

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

May 26, 2016 at 1:30 p.m.

1. [10-37416](#)-E-13 SHARION WILTON MOTION FOR ENTRY OF DEFAULT
[15-2243](#) DBJ-1 JUDGMENT
WILTON V. BANK OF AMERICA, 4-21-16 [[16](#)]
N.A.

Tentative Ruling: The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Chapter 13 Trustee, and Office of U.S. Trustee on April 25, 2016. By the court's calculation, 60 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is granted.

Sharion Wilton ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on April 21, 2016. Dckt. 16. The Plaintiff-Debtor is seeking an entry of default judgment against Bank of America, N.A. ("Defendant"), in the instant Adversary Proceeding No. 15-02243.

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The instant Adversary Proceeding was commenced on December 17, 2015. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on December 17, 2015. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Fed. R. Bankr. P. 7055(a) by the Clerk of the United States Bankruptcy Court on March 30, 2016. Dckt. 11.

COMPLAINT

The Complaint contains the following general allegations as summarized by the court:

1. Plaintiff-Debtor owns and resides in a parcel of real property known as 178 Picholine Way, Chico, California ("Property").
2. The Property had a fair market value of approximately \$285,000.00.
3. Plaintiff-Debtor filed a Chapter 13 Bankruptcy Case No. 10-37416 on July 1, 2010.
4. As of the petition date the following liens encumbered the Property:
 - a. First Deed of Trust in favor of Bank of America, N.A. in the amount of approximately \$287,907.00.
 - b. Second Deed of Trust in favor of Defendant.
5. Defendant has made a claim on Plaintiff-Debtor related to the Second Deed of Trust in the amount of approximately \$82,994.00.
6. As of the date of the filing of the Chapter 13 bankruptcy, the Second Deed of Trust was entirely unsecured. The Honorable Judge Sargis granted the Motion to Value Collateral of Defendant, valuing the secured portion of the claim as \$0.00. Case No. 10-37416, Dckt. 33.
7. On August 26, 2015, Plaintiff-Debtor's counsel sent Defendant a letter requesting reconveyance of the subject deed of trust.
8. Plaintiff-Debtor received her discharge after completion the plan on November 9, 2015.

First Claim of Relief - Declaratory Relief

The Plaintiff-Debtor alleges the following for the First Cause of Action:

1. Included in the debts discharged is the Defendant's claim.

2. Pursuant to California Civil Code 2941 (a), thirty days having passed after the satisfaction of the mortgage by discharge in case 10-37426, Defendant has failed to execute a certificate of the discharge thereof, as provided in Section 2939, nor has recorded or caused to be recorded, in Butte County.
3. As a direct result of Defendant's conduct, Plaintiff-Debtor has sustained damages including but not limited to attorney fees and costs. Defendant are further liable for \$500.00 pursuant to Civil Code Section 2941(d).

Prayer

The Plaintiff-Debtor requests the following relief in the complaint's prayer:

1. The court issue an order finding that the deed of trust recorded in the official records in the County of Butte, against the real property located at 178 Picholine Way, Chico, California, APN 018-400-015, is void and of no further force or effect as a lien or encumbrance on the property.
2. The court order compensatory damages according to proof.
3. The court order attorney fees and costs in bringing the action
4. For such other and further relief as the court deems just and proper.

MOTION

Debtor filed a Motion on July 28, 2015. Dckt. 11. The Plaintiff-Debtor requests the following in the Motion:

2. The court should enter a default judgment declaring the deed of trust is void.
 - a. "Here, both the plan and the motion to value 'stripped' the lien of Defendants which Defendants are obligated to reconvey upon discharge. Defendants have ignored this obligation and are delegating that responsibility to the Plaintiffs' Counsel and this Court"
3. The court should award attorney fees
 - a. "As a result of the failure of Defendants to provide a reconveyance, Plaintiffs have incurred attorney fees totaling \$1567.50.00 [sic]. . . Because the note and deed of trust provide for attorney fees which are reciprocal under California law, the court should include attorney fees in the judgment."
4. The court should award \$500.00 pursuant to Civil Code Section

2941.

- a. "It is clear that the Defendants have had plenty of opportunity to provide the reconveyance but have failed to do so making Defendants liable for an additional \$500.00."

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Reconveyance

That First Cause of Action seeks a declaration as between the parties that the court's October 12, 2010 order is a real, enforceable order, and that it really means that Defendant's secured claim has a value of \$0.00 (now that the plan has been completed), and therefore there is no debt for the Deed of Trust to secure.

Plaintiff-Debtor states that on July 1, 2010 she filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) First Deed of Trust in favor of Bank of America, N.A. in the amount of approximately \$287,907.00. and (2) Second Deed of Trust in favor of Defendant in the amount of \$82,994.00.

Plaintiff-Debtor states that on or about July 29, 2015, the Plaintiff-Debtor completed their Chapter 13 plan which required the Defendant to reconvey the Deed of Trust on the Property. Plaintiff-Debtor was discharged on November 9, 2015. Case No. 10-37416, Dckt. 85.

According to the Trustee's Final Report and Account in the Plaintiff-Debtor's bankruptcy case, Case Number: 2010-37416, Debtor's Plan was confirmed on April 9, 2011, and completed on July 29, 2015. Bankr. E.D. Cal. No. 10-37416, Dckt. 77, September 15, 2015. The discharge of Plaintiff-Debtor was entered on November 9, 2015. Bankr. E.D. Cal. No. 10-37416, Dckt. 85. Plaintiff-Debtor states that more than 30 days have passed and Defendants have not reconveyed, and that Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to the full reconveyance of the Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan which provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant-OneWest, and creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA 9 LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant-OneWest] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff-Debtor completed their plan on July 29, 2015. To date, Defendant has not reconveyed the Deed of Trust as required by § 2941 within 30 days after the obligation has been satisfied (here being after the completion of the plan).

Statutory Penalty

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars (\$500).

Cal. Civ. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- I. Within 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:
 - A. execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - B. The trustee shall execute and record the reconveyance within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - C. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.
- II. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within 60 calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

Cal. Civ. § 2924(b)

The 30-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff-Debtor presents evidence, which is uncontradicted, that as of July 29, 2015, Defendant knew of the bankruptcy plan being completed and a "demand" by Plaintiff-Debtor that the deed of trust had to be reconveyed.

Defendant failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the 30-day period.

Attorney's Fees

The Plaintiff-Debtor in their Third Cause of Action request attorney's fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, the Plaintiff-Debtor argues that they are entitled to reimbursement of attorney's fees under the reciprocal contractual attorney's fees because the Deed of Trust contains an attorney's fees and cost provision.

For their request pursuant to § 2941, the Plaintiff-Debtor asserts that it they are entitled to fees as the prevailing party in this action.

Plaintiff-Debtor has not provided evidence of relevant provision in the deed of trust or note that would entitle the Plaintiff-Debtor to attorneys' fees upon application of California Civil Code § 1717.

CONCLUSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and her interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant Bank of America, N.A. has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of \$0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it

necessary and proper for the entry of a default judgment against the Defendant.

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiff-Debtor states that the underlying contract has an attorney fees provision that, pursuant to § 1717(a), is reciprocal. Unfortunately, the Plaintiff-Debtor failed to provide evidence of the contract provision nor does the Plaintiff-Debtor submit a properly authenticated deed of trust

While the Plaintiff-Debtor's counsel has also provided a billing statement, showing approximately 5.5 hours working on the complaint, status conference, preparation of entry of default, and hearing, the failure to provide a copy of the contract makes it impossible for the court to grant the relief requested.

Though one might think that the court could take "judicial notice" that almost every note and deed of trust used by an institutional lender has an attorneys' fees provision, it is a fact specific issue. It is possible that while there may be an attorneys' fee provision, it is narrowly drawn and does not relate to title issues.

Therefore, the Plaintiff-Debtor's request for attorney's fees based on a contractual provision is denied without prejudice. FN.2.

FN.2. Plaintiff-Debtor did not attach a copy of the note or deed of trust to the Complaint. Neither did Plaintiff-Debtor include any copies as exhibits in support of the Motion. No copy of a proof of claim filed by Bank of America, N.A. is provided as an exhibit.

The Motion to Value the secured claim names "Bank of America" as the creditor whose claim is to be valued. It is asserted that the amount of the

creditor's claim was \$82,994.00.

CALIFORNIA CIVIL CODE SECTION 2941

Plaintiff-Debtor also seek an award of \$500.00 pursuant to California Civil Code Section 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

California Civil Code § 2941(b)(1) imposes an affirmative obligation on the beneficiary (creditor) when the obligation secured by the deed of trust has been satisfied. When no obligation remains, the beneficiary must instruct the trustee under the deed of trust to issue a full reconveyance of the deed of trust. Once the obligation no longer exists, resulting in the lien being extinguished by operation of law, the trustor or mortgagor (debtor) is entitled to a certificate of discharge, the mortgage cancelled or satisfied as of record, and the deed of trust reconveyed.

Here, Defendant Bank of America, N.A. failed to have the deed of trust reconveyed after the obligation secured had been satisfied, as required by California Civil Code § 2941(b)(1). Therefore, the violation of that section allows Plaintiff-Debtor to seek the penalty of \$500.00 pursuant to California Civil Code Section 2941(d).

The attorneys' fees provisions of California Civil Code § 2914(b)(5) apply only to a title company, not the beneficiary or owner of the note.

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendant Bank of America, N.A. and holds that the deed of trust is void. The court further awards \$500.00 pursuant to California Civil Code Section 2941(d).

The court denies without prejudice the request for default judgment as to attorney's fees in light of the Plaintiff-Debtor failing to provide evidence as to the relevant contract provisions.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default Judgment filed by Plaintiff-Debtor Sharion Wilton having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by Bank of America, N.A. against the real property commonly known as 178 Picholine Way, Chico, California, APN 018-400-015, with the County Recorder for Butte County, California, is void, unenforceable,

and of no force and effect. Further, the judgment shall adjudicate and determine that Bank of America, N.A. has no interest in the real property pursuant to the Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiff-Debtor's request for attorney fees is denied without prejudice.

IT IS FURTHER ORDERED that the Plaintiffs are awarded \$500 pursuant to California Code Section 2941(d).

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that attorneys' fees and costs allow by the court shall be enforced as part of the judgment. A motion for attorneys' fees and costs bill shall be filed and served on or before June 18, 2016.

5.	11-27845-E-11 IVAN/MARETTA LEE 15-2194 TGC-3 LEE ET AL V. CITY OF SACRAMENTO COMMUNITY	MOTION TO DISMISS ADVERSARY PROCEEDING 3-31-16 [98]
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Final Ruling: No appearance at the May 26, 2016 hearing is required.

The court having previously dismissed without prejudice the Motion to Dismiss Adversary Proceeding (Dckt. 108), **the Motion to Dismiss Adversary Proceeding is removed from the calendar.**