UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 17, 2017 at 10:00 a.m.

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1. 10-49214-A-13 GREGORY/OLGA PETERSEN — MOTION TO DISMISS ADVERSARY PROCEEDING 3-9-17 [33]
16-2206
PETERSEN ET AL V. NATIONSTAR MORTGAGE, LLC.

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

The defendant, Nationstar Mortgage, L.L.C., seeks dismissal without leave to amend under Fed. R. Civ. P. 12(b)(6) of the remaining three causes of action in the first amended complaint by the plaintiffs, Gregory and Olga Petersen, the debtors in the underlying discharged chapter 13 bankruptcy case.

The claims in question include:

(1) claim for declaratory relief to determine the value and extent of the defendant's interest in the debtor's property,
(2) breach of contract, and
(3) negligence.

The complaint also seeks recovery of attorney's fees and costs.

The plaintiffs filed the underlying chapter 13 case on November 4, 2010. They obtained confirmation of their chapter 13 plan on February 1, 2011. Case No. 10-49214, Docket 19. The plaintiffs' real property in Plumas Lake, California was subject to a mortgage held by Bank of America as of the petition and plan confirmation dates.

On or about December 5, 2012, Bank of America assigned its interest in the property to the defendant. In 2015, the defendant approved a loan modification for the plaintiffs' Plumas Lake property.

On March 31, 2016, the defendant filed a notice of mortgage payment change, increasing the plaintiffs' mortgage escrow payments for property taxes and insurance from $565.70 to $955.96. Case No. 10-49214, Docket 95. The court entered the plaintiffs' chapter 13 discharge on April 11, 2016.

The plaintiffs filed the instant adversary proceeding on September 29, 2016, asserting eight causes of action (excluding the request for attorney's fees and costs) and contending that the defendant increased the mortgage escrow payment on account of pre-petition property taxes owed by the plaintiffs even though such taxes were paid in full through their chapter 13 plan.

On December 14, 2016 the court dismissed without leave to amend all but the four claims being asserted in the first amended complaint.

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

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

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

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

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

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).

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).

The court will not dismiss the complaint due to the typos identified by the motion: one typo is that Yuba County's claim is $45,811.18, as opposed to the correct figure of $5,811.18; the other typo is a reference to a date in 2005, when the actual date was in 2015. Docket 28 at 3, 4; Docket 37 at 5, 6. The typos are minor and easily reconciled.

The court will not dismiss the claim for declaratory relief either. The claim seeks to determine the actual amount of the defendant's claim — akin to an objection to claim — given the defendant's inclusion in its claim of an amount representing pre-petition property taxes.

Next, the court will not dismiss the breach of contract claim as there are sufficient facts to state a plausible request for relief.

There was a valid loan modification agreement between the parties. Some months after the parties entered into the agreement and the court had approved it, the defendant demanded to be paid for its post-petition payment of a pre-petition claim of another creditor, Yuba County, even though that claim was being paid under the confirmed chapter 13 plan. When the plaintiffs refused, the defendant stopped honoring the loan modification.

The court approved the plaintiffs' entry into the loan modification agreement with the defendant in connection with the chapter 13 plan. Case No. 10-49214, Dockets 79 & 81. Confirmed chapter 13 plans are effectively a new contract between the debtor and his creditors. The defendant breached the plaintiffs' confirmed plan when it sought to recover Yuba County's claim from them in contravention of the terms of the plan.

There was a procedure for the defendant to notify the plaintiffs and the chapter 13 trustee of the incurred fees and charges in paying the outstanding property taxes to Yuba County. See Fed. R. Bankr. P. 3002.1(c). This procedure was not followed. The correct procedure was not to unilaterally increase the mortgage payment pursuant to Fed. R. Bankr. P. 3002.1(b).

The harm to the plaintiffs is stated on the face of the complaint. The defendant increased its claim without amending its proof of claim or giving the notice required by Rule 3002.1(c), seeking to recover from the plaintiffs more than they allegedly owe. Its notice was based on property taxes that either the plaintiffs had paid to the County pursuant to their plan or, if the taxes had not been paid to the County, the defendant failed to demand in a timely notice under Rule 3002.1(c).

Finally, there is no place for a tort action here. The legal relationship between the parties is governed by contract and by bankruptcy law, not by tort law. The relationship between the plaintiffs and the defendant is governed by the loan agreement, by the terms of the chapter 13 plan, and by applicable

bankruptcy law, such as Fed. R. Bankr. P. 3002.1. The defendant's duty of care toward the plaintiffs is contained and sufficiently defined within these legal authorities. This is what the plaintiffs bargained for when they entered into a contract with the defendant's predecessor in interest, filed for bankruptcy, and confirmed a chapter 13 plan. The court will not permit the plaintiffs to redefine the nature of their relationship with the defendant, by recovering pursuant to a general tort duty of care. The court will dismiss the negligence claim.

2.	16-27323-A-12 JPJ-2	DANNY SMITH AND SUSAN KELLOGG	MOTION TO DISMISS CASE 3-21-17 [28]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The chapter 12 trustee moves for dismissal, pointing out that the debtors have violated 11 U.S.C. § 1221 for not having filed a plan within 90 days of the petition date.

11 U.S.C. § 1221 provides: "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

This case was filed on November 3, 2016. The 90-day plan filing deadline ended on February 1, 2017. The debtors had not filed a plan by that date. The debtors also did not ask the court to extend the deadline, prior to its expiration.

Given the debtors' breach of the 90-day plan filing deadline, cause for dismissal exists. The motion will be granted and the case will be dismissed.

3.	16-22654-A-7 16-2087 SEQUOIA SALES, INC. V. LIM'S PRODUCE ET AL	MARC LIM	MOTION TO WITHDRAW AS ATTORNEY 3-16-17 [36]

Tentative Ruling: The motion will be dismissed without prejudice.

The movant, Walter Dahl, is seeking permission to withdraw as counsel for the defendant Marc Lim.

However, although this motion was served on Mr. Lim, it was served on him on March 16, only one to three days before he became incapacitated. Docket 39. The movant appeared before this court on March 27 on a motion in the bankruptcy case, representing to the court that he learned on the evening of March 24 that Mr. Lim suffered a debilitating stroke. Case No. 16-22654, Docket 132. Due to the stroke, Mr. Lim was placed on life support. Mr. Lim passed away subsequently, on April 1. Case No. 16-22654, Docket 140.

Given Mr. Lim's loss of capacity shortly after the service of the instant motion and given his passing approximately 17 days prior to the hearing on the motion, the court will dismiss the motion for inadequate service. If reset for a hearing, the motion should be served on Mr. Lim's successor(s) of interest.

4.	16-22654-A-7 16-2202	MARC LIM	MOTION TO WITHDRAW AS ATTORNEY

CHICK'S PRODUCE, INC. ET AL V. LIM 3-16-17 [23]

Tentative Ruling: The motion will be dismissed without prejudice.

The movant, Walter Dahl, is seeking permission to withdraw as counsel for the defendant Marc Lim.

However, although this motion was served on Mr. Lim, it was served on him on March 16, only one to three days before he became incapacitated. Docket 26. The movant appeared before this court on March 27 on a motion in the bankruptcy case, representing to the court that he learned on the evening of March 24 that Mr. Lim suffered a debilitating stroke. Case No. 16-22654, Docket 132. Due to the stroke, Mr. Lim was placed on life support. Mr. Lim passed away subsequently, on April 1. Case No. 16-22654, Docket 140.

Given Mr. Lim's loss of capacity shortly after the service of the instant motion and given his passing approximately 17 days prior to the hearing on the motion, the court will dismiss the motion for inadequate service. If reset for a hearing, the motion should be served on Mr. Lim's successor(s) of interest.

5. 87-20156-A-7 DALE/ANNA ATKINS MOTION TO
87-2153 BRK-3 RECONSIDER
FIBERGLASS REPRESENTATIVES ET AL V. ATKINS 3-14-17 [71]

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

James Barrett, the assignee of a $282,000 nondischargeability judgment entered by this court on November 15, 1988 against Anna Atkins, seeks reconsideration under Fed. R. Civ. P. 59(e) and 60(b) of this court's March 8, 2017 order denying his application to sell a real property in order to enforce the judgment.

The court had issued an order to show cause, directing the respondent, Sherryll Atkins, administrator of the probate estate of Anna Atkins — a now deceased debtor in the underlying chapter 7 bankruptcy case — to show cause why an order for sale of 518 Catalina Circle, Vallejo, California should not be entered. Dockets 46 & 50.

In his application before this court, Mr. Barrett sought to force an execution sale to enforce the judgment against the property, which the state court has determined to be owned by Dale Atkins (the other debtor in the bankruptcy case) via a joint tenancy right of survivorship.

Sherryll Atkins, as administrator of Anna Atkins' probate estate, opposes this motion.

Anna Atkins and Dale Atkins were married in 1973. On January 12, 1987, Anna and Dale Atkins filed the underlying joint chapter 7 case. Post-petition, in April 1987, creditor Fiberglass Representatives, Inc. filed a nondischargeability adversary proceeding against Anna Atkins. Sometime during 1988, the Atkins purchased the subject real property, taking title as joint tenants. Docket 53 at 6.

After a two-day trial in October 1988, this court — Judge Loren Dahl presiding — entered a money judgment on November 15, 1988 for $282,000 against Anna Atkins, in favor of Fiberglass. The judgment also declared the debt to be

nondischargeable. Anna Atkins had embezzled funds from Fiberglass.

Anna Atkins filed a notice of appeal from the judgment in favor of Fiberglass, with the Ninth Circuit Bankruptcy Appellate Panel, on January 12, 1989. The appeal was dismissed on July 6, 1990.

On October 19, 1989, this court granted Fiberglass' motion for an earnings withholding order against Dale Atkins, the spouse of Anna Atkins.

In August 1990, the state family court entered a dissolution judgment in the marriage of Anna Atkins and Dale Atkins.

In October 1990, Dale Atkins filed a motion for relief from the earnings withholding order. The court heard the motion in January 1991 and entered an order denying it on March 27, 1991.

In upholding the earnings withholding order against Dale Atkins, this court made a factual finding that the 1990 dissolution of Anna Atkins' marriage was a "sham" intended to defeat enforcement of the judgment. Findings of Fact and Conclusions of Law Re: Motion for Relief From Order Granting Issuance of Earnings Withholding Order As To Dale Atkins, Filed March 27, 1991.

On April 1, 1991, Dale Atkins filed a notice of appeal from the order with the Ninth Circuit Bankruptcy Appellate Panel. In January 1992, the BAP affirmed this court's denial of the motion for relief from the earnings withholding order. In affirming this court, the BAP declared the factual finding that the Atkins' 1990 divorce was a sham to be not clearly erroneous.

The BAP stated:

"*The bankruptcy court was not clearly erroneous in its factual determination that the marriage dissolution was a "sham transaction" intended to defeat the wage withholding order. The sham dissolution does not warrant relief from the wage withholding order under Rule 60(b)(5) or (6), nor does Rule 60(b) permit a challenge to the initial validity of the order. Therefore the bankruptcy court did not abuse its discretion by denying Atkins' motion. We therefore AFFIRM the bankruptcy court order.*"

Atkins v. Fiberglass Representatives, Inc. (In re Atkins), 134 B.R. 936, 940 (B.A.P. 9th Cir. 1992).

The nondischargeability judgment was renewed in November 1998. In September 2007, Fiberglass assigned the judgement to Mr. Barrett. The judgment was renewed once again in November 2008. Docket 47 at 3-4.

Anna Atkins passed away in August 2013.

In January 2015, Mr. Barrett asked the state probate court to determine that Anna Atkins had an interest in the real property and to assert jurisdiction over her interest in it, along with some personal property assets that are not relevant to this matter, in order that the interest in the real property might be used to satisfy his judgment.

This court discerns from the limited probate court record that Mr. Barrett invoked Cal. Prob. Code § 5601, arguing that the joint tenancy was severed by the Atkins' 1990 divorce, preventing the automatic transfer of the property (via the right of survivorship) to Dale Atkins. Docket 53 at 6. In effect,

Mr. Barrett acknowledged the validity of the Atkins' 1990 divorce.

Mr. Barrett further argued that the real property was community property at the time of Anna Atkins' death because the family court had retained jurisdiction over it. Docket 53 at 6.

On November 8, 2016, the state court issued a written ruling rejecting both of Mr. Barrett's arguments. Docket 53 at 5-14. The court rejected the applicability of Cal. Prob. Code § 5601, as the statute did not exist at the time of the Atkins' divorce, which was ultimately conceded by Mr. Barrett. Docket 53 at 6.

The state court rejected the community property argument as well. It concluded that the community property presumption did not apply, given Cal. Fam. Code § 802, which prescribes that:

"*The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of the person's death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years before the death.*"

Specifically, the state court determined that the Atkins' 1990 divorce "was final in 1990, 23 years before [Anna Atkins'] death in 2013." Docket 53 at 11. As the Atkins did not change their joint tenancy title within the four-year post-divorce period of section 802, the state court inferred that "it was the intent of [the Atkins] for the title to remain in joint tenancy." Docket 53 at 11. And, "[u]pon the death of Anna Atkins, [title] passed to Dale Atkins automatically outside of the [probate] estate and was not community property." Docket 53 at 11.

As a result, Dale Atkins, as the surviving joint tenant, was determined to be the owner of the real property. On January 12, 2017, Mr. Barrett filed here an application to sell the real property. An order to show cause was issued by this court on January 24 pursuant to that application.

Mr. Barrett sought to force an execution sale of the real property, even though it is owned only by Dale Atkins as the surviving joint tenant and even though he is not a judgment debtor. Mr. Barret relies upon Cal. Prob. Code § 13550, which provides:

"*Except as provided in Sections 11446, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551.*"

Kircher v. Kircher, 189 Cal. App. 4th 1105 (2010), interpreted section 13550 and related section 13551 (a limitation on the liability under section 13550) as allowing liability on a surviving spouse for deceased spouse's debts against property previously held in joint tenancy with the deceased spouse. Kircher at 1114-16.

The applicability of section 13550 hinges on whether Anna Atkins and Dale Atkins were married when Anna Atkins died. That is, Dale Atkins cannot be a surviving spouse at the time of Anna Atkins 2013 death if they were divorced in 1990. To establish they were married in 2013, Mr. Barrett invoked the law of the case doctrine and this court's (Judge Dahl presiding) 1991 determination,

in connection with the wage garnishment, that the 1990 divorce was a sham.

On March 8, 2017, this court entered an order discharging the order to show cause and denying Mr. Barrett's request for the sale of the property. Dockets 65 & 69.

Mr Barrett filed this motion on March 14, 2017, seeking reconsideration of the March 8 order, bringing to this court's attention Dale Atkins' appeal of the order denying relief from the earnings withholding order. Dockets 71 & 73.

Fed. R. Civ. P. 59(a)&(e) provides as follows:

"*(a) . . . (1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues–and to any party–as follows: (A) after a jury trial . . . ; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.*

"*(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.*

"*. . . .*

"*(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.*"

In bankruptcy proceedings, Rule 59 is subject to Fed. R. Bankr. P. 9023, which provides that:

"Except as provided in this rule and Rule 3008 [pertaining to the allowance and disallowance of claims], Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment."

Thus, the deadline for filing a motion for new trial or to alter or amend a judgment and for the court to order sua sponte a new trial is 14 days after entry of the judgment.

"The Court's authority to reconsider an order is governed by the doctrine that a court will generally not reexamine an issue previously decided by the same or higher court in the same case. Lucas Auto. Eng'g, Inc. v. Bridgestone / Firestone, Inc., 275 F.3d 762, 766 (9th Cir.2001); United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir.1998).

"Accordingly, a court has discretion to depart from a prior order when (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. Turner v. Burlington N. Santa Fe R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003) (quoting McDowell v. Calderon, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999) (en banc)).

Further, Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to set aside or reconsider an order or a judgment for:

"*(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.*"

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

Mr. Barrett filed this motion on March 14, 2017, only six days after the March 8 order he is asking the court to reconsider. Hence, the motion satisfies the 14-day deadline of Rule 9023 and it is made within reasonable time for purposes of Rule 60(b).

The court will grant Mr. Barrett's motion for reconsideration, as the ruling pertaining to the March 8 order stated "[t]his court's 1991 determination [that the Atkins 1990 divorce was a sham] was not appealed." Docket 65 at 4. This was a mistake as this court's 1991 factual finding, that the divorce was a sham, was appealed to the BAP and affirmed.

As this was one of the bases for denying Mr. Barrett's request for sale of the real property, reconsideration of the March 8 order is warranted.

Nevertheless, the court is not convinced that the BAP's review of this court's 1991 finding changes the outcome of the court's March 8 order.

Just because this court's 1991 decision was appealed does not mean that this court is automatically divested of discretion not to apply the law of the case.

The exceptions to the law of the case doctrine may apply even as to an issue previously decided by a higher court.

"Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, *or a higher court*, in the same case." Old Person v. Brown, 312 F.3d 1036, 1039 (9th Cir. 2002) (emphasis added) (citing Richardson v. United States, 841 F.2d 993, 996 (9th Cir. 1988)); Minidoka Irrigation Dist. v. Dep't of Interior of United States, 406 F.3d 567, 573 (9th Cir. 2005).

"The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion." United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (citing Arizona v. California, 460 U.S. 605, 618 (1983)).

Application of the law of the case is discretionary. Southern Ry. Co. v. Clift, 260 U.S. 316, 319 (1922) (holding that law of the case merely "directs discretion"); Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012); Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005); Minidoka at 574 (discussing lack of discretion when law-of-the circuit rules apply); Old Person at 1039 (discussing lack of discretion when law-of-the circuit rules apply); United States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000).

"*A [trial] court abuses its discretion in applying the law of the case doctrine only if*

(1) the first decision was clearly erroneous;
(2) an intervening change in the law occurred;
(3) the evidence on remand was substantially different;
(4) other changed circumstances exist; or
(5) a manifest injustice would otherwise result."

Ingle at 594 (citing Lummi Indian Tribe).

Mr. Barrett's citation of and quote from United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986) is inapposite, as the case was limited to:

- prior appellate court decisions, and
- legal issues, not factual ones.

The motion quotes the following paragraph from Houser:

"*The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. All rulings of a trial court are 'subject to revision at any time before the entry of judgment.' Fed.R.Civ.P. 54(b). A trial court may not, however, reconsider a question decided by an appellate court. 'When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.' Insurance Group Comm. v. D. & R.G.W. R.R., 329 U.S. 607, 612, 67 S.Ct. 583, 585, 91 L.Ed. 547 (1947). See Moore v. Jas H. Matthews & Co., 682 F.2d 830, 833-35 (9th Cir.1982) (quoting White v. Murtha, 377 F.2d 428, 431-32 (5th Cir.1967) (a district court must follow the decision of a reviewing court on a legal issue in the case)). Upon remand, an issue decided by an appellate court may not be reconsidered.*"

Houser at 567.

But, this language is dicta and not applicable here because there was no trial court involved in the application of the law of the case in Houser. The Houser court was deciding whether to reconsider a challenge to its jurisdiction given an earlier ruling by the same appellate court. Houser at 567. Ultimately, Houser concluded that the law of the case does not even apply to the question of subject matter jurisdiction. Houser at 569.

Even if applicable, though, the Houser holding is limited solely to legal issues. It does not apply to factual issues.

The paragraph quoted from Houser above is prefaced by the following language:

"The term 'law of the case' applies to the principle that in order to maintain consistency during the course of a single lawsuit, reconsideration of *legal questions* previously decided should be avoided." Houser at 567 (emphasis added). The issue in Houser was a legal one, whether to reconsider a challenge to jurisdiction given an earlier ruling by the same court.

In other words, it is *only* legal issues trial courts must apply the law of the case to, when such issues were resolved previously by an appellate court.

This is evident also from the cases cited by Houser. All cases cited by Houser apply the law of the case to legal issues.

In Insurance Group, the Supreme Court discussed applying the law of the case based on previously affirming a trial court's confirmation of a bankruptcy

plan, with the identical plan once more presented on appeal to the court. Insurance Group, 329 U.S. 607, 609-12.

In Moore, two legal issues were implicated: (1) whether the purchase and installation of grave markers are separate products and services for purposes of tying arrangements; and (2) whether cemetery quality control justifications are appropriate as a matter of law. Moore at 832-35.

White also involved a legal issue: whether the trustees of a labor union pension fund may "setoff against their liability to [a bankruptcy] [t]rustee . . . the amount of liabilities necessarily incurred for the operation of the [debtor's] business . . . and subsequently paid by the [pension fund]." White at 431-32.

The legal issue versus factual issue dichotomy exists also because of the different standards of appellate review for legal and factual issues.

The standard for appellate review of legal issues is de novo, a far more stringent standard than that of factual issues, *i.e.*, clearly erroneous. The de novo standard allows appellate courts to review legal issues anew, as if no decision had been rendered previously by the trial court. See, e.g., Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006).

This means that on legal issues decided by an appellate court previously, the trial court will have no discretion not to apply the law of the case. Only a substantial intervening change — like a change in the law — may be an exception to the law of the case.

On the other hand, on factual issues decided by an appellate court previously, the trial court will have discretion not to apply the law of the case because the appellate court gave deference to the trial court's determinations. See, e.g., United States v. Cazares, 121 F.3d 1241, 1245 (9th Cir. 1997). This is especially true when an appellate court merely confirms the trial court's reading of the facts not to be clearly erroneous. It is a determination only that the factual record supports the trial court's reading of the facts.

In this case, the issue is a factual one, *i.e.*, whether the Atkins' 1990 divorce was a sham. No legal issues are involved.

When it reviewed this court's finding that the divorce was a sham, the BAP merely stated that this court was not clearly in error in reaching the finding. It was a clearly erroneous standard of appellate review, applied to this court's factual determinations.

According to the BAP, this court was merely not wrong in finding that the divorce was a sham. The BAP did not state that the divorce was indeed a sham. It was not a de novo review.

This court then is not required to blindly apply the law of the case, without discretion, just because an appellate court determined this court not to be wrong on a factual issue. The exceptions to the law of the case are relevant to its applicability.

Applying the law of the case is not appropriate because injustice would result and the circumstances have changed since this court's 1991 decision.

First, as discussed in the court's ruling for the March 8 order, Mr. Barrett

should have challenged the validity of the Atkins' divorce with the court that issued the divorce decree, namely, the state court. Docket 65.

As with all other state court judgments, this court is required to give full faith and credit to marital dissolution judgments. See, e.g., Webster v. Hope (In re Hope), 231 B.R. 403, 418-19 (Bankr. D.C. 1999).

It is for the court that entered the dissolution judgment to decide whether the divorce was indeed a sham. Until then, this court must give full faith and credit to the dissolution judgment.

Under 28 U.S.C. § 1738:

"*The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.*

"*Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.*"

To allow Mr. Barrett to challenge the divorce decree here, without petitioning the state court that entered it, would be unjust.

Second, applying the law of the case and ignoring the probate court's 2016 decision validating the divorce would cause further injustice because, based on the limited record before this court, Mr. Barrett did not assert that the divorce was a sham before the probate court.

The California probate court has recognized the validity of the divorce judgment and has refused to treat it as a sham. In November 2016, the probate court recognized the 1990 divorce as valid.

Yet, this court has no evidence in the record that Mr. Barrett argued in probate court: against the validity of the divorce or that this court's 1991 decision on the divorce is binding on the probate court.

Rather, his arguments were premised on the validity of the divorce. He asked the probate court to decide that Anna Atkins had an interest in the real property based on severance of the joint tenancy due to the divorce and based on the divorce court's retention of jurisdiction over the property. Mr. Barrett then acknowledged the validity of the Atkins' 1990 divorce before the probate court.

Permitting Mr. Barrett to take inconsistent positions on the same issue before this court and the probate court is unjust, as it creates the risk for inconsistent results.

Third, it would be manifestly unjust for this court to apply the law of the case and collaterally revisit a judgment in a family law matter — an area of law traditionally left to the purview of state courts.

The injustice would be exacerbated given the same state court's 2016 validation of the divorce.

This court cannot ignore a state court judgment recognizing a divorce decree it issued 27 years ago as valid, despite a ruling to the contrary by this court 26 years ago.

Fourth, the probate court recognized the divorce's validity with respect to the same real property that is the subject of this proceeding. This court's 1991 decision, on the other hand, ruled on the validity of the divorce with respect only to Dale Atkins' earnings. As such, the probate court's decision is much more relevant to the finding on the validity of the divorce as to the real property than is this court's 1991 ruling.

Finally, the probate court's 2016 decision is a sufficient change in circumstances to require that it be followed by this court.

In the presence of two inconsistent judgments in different actions, it is the latter judgment that controls in a third action. Rest. Judg. 2d § 15. The last-in-time rule applies when a party fails to rely on the first action judgment in a second action, and an inconsistent second action judgment is entered. See, e.g., Dimock v. Revere Copper Co. of Boston, 117 U.S. 559, 565-66 (1886); Rest. Judg. 2d § 15. The last-in-time rule also applies when a party has relied without success on the first action judgment in the second action. See, e.g., Treinies v. Sunshine Mining Co., 308 U.S. 66, 76-78 (1939), reh. denied, 309 U.S. 693 (1940); Rest. Judg. 2d § 15.

This court's 1991 ruling and the probate court's 2016 ruling have led to inconsistent judgments. This court's ruling resulted in an order subjecting property of Dale Atkins (his earnings) to enforcement of the judgment.

On the other hand, the probate court's ruling resulted in a determination that Anna Atkins and her probate estate had no interest in the subject real property and therefore Mr. Barrett could not enforce the judgment against the real property, at least insofar it belonged to Anna Atkins.

The court will not apply the law of the case here as it would be inconsistent with the outcome in the probate case which recognized the validity of the divorce.

In conclusion, given the recent probate court determination, Mr. Barrett's inconsistent positions in this and the state courts, the state courts' preeminence in family and probate matters, and the extraordinary lapse of nearly 26 years since this court's prior determination, applying the law of the case is not appropriate.

As a result, Mr. Barrett cannot avail himself of Cal. Prob. Code § 13550, which requires Anna Atkins to have been married at the time she passed away in 2013. With a valid divorce in 1990, approximately 27 years ago, the Atkins were divorced in 2013 when Anna Atkins passed away. Consequently, Dale Atkins is not liable for the payment of the judgment to the extent required by section 13550.

While the court is altering its ruling on the March 8 order as outlined here, the outcome remains the same. The order to show cause will be discharged and Mr. Barrett's application for sale of the property will be denied. For the reasons in this ruling, the March 8 order will stand. This motion will be

granted in part and denied in part.

6. 87-20156-A-7 DALE/ANNA ATKINS — MOTION TO
87-2153 SDW-4 — DISGORGE FEES AND FOR SANCTIONS
FIBERGLASS REPRESENTATIVES ET AL V. ATKINS — 3-17-17 [75]

Tentative Ruling: The motion will be denied.

Dale Atkins, the surviving debtor in the underlying bankruptcy case, seeks an order:

(1) compelling creditor James Barrett, the assignee of a $282,000 nondischargeability judgment entered by this court on November 15, 1988 against Anna Atkins, to disgorge funds he has received from enforcement of the judgment against Dale Atkins;

(2) sanctioning Mr. Barrett for "raising the same state law argument in this court that had already been conclusively rejected, on the same grounds, in the state court;" and

(3) sanctioning Mr. Barrett for filing pleadings in this court revealing protected personal information of Dale Atkins.

Mr. Barrett opposes the motion.

The court incorporates here by reference its ruling on the related motion to reconsider, DCN BRK-3.

First, the court will not order Mr. Barrett to disgorge anything collected on account of this court's 1988 judgment against Anna Atkins from Dale Atkins. The court has no evidence that anything collected from Dale Atkins was pursuant to an invalid or unenforceable order.

The 1988 judgment against Anna Atkins is still valid and enforceable. The same is true as to the earnings withholding order. The order was entered in 1991 and then it was appealed by Dale Atkins. But, Mr. Atkins lost the appeal.

The probate court's validation of the Atkins' 1990 divorce in 2016 does not automatically undo the validity of the earnings withholding order. This court will not overturn one of its prior orders simply because it is willing to recognize a judgment by another court that is inconsistent with its prior order.

Moreover, "[a] motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c). Once again, the earnings withholding order was entered in 1991, 26 years ago.

Second, the court will not award sanctions against Mr. Barrett for "raising the same state law argument" he purportedly raised before the probate court in 2016.

The court disagrees that Mr. Barrett made the same arguments here as he raised with the state court in 2016. As discussed in the court's ruling on the related motion to reconsider, DCN BRK-3, Mr. Barrett's arguments in the probate court were based on the Atkins' 1990 divorce being valid.

Here, on the other hand, Mr. Barrett has argued that this court should follow its prior decision that the divorce was a sham, intended to defeat enforcement of the 1988 judgment against Anna Atkins. Mr. Barrett could not have made the law of the case arguments in state court that he made here. The arguments here have been premised on this court being bound by its prior determination about the divorce.

More, the law of the case argument raised by Mr. Barrett here is a colorable argument, grounded in both fact and law. As discussed at length in the ruling on the motion to reconsider, this court has some discretion to apply the law of the case based on its prior ruling about the divorce.

Finally, Mr. Barrett filed tax returns of Dale and Anna Atkins with the court on January 12, 2017, without redacting their protected personal information. Docket 49. On March 5, 2017, Dale Atkins filed an ex parte motion, consisting of two pleadings with a total of less than three pages, seeking the sealing of the returns. Dockets 62 & 63. The court entered an order on March 6, sealing the returns. Docket 64.

While Dale Atkins claims to have sustained harm due to Mr. Barrett's filing, he mentions only attorney's fees and costs in having to request the sealing. And, the motion is not accompanied with evidence of what attorney's fees and costs were incurred by Dale Atkins in sealing the documents filed by Mr. Barrett. There is only one declaration in support of the motion and it is lacking such evidence. See Docket 77.

Dale Atkins also identifies other sustained harm, but only as "potential harm." Docket 75 at 5.

The court will not speculate about, much less award damages for unidentified, potential or unsupported by evidence harm. The motion will be denied.