

UNITED STATES BANKRUPTCY COURT

Eastern District of California
Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 19, 2014 at 9:30 a.m.

1. [13-20051-E-7](#) TYRONE BARBER
RM-1

AMENDED MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-19-14 [[242](#)]

ROSE MAGNO VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay 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 Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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 are entered.

The Motion for Relief From the Automatic Stay is denied.

Rose Magno, who identifies as a Creditor of the Debtor on a child support claim that has not yet been fully satisfied by the Debtor ("Movant"), seeks an order for relief from the automatic stay imposed by 11 U.S.C. § 362(a) to allow Movant to continue pursuing her family law cases filed in Alameda County Superior Court. Debtor alleged owes Movant's minor children the sum of \$55,000 in settlement of a child support claim.

Additionally, Movant states that the Debtor has owed Movant \$16,233 in child support arrears since 2007. Movant has incurred attorney fees and legal

June 19, 2014 at 9:30 a.m.

costs in pursuing the collection of the amount owed. Movant requests relief from the automatic stay to pursue her California family law cases against Debtor, Case Nos. RG-11570236 and RF-04134982, for collection of the money owed and for costs and fees.

LIMITED OPPOSITION BY TRUSTEE

The Chapter 7 Trustee, Gary Farrar, submits limited opposition to the Motion. Dckt. No 260. Trustee states that the Second Amended Motion is the second amendment to a previous motion for relief from stay filed by Movant. Movant's original Motion appears at Docket Number 236, while her First Amended Motion appears at Docket Number 240. Movant has previously filed two proofs of claim in this case (Claim Numbers 11 and 12).

In her Second Amended Motion, Movant states that she seeks relief from the automatic stay to pursue her family law cases against Debtor. In connection with her original motion, Movant filed a declaration stating that she seeks relief from stay to proceed in state court in Alameda County "under Bankruptcy code 523A15 [sic]..." (Docket No. 238 at 2). To the extent Movant seeks only to proceed in state court to collect allegedly non-dischargeable sums from the Debtor, the Trustee takes no position on the Second Amended Motion, or the procedural propriety of the relief Movant seeks.

However, to the extent that Movant is seeking to liquidate her claims, or to have a state court affirmatively find them to be Domestic Support Obligations, the Trustee opposes the Second Amended Motion. Movant already has proofs of claim in this case setting forth the amounts she claims that she is owed, including amounts alleged to be Domestic Support Obligations. The Trustee is still investigating the proofs of claims, which involve highly contentious, long-running litigation between the Debtor and Movant, in multiple forums. Trustee has not made a determination as to whether he will object to the Movant's proofs of claims, and it is not clear there will ever be sufficient funds generated in the estate to justify further analysis of the proof of claims.

In the interim, Trustee states that the Movant's Proofs of Claims are deemed allowed, unless and until objections thereto are filed and sustained. Potential disputes concerning Movant's proofs of claims are properly the subject of the claims objection process, and should be decided in this court. Trustee asserts that the bankruptcy estates should not be required to expend resources it does not have to litigate in the Alameda County Superior Court, concerning the amount and nature of the Movant's proofs of claims in this case.

OPPOSITION BY DEBTOR

Debtor, Tyrone Barber, opposes the motion for relief from the automatic stay. Ruth Magno is the mother of the Debtor's two children, Cameron Barber and Preston Barber. Debtor alleges that Ms. Magno is not diligent in child support and is in contempt for failure to pay attorneys fees to Debtor's attorney. She is listed in the Debtor's schedules as owing \$112,000. An excerpt of the long cause order for child support is attached marked Exhibit A in support of the Motion. FN.1. No declaration is provided to authenticate the exhibits, nor is there any contention that they are self authenticating. Fed. R. Evid. 901. Further, while the Opposition makes reference to many factual statements, no evidence has been provided in support of such

contentions. Fed. R. Evid. 401, 601, 602, 801, 802.

FN.1. The exhibits that Debtor refers to are attached to the actual Opposition to the Motion as one continuous document, Dckt. No. 259, instead of being separated into different docket entries. This is not the practice in the Bankruptcy Court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1).

Ms. Magno requests relief from the automatic stay to continue two claims against Debtor. She contends that the claims are family law cases. Ms. Magno's Proof of Claim No. 1 is for \$93,500. The basis of the claim for \$55,000 is a "Stipulation re: Defendant's Attorney to Open Interest Bearing Trust account For Deposit of Funds To Fund Settlement Agreement and Order Thereon" and an order granting that stipulation. The claim is for \$55,000 plus \$5,500 per year interest. Ms. Magno states that there is a pending civil case regarding this claim.

Debtor states that Ms. Magno's explanation lists case numbers of existing cases, but does not inform the court if any of these cases have settled, or if any amounts have been paid. Debtor argues that to the extent there is a pre-petition claim, for monies due, it should be adjudicated by this court.

Ms. Magno filed a second claim, for \$16,233, with a proof of service from the Debtor's attorney on Ms. Magno's attorney. Debtor characterizes Ms. Magno's document as a mish mash of several documents. She has for instance, attached the order for the special master which Debtor states has no bearing on the claim. All the other pages are from various documents.

Debtor states that as will be seen from the Report of the Special Master, Ms. Magno owes money for fees to the Special Master, personally, and has no claim against the Debtor. Ms. Magno wants to sue the Debtor in state court, and seek assets of the Debtor which should be included in the Bankruptcy Estate. Further, since this is a claim for payment of attorney's fees, and it seeks monies from the Bankruptcy Estate, Debtor argues that it does not seem appropriate to give Ms. Magno a preference over all other creditors making claims against the Debtor's estate.

The motion for relief seeks relief to pursue to two state cases in the Alameda County Superior Court, RG-11570236 and RF-04134982. Ms. Magno makes allegations that Debtor owes \$55,000 and \$16,233 in child support and/or arrears. She alleges that Debtor used his family law attorney Mr. Hannon to shield him from paying his debt to his children by accusing Ms. Magno of child abuse. She alleges that Debtor is hiding behind the Bankruptcy court to

discharge his debt from his children and Ms. Magno. Ms. Magno further alleges the case was converted to Chapter 7 from a Chapter 13. Debtor counter-argues that this is incorrect, and that the case was converted from a Chapter 11 bankruptcy after a Philippine typhoon destroyed Debtor's property. Further, attorney's fees were not denied to Mr. Guthrie, as Ms. Magno alleges, but approved. In her motion, Ms. Magno cites 11 U.S.C. § 523 (a), presumably arguing that obligations for child support are not dischargeable.

Debtor has attached a copy of the Order Approving A Good Faith Settlement and the Points and Authorities for the Motion for Good Faith Settlement. Debtor claims that Ms. Magno has been paid \$52,500 (more than the underlying claim). Ms. Magno now claims more in her proof of claim than she claimed in the underlying lawsuit. The Motion for Good Faith Settlement states that the Debtor did make payments, but alleges three were outstanding. Debtor claims that it appears from the Motion for Good Faith Settlement and the Order Granting Motion for Good Faith Settlement, however, that all claims of Ms. Magno have been satisfied by Mr. Hannon and his insurer.

Ms. Magno has also attached excerpts of the Special Master's recommendations to her declaration regarding her Motion for Relief from Stay. Debtor points out that, as Exhibit C shows however, the master states that there were modifications to the original stipulation excerpts attached. The Master rejected for instance, Ms. Magno's claim for dental work on her children. This bankruptcy was filed on December 20, 2012. The family law case continued to be litigated beyond this date and the special master continued to make his recommendations. Ms. Magno never paid the special master's fees. Based on the Special Master's corrected findings Debtor made certain payments and received credits. Debtor asserts that the Special Master determined that Debtor owed Ms. Magno about \$6,000.

Currently, in the family law case, Ms. Magno is ordered to pay child support, sanctions, and attorneys fees to the Debtor and his attorney. On September 18, 2012, Ms. Magno was ordered to pay the Debtor \$25,000 in attorney's fees the Debtor incurred in the family law case.

"Petitioner shall pay to Respondent, as and for need based attorney's fees and costs incurred by the Respondent in this matter related to the Order to Show Cause filed October 16, 2009, the sum of \$25,000. Said sum shall be payable at the rate of \$500 per month commencing October 1, 2012 and continuing until paid in full. Said sum shall bear interest at the legal rate of 10% per annum commencing October 1, 2012. In the event that the Petitioner becomes more than 30 days in arrears on any payment on attorney fees and costs as ordered herein then the entire balance shall become due and payable forthwith."

See Exhibit D, page 32, Order of Superior Court Judge Pulido.

Debtor states that this is a proper claim of the Estate/Debtor against Ms. Magno. As no amounts have been paid in accordance with the order, the entire amount is accelerated. Debtor argues that there if there is a claim of the Estate for money and Ms. Magno has filed claims in this court, this Court should adjudicate any claims. On May 29, 2012, Ms. Magno was ordered to pay child support to Debtor. There have been two payments but the arrears now

exceed \$75,000. This amount Debtor claims as exempt. However, the child support maybe the subject of exemption litigation. See 11 U.S.C. §362(b)(2). The Payment History of Ms. Magno is attached as Exhibit F.

Debtor claims that the Payment History document shows that as of September 2012, \$56, 429.19 is owed. This amount now exceeds \$75,000, which Debtor claims is part of the bankruptcy estate. The Debtor has claimed this amount exempt, but the Trustee has retained its rights to object to Debtor's exemptions. All of the information to collect against Ms. Magno has been turned over to the Chapter 7 Trustee. The Trustee has not yet, as far as Debtor is aware, taken any steps to collect on these obligations.

Debtor argues that to the extent that Ms. Magno has filed claims against the estate, those claims should be adjudicated in this bankruptcy court. To the extent that her claims have validity, those claims should share in any assets of the estate. Debtor asserts that the claims are a mixture of claims for child support and non-child support (merely contractual claims against the Debtor).

Debtor argues that Debtor's estate has claims against Ms. Magno which should be adjudicated in this court. Debtor asserts that in certain instances, litigation is exempted from the automatic stay of 11 U.S.C. § 362. Ms. Magno's claims are only for the collection of money. Her claims do not fall under the exceptions to the automatic stay of 11 U.S.C. § 362(b)(2)(A). The claims are not for proving paternity (11 U.S.C. §362(b)((2)(A)(I))), establishment or modification of an order for domestic support (11 U.S.C. §362(b)(2)(A)(ii)), for the establishment of child custody or visitation (11 U.S.C. §362(b)(2)(A)(iii) (this has already been completed), for the dissolution of marriage (11 U.S.C. §362(b)(2)(A)(iv)) (the Debtor and Ms. Magno are not married), nor are the claims regarding domestic violence (11 U.S.C. §362(b)(2)(A)(v)).

Under 11 U.S.C. §362(b)(2)(B), actions that are undertaken for the collection of child support are not exempted from the automatic stay when child support obligations are sought from the property of the estate. 11 U.S.C. §362(b)(2)(B); see also *In re Gazzo*, 505 B.R. 28, 40 (Bankr. D. Colo. 2014). Here however, Ms. Magno's efforts to obtain money from Debtor fail under to fall under this exemption because she seeks to recover from property of the estate. Ms. Magno seeks to collect a child support obligation from property of the estate (she may collect domestic support obligations from property that is not property of the estate). 11 U.S.C. §362(b) (2) (B) is explicit in stating that the exemption to the automatic stay is applicable only to "property that is not property of the estate." 11 U.S.C. §362(b) (2) (B) (emphasis added).

Debtor argues that because Ms. Magno is seeking to recover from the property of the estate, relief from the automatic stay is inapplicable here. *In re Lawida*, BAP AZ-10-1443-DKIMY, 2011 WL 4502060 (B.A.P. 9th Cir. Aug. 1, 2011) (holding that "only actions seeking collection of a domestic support obligation from non-estate assets are excepted from the automatic stay.") Debtor claims that Ms. Magno's claims do not come within any of the exceptions of 11 U.S.C. §362. She wants to pursue contract claims to obtain money. Meanwhile, the Estate has claims against Ms. Magno, which are the Trustee's obligation to pursue in this bankruptcy.

DISCUSSION

Ms. Magno has already filed Proofs of Claim No. 11 and No. 12, claiming amounts owed of \$93,500.00 and \$22,235.24 respectively, for child support payments and unpaid arrears on prior payments.

The Trustee states that he is continuing to investigate Ms. Magno's proof of claims, which involve highly contentious, complex litigation between the Debtor and Movant. The Trustee has not made a decision as to whether he will object to Ms. Magno's claims, and requests that in the interim Ms. Magno's Proofs of Claims be deemed allowed, unless objections are filed and considered by the court. Trustee asserts that the proof of claims, if challenged, should be subject to the claims objection process and be adjudicated in this court. Trustee argues that the bankruptcy estate should not be required to use additional resources to litigate the matter, and to determine the amount and nature of the Movant's proofs of claims in this case.

Congress has addressed when the automatic stay should not apply in connection with family law matters. The provisions of 11 U.S.C. § 362(b)(2), which states,

(b) The filing of a petition under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 U.S.C. § 78eee(a)(3)], does not operate as a stay-

...

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

(I) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section

466(a)(16) of the Social Security Act [42 U.S.C. § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 U.S.C. § 666(a)(7)];

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 U.S.C. §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 U.S.C. §§ 601 et seq.];....

The Motion has been filed by Ms. Mango in *pro se* and supported by a two page declaration that has attached to it 23 pages of unauthenticated exhibits. Dckt. 236. As with the Debtor, these unauthenticated documents are dumped on the court.

This Motion and the Opposition by Debtor is a prime example of how battles between Ex's being waged in state court often times is attempted to be exported to the federal court so the parties can continue in a "War of the Roses Battle" without regard to their actual respective rights and their obligations to minors. FN.2.

FN.2. War of the Roses is a 1998 Movie directed by Danny DeVito which stars Michael Douglas, Kathleen Turner, and Danny DeVito. The storyline for the movie relates to the unrelenting campaign spouses wage against the other in a divorce battle over who will be victorious in retaining their home, and successfully punishing the other. One description of the plot line is,

"In an effort to win the house, Oliver offers his wife a considerable sum of cash in exchange for the house, but Barbara still refuses to settle. Realizing that his client is in a no-win situation, Gavin advises Oliver to leave Barbara and start a new life for himself. In return, Oliver fires Gavin and takes matters into his own hands. At this point, Oliver and Barbara begin spiting and humiliating each other in every way possible, even in front of friends and potential business clients. Both begin destroying the house furnishings; the stove, furniture, Staffordshire ornaments, and plates. Another fight results in a battle where Barbara nearly kills Oliver by using her monster truck to ram Oliver's antique automobile. In addition, Oliver accidentally runs over Barbara's cat in the driveway with his car. When Barbara finds out, she retaliates by trapping him inside his in-house sauna, where he nearly succumbs to heatstroke and dehydration."

www.Wikipedia.org and www.imbd.com.

Such battles are not permitted to be transported to federal court.

While the Debtor appears to be indigent that Ms. Magno states that the case was filed as a Chapter 13 case rather than the Chapter 11, Debtor ignores the reasons why the case was converted to one under Chapter 7. The grounds stated by the court for the conversion include the following:

- A. Debtor's in Possession failure to prosecute the Chapter 11 case.
- B. Though the case had been pending for one year, "the court was also concerned that this case, having been filed on December 20, 2012, little had been accomplished other than employing professionals and the filing of fee applications."
- C. The proposed Chapter 11 Plan failed to provide any specifics as to how the Debtor would perform, any standards by which performance could be benchmarked, provided no financial substance for repayment of claims, and failed to provide for general unsecured claims as filed in the case (limiting payment to only what the Debtor stated in his Bankruptcy Schedules).
- D. The Plan failed to provide for the priority tax claims.
- E. The Debtor proposed, without providing any information or basis, that he would fund the plan with \$1,500.00 a month payments, plus an additional \$2,144,584 from the operation of his business.
- F. No adequate financial information was provided in the proposed disclosure statement.

Civil Minutes, Dckt. 165. The prosecution of the Chapter 11 case by the Debtor, serving as Debtor in Possession, was not a highwater mark for him, and it is curious that he wants to bring this back to the court's attention.

From the Motion for Relief, the court cannot identify what relief Ms. Mango desires beyond that already granted statutorily by Congress. She cannot have the state court intrude on the bankruptcy process or the Trustee's administration of property of the estate (including recovery of any such property which is undisclosed or in the hands of Ms. Mango, the Debtor, or third-parties).

The Motion is denied without prejudice.

COURT PREPARED ORDER

The court shall issue an Order (not in minute order form) substantially in the following form holding that:

The Motion for Relief From the Automatic Stay filed by Rose Magno 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 Relief from the Automatic Stay is denied without prejudice. The Bankruptcy Code provides a statutory exclusion from the automatic stay for certain act and actions in connection with state family law

June 19, 2014 at 9:30 a.m.

- Page 8 of 10 -

issues.

For the convenience of the state court and the parties, the court provides the following recitation of 11 U.S.C. § 362(b)(2) stating this exclusion,

(b) The filing of a petition under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 U.S.C. § 78eee(a)(3)], does not operate as a stay-

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(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 U.S.C. § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 U.S.C. § 666(a)(7)];

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 U.S.C. §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as

specified under title IV of the Social Security Act [42 U.S.C.
§§ 601 et seq.];...."

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