UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 14, 2014 at 10:00 a.m.

---

1. 13-35329-A-12 KELLY/DEBORA HEISER — MOTION TO VALUE COLLATERAL
SJS-2
VS. THE BANK OF NEW YORK MELLON — 3-10-14 [18]

Tentative Ruling: The hearing on the motion will be continued to allow the respondent creditor bank to obtain its own appraisal of the subject property.

The debtors are asking the court to strip down the senior mortgage of The Bank of New York Mellon on their real property in Rio Linda, California. The mortgage totals approximately $221,879, whereas the debtors are claiming that the value of the property is $135,000.

The bank opposes the motion, contending that the debtors are not eligible for chapter 12 relief as they only manufacture cages and raise chinchillas. The bank also complains that the debtors' chapter 12 plan is not feasible.

Additionally, while the bank has produced an unauthenticated BPO for the property, stating that its value is between $200,000 and $220,000, the bank asks for more time to obtain its own appraisal of the property. Docket 30, Ex. 4.

Initially, whether or not the debtors are eligible for chapter 12 relief is not a defense to the debtors' assertion that the value of the property is $135,000. If the bank is convinced that the debtors are not eligible for chapter 12 relief, it should raise this issue in its own motion. Also, the court will not entertain objections to plan confirmation at this time. The motion is not asking plan confirmation. It is merely asking for the valuation of the bank's claim.

On the other hand, the court will provide the bank with more time to obtain its own appraisal of the property. The hearing on the motion will be continued.

2. 13-25330-A-12 PAUL MENNICK — MOTION TO CONFIRM CHAPTER 12 PLAN O.S.T.
WW-4 — 4-2-14 [103]

Tentative Ruling: The motion will be conditionally granted.

The debtor asks the court to confirm his second amended chapter 12 plan filed on April 2, 2014. Subject to hearing from any parties in interest at the April 14 hearing, the court will confirm the plan.

3. 13-34541-A-11 CAH-7 — 6056 SYCAMORE TERRACE LLC — MOTION TO CONFIRM PLAN 12-23-13 [40]

Tentative Ruling: The motion will be denied.

The debtor is asking the court to confirm its chapter 11 plan filed on December 23, 2013. Docket 40.

The principal creditor in this case, JPMorgan Chase Bank, secured by the debtor's only asset, a real property in Pleasanton, California, objects to plan confirmation, arguing that:

(A) the debtor cannot modify a secured claim when there is no privity of contract between the debtor and the secured creditor;

(B) the Supreme Court decision of Johnson v. Home State Bank, 501 U.S. 78 (1991) does not apply here and is distinguishable from the facts of the instant case;

(C) the proposed interest rate for the bank's claim falls short of the prime-plus formula articulated by Till v. SCS Credit Corp., 541 U.S. 465 (2004);

(D) the proposed 40-year amortization of the bank's loan is not fair and equitable;

(E) the plan provides contradictory provisions for payment of the taxes and insurance on the real property;

(F) the debtor cannot perform under the proposed plan, the plan is unfeasible and it has not been proposed in good faith; and

(G) the plan violates the absolute priority rule.

The court cannot confirm the debtor's chapter 11 plan. Without limitation, plan confirmation will be denied for the following reasons:

(1) The plan is not updated to reflect developments in the case, including, without limitation, that the property has been valued by stipulation at $1,920,000 and not $1,600,000 as provided by the plan.

(2) The plan violates the absolute priority rule as the debtor's equity holder is retaining interest in the debtor, while the plan is stripping off the second and third mortgages, it is stripping down the first mortgage, and it is paying general unsecured creditors a mere 2% dividend.

(3) The plan has some serious inconsistencies and contradictions, including, without limitation, the provisions for the payment of the taxes and insurance on the property. In one place, the plan says that taxes and insurance will be included in the mortgage payments (page 5), whereas in another place the plan says that the debtor will pay these directly (page 6). The debtor's counsel shall carefully review the plan and correct inconsistencies, contradictions, typos and other deficiencies.

(4) The plan should have a table of contents as it is well over 10 pages long.

(5) The debtor does not have the means to make plan payments and the plan is

unfeasible. The plan anticipates that the source for funding plan payments will come from the future rental of the property. In other words, the debtor does not have any income to fund a plan at this time and merely expects to have income if and when the property is rented. The court cannot confirm a plan where the debtor has a mere expectation of income.

More, even if the property is rented, the court is not convinced that the plan would be feasible given the seemingly checkered history of rental income generated by the property. The court will need a history of the debtor's ability to generate income from the property and projections based on that history, during the life of the plan, about what the debtor expects to be the rental income from the property.

Another problem is that the interest only payments to JPMorgan Chase Bank are calculated based on a claim of $1,600,000, when the now stipulated value of the property is $1,920,000.

(6) The plan has some serious good faith issues and the court cannot determine that it is fair and equitable as to the first mortgage claim, given that the plan proposes to pay only interest on account of that claim during its 60-month life. See 11 U.S.C. §§ 1129(a)(3) and (b)(1).

(7) The court also notes that the debtor has not obtained orders valuing the claims of the junior mortgagees yet. The court cannot confirm a plan until their claims are successfully valued.

The court finds it unnecessary to address the other deficiencies identified by JPMorgan Chase Bank. The motion will be denied.

4. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C. — MOTION TO VALUE COLLATERAL — 2-7-14 [85]
CAH-9
VS. JPMORGAN CHASE BANK, N.A.

Tentative Ruling: This motion has been resolved by stipulation. Dockets 111 & 112.

5. 11-42346-A-7 ERNEST BEZLEY — MOTION TO INTERVENE — 2-14-14 [13]
13-2291 PA-1
NIMS V. JENNINGS

Tentative Ruling: The motion will be granted.

The hearing on this motion was continued from March 17, 2014 for the movant to file a proposed complaint in intervention.

The movant filed the proposed complaint on March 31, 2014. Docket 25. The court is prepared to grant the motion.

Jacqueline Bezley moves to intervene as a plaintiff under Fed. R. Civ. P. 24(a) & (b), as made applicable here via Fed. R. Bankr. P. 7024.

The plaintiff, Eric Nims, the chapter 7 trustee in the underlying bankruptcy case of Ernst Bezley, the husband of the movant, has filed a conditional non-opposition, stating that he does not oppose intervention "to the extent that she [the movant] is not seeking any remedy that is, in fact, property of the bankruptcy estate." Docket 20.

Fed. R. Civ. P. 24(a) provides: "On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In the Ninth Circuit, a party may intervene as a matter of right under a four-part test: (1) the motion to intervene must be timely; (2) the party must assert an interest relating to the property or transaction which is the subject of the action; (3) the party must be so situated that without intervention the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the party's interest must be inadequately represented by other parties in the action. United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996); see also Cedar-Sinai Medical Center v. Shalala, 125 F.3d 765, 768 (9th Cir. 1997).

Fed. R. Civ. P. 24(b)(1) provides: "On a timely motion, the court may permit anyone to intervene who (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Permissive intervention requires 1) an independent ground for jurisdiction, 2) a timely motion, and 3) a common question of law and fact between the movant's claim or defense and the main action. Washington, 86 F.3d at 1506-07.

"In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

In determining whether a motion to intervene as of right or permissively is timely, the court must consider the stage of the proceeding at which the applicant seeks to intervene, prejudice to other parties, and the reason for and length of delay. Washington, 86 F.3d at 1503; see also Bouman v. Pitchess, 158 Fed. Appx. 937, 939 (9th Cir. 2006).

This adversary proceeding was filed on September 13, 2013. Discovery cut-off is May 15, 2014 and the continued status conference in the case is set for July 16, 2014. This means that there is still time for the movant to participate in discovery, assuming it is necessary. Docket 11. The court perceives no prejudice to the other parties in this proceeding, given that the movant had initiated her own separate adversary proceeding against the defendant here, Mr. Jennings, asserting for the same or similar claims as are asserted by the plaintiff here. See Adv. Proc. No. 13-2292, Docket 1. There has been no delay in the movant's intervention, since this court dismissed her adversary proceeding against Mr. Jennings on January 23, 2014. Accordingly, the court is persuaded that this motion is timely.

The movant is co-obligor, along with her husband and debtor Ernst Bezley, on loans extended to her and Mr. Bezley by the defendant in this proceeding, Mr. Jennings. She also holds joint tenancy interest in the real properties securing the loans. And, those loans are the subject of this adversary proceeding. The plaintiff is seeking: reformation of the loans, voidance of some of the provisions in the loans, recovery of interest paid on account of the loans, and recovery of treble damages for the interest paid on account of the loans.

The adjudication of the subject claims in favor of or against the defendant may

impair or impede the movant's interests in the loans and property securing the loans, especially if the defendant's proofs of claim are allowed as filed and/or the movant is found to have community property interest in unencumbered or underencumbered property that may be necessary to liquidate to pay the defendant's proofs of claim. See 11 U.S.C. § 541(a)(2) (providing that the bankruptcy estate is comprised of "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case").

Finally, the plaintiff in this proceeding represents only the interests of Mr. Bezley's bankruptcy estate and the creditors of that estate. He does not represent or adequately represent the movant's interests in property - community or separate - securing the loans and does not represent or adequately represent the movant's community property interests in unencumbered or underencumbered property that may be necessary to liquidate to pay the defendant's proofs of claim.

The court will permit the movant to intervene as a plaintiff under Rule 24(a)(2). The motion will be granted.

6.	11-42346-A-7 13-2292 BEZLEY V. JENNINGS	ERNEST BEZLEY PA-1	MOTION TO AMEND 2-6-14 [26]

Tentative Ruling: The motion will be denied.

The plaintiff in this now-dismissed adversary proceeding, Jacqueline Bezley, asks the court to amend its civil minutes (Docket 21) and civil minute order (Docket 23) dismissing this proceeding, to add the following language to the civil minute order:

- the motion to dismiss "is ORDERED GRANTED, without prejudice;"

- "[t]he granting of the motion is without prejudice as to Plaintiff filing a motion to intervene in the Chapter 7 Trustee's Adversary Proceeding against Harold Jennings, Adv. Proc. No. 13-02291;" and

- "[t]he granting of the motion is without prejudice as to Plaintiff objecting to the claims of Mr. Jennings, should the Trustee not do so."

At present, the civil minute order dismissing this proceeding states that "The motion is ORDERED GRANTED for the reasons stated in the ruling appended to the minutes."

The movant is asking the court to amend its civil minutes "to incorporate the additional findings of fact and conclusions of law made on the record in open court during the hearing on January 21, 2014."

The motion will be denied for several reasons.

First, unless an order states that dismissal is without prejudice, dismissal is always without prejudice. See, e.g., Fed. R. Civ. P. 41(a)(2), as made applicable by Fed. R. Bankr. P. 7041. The civil minute order and the minutes on the hearing resulting in the order granting the motion to dismiss and dismissing this proceeding do not state anywhere that the proceeding is being dismissed with prejudice. Dockets 21 & 23.

Further, as the court dismissed the movant's claims in this proceeding at the

least in part based on the lack of subject matter jurisdiction, the dismissal could not have been with prejudice. This court cannot rule that it has no subject matter jurisdiction over claims and then proceed to dismiss those claims with prejudice.

Second, the court will not enter an order effectively issuing an advisory opinion about what the movant can do, including objecting to Mr. Jennings' proofs of claim, "should the Trustee not do so."

More important, the trustee has already objected to Mr. Jennings' proofs of claim. The trustee's four causes of action against Mr. Jennings in Adv. Proc. 13-2291, filed on September 13, 2013, before the October 17, 2013 claims bar date, are objecting to Mr. Jennings' proofs of claim because:

- the trustee is seeking reformation of the loans upon which the proofs of claim are based,

- he is seeking the voidance of some of the provisions in the loans upon which the proofs of claim are based,

- he is seeking the recovery of interest paid on account of the loans upon which the proofs of claim are based, and

- he is seeking the recovery of treble damages for the interest paid on account of the loans upon which the proofs of claim are based.

Third, when a proceeding has been dismissed without prejudice, it is dismissed without prejudice as to all matters that could have been implicated if the proceeding was dismissed with prejudice. The court will not enumerate the movant's specific procedural rights that are not affected by the dismissal of this proceeding. The movant's procedural rights are well defined by the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure, which speak for themselves.

Fourth, even if the proceeding had been dismissed with prejudice, that would not have precluded the movant from filing a motion to intervene in the adversary proceeding instituted by the trustee. The granting of that motion would be an entirely different matter, however.

Fifth, the court is granting the movant's motion to intervene in the trustee's adversary proceeding against Mr. Jennings, meaning that the relief requested by the movant - seeking the minute order to say that dismissal is without prejudice to the movant filing a motion to intervene in the proceeding instituted by the trustee - is moot. This motion will be denied.

7. 12-33158-A-12 GREG HAWES — MOTION TO DISMISS CASE 2-6-14 [151]
JPJ-1

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 debtor opposes the motion, stating that he will be filing "a new plan prior to the date of this hearing to resolve the issues addressed in the Trustee's Motion."

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 17, 2012. The last plan in the case was filed on August 20, 2012, over 1.5 years ago. Docket 42. The only hearing on plan confirmation was held on October 1, 2012. Dockets 76 & 82. The court denied confirmation and the debtor has filed no other plan with the court.

The court also notes that the debtor's response to the instant motion is not supported by any evidence and the response does not explain why the debtor has not obtained confirmation of a plan during the 20-month duration of this case. This 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.

8. 12-33158-A-12 GREG HAWES — MOTION TO CONFIRM CHAPTER 12 PLAN
SAC-13 — 3-12-14 [158]

Tentative Ruling: The motion will be denied without prejudice.

The debtor is asking the court to confirm his chapter 12 plan filed on March 12, 2014. As the court is not granting the debtor's valuation motions, it cannot confirm the plan. This motion will be denied.

9. 12-33158-A-12 GREG HAWES — MOTION TO VALUE COLLATERAL
SAC-7
VS. BANK OF AMERICA, N.A. — 1-28-13 [87]

Tentative Ruling: The motion will be denied without prejudice.

This motion has been assigned a docket control number of a motion that was filed originally over a year ago on January 28, 2013 and was dismissed by the debtor on June 28, 2013, after several continuances and further briefing. Docket 134; Dockets 87-134. When the debtor filed the instant motion, he did not file another motion or further evidence in support of the motion. Rather, he filed only an amended notice of hearing with the docket control number for the motion filed on January 28, 2013. Docket 168.

Assuming the debtor is seeking the valuation of his primary residence in Palo Cedro, California, in an effort to strip down the first mortgage on the property held by Bank of America, as sought in the original motion with DCN SAC-7, the evidence filed by the debtor about the value of the property with the original motion is stale and outdated. This is especially true as property values in California have recovered significantly from a year ago.

Moreover, the evidence of value submitted with the original motion, claiming that the property is worth $550,000, is as of July 17, 2012, when the case was filed. In other words, the asserted value for the property with this motion is approximately 21 months old. The court takes judicial notice of the fact that real property values in California have increased dramatically since July 2012. Fed. R. Evid. 201(c).

Given that this case has been pending without a confirmed plan for 21 months already and that many courts have taken the position that valuation of claims

should be as of the plan confirmation and not the petition date, the court will not allow the debtor to value the property as of the petition date.

"Although the amount of a creditor's claim is fixed at the petition date, there is nothing to indicate that the value of the claim must also be determined at the petition date. Since modification of claims occurs only through debtors' plans, it is at confirmation that the bankruptcy court considers whether proposed modifications comply with requirements for confirmation. Thus, it may be entirely appropriate to value a claim at the time of plan confirmation. (Citations omitted).

"[E]ven though the bankruptcy court's rationale for valuing BAC's claim at confirmation was reasonable, the interpretation of § 1123(b)(5) as setting the determination of whether a claim is protected from modification at the date of confirmation is flawed. That approach improperly shifts the time for fixing a creditor's claim from the petition date to some future valuation date. It conflates the analysis of whether a creditor *holds a claim* with a determination of the *value* of that claim. The value of BAC' claim, whether it is secured or unsecured, is a distinct issue from whether BAC's claim is secured by the Debtors' principal residence."

BAC Home Loans Servicing, LP v. Abdelqadir (In re Abdelqadir), 455 B.R. 896, 902 (B.A.P. 9th Cir. 2011) (distinguishing between the time for fixing the amount of a claim and the time for valuing a claim and holding, on the other hand, that the appropriate time for determining whether the property is the debtor's principal residence is the petition date); Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 587 (B.A.P. 9th Cir. 2011) (citing Abdelgadir with approval and recognizing that valuing a claim at plan confirmation is correct); In re Gutierrez, 503 B.R. 458, 462-63 (Bankr. C.D. Cal. 2013); In re Schayes, 483 B.R. 209, 214-15 (Bankr. D. Ariz. 2012); see also Mariners Inv. Fund, LLC v. Delfierro (In re Delfierro), Case No. WW-11-1249-KiJuH, WL 1933316, at *1 (B.A.P. 9th Cir. May 29, 2012); Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages), Case No. ID-12-1397-JuKiKu, WL 1133924, at *3 (B.A.P. 9th Cir. Mar. 7, 2014).

In short, the debtor should file a new valuation motion with current evidence of value for the property. This motion will be denied.

10. 12-33158-A-12 GREG HAWES
SAC-8
VS. BANK OF AMERICA, N.A.

MOTION TO VALUE COLLATERAL
1-28-13 [95]

Tentative Ruling: The motion will be denied without prejudice.

As the court is denying the debtor's related valuation motion on this calendar, DCN SAC-7, it will deny this motion as well, given that it pertains to the same property and this motion has the same issues identified in connection with the other valuation motion. The ruling on the other valuation motion is incorporated here by reference.

11. 12-29961-A-7 PAUL DOSCHER
13-2378 PLC-3
WHATLEY V. MOREHOUSE ET AL

MOTION TO STRIKE OR REQUEST FOR ENTRY OF DEFAULT
3-7-14 [30]

Tentative Ruling: The motion will be granted in part.

The plaintiff, Douglas Whatley, the trustee in the underlying chapter 7 case, asks the court to strike the motion to reconsider (Docket 23) filed by Defendant Paulsue Living Trust in propria persona, given that the trust is not represented by a licensed attorney.

Non-attorney trustees of a trust may not represent the trust in propria persona. Although a non-attorney may appear in propria persona in his own behalf, that privilege is personal to him and he has no authority to appear as attorney for others than himself, including the trust for which he is a trustee. The reasoning behind this prohibition is that a trust constitutes more than merely its trustee, making any representation of the trust by the trustee a representation of another and not solely the trustee himself. This is especially true when the trustee seeking to represent the trust in propria persona is not the beneficiary or only beneficiary of the trust. See, e.g., Hale Joy Trust v. C.I.R., 57 Fed. Appx. 323, 324 (9th Cir. 2003); C.E. Pope equity Trust v. United States, 818 F.2d 696, 697-98 (9th Cir 1987).

Fed R. Civ. P. 12(f), as made applicable here by Fed. R. Bankr. P. 7012(b), provides that:

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

"The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. . . ." Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010). The disposition of a motion to strike lies within the discretion of the court. Garcia-Barajas v. Nestle Purina Petcare Co., No. 1:09-CV-00025 OWW DLB, 2009 WL 2151850, at *2 (E.D. Cal. July 16, 2009) (citing Legal Aid Serv. of Or. v. Legal Serv. Corp., 561 F. Supp. 2d 1187, 1189 (D. Or. 2008)).

In this case, the Paulsue Living Trust is alleged to be a revocable family trust and Paul Doscher, the debtor in the underlying bankruptcy case, is alleged to be trustor of the trust. One of the defendants in this proceeding, Wanda Doscher (a.k.a. Wanda Eaton), the former spouse of Mr. Doscher, has been attempting to represent the trust in her capacity as a trustee of the trust, although she is not a licensed attorney. Even though the court struck the answer filed for the trust by Ms. Doscher and prohibited Ms. Doscher from representing the trust in this proceeding (Docket 22), Ms. Doscher has filed more pleadings on behalf of the trust, including the motion to reconsider (Docket 23) that is scheduled for hearing on this calendar. The motion to reconsider will be stricken as it has not been filed by a licensed attorney representing the trust.

The plaintiff's request for attorney's fees as sanctions will be denied. The court does not have any admissible evidence concerning those fees nor is there authority for the award of fees.

12. 12-29961-A-7 PAUL DOSCHER — REQUEST FOR LEAVE FOR IN FORMA PAUPERIS, FOR SANCTIONS, FOR AN INVESTIGATION FOR PLAINTIFFS CHURNING AND TO DISMISS ADVERSARY PROCEEDING
13-2378
WHATLEY V. MOREHOUSE ET AL — 3-24-14 [37]

Tentative Ruling: This motion, filed on behalf of the Paulsue Living Trust, will be stricken in accordance with the ruling on the plaintiff's motion to strike, DCN PLC-3, which ruling is incorporated here by reference.

13. 12-29961-A-7 PAUL DOSCHER — MOTION TO RECONSIDER
13-2378
WHATLEY V. MOREHOUSE ET AL — 3-3-14 [23]

Tentative Ruling: This motion, filed on behalf of the Paulsue Living Trust, has been stricken. The ruling on the plaintiff's motion to strike, DCN PLC-3, is incorporated here by reference.

The court cannot hear this motion also because it requests the reconsideration of an order requiring the Paulsue Living Trust to be represented by licensed counsel. Docket 22. Yet, this motion has not been filed by licensed counsel representing the trust. It has been filed by Wanda Doscher (a.k.a. Wanda Eaton), a trustee of the trust. Ms. Doscher does not have the authority to represent the trust in any matters, including this motion, as she is not a licensed attorney. See, e.g., Hale Joy Trust v. C.I.R., 57 Fed. Appx. 323, 324 (9th Cir. 2003); C.E. Pope equity Trust v. United States, 818 F.2d 696, 697-98 (9th Cir 1987).

14. 14-20583-A-11 LARRY JENT — STATUS CONFERENCE 1-23-14 [1]

Tentative Ruling: None.

15. 13-34696-A-7 JEFFREY JOHNSON — MOTION FOR REMAND
JMD-3 — 2-5-14 [55]

Tentative Ruling: This motion will be dismissed as the movant has filed a replacement motion in the respective adversary proceeding (14-2036 or 14-2037) pending before the court.

16. 13-34696-A-7 JEFFREY JOHNSON — MOTION FOR REMAND
JMD-3 — 2-5-14 [57]

Tentative Ruling: This motion will be dismissed as the movant has filed a replacement motion in the respective adversary proceeding (14-2036 or 14-2037) pending before the court.

17. 13-34696-A-7 JEFFREY JOHNSON — MOTION FOR REMAND
14-2036 JMD-2
JOHNSON V. DARRAHVILLE, LLC. ET AL — 2-25-14 [8]

Tentative Ruling: The motion will be granted in part.

Defendants James Darrah (dba Stockton Baot Works) and Darrahville, LLC ask the

court to abstain and dismiss this action. In the alternative, the movants are asking the court to remand the action to the state court from which it was removed.

The defendant Stockton Golf & Country Club filed a joinder to the subject motion on March 14, 2014. Docket 11.

The plaintiff, Jeffrey Johnson, who is the debtor in the underlying bankruptcy case, opposes the motion, contending that the motion is unsupported by a declaration or other evidence. The plaintiff also complains that he was not served with "a written motion."

While the plaintiff was not served with a pleading titled "motion", the plaintiff has obviously received the "points and authorities in support of the motion," which clearly states the relief sought by the movants. The memorandum of points and authorities is attached to the plaintiff's declaration in support of his opposition to the motion. Docket 13. The court is satisfied that the plaintiff has had sufficient notice of the relief requested by the movants.

Further, in adjudicating this motion, the court did not have to rely on any evidence. The court relied only on the procedural history of this action and the bankruptcy case, which can be determined by examining the dockets. The court takes judicial notice of the docket of this action and the docket of the bankruptcy case. Fed. R. Evid. 201(c). Thus, whether or not the motion is supported by evidence is immaterial.

Turning to the merits of the motion, the plaintiff filed the underlying chapter 7 case on November 18, 2013, Case No. 13-34696, and received his chapter 7 discharge on March 4, 2014. On October 3, 2013, the plaintiff filed the instant action in state court (Case No. 39-2013-00302564) and removed it to this court on January 24, 2014. The action consists of five claims, including: breach of the implied covenant of quiet enjoyment, breach of the implied covenant of good faith and fair dealing, negligence, intentional infliction of emotional distress, and a claim for injunctive relief that enjoins the prosecution of the state court eviction action against the plaintiff.

First, when the plaintiff filed his chapter 7 bankruptcy case, he lost the authority to continue the prosecution of this action in state court, including removing it to this court. When the bankruptcy case was filed, the chapter 7 trustee became the real party in interest. She became, and still is, the only person who could prosecute the instant action, as the chapter 7 case is still pending and the court has not ordered abandonment of the action. See 11 U.S.C. § 541(a)(1) (prescribing that "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the estate at "[t]he commencement of a [chapter 7] case"); see also 11 U.S.C. § 554 (outlining the circumstances when abandonment can take place).

When the plaintiff removed the action to this court, then, he did not have the authority to do so. The action was removed to this court improperly. Accordingly, the court will remand the action to the state court from which it was removed.

Second, even if the action is abandoned back to the plaintiff, making it no longer property of the estate and removing the trustee as the real party in interest, the court would still remand the action to state court because this court would have no subject matter jurisdiction over the claims. The claims are non-core as they are all based on state law. The only potential subject

matter jurisdiction for this court over the claims is "related to" jurisdiction, which requires the resolution of the claims to somehow affect the administration of the debtor's bankruptcy estate. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3); 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)).

However, if the claims are abandoned, they would be abandoned back to the plaintiff. The estate would no interest them. Hence, their adjudication would not affect the administration of the plaintiff's chapter 7 bankruptcy estate. Thus, if the claims are abandoned, the court would still remand them back to state court because it would not have subject matter jurisdiction over the claims.

Third, the plaintiff seems to argue that this court should keep the claims because he is seeking to convert his chapter 7 case to one under chapter 13 and the claims will become part of his chapter 13 case.

But, the plaintiff's bankruptcy case has not been converted to a chapter 13 proceeding yet. And, the court cannot make decisions based on what may happen in the future. The court must make decisions with facts that are in existence now.

Finally, even if the plaintiff successfully converts his case to a chapter 13 proceeding, the court cannot ignore the improper removal of this action. As discussed above, the plaintiff removed this action on January 24, 2014, when he did not have the authority to prosecute this action. Conversion of the bankruptcy case to chapter 13 then would not redress the improper removal of the action. The motion will be granted in part.

18. 13-34696-A-7 JEFFREY JOHNSON — MOTION FOR REMAND
14-2037 JMD-3 — 2-25-14 [6]
JOHNSON V. STOCKTON GOLF AND COUNTRY CLUB, INC. ET AL

Tentative Ruling: The motion will be granted in part.

Defendants James Darrah (dba Stockton Baot Works) and Darrahville, L.L.C., ask the court to abstain and dismiss this action. In the alternative, the movants are asking the court to remand the action to the state court from which it was removed.

The defendant Stockton Golf & Country Club filed a joinder to the subject motion on March 14, 2014. Docket 9.

The plaintiff, Jeffrey Johnson, the debtor in the underlying bankruptcy case, opposes the motion, contending that the motion is unsupported by a declaration or other evidence. The plaintiff also complains that he was not served with "a written motion."

While the plaintiff was not served with a pleading titled "motion", the plaintiff has obviously received the "points and authorities in support of the motion," which clearly states the relief sought by the movants. The memorandum of points and authorities is attached to the plaintiff's declaration in support of his opposition to the motion. Docket 11. The court is satisfied that the plaintiff has had sufficient notice of the relief requested by the movants.

Further, in adjudicating this motion, the court did not have to rely on any evidence. The court relied only on the procedural history of this action and the bankruptcy case, which can be determined by examining the dockets. The court takes judicial notice of the docket of this action and the docket of the bankruptcy case. Fed. R. Evid. 201(c). Thus, whether or not the motion is supported by evidence is immaterial.

Turning to the merits of the motion, the plaintiff filed the underlying chapter 7 case on November 18, 2013, Case No. 13-34696, and received his chapter 7 discharge on March 4, 2014. On November 4, 2013, the plaintiff filed the instant action in state court (Case No. 39-2013-00303707) and removed it to this court on January 24, 2014. The action consists of two claims, one to quiet title declaring that the plaintiff is an owner of an easement and the other seeking injunctive relief that enjoins the prosecution of the state court eviction action against the plaintiff.

First, when the plaintiff filed his chapter 7 bankruptcy case, he lost the authority to continue the prosecution of this action in state court, including removing the action to this court. When the bankruptcy case was filed, the chapter 7 trustee became the real party in interest plaintiff to the action. She became and still is the only person who could prosecute the action, as the chapter 7 case is still pending and the court has not ordered abandonment of the action. See 11 U.S.C. § 541(a)(1) (prescribing that "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the estate at "[t]he commencement of a [chapter 7] case"); see also 11 U.S.C. § 554 (outlining the circumstances when abandonment can take place).

When the plaintiff removed the action to this court, then, he did not have the authority to do so. The action was removed to this court improperly. Accordingly, the court will remand the action to the state court from which it was removed.

Second, even if the action is abandoned back to the plaintiff, making it no longer property of the estate and removing the trustee as the real party in interest, the court would still remand the action to state court because this court would have no subject matter jurisdiction over the claims. The claims are non-core as they are all based on state law. The only potential subject matter jurisdiction for this court over the claims is "related to" jurisdiction, which requires the resolution of the claims to somehow affect the administration of the debtor's bankruptcy estate. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3); 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)).

However, if the claims are abandoned, they would be abandoned back to the plaintiff. The estate would no interest them. Hence, their adjudication would not affect the administration of the plaintiff's chapter 7 bankruptcy estate. Thus, if the claims are abandoned, the court would still remand them back to state court because it would not have subject matter jurisdiction over the claims.

Third, the plaintiff seems to argue that this court should keep the claims because he is wishes convert his chapter 7 case to a chapter 13 proceeding and the claims will become part of his chapter 13 case.

But, the plaintiff's bankruptcy case has not been converted to a chapter 13

proceeding. And, the court cannot make decisions based on what may happen in the future. The court must make decisions with facts that are in existence now.

Finally, even if the plaintiff successfully converts his case to a chapter 13 proceeding, the court cannot ignore the improper removal of this action. As discussed above, the plaintiff removed this action on January 24, 2014, when he did not have the authority to prosecute this action. Conversion of the bankruptcy case to chapter 13 then would not redress the improper removal of the action.

The motion will be granted in part.