alexander Declaration, Dckt. 319. On October 6, 2014, Rego was forced to pay Debtor's cable bill to reactivate service at the Rua Esperanza Property though Debtor and his family were still residing there.

While this case was pending in Chapter 11, Debtor attempted to sell the Rua Esperanza Property. In his declaration supporting the motion for sale, Debtor identifies the Pinehurst Property as a former rental property, stating that "Debtor in Possession intends to vacate [the Rua Esperanza Property] upon closing and move to [the Pinehurst Property.]" The Debtor stated further that \$50,000.00 of the sale proceeds would be needed in order to make the Pinehurst property livable after former tenants, evicted by Debtor, left the property in a state of disrepair.

After Debtor's proposed sale fell through, Debtor's case was converted to a Chapter 7, and the court subsequently entered an order granting Trustee's motion to sell the Rua Esperanza Property for \$1,855,000.00, providing \$10,000.00 to Debtor for exempt household items included in the sale.

2. The Sports Items are more akin to memorabilia or display items than household goods, and are not ordinarily found in households. Therefore, the Sports Items are not exempt under California Code of Civil Procedure § 704.020.

Along with the Trustee's Motion, the Trustee filed the following declarations in support: (1) Declaration of Yvonne Rego; (2) Declaration of Leanne Hammond; (2) Declaration of Trustee; and (4) Declaration of Joey Alexander.

The Rego Declaration states that Ms. Rego, during July 7, 2014 through October 10, 2014, Ms. Rego lived at Rua Esperanza with the Debtor and his family. Dckt. 316. Ms. Rego asserts that she would see the Debtor and his family, as well as she would see the Debtor's Maserati inside the garage. Ms. Rego states that she visited Pinehurst property with the Debtor in late August 2014 or early September 2014. Furthermore, Ms. Rego states that on October 6, 2014, prior to moving out, she made a payment to Direct TV after the service was shut off due to unpaid bills.

The Hammond Declaration states that Ms. Hammond visited Ms. Rego at Rua Esperanza. Dckt. 317. Ms. Hammond testifies that she saw the Debtor and his family at Rua Esperanza and that she believed the Debtor was living there.

The Alexander Declaration states that during the period of September 2014 and October 2014, Mr. Alexander lived at Pinehurst. Dckt. 319. Mr. Alexander asserts that he lived at the Pinehurst property with Caleb Scribner and his wife and two children and Jessie Morgan. Mr. Alexander testifies that the Debtor and his family were not living there during the time period, including September 17, 2014. Mr. Alexander states "[t]he Debtor rented the Pinehurst Property to us."

DEBTOR'S OPPOSITION

Debtor filed an opposition to Trustee's Objection on January 18, 2016. Dckt. 331. Debtor's arguments are as follows:

1. Trustee is seeking to cover up her lack of vigorous opposition to a relief of stay motion resulting in the sale of the Rua Esperanza Property, as well as her lack of vigorous pursuit of higher offers for that same sale. In selling the Rua Esperanza Property, Trustee "merely carved out an amount sufficient for her needs, the needs of her counsel and professionals, and the secured creditor."
2. Debtor's principal dwelling at the time of filing was the Pinehurst Property. Debtor's address listed as the Rua Esperanza Property was a duplication error due to the expedited nature of this filing. Debtor's personal belongings were at the Rua Esperanza Property because that property was being marketed

as fully furnished. Furthermore, there were no personal belongings or furnishings at the Pinehurst Property because Debtor wished to add his furnishings to the Rua Esperanza Property sale in order to buy new furnishings for the Pinehurst Property.

While Rego did reside at the Rua Esperanza Property, neither house can look into the other except by walking up and looking through windows. Rego's living space was equivalent to living next door to Debtor's at the Rua Esperanza Property. Furthermore, the last time Debtors had coffee with Rego was on September 1, 2014, following Rego's termination from Debtor's employment. On October 6, 2014, the cable service had turned off because Debtor's had stopped living at the Rua Esperanza Property and no longer needed television service there. While Debtor and his wife still maintained appearances in the neighborhood of Rua Esperanza that they lived and intended to live there, they had disclosed to close friends and family their intent to move.

Debtor consulted with Caleb Scribner ("Scribner") as early as May 2014 regarding his intention to move into the Pinehurst Property. After evicting former tenants, Debtor allowed Scribner and his family to reside at the Pinehurst Property as guests, while Debtor maintained a room there so he could rehabilitate the property. See Scribner Declaration, Dckt. 333. In August 2014, Debtor contracted with a landscape company to bring fresh beauty bark to the Pinehurst Property as part of the rehabilitation process. Debtor was physically present through the filing of his petition to work on the interior and exterior of the Pinehurst Property. See Mills Declaration, Dckt. 332.

3. Debtor's Sports Items are a random collection for Debtor's personal enjoyment and decoration, and are not memorabilia. Fewer than 50% of the items have certificates of authenticity, the display stands and frames for each item are separate, none of the items are original game wear, and there is no theme behind the Sports Items. Because the Sports Items are general decoration, they should be considered household goods, like art.
4. Debtor does not oppose Trustee's objection as to the Wurlitzer juke box or the antique slot machine, and argues that the Go-Kart is not property of the estate, and therefore not entitled to an exemption.

Along with the Debtor's opposition, the Debtor provides the declarations of: (1) Debtor; (2) Caleb Scribner; and (3) Tamara Mills.

The Scribner Declaration declares that Mr. Scribner moved into the Pinehurst property while he was relocating himself and his family to California. Dckt. 333. Mr. Scribner states that he was instructed to keep a room available to him at all times and that Mr. Scribner assist in repairing and rehabilitating the property. On September 16, 2014, Mr. Scribner states

that he was informed that the Debtor "was going to be moving his family to Pinehurst shortly and that in addition to his current room he was going to need all of [them] to vacate the Pinehurst home." Additionally, of note, Mr. Scribner states:

I continued to live in Pinehurst into the month of October all the while maintaining a room for Mills and assisting him in getting the property ready for his wife and children to move in.

Tamara Mills' declaration states that it was her and the Debtor's intention to move to Pinehurst. Dckt. 334. Mrs. Mills discusses that she "had not physically moved to Pinehurst on September 17, 2014," and that she held events at Rua Esperanza to lead "neighbors to believe that we were still doing well financially and to believe that I was residing and intending to reside at Rua Esperanza." Mrs. Mills then restates essentially the same bases as those in the opposition.

TRUSTEE'S REPLY

On January 21, 2016, Trustee filed a reply stating the following:

1. The Debtor's focus on the sale of the Rua Esperanza Property is irrelevant to the current Objections.
2. The Debtor has not met his burden of showing that the Pinehurst Property was intended to be his principal dwelling at filing. Debtor's current claims are inconsistent with his petition and schedules. Furthermore, during the Summer of 2014, at a time when Debtor claims he was already discussing moving into the Pinehurst Property, Debtor was actively marketing the property.

While Debtor claims that he maintained a room beginning August 2014 at the Pinehurst Property, he only recalls staying there overnight on September 16 and 18, 2014. Joey Alexander, a tenant there, further states that he had access to each room, and that neither Debtor nor his family resided there. Moreover, Rego was never an employee of Debtor, and was not terminated by him.

3. The Debtor's current characterization of the Sports Items is inconsistent with past representations. Furthermore, items that are not ordinarily found in households, and which are used as purely ornamental display are not household goods.
4. Lastly, the Debtor misunderstands the Trustee's avoidance rights, namely concerning the priming rights of the Trustee.

The Trustee provided the declarations of Yvonne Rego, Tony Manning, and Joseph Alexander.

Ms. Rego's declaration states that she was never employed nor terminated by Debtor and instead worked alongside Debtor. Dckt. 341. Ms. Rego declares that she was terminated from Elevate, which is a solar power business, and not by Debtor. Additionally, Ms. Rego asserts that her relationship was not

strained, as asserted by Debtor. Ms. Rego also asserts that she did in fact see the Debtor's family at Rua Esperanza and that the television payments was due to unpaid bills and that Debtor's wife thanked her for making the payment.

Tony Manning declares that he filed Proof of Claim No. 17-1, asserting a secured claim in the amount of \$115,000.00 on account of a promissory note and deed of trust against the Pinehurst Property. Dckt. 342. Mr. Manning states that the security interest arose as part of a settlement of a lawsuit filed against Debtor. The Settlement provided that the Debtor would pay Mr. Manning \$115,00.00 from the sale proceeds of the sale of the Pinehurst property, directly from escrow. The Settlement provided Placer Title Company would handle the escrow.

The Trustee also attached Joseph Alexander's supplemental declaration. Dckt. 343. This declaration states that Mr. Alexander has access to each room at the Pinehurst property during the period of September 2014 and October 2014. Mr. Alexanders testifies that:

[The Debtor] did not have a room at the Pinehurst Property while I was living at the property. The Debtor did not stay overnight at the Pinehurst Property while I was living at the property. I did see him at the Pinehurst Property working on projects.

Additionally, Mr. Alexander testifies that he did not have a written lease agreement but did pay rent to the Debtor.

SUPPLEMENTAL DECLARATION OF JOSEPH ALEXANDER

The Debtor filed a "supplemental Corrective Declaration of Joseph Alexander Opposing Trustee's Objection to Exemptions" on February 11, 2016. Dckt. 351. Mr. Alexander states, still under the penalty of perjury, that the purpose of the supplemental declaration is to correct the information in his prior declarations filed by the Trustee. Mr. Alexander alleges that for both declarations, Rego approached him to sign the declarations. Mr. Alexander argues that he did not understand the purpose of the document, the importance of perjury, nor if any of the information was correct. Mr. Alexander argues that for both declarations, Mr. Alexander felt pressure to sign the documents without correcting information due to the alleged pressure from Rego.

Mr. Alexander states that he would correct the following statements:

1. "I did live at the Pinehurst property on the dates in question, I can assert that Freddie did stay nights there while preparing the property for his family to move in as their permanent residence." Dckt. 351, ¶ 28a.
2. "I did not pay rent at all to Freddie. I paid my portion of the expenses to Caleb Scribner but never to Freddie. And although I considered it my 'rent' in a loose fashion, I did know that it was not the market value of rent for such a nice property and that I was merely a guest in Freddie's house." Dckt. 351, ¶ 28b.
3. "Although I did not think of him as a roommate (because I did

not think he would be leaving the property and staying with us when we left) I knew that he had full access to and use of the Pinehurst property and that he was staying some nights as well as preparing it for his family to occupy." Dckt. 351, ¶ 28c.

TRUSTEE'S RESPONSE

The Trustee filed a response to the Debtor's request for judicial notice on February 18, 2016. Dckt. 355. The Trustee asserts that while she questions the circumstances surrounding Mr. Alexander's change of testimony, the Trustee notes that the only substantive changes in the testimony is that Mr. Alexander now asserts that the Debtor spent some nights at the Pinehurst property and that Mr. Alexander paid what he considered his rent to Caleb Scribner and not to the Debtor directly.

The Trustee concludes by stating that the Debtor has repeatedly testified and made representations that Rua Esperanza was his residence and the location for his personal property; that the Pinehurst property was a rental property and had not been occupied by the Debtor; and that the Pinehurst property would be marketed and sold in furtherance of the Debtor's settlement agreement with Tony Manning. The Trustee argues that the Debtor has not sufficiently shown that the Debtor is entitled to an exemption.

APPLICABLE LAW

Homestead

For purposes of the instant Objection, California law provides the following homestead exemption:

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

California Code of Civil Procedure § 704.730.

Under California law, the factors a court should consider in determining residency, for homestead purposes, are physical occupancy of the property and the intention with which the property is occupied. *In re Kelley*, 300 B.R. 11 (BAP 9th Cir. 2003). California Government Code specifies what should be considered when determining the place of residence:

In determining the place of residence the following rules shall be observed:

(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.

(b) There can only be one residence.

(c) A residence cannot be lost until another is gained.

(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.

(e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.

(f) The residence can be changed only by the union of act and intent.

(g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse.

Cal. Govt Code § 244 (West).

Under California law, debtor or debtor's spouse must reside in dwelling when bankruptcy petition is filed in order to be entitled to homestead exemption, whether homestead is claimed under article on homestead exemption or under article on declared homesteads. Cal. C.C.P. §§ 697.710, 704.710 et seq., 704.910 et seq; see, e.g. *In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992) (under California law, debtors' claim of homestead exemption was valid, even though debtors did not physically occupy house all the time, where debtors were only temporarily absent for a few days at a time for employment away from home).

California courts have discussed the requirements in order to claim a homestead exemption:

In *Tromans v. Mahlman*, 92 Cal. 1, 8 [27 P. 1094, 28 P. 579], it is said: "To effect its purpose, the [homestead] statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended. ... Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their home in San Francisco. ..."

Ellsworth v. Marshall, 196 Cal. App. 2d 471, 474, 16 Cal. Rptr. 588 (Ct. App. 1961).

Bankruptcy courts in the Eastern District have grappled with the proper burden of proof as to proving that applicability of an exemption. Specifically,

Because California law mandates the use of state exemptions, prohibits the use of federal exemptions, and allocates the burden of proof to the exemption claimant, the court further concludes that California Code of Civil Procedure § 703.580(b) is a substantive element of a California exemption and California exemption law that must be applied inside bankruptcy the same as it would outside bankruptcy.

In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015).

Memorabilia

California has defined "collectible" as:

an autographed sports item, including, but not limited to, a photograph, book, ticket, plaque, sports program, trading card, item of sports equipment or clothing, or other sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more.

Cal. Civ. Code § 1739.7 (West).

In comparison, California states that "household furnishings, appliances, provisions, wearing apparel and other personal effects" are exempt under California if the following are met:

(a) Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt in the following cases:

(1) If ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence.

(2) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if ordinarily and reasonably necessary to, and personally used or procured for use by, the spouse and members of the spouse's family at the spouse's principal place of residence.

(b) In determining whether an item of property is "ordinarily and reasonably necessary" under subdivision (a), the court shall take into account both of the following:

(1) The extent to which the particular type of item is ordinarily found in a household.

(2) Whether the particular item has extraordinary value as compared to the value of items of the same type found in other households.

Cal. Civ. Proc. Code § 704.020 (West).

DISCUSSION

First, to narrow the issues at bar, the court sustains the objection to exemption as to the Wurlitzer juke box and the antique slot machine. The Trustee and the Debtor concur that the exemptions claimed in each of these items are not proper and should be sustained. Therefore, the Trustee's objection to exemptions as to the Wurlitzer juke box or the antique slot machine and the claimed exemptions are disallowed in their entirety.

The crux of the remaining objection deals with the final three items: (1) Homestead exemption; (2) Spots Memorabilia; and (3) Go-Kart.

Homestead Exemption

The court does not find that the Debtor has met his burden to justify the use of a homestead exemption on the Pinehurst Property.

The burden of proof is on the Debtor to show that the Debtor is entitled to an exemption. *In re Pashenee*, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015). In order for the Debtor to claim a homestead exemption on the Pinehurst Property, the Debtor must have resided at Pinehurst when bankruptcy petition was filed.

Before discussing why the Debtor has failed to prove that he is entitled to claim a homestead exemption on the Pinehurst Property, the court reviews the prior pleadings in the instant case to determine where the Debtor has purported to "reside" during the bankruptcy case.

1. Petition, Dckt. 1.
 - a. Filed September 17, 2014.
 - b. Lists Street Address of Debtor as: "201 Rue Espinosa, Lincoln, CA."
2. 2012 Tax Return, Dckt. 20.
 - a. Filed September 25, 2014.
 - b. The home address is listed as: "201 Rue Esperanza."
3. Status Report, Dckt. 34.
 - a. Filed October 7, 2014.
 - b. "POST PETITION ACTIVITIES: The debtor has hired (subject to future court approval) an independent real estate agent named Mimi Nassif, to market, list and show the residence on Rua Esperanza, Lincoln CA 95648. Agent has received an offer for purchase, debtors attorney is gathering this offer as part of the necessary documents for a motion to approve the proposed sale. The sale price will exceed all secured claims on the property."
4. Motion to Authorize the Debtor to Employ Realtor Mimi Nassif, Dckt. 36.
 - a. Filed October 9, 2014.
 - b. "Luke Garcia, attorney for and on behalf of Charles Fredell Mills, Jr, the Debtor herein, hereby moves this Court for an Order Authorizing the Debtor to Employ Realtor Mimi Nassif to market, list, acquire all necessary escrow and the title contractors necessary to sell the real estate property located at 201 Rua Esperanza in Lincoln California, 95648."

- c. The Rua Esperanza Property is called the "real estate" in the Motion.
5. Motion to Authorize the Debtor in Possession to Sell Real Property and Contents, Dckt. 41.
- a. Filed October 9, 2014.
- b. The Motion sought authorization to sell the Rua Esperanza Property.
- c. "Further, the Debtor In Possession hereby moves this court to allow this sale to be conducted in such a way as to include all furnishings, contents, decorations, and accouterments of the **home** except the personal belonging of the Debtor In Possession and to keep a portion of the remaining funds for repair and furnishing of the **home to which they will move.**" Dckt. 41, lines 21-24.
- d. "Debtor In Possession **intends to vacate the [Rua Esperanza Property] upon closing and move to 9285 Pinehurst Drive, Roseville California 95747.** This address was formerly used as a rental by the Debtor in Possession but is currently vacant as of the date of this motion and the date of filing." Dckt. 41, ¶ 9.
- e. "Wherefore Debtor in Possession also requests in the this motion permission to use \$50,000.00 of the net proceeds after distribution for renovating and furnishing the home on 9285 Pinehurst Drive, Roseville California 95747. That home has been left dilapidated and unfurnished by the recent removal of a nonpaying renter. **In order for the Debtor in possession to move into and live in that home furniture and repairs will be necessary.**" Dckt. 41, ¶ 16.
6. Declaration of Debtor in Support of Motion to Authorize the Debtor in Possession to Sell Real Property and Contents, Dckt. 43.
- a. Filed October 9, 2014.
- b. "The buyer intends to occupy [Rua Esperanza] and therefore I will be moving myself and my family (Wife and two sons) to a house that we formerly used as a rental property located at 9285 Pinehurst Drive, Roseville, California 95747 hereinafter 'Pinehurst'." Dckt. 43, ¶ 14.
- c. "I recently evicted the former tenants who had not paid their rent for many months. This however has left the home in a state of disrepair and dilapidation. This

coupled with the proposed sale of all furnishings, contents, decorations, and accouterments will leave the Pinehurst home empty and in poor living condition." Dckt. 43, ¶ 16.

7. Schedules, Dckt. 50.
 - a. Filed October 15, 2015.
 - b. Schedule B, pg. 7.
 - i. All household goods and furnishings, including audio, video, and computer equipment, cash on hand, books, pictures, and other art objects antiques, stamp, coin, record, tape, compact disc, and other collections or collectible, wearing apparel, furs and jewelry, automobiles, and office equipment are **listed as being located at Rua Esperanza Property.**
 - ii. No personal property listed is reported to be located at the Pinehurst Property.
 - c. Schedule C, pg. 11.
 - i. Claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the Pinehurst Property in the amount of \$100,000.00.
 - d. Schedule I, pg. 22.
 - i. Debtor's employment is listed as "Self Employed Energy Broker" with Energy Master Agents. **The address is the Rua Esperanza Property.**
 - e. Schedule J, pg. 24.
 - i. Debtor states that his two sons and his wife live with him.
 - ii. The "rental or home ownership expenses for your residence" is listed at \$3,300.00.
 - iii. The Debtor lists "Other real property expenses" for "Mortgages on other property" as \$1,200.00.
 - f. Statement of Financial Affairs, pg. 27.
 - i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."

- ii. Debtor indicated that there are **no** previous addresses.
8. Amendment Petition, Dckt. 52.
- a. Filed October 15, 2014.
 - b. "Amendment(s) to the following petition, list(s), schedule(s) or statement(s) are transmitted herewith: Voluntary Petition for address spelling correction."
 - c. The amended petition states that the street address of the Debtor is "201 **Rua Esperanza** Lincoln, CA"
9. Motion to Dismiss, Dckt. 81.
- a. Filed November 17, 2014.
 - b. "The financial situation of the Debtor has unexpectedly changed and the Debtor now desires to dismiss this case. Most notably the impending foreclosure that was threatening to debtors form [sic] **primary residence** [Rua Esperanza] has been resolved through the sale approved by this court."
10. Declaration of Debtor in Support of Ex Parte Motion to Dismiss Case, Dckt. 83.
- a. Filed November 17, 2014.
 - b. "My financial and legal situation has unexpectedly changed and now wish to dismiss this case. Namely, the funds from the sale of my former home and furnishings will allow full payment of all my personal debts." Dckt. 83, ¶ 3.
11. Emergency Application for Order Authorizing the Debtor in Possession to Receive Early Disbursement of Estimated Remaining Funds from Sale, Dckt. 85.
- a. Filed November 19, 2014.
 - b. "Upon consummation of [the sale of Rua Esperanza Property] on **November 18, 2014** the debtor gave up all furnishings of the home and **moved to a former rental unit of the debtor [Pinehurst Property], which was presently unfurnished.**" Dckt. 85, ¶ 2.
 - c. "The debtor brought personal belongings (like clothes and kids toys) but only mattresses for sleeping on. The debtor did not even get to keep the second refrigerator located at the **former primary residence** nor the second washer or dryer." Dckt. 85, ¶ 3.

- d. "Therefore, the debtor is now essentially living in a wholly unfurnished house with no ability to keep cold foods or store the clothing they retained upon departure of the former primary residence." Dckt. 85, ¶ 4.
12. Amended Schedules, Dckt. 118.
- a. Filed December 10, 2014.
 - b. Schedule B
 - i. All household goods and furnishings, including audio, video, and computer equipment, cash on hand, books, pictures, and other art objects antiques, stamp, coin, record, tape, compact disc, and other collections or collectible, wearing apparel, furs and jewelry, automobiles, and office equipment are **listed as being located at Rua Esperanza Property.**
 - ii. All personal property listed is reported to be located at the Pinehurst Property.
 - c. Schedule C, pg. 11.
 - i. Claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the Pinehurst Property in the amount of \$100,000.00.
 - d. Statement of Financial Affairs, pg. 27.
 - i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."
 - ii. Debtor indicated that there are **no** previous addresses.
13. Amended Petition and Schedule
- a. Filed January 18, 2016.
 - b. Petition, pg. 2.
 - i. **Debtor's Street Address is listed as "9285 Pinehurst Drive, Roseville CA 95747" for the first time in the case.**
 - ii. **Mailing Address of Debtor is listed as "201 Rua Esperanza, Lincoln, CA 95648.**

- c. Statement of Financial Affairs, pg. 27.
- i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."
 - ii. Debtor indicated that there are **no** previous addresses.

As shown supra, the first time the Debtor claims Pinehurst Property as his residence and street address is on January 18, 2016 in the amendment to the Petition. Dckt. 330. This amendment still lists the mailing address of the Debtor as Rua Esperanza Property. The Debtor did not amend or supplement his Schedules B, C, nor Statement of Financial Affairs to indicate that any property other than Rua Esperanza was his residence. The Debtor does not indicate any prior addresses on the Statement of Financial Affairs, even though the Debtor claims to have moved to Pinehurst on November 18, 2014. See Emergency Application for Order Authorizing the Debtor in Possession to Receive Early Disbursement of Estimated Remaining Funds from Sale, Dckt. 85.

This is in direct conflict with the Debtor's repeated representation in connection with the instant Objection that Pinehurst Property has been the residence of the Debtor since, at the latest, October 2014. Dckt. 331, pg. 3, lines 7-10.

The Debtor does not provide any explanation why, since September 17, 2014, the Debtor has not ever stated that Pinehurst Property has been his residence. In fact, as seen supra, the Debtor has made repeated representations, under the penalty of perjury, that the Debtor and the family had not moved into Pinehurst until November 18, 2014. The Debtor stated that the Pinehurst Property was vacant following the eviction of the former tenants earlier in 2014. Nowhere prior to the opposition had the Debtor indicated that Mr. Alexander or Mr. Scribner lived at Pinehurst Property. The court is curious as to how both Mr. Alexander or Mr. Scribner was able to live at Pinehurst Property when the Debtor declared that there were no furnishing at the house.

In fact, the Debtor has continued to represent that all the Debtor's personal belongings, including clothes, jewelry, and cars, were located at Rua Esperanza and that him and his family were actually still residing at the Rua Esperanza Property

For instance, in the Debtor's first Motion to Sell the Rua Esperanza Property, the Motion stated: "Debtor In Possession ***intends to vacate the [Rua Esperanza Property] upon closing and move to 9285 Pinehurst Drive, Roseville California 95747.*** This address was formerly used as a rental by the Debtor in Possession but is currently vacant as of the date of this motion and the date of filing." Dckt. 41, ¶ 9.

The Debtor's declaration in support of the Motion to Sell the Rua Esperanza Property stated "The buyer intends to occupy [Rua Esperanza] and therefore I will be moving myself and my family (Wife and two sons) to a house

that we formerly used as a rental property located at 9285 Pinehurst Drive, Roseville, California 95747 hereinafter 'Pinehurst'." Dckt. 43, ¶ 14.

The language of the Motion and the Declaration unequivocally indicate that the Debtor was residing at Rua Esperanza Property. The Debtor indicates that he and his family will move following the closing of the sale; not that the Debtor has already moved and intended to live at Pinehurst with his family.

Further indicating that the Debtor did not "reside" at the Pinehurst Property at the time of the petition to qualify for the homestead exemption pursuant to California Code of Civil Procedure § 703.740, the Debtor declared "I recently evicted the former tenants who had not paid their rent for many months. This however has left the home in a state of disrepair and dilapidation. This coupled with the proposed sale of all furnishings, contents, decorations, and accouterments will leave the Pinehurst home empty and in poor living condition." Dckt. 43, ¶ 16. This statement is in direct conflict with the testimony now given by the Debtor that since September 2014, the Debtor had constantly been working on and improving the house, with the assistance of "guests" who were living at Pinehurst at the time, allegedly with Debtor.

While it is true that California courts, when determining whether a property qualifies for a homestead exemption, have found that even if a debtor did not physically occupy a house all the time, a debtor may be entitled to claim a homestead exemption if being temporarily absent for a few days at a time was due to employment, California courts have also found that a debtor cannot create a "sham" to qualify for homestead exemption. Compare *In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992) with *Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, 16 Cal. Rptr. 588 (Ct. App. 1961).

Specifically, courts have found that "the word 'actually,' to show that the residence must be real, and not sham or pretended." *Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, 16 Cal. Rptr. 588 (Ct. App. 1961).

Here, the Debtor's claim that Pinehurst Property is the debtor's actual residence appears to be akin to a sham. Namely, the Debtor, throughout the life of the case, has indicated numerous times that: (1) the Debtor and his family live with him; (2) the Debtor's address is the Rua Esperanza Property; (3) all of the Debtor's and family's property is located at Rua Esperanza; (4) the Debtor's business is located at Rua Esperanza; etc.

The Debtor cannot, in hindsight, attempt to claim the intention to reside elsewhere when the statements made by the Debtor under the penalty of perjury. In fact, the Debtor's wife's own declaration indicates that the family continued to reside and host at the Rua Esperanza to "keep up appearances." This undercuts the intention argument.

What seems more akin to the factual scenario in the instant case is that the Debtor's "stay" at the Pinehurst Property was to rehabilitate the property, which, at the time of the Motion to Sell, was allegedly empty and in disrepair. This "temporary purpose" (here being the repairs to a rental property) indicates that it was not the residence of the Debtor. In fact, the Debtor in both the Motion to Sell and his Declaration in support indicate that the Pinehurst Property is uninhabitable at the time of the alleged "intention" to reside at the Pinehurst Property. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which

he or she returns in seasons of repose.

Both the Trustee and Debtor lose sight of the underlying contention - whether the Debtor was residing at Pinehurst at the time of filing to qualify for a homestead exemption. The Debtor and Trustee get "sidetracked" in arguing whether the sale of Rua Esperanza Property was pursued appropriately by the Trustee and the truthfulness of Mr. Alexander's testimony.

At the hearing, xxxxx

Sports Memorabilia

The next asset in contention is the various sports memorabilia, including sports jerseys, football, helmets, and autographed sports equipment as listed on Debtor's Amended Schedule B.

The court finds that the sports memorabilia is not "household furnishings that can be exempt pursuant to California Code of Civil Procedure § 704.020.

California law clearly defines "collectible" as :

an autographed sports item, including, but not limited to, a photograph, book, ticket, plaque, sports program, trading card, item of sports equipment or clothing, or other sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more.

Cal. Civ. Code § 1739.7 (West).

First thing of note, is that the Debtor lists the sports memorabilia as "Books, Pictures and Other Art Objects; Collectible" on the Debtor's Schedule B, which is a separate category from Household Goods and Furnishings. Dckt. 118. In fact, the Debtor states that he has "collectable sports memorabilia: 15 signed jerseys, 7 signed helmets, one signed foot ball [sic] and one signed basketball" before referencing the attached itemized list. Dckt. 118.

Second, the Debtor's sports memorabilia does correctly fit within the definition of "collectible" as defined by California. The sports memorabilia are "sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more." The Debtor's own valuations indicate that each item of sports memorabilia is valued far higher than \$5.00.

Third, Debtor's argument that these are not of value because lack of authentication, were not actually worn at events, and the lack of theme constitutes them as household decorations is unpersuasive. The court is not convinced that the estimated \$25,315.00 in sports memorabilia is not a consistent theme. The Debtor attempts to split hairs by asserting that since there is not a unified team or sport that they are nothing more than decorations. Given the quantity of the sports memorabilia and the substantial value of the goods, the court does not find that the memorabilia fits any other definition than "collectible."

The Debtor attempts to create a definition of "memorabilia" that requires that the item itself holds a "memory" of an event. This is far too narrow of a definition and one that the Debtor does not give any support.

As an aside, assuming *arguendo*, that the Debtor's residence was, in fact, Pinehurst Property (which the court does not so determine) and that the memorabilia could be considered "household furnishings", the Debtor would be ineligible to claim an exemption in the memorabilia. California defines "household goods" as:

(a) Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt in the following cases:

(1) If ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family **at the judgment debtor's principal place of residence.**

If the Debtor wishes to claim that the sports memorabilia is exemptible as household furnishings, the Debtor would need to concede that the Debtor's residence, at the time of filing, was Rua Esperanza, since that is where the sports memorabilia was stored. See Schedule B, Dckt. 118. As such, the Debtor is making conflicting arguments that he is entitled to both the homestead exemption on the Pinehurst Property and the household furnishings exemption on the sports memorabilia. This is not permissible on its face under California law.

At the hearing, xxxxx

Go-Kart

The final exemption in contention is the one claimed pursuant to California Code of Civil Procedure § 704.020 on the Go-Kart.

The Debtor filed an amended Statement of Financial Affairs on January 18, 2016, amending question 14 to indicate that the Debtor is holding the Go-Kart on behalf of the Debtor's minor son. The Debtor reiterates that he is holding the Go-Kart for his son in his opposition.

To qualify for exemption under California Code of Civil Procedure § 704.020, the good must be "ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence."

The Debtor fails this in two ways: (1) the Debtor admits that the Go-Kart is not his possession and is thus not "necessary to, and personally used or procured for use by" the Debtor and (2) the Debtor has not shown how a Go-Kart is ordinary and necessary as a household furnishing.

At the hearing, xxxxx

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 Exemptions filed by the 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 Objection is **xxxxxx**.

4. [15-21689](#)-E-7 KELLY HAWKINS-DOUGLAS
MRL-1 Mikalah R. Liviakis

MOTION TO VACATE DISMISSAL OF
CASE
1-27-16 [[32](#)]

DEBTOR DISMISSED: 01/25/2016

Tentative Ruling: The Motion to Vacate Dismissal was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 28, 2016. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 -----
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The Motion to Vacate is granted and the order dismissing the case (Dckt. 30) is vacated.

Kelly Hawkins-Douglas ("Debtor") filed the instant Motion to Vacate Dismissal on January 27, 2016. Dckt. 32.

The instant case was filed on March 3, 2015, as a Chapter 13 case.

Dckt. 1. A modified plan was confirmed on May 13, 2015. Dckt. 15. On December 16, 2015, the Chapter 13 Trustee filed a Motion to Dismiss the Case due to Debtor's delinquency in plan payments in the amount of \$6,860.00. Dckt. 19.

The Debtor asserts that she filed a Notice of Voluntary Conversion to Chapter 7 on January 18, 2016, two days prior to the hearing on the Motion to Dismiss. Dckt. 24.

The Debtor's counsel asserts that due to the conversion, the Debtor did not file a response nor appeared at the hearing.

In light of the lack of response, the Motion to Dismiss was granted on January 20, 2016 as a final ruling pursuant to Local Bankr. R. 9014-1(f)(1). Dckt. 28 and 31.

The Debtor seeks to have the order dismissing the case vacated on the following grounds of mistake or excusable neglect due to the voluntary conversion of the case to one under Chapter 7.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 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.

Red. 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. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 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, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

The Debtor argues that the dismissal should be vacated because the case was converted to one under Chapter 7 prior to the Chapter 13 Trustee's Motion to Dismiss.

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. Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

The sole ground for the Motion to Dismiss was the Debtor's delinquency. As a Local Bankr. R. 9014-1(f)(1) motion, the Debtor and Debtor's counsel were required to oppose the Motion in writing 14-days prior to the hearing. However, the Debtor nor Debtor's counsel failed to file a response stating that the Debtor was converting the case nor appeared at the hearing, as evidenced by the court's civil minutes on the Motion. Dckt. 28. The court, the day prior to the hearing, the court posted its pre-hearing tentative decisions, in which the Debtor and Debtor's counsel had the opportunity to review. Even in light of all the notice provided concerning the Motion to Dismiss, the Debtor did not respond nor did the Debtor or Debtor's counsel appear at the hearing.

The court has made it abundantly clear in the past that it is imperative for parties to respond to motions, especially motions to dismiss, either through written opposition if an Local Bankr. R. 9014-1(f)(1) motion or in person if an Local Bankr. R. 9014-1(f)(2) motion.

The Notice of conversion was filed on Tuesday January 19, 2016. That followed the federal holiday on Monday January 18, 2016. The court conducted the dismissal calendar hearing at 10:00 a.m. on January 19, 2016. The tentative and final rulings were posted for all counsel and parties in interest to read on the afternoon of January 19, 2016 at 4:22 p.m.

It appears that counsel and Debtor ignored the posted ruling stating that the case was dismissed for the stated grounds, with Debtor having filed no opposition. Counsel, notwithstanding filing the Notice of Conversion on January 19, 2016, ignored the court's posted ruling and took no action to correct the "error" caused by the very late filing of the Notice of Conversion.

In his Motion, counsel makes the erroneous argument that "since the court removed the matter from the calendar, counsel did not appear." The court's ruling, while a final ruling, states:

"Final Ruling: No appearance at the January 20, 2016 hearing is required.

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While a "final ruling," the court does not remove it from the calendar. Further, the ruling states "no appearance is required." The court does that for this very reason - if an attorney, diligently representing his or her client, sees an error, they can come to court the day of the hearing and bring the error to the attention of the court (or the Chapter 13 Trustee as in this case).

Debtor's Motion makes a further misstatement, that "As a result of this filing [the Notice of Conversion], Debtor's attorney removed the Motion to Dismiss from the calendar." Counsel or parties do not "remove" items from the court's calendar. Possibly counsel means that when he uploaded the Notice of Conversion, which was filed on January 19, 2016, he removed the entry from "counsel's calendar" and then counsel failed to read the rulings posted for the January 20, 2016 dismissal calendar, such might be a plausible statement. But Debtor's counsel did not remove the motion to dismiss from the court's calendar.

Merits of Motion

However, even in light of these concerns, the Debtor has presented a legitimate and legally basis for the court to consider the instant Motion. As stated by the Debtor had converted her case to a Chapter 7 by filing the Notice of Conversion. While the Debtor's counsel should not have relied solely on the Notice of Conversion filed one day prior to the hearing, the conversion provides justification under Fed. R. Civ. P. 60(b)(6) as other grounds upon which relief is warranted. The Debtor should not be put through the cost and expense of a new filing because counsel failed to read, or if he read, failed to act upon the court's posted rulings the day before the hearing.

However, what occurred was an "error," one which the court is confident will not occur. There is no need to consider corrective sanctions for counsel, beyond the holdings in this ruling. This serves not only as a good lesson for counsel in double checking to make sure acts taken which have a significant impact on a client are properly filed and have been brought to the attention of the court (especially when filed the day before the hearing), but also to be clear and precise in the use of language (such as to which calendar counsel purports to have the authority to remove matters).

Therefore, in light of the foregoing, the Motion is granted and the order dismissing the case (Dckt. 30) is vacated.

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 Vacate Dismissal of Case filed by Debtor 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 granted and the order dismissing the case (Dckt. 30) is vacated. The case shall proceed as a Chapter 7 case in this court.