

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

April 8, 2014 at 9:32 A.M.

PLEASE TAKE NOTE: Matter 26 on this calendar, in In re Cielo Vineyards & Winery, LLC, no. 13-34754-B-11, will not be called for hearing before 10:00 a.m.

1. [08-22725](#)-B-7 BAYER PROTECTIVE TRUSTEE'S MOTION TO SELL O.S.T.
HSM-14 SERVICES, INC. 3-27-14 [[858](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(3)(motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

2. [13-35405](#)-B-7 MARCIAL CASTELLANOS AND MOTION TO COMPEL ABANDONMENT
TOG-5 BEATRIZ PALAFOX 3-20-14 [[30](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

3. [13-33107](#)-B-7 BUTTE STEEL & MOTION FOR COMPENSATION FOR
BLL-6 FABRICATION, INC. BYRON LEE LYNCH, TRUSTEE'S
ATTORNEY
3-11-14 [[103](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on an interim basis in the amount of \$16,450.00 in fees and \$377.65 in costs, for a total of \$16,827.65 in fees and costs, for the period October 24, 2013, through and including February 28, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

By order entered on November 8, 2013 (Dkt. 16), the court authorized the chapter 7 trustee to retain the applicant as counsel for the chapter 7

trustee in this case, with an effective date of employment of October 24, 2014. The applicant now seeks compensation for services rendered and costs incurred during the period October 24, 2013, through and including February 28, 2014. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

4. [09-21417](#)-B-7 EDGAR/RHEA BEACH MOTION FOR TURNOVER
DNL-2 3-11-14 [[57](#)]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 542(a), the chapter 7 trustee shall recover \$153,000.00 from the debtors, Edgar Beach and Rhea Beach. This order shall be enforceable in the same manner as a money judgment. Except as so ordered, the motion is denied.

The trustee seeks turnover of the net proceeds of the sale of real property located at 4329 Calcutta Way, Sacramento, California (the "Calcutta Property") in the amount of \$153,000.00.

In order to prevail on a turnover motion, the trustee must demonstrate that: (1) the Property is or was in the debtors' possession, custody or control during the pendency of the bankruptcy case; (2) the Property could be used by the trustee or exempted by the debtors; and (3) the Property has more than inconsequential value and benefit to the estate. Bailey v. Suhar (In re Bailey), 380 B.R. 486, 490 (6th Cir. BAP 2008). If the foregoing elements are demonstrated, but the debtors are not in possession of the Property at the time of the motion, the trustee is entitled to an order requiring the debtors to pay to the trustee the value of the Property. Newman v. Schwartz (In re Newman), 487 B.R. 193, 200 (9th Cir BAP 2013). See also Shapiro v. Henson, 739 F.3d 1198 (9th Cir. 2014); In re Bailey, 380 B.R. at 492-493; Boyer v. Davis (In re U.S.A. Diversified Prods., Inc.), 193 B.R. 868, 879 (Bankr. N.D. Ind. 1995); In re Gentry, 275 B.R. 747 (Bankr. W.D. Va. 2001). Such an order to pay the value of the Property is enforceable as a money judgment. White v. Brown (In re White), 389 B.R. 693, 699 (9th Cir. BAP 2008).

The foregoing authorities are consistent with the pre-Code "dual method" system for turnover, under which a trustee could recover estate property from an entity who had possession of it at one time through either a summary proceeding or a plenary proceeding. Shapiro, 739 F.3d at 1202. A summary proceeding usually resulted in an order to turn over the estate's property to the trustee, but required a showing that the entity was in possession of the property at the time sought. Maggio v. Zeitz (In re Luma Camera Serv., Inc.), 333 U.S. 56, 63-64, 68 S.Ct. 401, 92 L.Ed. 476 (1948) ("[T]he primary condition of relief [in a summary proceeding] is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. . . the remedy . . . is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding."). This additional requirement is necessary because a motion for contempt was the usual method for enforcing an order obtained in a summary proceeding, and "present possession was required so that an entity could not be held in contempt for failing to do the impossible - to turn over property it no longer

possessed." Shapiro, 739 F.3d at 1202. The court also construes the language in Maggio v. Zeitz regarding the requirement that the "evidence satisfactorily establishes" the existence of the property or its proceeds and possession by the defendant to mean that the moving party must show those things, and not that the debtors must appear and show that they are no longer in possession in order to avoid a turnover order.

The alternative to a summary proceeding is a plenary proceeding, which results in a judgment enforceable in the same manner as any other court judgment and not via motions for contempt. Shapiro, 739 F.3d at 1202. To obtain such a judgment, the trustee must show evidence of the value of the property for which he seeks turnover. In the present day, the "dual method" is subsumed under 11 U.S.C. § 542 (requiring delivery to the trustee of "property, or the value of such property"), even though the terms "summary proceeding" and "plenary proceeding" are not found in the statute.

In this case, the trustee alleges without dispute that prior to the filing of the bankruptcy case, the debtors owned and held title to the Calcutta Property. The trustee alleges that before they commenced their bankruptcy case the debtors caused title to the Calcutta Property to be transferred to William Roderick Beach ("Roderick") and subsequently to Tanja Keleman ("Tanja") for the purpose of removing the debtors from the chain of title to the Calcutta Property while continuing to assert ownership of the property. The trustee alleges without dispute that the Calcutta Property was sold on or about April 13, 2009, during the pendency of the bankruptcy case, and that the net proceeds of the sale in the amount of \$153,000.00 were remitted to the debtors. Although the trustee has not shown that the debtors had possession of the proceeds at the time the motion was filed, he has shown that he is entitled to recover the value of the proceeds from the debtors.

The court will issue a minute order.

5. [09-21417](#)-B-7 EDGAR/RHEA BEACH MOTION FOR TURNOVER
DNL-3 3-11-14 [[63](#)]

Tentative Ruling: The motion is denied without prejudice.

The trustee seeks turnover of real property located at 6841 Speckle Way, Sacramento, California (the "Speckle Property").

In order to prevail on a turnover motion, the trustee must demonstrate that: (1) the Property is or was in the debtors' possession, custody or control during the pendency of the bankruptcy case; (2) the Property could be used by the trustee or exempted by the debtors; and (3) the Property has more than inconsequential value and benefit to the estate. Bailey v. Suhar (In re Bailey), 380 B.R. 486, 490 (6th Cir. BAP 2008). If the foregoing elements are demonstrated, but the debtors are not in possession of the Property at the time of the motion, the trustee is entitled to an order requiring the debtors to pay to the trustee the value of the Property. Newman v. Schwartz (In re Newman), 487 B.R. 193, 200 (9th Cir BAP 2013). See also Shapiro v. Henson, 739 F.3d 1198 (9th Cir. 2014); In re Bailey, 380 B.R. at 492-493; Boyer v. Davis (In re U.S.A. Diversified Prods., Inc.), 193 B.R. 868, 879 (Bankr. N.D. Ind. 1995); In re Gentry, 275 B.R. 747 (Bankr. W.D. Va. 2001). Such an order

to pay the value of the Property is enforceable as a money judgment. White v. Brown (In re White), 389 B.R. 693, 699 (9th Cir. BAP 2008).

The foregoing authorities are consistent with the pre-Code "dual method" system for turnover, under which a trustee could recover estate property from an entity who had possession of it at one time through either a summary proceeding or a plenary proceeding. Shapiro, 739 F.3d at 1202. A summary proceeding usually resulted in an order to turn over the estate's property to the trustee, but required a showing that the entity was in possession of the property at the time sought. Maggio v. Zeitz (In re Luma Camera Serv., Inc.), 333 U.S. 56, 63-64, 68 S.Ct. 401, 92 L.Ed. 476 (1948) ("[T]he primary condition of relief [in a summary proceeding] is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. . . the remedy . . . is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding."). This additional requirement is necessary because a motion for contempt was the usual method for enforcing an order obtained in a summary proceeding, and "present possession was required so that an entity could not be held in contempt for failing to do the impossible - to turn over property it no longer possessed." Shapiro, 739 F.3d at 1202. The court also construes the language in Maggio v. Zeitz regarding the requirement that the "evidence satisfactorily establishes" the existence of the property or its proceeds and possession by the defendant to mean that the moving party must show those things, and not that the debtors must appear and show that they are no longer in possession in order to avoid a turnover order.

The alternative to a summary proceeding is a plenary proceeding, which results in a judgment enforceable in the same manner as any other court judgment and not via motions for contempt. Shapiro, 739 F.3d at 1202. To obtain such a judgment, the trustee must show evidence of the value of the property for which he seeks turnover. In the present day, the "dual method" is subsumed under 11 U.S.C. § 542 (requiring delivery to the trustee of "property, or the value of such property"), even though the terms "summary proceeding" and "plenary proceeding" are not found in the statute.

In this case, the trustee has not shown satisfactory evidence to support his allegation that the debtors "have possession, custody or control of the Speckle Property," at the time that the motion was filed. The trustee has shown evidence that the debtors owned the Speckle Property prior to the filing of the bankruptcy case, and that they caused title to the Speckle Property to be transferred to William Roderick Beach ("Roderick") and subsequently to Tanja Keleman ("Tanja") for the purpose of removing the debtors from the chain of title to the Speckle Property while continuing to assert ownership of the property. The trustee has also shown that Tanja subsequently transferred title to the Speckle Property to the debtors during the pendency of the bankruptcy case, and that the debtors subsequently transferred title to John Francisco Velasquez on April 24, 2012. This evidence of past transactions, however, does not establish that the debtors were in possession custody or control of the Speckle Property at the time that the motion for turnover was filed. The conclusory allegation that the debtors currently have possession is insufficient.

In this case the court is also unable to give the trustee a money judgment for the value of the Speckle Property, as the trustee has shown

no evidence of the Speckle Property's value. Accordingly, the motion is denied without prejudice.

The court will issue a minute order.

6. [14-21923](#)-B-7 PATRICIA LOGAN MOTION TO COMPEL ABANDONMENT
MOH-1 3-25-14 [[11](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to May 20, 2014, at 9:32 a.m.

As the personal property for which the debtors seek abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

7. [12-37124](#)-B-7 KHALID MAHMOOD MOTION TO ABANDON
PGM-1 3-11-14 [[28](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied without prejudice.

The motion lacks essential information required for the court to render a decision. The information missing from the motion and/or its supporting papers is the following:

- 1.) The address of the real property debtor requests that the court deem abandoned. Describing the property as "real property" (Dkt. 28 at 2) is insufficient.
- 2.) Whether the debtor claims an interest in the entirety of the property or a percentage thereof.
- 3.) The amount of secured debt, if any, encumbering the property.
- 4.) The legal authority which justifies abandonment of the property.

The court is aware of the amended Schedules A, B and C filed by the debtor on January 24, 2014 (Dkt. 25). However, it is not incumbent on the court to search through the debtor's schedules in an effort to uncover the information necessary for rendering a decision on the motion. The court's local rules require that each motion shall cite the legal

10. [13-32529](#)-B-7 GARY/DEBRA CAMPBELL
HSM-5

MOTION TO SELL
3-11-14 [[76](#)]

Tentative Ruling: The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 363(b) and (f), the chapter 7 trustee is authorized to sell the estate's interest in the real property located at 10774 Heather Road, Truckee, California (the "Property") in an "as-is" and "where-is" condition to Stacy Meredith for \$605,000.00. The chapter 7 trustee is authorized to sell the Property free and clear of the lien of the Internal Revenue Service of the United States (the "Service") to the extent described in the motion pursuant to 11 U.S.C. § 363(f)(2). The trustee is authorized to distribute the proceeds of the sale in the manner described in the motion. The trustee is authorized to execute all documents necessary to complete the approved sale. The fourteen-day stay of this order granting the motion imposed by Fed. R. Bankr. P. 6004(h) is waived. Pursuant to 11 U.S.C. § 330(a) and Fed. R. Bankr. P. 2016, the trustee is authorized to pay Reed Block Realty ("Reed Block") a commission equal to six percent (6%) of the sale price. Except as so ordered, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The sale is authorized free and clear of the liens of the Service and the EDD pursuant to 11 U.S.C. § 363(f)(2) to the extent described in the motion, as the Service has consented to a sale free and clear of its liens to the extent that its lien secures tax penalties and interest on tax penalties.

The court approved the estate's employment of Reed Block for the purposes of assisting the trustee with the sale of the Property by order entered February 7, 2014 (Dkt. 72). The court finds that the approved commission for Reed Block is reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

11. [13-20645](#)-B-7 ROBERT/TRISTINA KITAY
[13-2126](#)
GONZALEZ V. KITAY ET AL

CONTINUED MOTION TO SET ASIDE
DEFAULT AND DEFAULT JUDGMENT,
MOTION TO DISMISS ADVERSARY
PROCEEDING, MOTION TO VACATE
HEARING, ETC.
1-3-14 [[70](#)]

Disposition Without Oral Argument: This motion continued from February 11, 2014, to allow defendant Robert Kitay to file supplemental briefing regarding the court's order entered November 4, 2013 (Dkt. 40) granting of the plaintiff's motion for default judgment in the amount of \$5000.00, which amount the court determined to be nondischargeable pursuant to 11

U.S.C. § 523(a)(4). Mr. Kitay timely filed his supplemental brief on February 27, 2014 (Dkt. 115). Having reviewed the supplemental briefs and the record, the court has determined that further oral argument will not assist the court in rendering a decision, and now issues the following ruling.

The motion is denied in part and dismissed as moot in part. The defendant debtor Robert N. Kitay's ("Debtor" or "Defendant") request to vacate the court's order entered August 21, 2013 (Dkt. 23) (the "Default Order"), striking his answer to the initial complaint and entering his default is denied. Debtor's request to vacate the court's order entered November 4, 2013 (Dkt. 40) (the "MDJ Order"), granting in part the plaintiff's motion for entry of default judgment is also denied. The Debtor's request for dismissal of the adversary proceeding is granted in part. All claims for relief in the first amended complaint filed on November 19, 2013 (Dkt. 45) (the "FAC") with the exception of the claim for relief under 11 U.S.C. § 523(a)(4) as to Robert N. Kitay only are dismissed without leave to amend. The Debtor's request for a continuance of the plaintiff's motion for entry of default judgment filed on December 3, 2013 (Dkt. 55), is dismissed as moot.

Request to Vacate Default

With respect to the Debtor's request for vacatur of the Default Order and the MDJ Order, the request is denied because the debtor has not satisfy the standard for obtaining a vacatur. Fed. R. Bankr. P. 7055, incorporating Fed. R. Civ. P. 55(c), states that the court may set aside an entry of default for good cause, and it may set aside a default judgment under Fed. R. Civ. P. 60(b). In determining to set aside the Default Order and the MDJ Order, the court must consider three factors to consider in determining whether to set aside a default judgment under Fed. R. Bankr. P. 7055: (1) whether default was willful or whether culpable conduct of defendant led to default, (2) whether setting aside default would prejudice the adverse party, and (3) whether meritorious defense has been presented. Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-26 (9th Cir.2004). These factors are disjunctive, and the debtor bears the burden of showing that they have been satisfied. The court may deny the motion if any of the three factors is true. Id. at 926.

In this case, the court finds that the debtor has not met his burden regarding the first factor. The Debtor's default was entered after the Debtor failed to comply with the court's order entered July 20, 2013 (Dkt. 15), which continued the status conference in the adversary proceeding to August 21, 2013, and which ordered the plaintiff and the Debtor to comply with the court's Order to Confer on Initial Disclosures and Setting Deadlines (Dkt. 5) (the "OTC") if the adversary proceeding was not resolved before July 23, 2013. The Debtor argues in the motion that he did not comply with the OTC because he was never served with the OTC by the plaintiff. He argues that service of the OTC on him was required before he was required to comply with any of the court's orders in the adversary proceeding, and that it was the plaintiff's responsibility to ensure that the Debtor complied with the OTC.

However, the debtor ignores the fact that he filed an answer to the initial complaint on May 15, 2013 (Dkt. 13) (the "Answer"), which Answer did not raise the issue of the court's personal jurisdiction over the Debtor; in fact, the Answer conceded the court's jurisdiction over the

Debtor and the adversary proceeding. By appearing in the adversary proceeding by way of the Answer, the debtor voluntarily submitted himself to the jurisdiction of the court. In re Connaway, 178 U.S. 421, 428 (1900) ("The voluntary appearance of a [party] is equivalent to personal service of the summons and copy of the complaint upon him."). As a result, he was required to comply with the July 20, 2013 order, which was served on him at his address of record for the adversary proceeding, as well as the OTC. The OTC also places the duties of meeting and conferring at a discovery conference, arranging for initial disclosures and for the preparation and filing of a joint discovery plan equally on both parties. Even if he was unable to meet and confer with the plaintiff in response to the plaintiff's letter regarding settlement and/or a discovery schedule, the Debtor failed to appear at the continued status conference and failed to file any document in the adversary proceeding in advance thereof. There is nothing in the OTC or the rules of the court applicable to this adversary proceeding which excuses the debtor's compliance under such circumstances. The debtor, as an attorney licensed in the state of California, was presumably well aware of the significance of appearing in this action and the consequences of failing to comply with the court's orders. Based on the foregoing, the court finds that the debtor's conduct which led to his default was willful.

As to the second factor, the court finds that the debtor has not met his burden of showing that the plaintiff would not be prejudiced by setting aside the Default Order or the MDJ Order. The motion does not address the issue of prejudice to the plaintiff at all.

As to the third factor, the court finds that the debtor has sustained his burden of showing a meritorious defense to the adversary proceeding. The debtor's burden to show a meritorious defense is not extraordinarily heavy. "All that is necessary to satisfy the 'meritorious defense' requirement is to allege sufficient facts that, if true, would constitute a defense." United States v. Signed Personal Check No. 730, 615 F.3d 1085, 1094 (9th Cir. 2010). In this case, the court finds that the Debtor has alleged sufficient facts in the motion that, if true would constitute a defense to the plaintiff's claims.

However, although the Debtor has sustained his burden of showing that he has a meritorious defense to the plaintiff's allegations, because he failed to meet his burden of showing that the Default Order and the MDJ Order were not the result of willful or culpable conduct or that the plaintiff would not be prejudiced if the orders were vacated, the Debtor's request is denied.

Request to Dismiss Adversary Proceeding

With respect to the Debtor's request for dismissal of the adversary proceeding in its entirety, the court's decision is based on the following procedural history. The plaintiff filed the initial complaint (Dkt. 1) (the "Complaint") on April 15, 2013. The Complaint alleged claims for relief under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6) and 727(a)(3) and (a)(4). The Complaint named Robert N. Kitay and the "Law Offices of Robert N. Kitay" as defendants. Robert N. Kitay filed the Answer on May 15, 2013 (Dkt. 13). The Answer was stricken by order entered August 21, 2013 (Dkt. 23) and, pursuant to the court's order, the clerk of the court entered Robert N. Kitay's default on August 21, 2013 (Dkt. 25).

On September 20, 2013, the plaintiff filed a motion for entry of default judgment (Dkt. 27), specifically seeking entry of default judgment against Robert N. Kitay. The motion was heard on October 29, 2013. By order entered November 4, 2013 (Dkt. 40), the court ordered that the plaintiff would recover \$5000.00 from Robert N. Kitay, plus costs in the amount of \$290.00, which amount would be nondischargeable pursuant to 11 U.S.C. § 523(a)(4). The court dismissed the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) and 727(a)(3) and (a)(4), with leave granted to the plaintiff to amend. The plaintiff was ordered to file and serve the FAC consistent with the requirements of Fed. R. Bankr. P. 7004 on or before November 19, 2013, failing which the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) and 727(a)(3) and (a)(4) would be dismissed without further notice or hearing.

The plaintiff filed the FAC on November 19, 2013 (Dkt. 45). The FAC removes the "Law Offices of Robert N. Kitay" as a defendant and added joint debtor Tristina Kitay ("Tristina") as a defendant. The FAC retained the plaintiff's claims under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6). The FAC also removed plaintiff's claims under 11 U.S.C. § 727 and added claims for relief for "breach of contract," "professional negligence" and "constructive fraud."

The debtor correctly argues that the plaintiff did not comply with the court's order entered November 4, 2013 (Dkt. 40), to file and serve the FAC (Dkt. 45) on or before November 19, 2013, consistent with the requirements of Fed. R. Bankr. P. 7004, failing which the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A), (a)(6), 727(a)(3) and (a)(4) would be dismissed. The plaintiff did not properly serve the Debtor or Tristina with the FAC, as he served the Debtor and Tristina at an address that was not their address of record. The plaintiff's assertion that the address for service was listed as the Debtor's and Tristina's street address on their voluntary petition filed on January 17, 2013, in the parent bankruptcy case is unavailing; on February 2, 2013, the Debtor and Tristina filed a notice of change of address in the parent case, which changed their address of record to 2508 Garfield, Avenue, Suite A, Carmichael, California, the same address listed by the Debtor on the first page of the Answer. The court also notes that the plaintiff has himself previously used the Garfield Avenue address as the address for service of matters in this adversary proceeding on the debtor; for example, the plaintiff's proof of service for his first motion for entry of default (Dkt. 31) shows that he served the Debtor at the Garfield Avenue address. The plaintiff failed to timely serve the FAC's amended claims for nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (a)(6) on both the Debtor and Tristina. More importantly, any objections as to Tristina's discharge or to nondischargeability as to a debt with respect to Tristina are time-barred; the filing of the FAC on November 19, 2013, which named Tristina as a defendant, occurred long after the deadline of April 15, 2013, to file a claim objecting Tristina's discharge or the nondischargeability of a debt as to Tristina expired.

The plaintiff's failure to timely serve the FAC constitutes grounds for dismissal of his claims under 11 U.S.C. §§ 523(a)(2)(A), (a)(6), as to both Debtor and Tristina as set forth in the court's November 4, 2013 order. The claims under § 523(a)(2)(A) and (a)(6) having been dismissed, court also dismisses the plaintiff's claims for "breach of contract," "professional negligence" and "constructive fraud" because those claims, without an accompanying claim for a determination of nondischargeability, are not appropriately brought in the adversary proceeding associated with

the parent chapter 7 case. Those claims are properly asserted through the chapter 7 claims process and can be set forth in a proof of claim filed in the parent bankruptcy case.

Determination of Nondischargeability of \$5,000.00 Payments Under § 523(a)(4)

Based on the foregoing dismissal of claims from the FAC, the only remaining claim for relief in the FAC is a claim for determination of nondischargeability as to Robert N. Kitay, on which the court has already granted the plaintiff's motion for entry of default judgment in the amount of \$5000.00 by order entered November 4, 2013.

At the prior hearing on this motion the Debtor expressed concern that the court's findings underlying the MDJ Order had no basis in the record. The court continued the hearing on the motion to allow the Debtor to brief the issue, and has reviewed the Debtor's supplemental brief.

The court is not persuaded by the Debtor's argument. Although the Debtor is correct that the initial complaint does not allege that the plaintiff paid the debtor the specific amount of \$5000.00, which amount was then diverted to the Debtor's personal use, the complaint (Dkt. 1) does contain the following allegation on page 3, paragraph 14:

Debtor acting in the capacity of LORK [the Law Offices of Robert Kitay] received monies intended to be remitted for the legal services to obtain a default and conduct discovery . . . but instead of performing as promised and represented he rapidly and improperly dissipated those funds and other corporate monies on personal expenses not for the benefit of plaintiff; as the principal officer for LORK, debtor made other improper payments to himself, friends, relatives, other company insiders; and failed to operate the company as a legitimate business.

Later in the initial complaint on page 5, under "Count II," plaintiff alleges that the debt owed to the plaintiff by the debtor is nondischargeable under § 523(a)(4).

Subsequently, in connection with his motion for entry of default judgment filed on 9/20/13 (Dkt. 27), the plaintiff filed his own declaration (Dkt. 29) in support of the motion. It is in this declaration that the plaintiff provides evidence, in the form of his undisputed testimony (the Debtor did not respond to the motion) regarding payment of \$5000.00 to the Debtor:

a.) On page 3, paragraph 9, of the declaration, the plaintiff states that the Debtor was his attorney in, Gonzales v. HSBC, Chase, Naiman, et al., Sacramento County Superior Court case number 34-2009-00038219, consolidated with 34-2011-00105815 from May 2010 through October 2011. The plaintiff states that the Debtor did not adequately represent him and made misrepresentations of fact inducing plaintiff to enter into a written fee agreement. He says that the Debtor continued to make misrepresentations of fact over the course of the relationship "by misleading me into believing the Debtor was actively working on the case when in fact he was not to any significant degree." On page 3, paragraph 10 of the declaration plaintiff asserts that he paid the Debtor "over \$2500 in attorney's fees" related to this case.

b.) On pages 5 and 6 of the declaration the plaintiff discusses a second set of litigation consisting of two related state court matters: In re Gonzales, Sacramento County Superior Court case number 34-2008-00006532 and Gonzales v. Johnson, Reed, et al., Sacramento County Superior Court case 34-2011-00107430. The plaintiff says that after providing case files for these matters to the Debtor in February 2010, that the Debtor told the plaintiff he would pursue efforts to collect on a 2009 probate judgment and to file civil tort claims. Plaintiff asserts on page 6, paragraph 18 that "Debtor acting as our attorney induced my daughter and me to pay him or his firm over \$2500 for legal services. We did so in complete reliance upon the debtor's representation he would conduct judgment enforcement and preserve all tort claims against the underlying defendants. . . . Contrary to debtor's express representations . . . Though he took my money for legal fees, he took no action to pursue collection, enforcement of the judgment, and most critically, did not file the civil complaint timely as promised and represented to us."

Thus, the court's decision was based on the allegation in the complaint that the plaintiff paid the Debtor monies for legal services, which monies were not used in connection with legal services but were diverted for the Debtor's personal use, supported by the plaintiff's declaration in connection with the motion for entry of default judgment regarding the amount paid.

A determination of the amount of damages based on the plaintiff's supporting declaration is an accepted practice, and one in which the court routinely engages.

"Rule 55 gives the court considerable leeway as to what it may require as a prerequisite to the entry of a default judgment.] 'The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount *918 of damages, will be taken as true.'" (citations omitted). Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977).

Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-918 (9th Cir. 1987).

A formal court hearing is not required in every case. [See FRCP 55(b)(2). . . . The "hearing" may be on affidavits. I.e., plaintiff may submit its evidence in the form of affidavits or declarations and defendant (where it has "appeared" in the action) may do likewise. The court may base its judgment entirely on the affidavits submitted. [See Davis v. Fendler (9th Cir. 1981) 650 F2d 1154, 1161-1162; Action S.A. v. Marc Rich & Co., Inc. (2nd Cir. 1991) 951 F2d 504, 508]

William Schwazer, et al. California Practice Guide: Federal Civil Procedure Before Trial, § 6:91 (West, 2014).

Based on the foregoing, the court declines to vacate or amend the MDJ Order.

Request to Continue Hearing on Plaintiff's Motion for Entry of Default Judgment

With respect to the Debtor's request for a continuance of the plaintiff's motion for entry of default judgment filed on December 3, 2013, the request is dismissed as moot. The court denied that motion by order entered January 17, 2014 (Dkt. 87).

The court will issue a minute order on this motion. The claims for relief in this adversary proceeding now having been fully resolved, the court will issue a separate judgment stating that he shall recover \$5000.00 from Robert N. Kitay, which amount shall be nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

12. [13-20645](#)-B-7 ROBERT/TRISTINA KITAY CONTINUED MOTION FOR ENTRY OF
[13-2126](#) DEG-1 DEFAULT JUDGMENT
GONZALEZ V. KITAY ET AL 1-28-14 [[89](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is dismissed.

The motion is dismissed because its substance is duplicative of prior motions for entry of default judgment filed by the plaintiff on September 20, 2013 (the "First MDJ") and December 3, 2013 (the "Second MDJ"). In connection with the First MDJ, the court entered an order on November 4, 2013, (Dkt. 40) (the "Order") granting the First MDJ in part with respect to the plaintiff's claim for relief under 11 U.S.C. § 523(a)(4), dismissing the plaintiff's remaining requests for relief and granting the plaintiff leave to amend. Subsequent proceedings in this case have flowed from the Order. Specifically, the defendant debtors have filed a motion to vacate the Order and the default of defendant Robert Kitay, and for dismissal of the first amended complaint (the "FAC") filed by the plaintiff on November 19, 2013. For reasons explained elsewhere on this calendar the court has denied the debtors' motion in part and granted it in part, dismissing the FAC but leaving the Order intact. Because the relief sought in the present motion is duplicative of that sought in the First MDJ, which has now been fully resolved, the motion is dismissed.

The court will issue a minute order.

13. [13-20645](#)-B-7 ROBERT/TRISTINA KITAY MOTION TO SELL
SLC-2 3-10-14 [[105](#)]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 363(b)(1), the chapter 7 trustee is authorized to sell the estate's interest in the Law Offices of Robert Kitay, P.C., the Law Office of Robert Kitay (sole proprietorship) and the associated business assets described in the motion (collectively, the "Property") in "as-is, where-is" condition to the debtor for \$17,000.00, without deduction of the debtor's exemption in the Property. The net proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

Regarding the trustee's objection that the debtors should not be allowed to amend their claim of exemption in the Stock due to their allegedly intentional omission of the Stock in their original schedules, the United States Supreme Court (the "Court") has recently held in Law v. Siegel, 134 S.Ct. 1188, 82 USLW 4140, 59 Bankr.Ct.Dec. 43 (March 4, 2014) that federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Bankruptcy Code. In so holding, the Court abrogated the Seventh Circuit's ruling of In re Yonikus, 996 F.2d 866, 872-873 (7th Cir. 1993), which the trustee relies on in his objection, through the following language:

Siegel points out that a handful of courts have claimed authority to disallow an exemption (or to bar a debtor from amending his schedules to claim an exemption, which is much the same thing) based on the debtor's fraudulent concealment of the asset alleged to be exempt. See, e.g., In re Yonikus, 996 F.2d 866, 872-873 (C.A.7 1993); In re Doan, 672 F.2d 831, 833 (C.A.11 1982) (per curiam); Stewart v. Ganey, 116 F.2d 1010, 1011 (C.A.5 1940). He suggests that those decisions reflect a general, equitable power in bankruptcy courts to deny exemptions based on a debtor's bad-faith conduct. *For the reasons we have given, the Bankruptcy Code admits no such power.* It is of course true that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption. E.g., In re Sholdan, 217 F.3d 1006, 1008 (C.A.8 2000); see 4 Collier on Bankruptcy ¶ 522.08[1]-[2], at 522-45 to 522-47. Some of the early decisions on which Siegel relies, and which the Fifth Circuit cited in Stewart, are instances in which federal courts applied state law to disallow state-created exemptions. See In re Denson, 195 F. 857, 858 (N.D.Ala.1912); Cowan v. Burchfield, 180 F. 614, 619 (N.D.Ala.1910); In re Ansley Bros., 153 F. 983, 984 (E.D.N.C.1907). *But federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code.*

Law v. Siegel, 134 S.Ct. at 1196-97 (emphasis added).

Here, the trustee cites to no section of the Bankruptcy Code which gives this court the statutory authority to disallow a state law exemption based on the alleged bad faith conduct of the debtors. In the absence of such authority, the court interprets the trustee's request as one made pursuant to 11 U.S.C. § 105(a). Siegel requires that such a request be denied. While it is true that Siegel leaves open the possibility that state law exemptions can be disallowed based on debtor misconduct, this court's authority to do so must be rooted in state law. In this instance, the trustee has cited to no California authorities which this court can rely on to disallow the debtors' claim of exemption in the Stock due to their alleged misconduct. As such, this portion of the trustee's objection is overruled.

The court will issue a minute order.

16. [14-21289](#)-B-7 EBONIE DELONEY MOTION TO IMPOSE AUTOMATIC STAY
2-12-14 [[7](#)]
CASE DISMISSED 2/24/14

Tentative Ruling: The motion is dismissed.

The motion is moot. The bankruptcy case was dismissed by order entered February 24, 2014 (Dkt. 12).

The court will issue a minute order.

17. [14-22098](#)-B-7 JOHN/TAMMY DETTMAN MOTION TO AVOID LIEN OF CAVALRY
SJS-1 SPV I, LLC
3-20-14 [[11](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

18. [13-27856](#)-B-7 ARTHUR LUND MOTION TO ABANDON
HCS-2 3-5-14 [[63](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 554(a), the real property located at 4159 North Commerce Street, Stockton, CA 95204 (the "Property") is deemed abandoned by the estate. Except as so ordered, the motion is denied.

The trustee alleges without dispute that, after accounting for all encumbrances secured by the Property as well as the costs associated with selling the Property, the Property has no realizable equity for the bankruptcy estate. Based on the foregoing, the court finds that the Property is burdensome to the estate and of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a).

The court will issue a minute order.

19. [12-41636](#)-B-7 DIANA GORDEN MOTION TO SELL
CWC-2 3-11-14 [[31](#)]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the trustee is authorized to sell the estate's one-third (1/3) beneficial interest in the Mary Lee Gorden Living Trust to Patricia L.

Mora for \$1,728.00 on the terms set forth in Purchase Offer Agreement attached as Exhibit "3" to the motion (Dkt. 34, p.4). The net proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so order, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

Counsel for the trustee shall submit an order that conforms to the foregoing ruling.

20. [13-24651](#)-B-7 DAVID/KAREN FARLEY MOTION TO SELL
HSM-3 3-7-14 [[40](#)]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the trustee is authorized to sell the real property located at 5201 Westley Road, Placerville, CA 95667 (the "Property") to Tyler J. Wheeler and Jennifer Wheeler (collectively, the "Purchasers") for \$234,000.00 on the terms set forth in the California Residential Purchase Agreement and Joint Escrow Instructions attached as Exhibit "A" to the motion (the "Agreement") (Dkt. 43, p.2), provided that the court's ruling does not authorize sale of the Property to any other purchaser and does not authorize sale of the Property free and clear of liens. The trustee is further authorized pursuant to 11 U.S.C. § 330(a) to pay the listing agent, Reed Block, through escrow, a commission totaling six percent (6.00%) of the gross proceeds of the sale for actual, necessary services performed and actual, necessary expenses incurred. Additionally, the trustee is authorized to pay, through escrow, the reasonable and necessary costs and expenses of closing, including the credit contractually guaranteed to the Purchasers, all of which are more fully described in the motion and the Agreement. The net proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

Counsel for the trustee shall submit an order that conforms to the foregoing ruling.

21. [14-21861](#)-B-7 BRYAN/ANDREA KAUFFROATH MOTION TO COMPEL ABANDONMENT
WRF-1 3-24-14 [[9](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is continued to May 20, 2014, at 9:32 a.m.

As the property for which the debtors seeks abandonmen (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Federal Bankruptcy Rule 4003(b)(1) has expired.

The court will issue a minute order.

22. [13-33458](#)-B-7 ROY ARRIAGA MOTION FOR COMPENSATION FOR
TAA-3 WEST AUCTIONS, INC.,
AUCTIONEER(S)
2-26-14 [[39](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved on a final basis in the amount of \$10,471.53 in auctioneer's commissions, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On October 17, 2013, the debtor filed a chapter 7 petition. By order entered on January 7, 2014 (Dkt. 34), the court authorized the trustee to retain West Auctions, Inc. ("West") as auctioneer for the trustee in this case. West is to receive 20.00% of the gross proceeds for selling certain personal property of the debtor (Dkt. 34, p.2). The trustee now seeks compensation for commissions earned by West through February 14, 2014. As set forth in the application, the approved commissions are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

23. [13-20966](#)-B-7 MICHAEL GRYLLES
SLC-1

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH MICHAEL JOHN
GRYLLES
3-10-14 [[27](#)]

Tentative Ruling: The motion is dismissed without prejudice.

The motion is not ripe, and therefore the court lacks jurisdiction over the matter. The trustee seeks court approval to enter into a settlement agreement with debtor Michael John Grylls (the "Debtor") to settle a dispute regarding alleged preferential transactions entered into between the Debtor and certain other parties. However, the trustee has failed to provide evidence that there is an actual compromise or settlement for the court to approve.

The absence of an actual compromise or settlement for the court to approve means that the court lacks jurisdiction over the matter because the motion lacks justiciability. The justiciability doctrine concerns "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Under Article III of the United States Constitution, federal courts only hold jurisdiction to decide cases and controversies. With no finalized, actual compromise or settlement agreement to which all necessary parties consent, no case or controversy within the meaning of Article III exists.

Here, the trustee has failed to provide the court with either a copy of the settlement agreement or any other evidence that there is a final agreement in place to which the Debtor consents. The trustee's declaration (Dkt. 29) states only that the debtor has agreed to pay. The motion, also signed by the trustee (but not under oath) states that the Debtor has already paid the settlement amount. The Debtor has not signed the motion or any other document that the trustee has provided to the court. The evidence submitted in the form of sworn statements and documentation is insufficient to establish that there is an actual settlement agreement for the court to approve. Therefore, the motion is not ripe for adjudication and is dismissed without prejudice.

The court will issue a minute order.

24. [13-24369](#)-B-7 NAEEM/WIZMA AMIRI
ASF-3

MOTION FOR COMPENSATION BY
GABRIELSON AND COMPANY,
ACCOUNTANT(S)
3-4-14 [[59](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11

U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's accountant, Gabrielson and Company ("G&C"), in the amount of \$2,143.50 in fees and \$123.09 in expenses, for a total award of \$2,266.59, for services rendered during the period of August 22, 2013, through and including March 3, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On March 29, 2013, the debtors commenced this bankruptcy case by filing a voluntary petition under chapter 7. By order entered September 6, 2013 (Dkt. 40) (the "Order"), the court granted the trustee's request to employ G&C as accountant for the bankruptcy estate. The Order does not specify an effective date of employment, so G&C's employment was effective September 6, 2013. The application for an order authorizing G&C's employment was filed on August 27, 2013 (Dkt. 36). This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving G&C's employment retroactive to August 22, 2013, the first date on which G&C rendered services to the trustee according to the attached billing records. The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988) (extraordinary or exceptional circumstances to justify retroactive employment). In this case, the court grants an effective date of August 22, 2013.

In the absence of an objection from any party in interest, the court finds that, as set forth in the application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

G&C shall submit an amended form of employment order which is identical to the Order, but which shall in addition specify an effective date of employment of August 22, 2013. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

25. [13-29374](#)-B-11 SUSAN GLINES-THOMPSON
UST-2

MOTION FOR THE COURT'S
DETERMINATION OF THE REASONABLE
VALUE OF THE SERVICES OF
JEFFERY YAZEL, ESQ.
2-28-14 [[107](#)]

Tentative Ruling: Respondent Jeffery Yazel (the "Respondent")'s request for allowance of compensation and expenses as counsel for the debtor contained in his opposition (the "Opposition") to the United States Trustee's motion is denied without prejudice. The Respondent shall file, notice and set for hearing on May 20, 2014, at 9:32 a.m. a motion for allowance of compensation of fees and expenses that complies with all

requirements for such motions. The balance of this matter is continued to May 20, 2014, at 9:32 a.m.

The Opposition contains a request for allowance of compensation and expenses. However, the Opposition does not comply with the requirements for such requests including, without limitation, Federal Rule of Bankruptcy Procedure 2002(a)(6). The court will resolve both a compensation motion and the instant motion at the same time.

The court will issue a minute order.

26. [13-34754](#)-B-11 CIELO VINEYARDS & MOTION TO USE CASH COLLATERAL,
SAC-2 WINERY, LLC MOTION FOR ADEQUATE PROTECTION
AND/OR MOTION TO SCHEDULE A
FINAL HEARING O.S.T.
3-31-14 [[41](#)]

Tentative Ruling: This matter will not be called for hearing before 10:00 a.m. As this is a properly filed motion under LBR 9014-1(f)(3) (motions set on shortened time) and opposition may be presented at the hearing, the court issues no tentative ruling on the merits of the motion.