UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 30, 2015 at 10:00 a.m.

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1. 15-21313-A-11 ELK GROVE COMMUNICATIONS TOWER, INC. — STATUS CONFERENCE 2-20-15 [1]

Final Ruling: The status conference will be dropped from calendar given that the case was dismissed on March 10, 2015.

2. 14-27620-A-12 JOE/MARIA PIMENTEL — MOTION TO DISMISS CASE 3-9-15 [65]
JPJ-1

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the chapter 12 trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the debtor, the creditors, 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 offer 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal because the debtor has failed to prosecute this case. The debtors do not oppose dismissal.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

This case was filed on July 25, 2014. The last plan filed by the debtors was on November 8, 2014. Docket 29. The 45-day deadline to obtain confirmation of the amended plan expired on December 23, 2014. 11 U.S.C. § 1224. The debtor unsuccessfully sought extension of the deadline to confirm the plan to January 20, 2015. The debtor has done nothing since then to prosecute the case, including the filing of a new plan.

The foregoing amounts to unreasonable delay that is prejudicial to creditors, which is cause for dismissal. Accordingly, the motion will be granted and the case will be dismissed.

3. 14-27620-A-12 JOE/MARIA PIMENTEL — MOTION FOR RELIEF FROM AUTOMATIC STAY
HTP-1
BANK OF STOCKTON VS. — 3-2-15 [58]

Tentative Ruling: The motion will be dismissed as moot.

The movant, the Bank of Stockton, seeks relief from stay as to a real property in Tracy, California, constituting three different addresses on S. Lammers Road.

The motion will be dismissed as moot given the dismissal of the case, which automatically dissolves the stay. 11 U.S.C. § 362(c)(2)(B). The movant is not seeking retroactive or section 362(d)(4) stay relief.

4. 10-41061-A-7 CONSTANCE AGEE — MOTION TO DISMISS ADVERSARY PROCEEDING OR FOR A MORE DEFINITE STATEMENT
14-2336 EAT-2
AGEE V. RESIDENTIAL CREDIT SOLUTIONS INC., ET AL., — 2-13-15 [47]

Tentative Ruling: The motion will be granted and all claims against Sage Point Lender Services, L.L.C., will be dismissed.

Sage seeks dismissal of the amended complaint filed on January 27, 2015. Docket 22.

Fed. R. Civ. P. 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).

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).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Further, "[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." Fed. R. Civ. P. 12(d); 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).

A federal court has the obligation to review sua sponte whether it has subject matter jurisdiction under Article III's case-or-controversy requirement. Fed. R. Civ. P. 12(h)(3) (providing that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); Florida Wildlife Fed'n, Inc. v. South Florida Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011); see also Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc., 561 F.3d 1294, 1296 (11th Cir. 2009) (citing 28 U.S.C. § 1447(c)).

"Federal courts are always 'under an independent obligation to examine their own jurisdiction,' . . . and a federal court may not entertain an action over which it has no jurisdiction." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)(citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) and Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)).

Bankruptcy jurisdiction extends to four types of title 11 matters, cases "under title 11," cases "arising under title 11," proceedings "arising in a case under title 11," and cases "related to a case under title 11." See Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006).

The first three types of title 11 matters are termed as core proceedings by 28

U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." Contra Stern v. Marshal, 131 S. Ct. 2594, 2608 (2011) (creating another category of core claims as to which the bankruptcy court cannot enter final judgment, treated as "cases related to a case under chapter 11"); see also Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165, 2172 (2014).

"Stern made clear that some claims labeled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b). Stern did not, however, address how the bankruptcy court should proceed under those circumstances. We turn to that question now."

Bellingham Insurance at 2172.

28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to– (A) matters concerning the administration of the estate . . . [and] (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

On the other hand, "related to a case under title 11" proceedings are noncore, meaning that the bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1). Given the subject motion, though, consent of the parties is highly unlikely in this case.

Cases "under title 11" are the only ones over which district courts have original and exclusive jurisdiction. As to cases "arising under," "arising in," or "related to title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of bankruptcy case.'" Id.

A proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)).

The plaintiff, Constance Maria Agee, filed the underlying chapter 7 bankruptcy case on August 9, 2010. Case No. 10-41061, Docket 1. The chapter 7 trustee issued a report of no distribution September 20, 2010 and the plaintiff received a chapter 7 bankruptcy discharge on November 22, 2010. Case No. 10-41061, Dockets 18 & 22. The case was closed on December 3, 2010. Case No. 10-41061, Docket 24. On September 16, 2014, the court entered an order reopening the bankruptcy case, pursuant to a request by the plaintiff. Case No. 10-

41061, Docket 29. On December 9, 2014, the plaintiff commenced the instant adversary proceeding by filing a complaint. The plaintiff filed an amended complaint on January 27, 2015.

The amended complaint asserts three causes of action:

(1) seeking court determination and declaratory relief that the defendants do not have enforceable security interest in the plaintiff's real property in North Highlands, California,

(2) a claim for quieting title of the property, and

(3) a claim seeking a permanent injunction against the defendants, prohibiting them from: trespassing on the property, filing documents pertaining to the property with the County of Sacramento that would place cloud on title, and "[t]aking any action that could adversely affect the Plaintiff's rights to quiet use, peace, and enjoyment of the aforementioned real property."

Docket 22.

The essence of the complaint is a challenge to the defendants' interest in the property and to their authority to foreclose on the property.

The court does not have subject matter jurisdiction over any of the claims asserted by the plaintiff and none of them are core within the meaning of 28 U.S.C. § 157(b)(1).

The claims are not "cases under title 11." None of them invoke a substantive right provided by title 11 or could arise only in the context of the bankruptcy case. See Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)); see also Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006).

The claims are based on state foreclosure, fraud, real property secured transaction law.

In addition, none of the claims could conceivably affect the administration of the plaintiff's bankruptcy estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)). There is no longer a bankruptcy estate. The plaintiff's bankruptcy case was discharged on November 22, 2010, over four years ago. Also, the trustee found nothing to administer in the plaintiff's estate and issued a report of no distribution on September 20, 2010.

The court also notes that the facts giving rise to the instant dispute arose after August 12, 2012, when Residential Credit Solutions, Inc. sent a letter to the plaintiff informing her that RCS is the new servicer on the loan secured by the property. Docket 22 at 4. In other words, the facts giving rise to the instant dispute arose approximately two years after the debtor's bankruptcy case was fully administered, discharged, and closed.

There is no bankruptcy estate which the subject claims could conceivably affect.

The foregoing analysis is virtually duplicative of the court's ruling on the plaintiff's motion to set aside the foreclosure sale in the underlying

bankruptcy case, where this court ruled that:

"*The debtor is seeking to undo a foreclosure sale, by having the court declare that the sale was invalid, is seeking to recover the property she lost to foreclosure, and is seeking to determine that her interest in the property is superior to the interest of other parties.*

. . .

"*[T]he court does not have subject matter jurisdiction over any of the claims, as they are brought pursuant to state law and the subject bankruptcy case has been administered already.*

"*This case was filed by the debtor as a chapter 7 proceeding on August 9, 2010. The trustee issued a report of no distribution on September 20, 2010. The debtor received her chapter 7 discharge on November 22, 2010. The case was closed on December 3, 2010. As the debtor's claims are not core because they arise pursuant to nonbankruptcy law, the only conceivable jurisdiction this court could have is "related to" subject matter jurisdiction.*"

Case No. 10-41061, Docket 75. The court's ruling on the plaintiff's motion to set aside is incorporated here by reference. Id.

The court also declines to exercise jurisdiction under Carraher v. Morgan Elec., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992). Carraher does not apply here because the plaintiff's bankruptcy case was not dismissed, as was the underlying bankruptcy case in Carraher. The plaintiff's bankruptcy case was discharged and then administratively closed. The claims against the movant will be dismissed for lack of subject matter jurisdiction.

Further, even though not asserted in the amended complaint, but asserted in the original complaint, the court will address the contention that the plaintiff's discharge in the bankruptcy case somehow precludes the defendants from exercising their security interest against the property.

Such a claim will be dismissed for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

The bankruptcy discharge eliminated only the plaintiff's personal obligation on the loan secured by the property. It did not affect the defendants' security interest in the property, to the extent they (or their predecessor in interest) had such interest in the property as of the petition date.

Stated differently, a chapter 7 discharge extinguishes "in personam" liability on debt, but it does not extinguish "in rem" liability.

Thus, regardless of the defendants' interests in the property, the plaintiff's bankruptcy discharge did not impact those interests. It only extinguished the plaintiff's personal obligation on the subject loan secured by the property.

Finally, the plaintiff's opposition to this motion - which is identical to her oppositions to the other two related dismissal motions, is unhelpful. The plaintiff does not address the basis for this court's subject matter jurisdiction or the basis for her claiming that the bankruptcy discharge somehow precludes the defendants from enforcing their security interest in the subject real property.

The court will deny the plaintiff's request for transfer of this adversary proceeding to the federal district court. This court has no authority to do so. It is up to the district court to withdraw the reference, if appropriate. In the meantime, the pendency of a motion to withdraw the reference does not stay proceedings in this court. Once this court has determined that it has no subject matter jurisdiction over the claims, this court can do nothing except dismiss the claims. See Rhodes v. United States, 760 F.2d 1180, 1186 (11th Cir. 1985).

The motion will be granted and all claims against the movant will be dismissed.

5. 10-41061-A-7 CONSTANCE AGEE — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2336 NLG-2 — 2-12-15 [41]
AGEE V. RESIDENTIAL CREDIT SOLUTIONS INC., ET AL.,

Tentative Ruling: The motion will be granted.

One of the defendants, Residential Credit Solutions, Inc., seeks dismissal of the amended complaint filed by the plaintiff Constance Agee on January 27, 2015. Docket 22.

The motion will be granted in accordance with the court's ruling on a similar dismissal motion brought by Sage Point Lender Services, L.L.C., in the instant adversary proceeding, which motion is also being heard on this calendar. The court incorporates that ruling here by reference.

6. 10-41061-A-7 CONSTANCE AGEE — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2336 SMR-2 — 2-9-15 [30]
AGEE V. RESIDENTIAL CREDIT SOLUTIONS INC., ET AL.,

Tentative Ruling: The motion will be granted.

Two of the defendants, GP Equities, Inc. and AKS Equities, Inc., seek dismissal of the amended complaint filed by the plaintiff Constance Agee on January 27, 2015. Docket 22.

The motion will be granted in accordance with the court's ruling on a similar dismissal motion brought by Sage Point Lender Services, L.L.C., in the instant adversary proceeding, which motion is also being heard on this calendar. The court incorporates that ruling here by reference.

7. 10-41061-A-7 CONSTANCE AGEE — STATUS CONFERENCE
14-2336 — 1-27-15 [22]
AGEE V. RESIDENTIAL CREDIT SOLUTIONS INC., ET AL.,

Tentative Ruling: None.

8. 14-28468-A-11 BUALAI WHITE — MOTION TO VALUE COLLATERAL
MRL-7 — 2-15-15 [77]
VS. GREEN TREE SERVICING, L.L.C.

Tentative Ruling: The motion will be granted.

The debtor is asking the court to strip down the $469,420 only mortgage held by

Green Tree Servicing on a rental real property on Plumas Arboga Road in Olivehurst, California.

The debtor asks the court value the property, based on her opinion as owner, at $250,000. The debtor is seeking to strip down the mortgage held by the respondent to $250,000.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is secured only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

A debtor's opinion of value is evidence of value and it may be conclusive in the absence of contrary evidence. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor contends that the property has a value of $250,000. Docket 79 at 2; Docket 1, Schedule A; Dockets 41 & 127, Amended Schedule A. The property is subject to a single mortgage in favor of Green Tree Servicing for approximately $469,420. Docket 127, Amended Schedule D.

The court has received no evidence refuting the debtor's valuation of the property.

The subject property is not the debtor's residence. The anti-modification provision of 11 U.S.C. § 1123(b)(5) then does not apply. Green Tree Servicing's claim against the property is partially unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after deduction of the mortgage. Green Tree Servicing's claim will be stripped down to $250,000, representing the value of the property. Its claim in excess of $250,000 will be an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the

court then will entertain an adversary proceeding.

9. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY
SAC-19 — 2-18-15 [265]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtors, creditors, the chapter 12 trustee, the U.S. Trustee, and any other party 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Scott A. CoBen & Associates, attorney for the debtor in possession, has filed its first interim motion for approval of compensation. The order approving the movant's employment was entered on June 9, 2014. Docket 105. The movant seeks approval and payment of $10,650 in fees and $0.00. The requested compensation is for the period from May 14, 2014 through February 18, 2015. The compensation includes an hourly rate of $300.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The applicant's services included, without limitation: (1) analyzing issues with the case, given that the movant was retained post-petition, (2) developing a strategy with the debtors about obtaining plan confirmation, (3) reviewing proofs of claim, (4) addressing tax return issues, (5) assisting the debtors in their compliance with a discovery request, (6) preparing, filing and prosecuting a motion for cash collateral use, (7) preparing, filing and prosecuting valuation, lien avoidance and turnover motions, (8) resolving a stay relief motion with a creditor, (9) preparing, filing and prosecuting plan confirmation motions, and (10) preparing, filing and prosecuting employment and compensation motions.

The court concludes that the compensation is for actual, necessary, and beneficial services rendered. The compensation will be approved.

10. 15-21491-A-11 BELLA PROPIEDAD, LLC — MOTION TO EMPLOY
WSS-1 — 3-6-15 [16]

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

The debtor requests authority to employ W. Steven Shumway as bankruptcy counsel for the estate. The movant's compensation will be based on an hourly fee arrangement. The movant will assist the debtor with the administration of the chapter 11 estate.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain

exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including . . . on a contingent fee basis."

The motion will be denied to the extent the debtor is seeking to employ Mr. Shumway to represent the debtor in state court lawsuits. The motion does not state what services, if any, the estate needs in state court. The Statement of Financial Affairs lists no pending lawsuit to which the debtor is a party and Schedule B lists no interest in claims against anyone. Docket 14.

Otherwise, the court concludes that the terms of employment and compensation are reasonable. The movant is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved in part.

11. 15-21491-A-11 BELLA PROPIEDAD, L.L.C. MOTION TO SELL
WSS-2 3-9-15 [20]

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

The debtor in possession requests authority to sell for $2.5 million the estate's interest in a real property in Carmichael, California (Mapel Lane) to Carmichael Holdings, Inc. All encumbrances against the property - including property taxes totaling approximately $40,000 and a mortgage totaling approximately $1,911,371 in favor of Sunmark Capital, LLC - will be paid from escrow.

As part of the sale, the debtor is entering into a lease back agreement for the property with the buyer, with a term ending on December 31, 2015. In addition, the debtor is being granted an option to purchase back the one-acre portion of the property where the residence is located, for $2 million.

As escrow is due to close on March 31, 2015 and there are no contingencies under the current purchase agreement, the debtor asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h).

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. The sale will pay all encumbrances against the property and, while it will generate approximately $550,000 of net proceeds for the estate, the debtor does not have any unsecured creditors.

Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the estate. The court will waive the 14-day period of Rule 6004(h).

However, the court will deny approval of the lease back agreement. The motion is devoid of information about that agreement. For instance, the motion does not state the proposed rent and why leasing back the property from the buyer is in the best interest of the estate, especially when the debtor owns another real property in Fair Oaks, California.

12. 14-25893-A-11 ZOYA KOSOVSKA
14-2271
KOSOVSKA ET AL. V. FEDERAL NATIONAL MORTGAGE ASSOCIATION

MOTION TO RECONSIDER
1-20-15 [25]

Tentative Ruling: The motion will be denied.

The plaintiffs in this now remanded adversary proceeding, Zoya Kosovska and Liliya Walsh, move for reconsideration of the court's order remanding the adversary proceeding action to the state court, from where it was removed, and awarding costs of litigation to the defendants. Zoya Kosovska is also the debtor in the underlying now dismissed chapter 11 case.

Defendants Seterus, Inc., and Federal National Mortgage Association oppose the motion.

Preliminarily, the court will no longer permit Liliya Walsh to translate for and/or make arguments for Zoya Kosovska. She is not an attorney and she is a co-plaintiff with the debtor. As the court is unable to tell during the translation of Zoya Kosovska's statements how much of what she says originates with her or originates with Liliya Walsh, the court will prohibit Liliya Walsh from translating for Zoya Kosovska.

The motion will be denied for several reasons.

First, the motion does not given any basis or cite any legal authority permitting the court to revisit the motion for remand based on which the court remanded the action back to state court. While this motion argues at length that the court was wrong in remanding the action, this motion makes no effort to establish grounds for reconsideration of the court's remand.

For instance, there is no citation or briefing of Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024.

This is a separate and independent basis for denying this motion.

Second, this motion is not supported by any evidence, such as a declaration or affidavit establishing the factual assertions in the motion. For example, the motion asserts that the state court action "ha[d] not progressed very far[,] . . . it ha[d] not gone beyond the motion to dismiss." There is no evidence in the record establishing these factual assertions. This violates Local Bankruptcy Rule 9014-1(d)(6) and it is a separate and independent basis for denying this motion.

Third, even if the court had a proper basis for reconsidering the remand, the court would still remand the action to state court.

The movants' citation to 28 U.S.C. § 1478 is misplaced. That statute governed removal until 1984, when it was replaced by 11 U.S.C. § 1452.

Further, the assertion that the action was not ready for trial in the state court is irrelevant. That is not the standard for determining whether this court may remand.

The court made specific findings with respect to the progress of the state court action. "Substantial litigation has taken place in the state court proceeding during the nine months prior to removal, including, without

limitation, litigation pertaining to: the filing of three complaints, temporary restraining order and preliminary injunction motions, extensive litigation over multiple demurrer motions, reconsideration and discovery motions, orders to show cause, and motion(s) to strike. The parties have also conducted discovery in the state court action. Dockets 6-11." Docket 20 at 3.

Next, the assertions that litigation before the bankruptcy court would "move faster," be "under the same roof," "hav[e] consistent decisions," "have quick resolution," and "prevent[] piecemeal litigation," have no merit. Docket 25 at 5 (pages in motion misnumbered).

As already discussed in its ruling remanding the action, this court has no jurisdiction whatsoever over the claims asserted by Liliya Walsh. She is not a debtor and her claims have no impact on the now dismissed chapter 11 case of Zoya Kosovska. This court then cannot adjudicate the claims asserted by Liliya Walsh. As such, it is allowing the claims by Zoya Kosovska to proceed in this court that would split the litigation "under different roofs," increase the risk of inconsistent outcomes against the same defendants, and necessitate piecemeal litigation.

Furthermore, the contention that it was the dismissal of the underlying bankruptcy case that halted already ongoing discovery by the plaintiffs in this proceeding has no merit. The action was removed to this court on September 15, 2014, whereas the bankruptcy case was dismissed seven days later on September 22, 2015. This court had not even held an initial status conference hearing in this adversary proceeding - set for November 19, 2014 (Docket 5), much less authorized the parties to conduct discovery. No one conducts discovery in any proceeding before the court, without prior court authorization for such discovery.

The court also notes that no one even filed a discovery plan in this case.

Fourth, just because this court may have had "more" jurisdiction at the time of removal, because the bankruptcy case had not been dismissed yet, does not mean that this court's subject matter jurisdiction is established forever.

"Federal courts are *always* 'under an independent obligation to examine their own jurisdiction,' . . . and a federal court may not entertain an action over which it has no jurisdiction." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)(citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) and Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)).

A federal court has the obligation to review sua sponte whether it has subject matter jurisdiction under Article III's case-or-controversy requirement. Fed. R. Civ. P. 12(h)(3) (providing that "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action"); Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); Florida Wildlife Fed'n, Inc. v. South Florida Water Mgmt. Dist., 647 F.3d 1296, 1302 (11th Cir. 2011); see also Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc., 561 F.3d 1294, 1296 (11th Cir. 2009) (citing 28 U.S.C. § 1447(c)).

Fifth, while the dismissal of the bankruptcy case, after the removal, may not have automatically stripped off this court of subject matter jurisdiction, the only type of jurisdiction this court would have been able to assert would have been ancillary jurisdiction. See Carraher v. Morgan Elec., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992) (holding that bankruptcy courts

are not automatically divested of subject matter jurisdiction over related cases when the underlying bankruptcy case has been dismissed).

However, the concept of ancillary jurisdiction in bankruptcy, after dismissal, is quite limited.

"'*Ancillary jurisdiction may rest on one of two bases: (1) to permit disposition by a single court of factually interdependent claims, and (2) to enable a court to vindicate its authority and effectuate its decrees.' In re Valdez Fisheries, 439 F.3d at 549 (citing Kokkonen, 511 U.S. at 379-80, 114 S.Ct. 1673). Jessen only invokes the bankruptcy court's need to effectuate its decrees.*

"*The Supreme Court has explained that it has never 'relied upon a relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit' to support ancillary jurisdiction. Kokkonen, 511 U.S. at 379, 114 S.Ct. 1673. We have elaborated that a bankruptcy court has subject matter jurisdiction to interpret orders entered prior to dismissal of the underlying bankruptcy case, In re Franklin, 802 F.2d at 326-27, 'and to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action,' Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 481 (9th Cir.1989). Alternatively, '[t]he bankruptcy court does not have jurisdiction, however, to grant new relief independent of its prior rulings once the underlying action has been dismissed.' Id.*"

Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1135 (9th Cir. 2010);

"*[T]he bankruptcy court's jurisdiction after dismissal is not unlimited[,] [but] retains subject matter jurisdiction to interpret orders entered prior to dismissal and to dispose of ancillary matters such as an application for an award of attorney's fees. Id. at 46 (citing In re Franklin, 802 F.2d 324, 326-27 (9th Cir.1986) and U.S.A. Motel Corp. v. Danning, 521 F.2d 117 (9th Cir.1975)). However, once a bankruptcy case has been dismissed, the bankruptcy court does not have jurisdiction to grant new relief independent of its prior rulings. Id. (citing In re Taylor, 884 F.2d 478, 481 (9th Cir.1989)).*

. . .

"*The circumstances here are distinguishable. The Court is not being asked to interpret its own order, or to approve an application for attorney's fees. In the Tentative Decision, the Court framed the key issue as whether there is any property of the estate to surcharge, once the case has been dismissed. Upon dismissal of a bankruptcy case, property of the estate is revested in the entity in which such property was vested immediately before the commencement of the case. § 349(b)(3). The relief requested by Debtor in the Surcharge Motions requires this Court to exercise jurisdiction over property in which both the estate and the Bank had an interest—specifically, the $100,000 collected in relation to the Castro litigation, and the collected accounts receivable. Upon dismissal, the Court was divested of jurisdiction over those funds. Property that is no longer property of the estate may not be surcharged. See In re Skuna River Lumber, LLC, 564 F.3d 353, 355 (5th Cir.2009); In re Maine Pride Salmon, Inc., 180 B.R. 337, 342 (Bankr.D.Me.1995).*"

In re Valley Process Systems, Inc., Case No. 13-51936-ASW, WL 3635367 at *1-2

(Bankr. N.D. Cal. July 23, 2014).

When this court dismissed Zoya Kosovska's bankruptcy case, all assets of that bankruptcy estate were revested back in Zoya Kosovska. 11 U.S.C. § 349(b)(3) prescribes that "[u]nless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

. . .

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

One of the assets that revested back with Zoya Kosovska, was her claim against the defendants in this adversary proceeding. As a result, the dismissal of the bankruptcy case divested this court of jurisdiction to adjudicate Zoya Kosovska's claim.

The claim included a challenge to the enforcement of the defendants' claims under state law, seeking an award of damages against the defendants for slander of title, and seeking clear title of the real property owned by Zoya Kosovska. As stated by the court in its ruling remanding this proceeding, Zoya Kosovska's claims "include violation of California Civil Code § 2924, slander of title and cancellation of instrument." Docket 20 at 2; Docket 7 at 6-15.

Adjudicating Zoya Kosovska's claim in this adversary proceeding did not involve the interpretation, implementation or revisiting of orders entered prior to dismissal of the underlying bankruptcy case and was not ancillary to the administration of Zoya Kosovska's dismissed bankruptcy case.

In the underlying bankruptcy case, the court entered the following orders:

- an order authorizing the debtor to pay the filing fee in installments,

- an order setting a status conference hearing and addressing other administrative issues,

- an order extending the time for the debtor to file a single asset real estate declaration,

- an order extending the time for the debtor to file her bankruptcy schedules and statements,

- an order denying the continuance of the hearing on a preliminary status conference,

- an order to show cause for failure to pay fees, a chapter 11 status conference order,

- a chapter 11 status conference order,

- an order discharging the order to show cause,

- another order to show cause for failure to pay fees,

- an order shortening the time for a hearing on the United States Trustee's motion to dismiss,

- an order discharging the second order to show cause,

- an order dismissing the case,

- an order dismissing as moot a stay relief motion.

Case No. 14-25893, Dockets 6, 8, 18, 19, 29, 31, 33, 39, 41, 49, 65, 75, 77.

None of the above orders have relevance to the adjudication of the claim in this adversary proceeding. The claim is based on state law rights and liabilities and has no bearing on, or connection to, the above orders which are largely administrative in nature. This case did not seek to dispose of ancillary matters, such as a compensation motion for services rendered in the bankruptcy case prior to dismissal or a motion for sanctions pertaining to conduct perpetrated during the pendency of the bankruptcy.

Adjudicating Zoya Kosovska's claim would have required the granting of new relief, separate and independent from any prior ruling or order in the bankruptcy case, namely, relief based exclusively on state law rights and liabilities.

Adjudicating the claim then would not have been ancillary to Zoya Kosovska's bankruptcy case. As such, this court did not have ancillary subject matter jurisdiction over the claim once the bankruptcy case was dismissed. This, as a result, required the application of mandatory remand under 28 U.S.C. § 1452(a).

Sixth, the administration of the bankruptcy case involved the adjustment of the debtor-creditor relationship, implicating public rights which this court has jurisdiction to adjudicate. "From the beginning, the 'core' of federal bankruptcy proceedings has been 'the restructuring of debtor-creditor relations.' Northern Pipeline, supra, at 71, 102 S.Ct. 2858." Stern v. Marshall, 131 S.Ct. 2594, 2628 (2011).

On the other hand, Zoya Kosovska's claim asked this court to adjudicate state law causes of action that are asserting private rights against the defendants. "Several previous decisions have contrasted cases within the reach of the public rights exception—those arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments'—and those that are instead matters 'of private right, that is, of the liability of one individual to another under the law as defined.' Crowell v. Benson, 285 U.S. 22, 50, 51, 52 S.Ct. 285, 76 L.Ed. 598."

Stern v. Marshall, 131 S.Ct. 2594, 2598 (2011); see also N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982)(distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, ... from the adjudication of state-created private rights"); Stern at 2612-13 (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977) for the proposition that the public rights "[e]xception extends to cases 'where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights,' while '*[w]holly private tort, contract, and property cases*, as well as a vast range of other cases . . . are not at all implicated'").

Such claims have nothing to do with the interpretation, implementation or revisiting of orders entered by the court in the bankruptcy case and have nothing to do with the adjustment of the debtor-creditor relationship. The

claims are seeking the adjudication of what amounts to private rights between her and the defendants - rights based on tort, contract and real property principles. Given the private rights implicated by Zoya Kosovska's claims and the absence of a pending bankruptcy case, this court does not have the constitutional authority to adjudicate them.

Hence, to the equitable considerations of Carraher and 28 U.S.C. § 1452(b) - already addressed by the court in the ruling remanding this case (Docket 20 at 2-4) - this court adds the constitutional authority considerations of Stern, in affirming that both the mandatory and equitable remand were warranted.

As a final note, the cases cited in the motion, urging the court to retain jurisdiction over the case, predate the Stern decision. Docket 25 at 7-9 (9-11 as numbered).

Seventh, the court has already addressed the equitable considerations of Carraher and 28 U.S.C. § 1452(b) (equitable remand) in the ruling remanding the case to the state court. Docket 20 at 3.

"The court exercises its discretion and declines to retain jurisdiction under Carraher over the state law claims in this proceeding even after considering economy, convenience, fairness and comity under Carraher. None of these factors favor retaining jurisdiction over the state law claims. Substantial litigation has taken place in the state court proceeding during the nine months prior to removal, including, without limitation, litigation pertaining to: the filing of three complaints, temporary restraining order and preliminary injunction motions, extensive litigation over multiple demurrer motions, reconsideration and discovery motions, orders to show cause, and motion(s) to strike. The parties have also conducted discovery in the state court action. Dockets 6-11."

Docket 20 at 3.

The equitable considerations of equitable remand - such as economy, convenience, fairness and comity - apply equally to those of Carraher.

"[E]ven assuming that the court had subject matter jurisdiction over the claims brought by Ms. Kosovska, equitable remand under 28 U.S.C. § 1452(b) is proper.

"Judicial economy and comity dictate that all claims - including the claims that do not involve the bankruptcy estate - be adjudicated together, as they arise from the same nucleus of facts. Adjudicating the claims that do not impact the bankruptcy estate separately from the claims that do not pertain to the estate, would result in piecemeal litigation.

"Dividing the litigation in such fashion may also result in inconsistent outcomes and liability on account of the same claims. This would prejudice the defendants.

"The court also has no evidence that the claims cannot be timely adjudicated in state court.

"As mentioned above, the state court is much better equipped at adjudicating all claims in this action, given that it involves state law claims and given the substantial pre-removal litigation outlined above."

Docket 20 at 3.

In addition to the foregoing, the court concluded that the removal was untimely, which is a separate and independent basis for remanding the case.

"Moreover, the removal was untimely, in violation of Fed. R. Bankr. P. 9027(a)(2), pertaining to 'Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code' and providing that 'If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of:

(A) 90 days after the order for relief in the case under the Code,

(B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or

(C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.'

"Under these facts, only Fed. R. Bankr. P. 9027(a)(2)(A) possibly applies. Subsection (2)(B) is not applicable because the automatic stay of 11 U.S.C. § 362(a) never stayed the prosecution of the state court action. That was because the action was instituted by plaintiffs. Nothing in section 362(a) prohibits a debtor in possession from prosecuting a pending state court action as of the petition date. Subsection (2)(C) is not applicable because no trustee was appointed in the underlying case . . . .

. . .

"The removal was untimely even under 9027(a)(2)(A). The underlying bankruptcy case was filed on June 2, 2014. The 90 day deadline specified under subsection (2)(A) expired on August 31, 2014; the removal was 15 days late. Thus, because the removal motion was filed after the longest applicable deadline, the removal is untimely under 9027(a)(2)."

Docket 20 at 3-4.

The movants argue that the court was wrong in concluding that the removal was untimely because the 30-day period of Fed. R. Bankr. P. 9027(a)(2)(B) has not expired as the court never terminated the stay.

But, as already discussed by the court and not addressed by the motion, "[u]nder these facts, only Fed. R. Bankr. P. 9027(a)(2)(A) possibly applies. Subsection (2)(B) is not applicable because the automatic stay of 11 U.S.C. § 362(a) never stayed the prosecution of the state court action. That was because the action was instituted by plaintiffs. Nothing in section 362(a) prohibits a debtor in possession from prosecuting a pending state court action as of the petition date." Docket 20 at 3.

The movants ignore the conditional provision in Fed. R. Bankr. P. 9027(a)(2)(B): "if the claim or cause of action in a civil action has been stayed under § 362 of the Code."

Similarly, Fed. R. Bankr. P. 9027(a)(2)(C) did not apply because no trustee was ever appointed in the underlying bankruptcy case.

The court will amend its ruling on remand in one respect. The court was wrong to conclude that Fed. R. Bankr. P. 9027(a)(2)(C) did not apply because "the removal occurred well beyond the 180-day limit." Docket 20 at 3. If a trustee

had been appointed in the bankruptcy case and Fed. R. Bankr. P. 9027(a)(2)(C) had been applicable, the removal would have been within "180 days after the order for relief." The underlying bankruptcy case was filed on June 2, 2014, while the 180 day deadline specified under Fed. R. Bankr. P. 9027(a)(2)(C) would have expired on November 29, 2014.

Nonetheless, Fed. R. Bankr. P. 9027(a)(2)(C) did not apply because no trustee was ever appointed in the underlying bankruptcy case.

Eight, the movants' references to abstention are misplaced. Abstention is not appropriate here. Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

"Abstention can exist only where there is a parallel proceeding in state court. That is, inherent in the concept of abstention is the presence of a pendent state action in favor of which the federal court must, or may, abstain." Sec. Farms v. Int'l Broth. of Teamsters, Chauffers, Warehousemen & Helpers, 124 F.3d 999, 1009 (9th Cir. 1997).

As there was no parallel proceeding when this court remanded the case, abstention was inapplicable.

Finally, even if the court had grounds to reconsider the awarding of litigation costs to the defendants, the outcome would still be the same. The court rejects the movants' contention that an award of attorney's fees is not allowed when the case was remanded on equitable grounds. See, e.g., Marshall v. Bochner, Case No. EDCV 11-00137 DDP, WL 3932607, at *2 (C.D. Cal. July 30, 2013).

More, the court remanded the case not just on equitable grounds. It do because mandatory remand was also required and because the removal was not timely.

The court's findings and conclusions that "[n]either plaintiffs had an objectively reasonable basis for removal," is readily supported by the record examined by the court in its ruling on remand. Docket 20 at 4-5. The court takes judicial notice of that ruling for all aspects of this ruling and incorporates that ruling here by reference. Fed. R. Evid. 201(c)(1); Docket 20.

The court also finds no unusual circumstances present, warranting reversal on the fee award. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005); see also Gotro v. R & B Realty Group, 69 F.3d 1485, 1487 (9th Cir. 1995) (clarifying that "[i]n [Moore v. Permanente Medical Group, Inc., 981 F.2d 443 (9th Cir.1992)] we concluded that Congress had abandoned the bad faith standard and given the district court wide discretion to award attorneys' fees").

Except to the extent the ruling on remand is amended by this ruling, this motion will be denied. The court will not reconsider or alter its order remanding this case to the state court.