UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 21, 2017, at 2:00 p.m.

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1. 11-41822-E-13 MICHAEL/CAROLYN RANGEL
17-2067
RANGEL ET AL V. CHASE HOME FINANCE, LLC ET AL

STATUS CONFERENCE RE: COMPLAINT
4-19-17 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Heather E. Stern

Adv. Filed: 4/19/17
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxx.

Notes:
Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities filed 5/22/17 [Dckt 8], set for hearing 7/6/17 at 11:00 a.m.

Plaintiff's Status Report filed 6/14/17 [Dckt 23]

JUNE 21, 2017 STATUS CONFERENCE

From reviewing the Complaint filed by Michael and Carolyn Rangel, the "Plaintiff-Debtor," it appears that the actual dispute between the parties is whether a 2011 loan modification is effective to set the terms of the secured claim that has been paid for five years (under such terms) in Plaintiff-Debtor's bankruptcy case. The Motion makes reference to a loan modification agreement, but a copy is not attached as an exhibit to the Complaint.

It is alleged that in the bankruptcy case Plaintiff-Debtor successfully objected to JPMorgan Chase Bank, N.A.'s assertion that the payments on the secured claim were increased. The court's actual order provides that "the Trustee is authorized to continue the mortgage payments of $2,265.00 as set forth in the

confirmed plan, not the $4,363.85 stated in the Notice of Mortgage Payment Change. The court makes no determination as to the correct amount of the mortgage payment or whether the loan has been modified by agreement of the parties." 11-41822; Order, Dckt. 57.

The Civil Minutes provide an insight as to the dispute that is at the heart of the Complaint now before the court, stating:

The confirmed plan lists Chase Mtg on Plaintiff-Debtor's residence located at 12451 Rising Road, Wilton, California, as a Class 1 Creditor. The additional provisions state that Plaintiff-Debtor received a loan modification in March that was signed both by Plaintiff-Debtor and Chase Bank, though Chase denies that the loan modification existed, and that Chase Bank refused to accept payments after the first tendered payment. No objection was made to the plan by JPMorgan Chase Bank, N.A. and an order confirming the plan was entered on November 11, 2011.

> "The dispute appears to be regarding the validity of the underlying loan modification agreement between Chase/JPMorgan Chase Bank, N.A. and Debtors. However, the court will not adjudicate rights under the underlying modification agreement without the proper proceedings before it. A request to determine the extent, validity, or priority of a security interest, or a request to avoid a lien, requires adversary proceeding. Fed. R. Bankr. P. 7001(2). Debtor cannot attempt the determine the extent, validity, or priority of the creditors security interest through a plan provision or an objection to a notice of mortgage payment change. The court notes that the plan, filed back in September 2011, states the dispute with Chase Bank (or JPMorgan Chase Bank, N.A.) regarding rights under a purported Loan Modification Agreement. However, no adversary proceeding to determine the respective parties rights has been filed to date.
>
> Further, Chase Bank or JPMorgan Chase Bank, N.A. has not responded to the Motion, which makes their position unknown.
>
> Based on the foregoing, the court will sustain the objection as to allow the Trustee to pay the lesser amount. **However, the parties would be wise to move forward with a proper proceeding in order for the court to determine their respective rights.**

Id.; Civil Minutes p. 2, Dckt. 55 (emphasis added). It appears that neither Plaintiff-Debtor, Plaintiff-Debtor's prior counsel, and JPMorgan Chase Bank, N.A. have allowed this issue to languish for the five years of the Chapter 13 Plan, allowing it to be performed and monies to be disbursed pursuant to the order of this court confirming the Plan.

In support of the Objection to Notice of Mortgage Payment Change, Plaintiff-Debtor filed a document titled Home Affordable Modification Agreement ("HAMA"). *Id.*; Exhibit C, Dckt. 53. In that document Chase Home Finance, LLC is identified as the "Lender." The HAMA identifies "Monica Miranda, Vice President, as signing for Chase Home Finance, LLC and Mortgage Electronic Registration Systems, Inc. ("MERS") signing as "Nominee for Lender."

Terms of the HAMA include:

A. "If my representations and covenants in Section 1 continue to be true in all material respects, then **this Home Affordable Modification Agreement ("Agreement") will, as set forth in Section 3, amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.** The Mortgage and Note together, as they may previously have been amended, are referred to as the "Loan Documents." Capitalized terms used in this Agreement and not defined have the meaning given to them in Loan Documents." (Emphasis added.)

B. "I understand that after I sign and return two copies of this Agreement to the Lender, the Lender will send me a signed copy of this Agreement. This Agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied."

C. In Section 2, the conditions include the following:

1. "1 understand that the Loan Documents will not be modified unless and until (I) the Lender accepts this Agreement by signing and returning a copy of it to me, and (ii) the Modification Effective Date (as defined in Section 3) has occurred. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement."

D. The dollar amount of the monthly payments on the secured claim are set forth in ¶ 3C of the HAMA.

E. The signature page signed by Monica Miranda for Chase Home Finance, LLC and by MERS, states,

1. "LENDER SIGNATURE PAGE TO HOME AFFORDABLE MODIFICATION AGREEMENT BETWEEN CHASE HOME FINANCE LLC And MICHAEL RANGEL, LOAN NUMBER 1646742074 WITH A MODIFICATION EFFECTIVE DATE OF APRIL 01,2011

   In Witness Whereof, the Lender has executed this Agreement.

It appears, notwithstanding all of the smoke and confusion of the litigation war generated by the Complaint and Motion to Dismiss, it appears that the issue may simply be Plaintiff-Debtor asserting its contractual rights (which presumably include the right to legal fees) and Defendant asserting that there is no modification (which presumably includes the counter right to legal fees) and there is a greater amount owning than has been paid under the confirmed Chapter 13 Plan.

At the Status Conference, **xxxxxxxxxxxxxxxxxxxxxxxxxxx**.

SUMMARY OF COMPLAINT

Plaintiff-Debtor has filed a complaint listing seven different theories of claims stated in the caption of the Complaint as:

> (1) DECLARATORY RELIEF
>
> (2) BREACH OF CONTRACT
>
> (3) BREACH OF THE COVENANT OF GOOD PLAINTIFFS FAITH AND FAIR DEALING
>
> (4) UNJUST ENRICHMENT
>
> (5) VIOLATION OF CA. BUSINESS PROF. CODE 17200 ET SEQ.
>
> (6) VIOLATION OF C.C.C. 2923.6(C)
>
> (7) VIOLATION OF C.C.C. 2924.10

Complaint, p. 1:15.5–20; Dckt. 1.

Plaintiff-Debtor asserts that Defendant Chase was the servicer of a Class 1 claim "in this discharged Chapter 13 Plan." In the allegations, Plaintiff-Debtor has lost the court in using the phrase "discharged Chapter 13 Plan." The court is unsure of what a discharged (possibly dismissed) Chapter 13 Plan could be.

It is asserted that Plaintiff-Debtor submitted and defendant(s) did not reject a loan modification request.

In the First Cause of Action, Plaintiff-Debtor seeks "declaratory relief," with the court to declare:

> A. "Defendants' duty to pay the Trustee in a timely fashion, pursuant to the Local Bankruptcy Court Rules, or lose the offered Loan Modification."
>
> B. That "Defendants holding the Note have a fiduciary duty to prosecute the Loan Modification application and to adhere to the California Homeowners Bill of Rights in a timely fashion."
>
> C. "[Plaintiff-Debtor] therefore seeks a declaratory judgment pursuant to F.R.B.P. § 7001(9), invoking F.R.B.P. § 7001(2) & F.R.B.P. § 7001(6), determining that Defendant is liable for negligence processing of the loan modification, costs, and attorney fees."

Id., ¶¶ 28–30.

This court has addressed with counsel for Plaintiff-Debtor on multiple prior occasions that the authority for a person to seek, and the court to grant, declaratory relief is very limited. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. § 2201,

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Here, Plaintiff-Debtor appears to state that rights have been violated, but Plaintiff-Debtor does not seek to enforce such rights, only to obtain an "advisory opinion." That is not the proper subject of a request for declaratory relief.

The Complaint continues to state other causes of action, which the court now recognizes as boilerplate general allegations used by Plaintiff-Debtor's counsel, devoid of any specific alleged conduct. *See* Civil Minutes for June 21, 2017 in Adversary Proceeding 17-2016 as an example of use of these cookie-cutter pleadings.

SUMMARY OF ANSWER

JPMorgan Chase Bank, N.A. ("Defendant") has filed a twenty-five page Motion to Dismiss. Dckt. 8. This document actually appears to be a mash-up of a Notice of Motion, Motion, and Memorandum of Points and Authorities. This is clearly in violation of Local Bankruptcy Rule 9006-1 and the Revised Guidelines for Preparation of Documents that require the motion (which must state with particularity the grounds upon which relief is request, Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), be separate from the points and authorities, which are separate from each declaration, which are separate from the exhibits (which exhibits may be combined into one document).

This Local Rule exists for a practical reason—to clearly state what the grounds are and put the speculation, argument, extensive citations and quotations, and conjecture in separate documents. Many times attorneys forget that a trial court does not have weeks or months to review a complex brief as an appellate court does. Additionally, the trial court does not have a phalanx of clerks to work through complex appellate briefs. Generally, a trial court will have a ten-day window to read the motions that state the grounds with particularity, consider the separate points and authorities, review the evidence, and draft a tentative ruling. FN.2.

FN.2. As some others have complained, counsel for Defendant might argue "but judge, I am a good writer and my briefs are not the 'boilerplate,' 'garbage' form pleadings that are slapped together by a paralegal, waive the rules for me." The court will not engage in a "you are good enough" and "you are not good enough" sorting of attorneys for an uneven application of the rules. The Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules do not create a class of special privilege attorneys for whom only the rules they choose apply. For the "good attorneys," when they follow the rules, their exemplarily pleadings stand out even more, screaming to show the court the correct ruling.

The totality of the "grounds" upon which request is made for the court to dismiss the Complaint are stated to be:

> "Specifically, the Motion to Dismiss will be made on the following grounds:
>
> 1. The first claim for "Declaratory Relief" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.
>
> 2. The second claim for "Breach of Contract" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.
>
> 3. The third claim for "Breach of the Covenant of Good Faith and Fair Dealing" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.
>
> 4. The fourth claim for "Unjust Enrichment" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.

> 5. The fifth claim for "Violation of CA. Business Prof. Code § 17200 et seq." fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.
>
> 6. The sixth claim for "Violation of C.C.C. § 2923.6(c)" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012.
>
> 7. The seventh claim for "Violation of C.C.C. § 2924.10" fails to state facts sufficient to constitute a claim for relief pursuant to FRCP 12(b)(6) and FRBP 7012."

Motion to Dismiss, p.2:12–28. These "grounds" are merely Defendant's legal conclusions, which are insufficient for the court to determine that the Motion to Dismiss should be granted—notwithstanding Defendant and Defendant's counsel having dictated such conclusions to the court.

The document continues with the Points and Authorities's Table of Cases that is two pages and two lines long. After that, the Points and Authorities has a discussion of the "relevant facts," which do not relate to the face of the Complaint but events occurring during the period of 2003 through 2017. Based on the "facts" argued by Defendant, the Complaint should be dismissed.

Continuing, the Points and Authorities admits that at least one of the Plaintiff-Debtors is a borrower, while asserting that the second Plaintiff-Debtor is not a borrower.

The Points and Authorities then proceeds to address Cause of Action by Cause of Action what is required to state a claim. Woven in the arguments may be the actual grounds, which must be stated in the Motion.

The discussions of the various Causes of Action in the Points and Authorities sound in the nature of arguing the merits of what is alleged, rather than merely what is, or is not, alleged. Additionally, to be fair to Defendant and its counsel, some of the "grounds" stated in the Points and Authorities may well be based on the face of the Complaint itself.

In support of the Motion to Dismiss Defendant filed twelve exhibits. Defendant does not explain how bringing in this evidence is proper for a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. It is pregnant with an admission that the matter cannot be determined on the face of the Complaint but requires some form of evidentiary proceeding.

For these exhibits, Defendant has filed a Request for Judicial Notice. Dckt. 22. The exhibits are copies of documents purported to be filed with the Sacramento County Recorder and documents from Plaintiff-Debtor's bankruptcy case. Other than citing to Federal Rules of Evidence §§ 201(b), 201(c), and 201(d), Defendant offers no explanation as to how these documents are:

> "(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding."

FED. R. EVID. 201.

With respect to all of the documents purported to be recorded at the Sacramento County Recorder, the court cannot say those documents and the contents are "generally known" within this State. Rather, they are generally not known, the information therein learned only when a person specially goes to find such document.

The court cannot say that what is in those documents can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The "source" is the document itself. It is not as if it is a "fact" that can be determined, such as the city of Stockton is in California, or that it is approximately forty-eight miles south of Sacramento, California. Those facts are generally known by people in this jurisdiction, as well as readily ascertainable from a number of maps and other recognized services.

The Supreme Court has provided a procedure for authenticating documents, which procedure is found in Federal Rules of Evidence 901 and 902. Rule of Evidence 901 requires that evidence be produced to authenticate the document, which commonly is a person with personal knowledge (such as a client who has the documents in its records). Rule of Evidence 902 allows some documents to be self-authenticating, which include certified copies of public records—such as records obtained from a county recorder.

2. **16-26043-E-13 SUSAN GEDNEY**
17-2006
GEDNEY V. WRIGHT ET AL

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
1-30-17 [7]

Plaintiff's Atty: Aubrey L. Jacobsen
Defendant's Atty: unknown

Adv. Filed: 1/24/17
Answer: none

Amd. Cmplt Filed: 1/30/17
Answer: none

Nature of Action:
Declaratory judgment
Validity, priority or extent of lien or other interest in property

The Adversary Proceeding having been dismissed by Plaintiff-Debtor, **the Status Conference is removed from the Calendar.**

Notes:
Continued from 5/31/17, the Plaintiff reporting that this Adversary Proceeding will be dismissed.

Request for Dismissal Without Prejudice filed 6/1/17 [Dckt 65]; proposed order not submitted to court

3. **16-20852-E-11** **MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP**

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 2-16-16 [1]

Debtor's Atty: J. Luke Hendrix

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 2/16/17 to allow time for the Parties to address post-confirmation issues, including the filing of final fee applications.

[DNL-7] Order Confirmation Plan Dated November 9, 2016, filed 2/24/17 [Dckt 197]

[DNL-7] Order Granting Wells Fargo Bank Relief from Stay filed 2/28/17 [Dckt 202]

[DNL-10] First and Final Application to Approve Compensation of Desmond, Nolan, Livaich & Cunningham filed 3/30/17 [Dckt 204]; Order granting filed 5/2/17 [Dckt 220]

[DNL-9] First and Final Application to Approve Compensation to Accountant filed 3/30/17 [Dckt 210]; Order granting filed 5/2/17 [Dckt 219]

Post-Confirmation Status Report filed 5/2/17 [Dckt 221]

JUNE 21, 2017 POST-CONFIRMATION STATUS CONFERENCE

The Chapter 11 Plan was confirmed in this case on February 24, 2017, with the effective date of March 11, 2017. The confirmation order is final, no appeals taken therefrom.

In the Status Report filed by the Plan Administrator/Debtor, it is stated that performance of the plan is current, with no motions, contested matters, or adversary proceedings pending. Dckt. 221. Orders approving compensation for Debtor in Possession's Counsel and the Debtor in Possession's accountants were entered on May 2, 2017.

At the Status Conference, the Plan Administrator/Debtor reporting the Chapter 11 case would be administratively closed xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

4. **17-21173-E-13 ODETE CABRAL**
17-2056
CABRAL V. NATIONSTAR MORTGAGE, LLC

STATUS CONFERENCE RE: COMPLAINT
4-11-17 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: unknown

Adv. Filed: 4/11/17
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is xxxxxxxxxxxxxxxxxxxx.

Notes:
Plaintiff's Status Statement filed 6/14/17 [Dckt 8]

JUNE 21, 2017 STATUS CONFERENCE

The Status Report filed by Odete Cabral, the "Plaintiff/Debtor," advising the court: (1) Defendant has not answered the Complaint; (2) there has been no meeting or discussing by Counsel for Plaintiff/Debtor with any defendant or counsel for any defendant, and (3) Plaintiff/Debtor seeks a 30 days delay in these proceedings "to provide defendant to answer the complaint." Dckt. 8.

Given that there has been no communication by any defendant, the court is unsure why Plaintiff/Debtor is shying away from diligently prosecuting this Adversary Proceeding and giving an extension of time to a non-appearing, non-communicating defendant.

As discussed below, the court has grave concerns about the conduct of Plaintiff/Debtor in this Adversary Proceeding; and the repeated conduct of Plaintiff/Debtor's counsel seeking advisory, declaratory relief judgments for claims, if they actually exist, should be properly enforced.

It appears that rather than attempting to enforce rights and claims in which Plaintiff/Debtor has a good faith belief, he has been sitting idle for the past seventy-one days since this Complaint was filed, choosing not to prosecute this Adversary Proceeding.

At the Status Conference, xxxxxxxxxxxxxxxxxxxx.

SUMMARY OF COMPLAINT

Plaintiff/Debtor has filed a complaint seeking to state claims for relief for:

(1) DECLARATORY RELIEF
(2) NEGLIGENCE
(3) BREACH OF THE COVENANT OF GOOD
PLAINTIFF FAITH AND FAIR DEALING
(4) UNJUST ENRICHMENT
(5) VIOLATION OF CA. BUSINESS PROFESSIONAL CODE 17200 et seq.
(6) VIOLATION OF C.C.C. 2923.6(C)
(7) VIOLATION OF C.C.C. 2924.10

The First Cause of Action is one for "Declaratory Relief." In it, Plaintiff/Debtor that certain real property (the "Property") became property of the bankruptcy estate when Plaintiff/Debtor commenced a Chapter 13 case. Plaintiff/Debtor asserts that a claim or controversy exists and Plaintiff/Debtor demands that the court make a declaration:

> A. Of "Defendant's duty to pay the Trustee in a timely fashion, pursuant to the Local Bankruptcy Court Rules, or lose the offered trial loan Modification."
>
> B. That "Defendant has a fiduciary duty to timely prosecute the loan modification application and to adhere to the California Homeowners Bill of Rights."
>
> C. "Plaintiff therefore seeks a declaratory judgment pursuant to F.R.B.P. § 7001(9), invoking F.R.B.P. § 7001(2) & F.R.B.P. § 7001(6), determining that Defendant is liable for negligence processing of the loan modification, costs, and attorney fees."

Complaint, ¶¶ 29, 30, 31; Dckt. 1.

This court has addressed with counsel for Plaintiff/Debtor on multiple prior occasions that the authority for a person to seek, and the court to grant, declaratory relief is very limited. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. § 2201,

> § 2201. Creation of remedy

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Reading the First Cause of Action, it may be that Plaintiff/Debtor could have asserted contractual or statutory claims for relief, but has chosen not to do so. Rather, Plaintiff/Debtor's counsel is seeking merely an advisory opinion from the court, to use in some other litigation if counsel so chooses.

In the Second Cause of Action it is asserted that Defendant has breached its obligations under a loan modification. Further, it is alleged that "Defendant systematically and pervasively grants loan modifications after participating in the Chapter 13 confirmation process, filing proof of claims, notice mortgage payment changes, and accepting confirmation of such plans." Complaint ¶ 45, Dckt. 1. Thus, Plaintiff/Debtor asserts a right to receive damages from Defendant. The court cannot identify in the Second Cause of Action the duty from which a tort claim for negligence could arise. Rather, it appears that Plaintiff/Debtor states that there is some sort of contractual duty (without specifying the contract and the terms).

In the Third Cause of Action Plaintiff/Debtor states that there is a contractual relationship between Plaintiff/Debtor and Defendant, and pursuant thereto a duty of good faith and fair dealing exists. Plaintiff-Debtor then alleges that this duty of good faith and fair dealing was breached by Defendant in unstated ways, which include purchasing forced place insurance. It is alleged in the Complaint that Defendant (and the underlying creditor having a claim secured by the Property) could not obtain forced place insurance (presumably if Plaintiff/Debtor had allowed the insurance to lapse on the Property that secured the claim).

The Fourth Cause of Action asserts that Defendant has been "unjustly enriched" by its conduct. This conduct is asserted to include entering into a trial loan modification "that on its face [Plaintiff/Debtor'

would be in default . . . ." *Id.*, ¶ 58. That there are unidentified "kickback, commissions, or other compensation" received by Defendant or its "affiliates" (who are not identified). *Id.* ¶ 60.

The Fifth Cause of Action seeks to assert a claim for unfair business practices pursuant to California Business and Professions Code §§ 17200 et seq. It is asserted that the practices upon which such a claim are based are:

> "a. Manipulating the loan modification process,
>
> b. Failing to maintain and pay the regular insurance policy,
>
> c. Arranging for kickbacks, commissions, or other compensation for itself and/or its affiliates in connection with loan modifications, ..."

Id., ¶ 66.

The Sixth Cause of Action asserts that a claim exists under the California Home Owners Bill of Rights. The complaint states the following as the basis for such relief:

> "73. The C.C.C. 2923.6, provides the legal duty to use reasonable care.
>
> 74. The C.C.C. 2923.6, provides the legal duty to provide a written determination as to the loan modification application.
>
> 75. The C.C.C. 2923.6, provides the legal duty not to dual track the foreclosure of the debtor's home while a loan modification is in submission, and the appeal time has expired.
>
> 76. Plaintiff did not receive a denial of the loan modification application.
>
> 77. Nationstar continued the foreclosure by setting a notice of sale while a loan modification was submitted."

Id., ¶¶ 73–77.

The Seventh Cause of Action asserts another California Homeowners Bill of Rights claim arising under California Civil Code § 2924.1, stating that no denial of the requested loan modification was given and Defendant "dual-tracked" by noticing a foreclosure sale.

SUMMARY OF ANSWER

No answer has been filed.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (L). Complaint ¶ 6, Dckt. 1.

5. 09-29681-E-13 FERNANDO/ALAPE GELVERIO
16-2217
GELVERIO ET AL V. U.S. BANK CONSUMER FINANCE ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
10-7-16 [1]

Tentative Ruling:

Oral argument may be presented by the parties at the scheduled Status Conference, 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.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: unknown

Adv. Filed: 10/7/16
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 3/29/17

Plaintiff's 3rd Status Statement filed 6/14/17 [Dckt 15]

The Status Conference is concluded and removed from the Calender, the court ordering the dismissal of this Adversary Proceeding without prejudice due to the lack of prosecution thereof by Plaintiff-Debtor.

JUNE 21, 2017 STATUS CONFERENCE

On June 14, 2017, Fernando and Plape Gelverio, the "Plaintiff-Debtor," filed a Third Status Report. Dckt. 15. In it, Plaintiff-Debtor confirms:

"A. Defendant U.S. Bank Consumer Finance has not yet answered the Complaint."

At this juncture, the court notes that the Complaint was filed on October 7, 2016. In the 257 days that have passed since the Complaint was filed, Plaintiff-Debtor's "prosecution" of this Adversary Proceeding has consisted of telling the court that no answer has been filed.

> "B. Plaintiff-Debtor's Counsel has not met and conferred with defendant. However, Plaintiff-Debtor's Counsel has been contacted by a "Meagan Tom, Esq." who has "recently been retained by defendant."
>
> C. Notwithstanding the Federal Rules of Civil Procedure, Plaintiff-Debtor "anticipates" that defendant will file an answer by July 14, 2017."

July 14, 2017, is 280 days after the complaint was filed. Plaintiff-Debtor has allowed this Adversary Proceeding to languish now for more than eight months, unilaterally determining that a defendant does not need to comply with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules.

> "D. Plaintiff-Debtor then requests yet another delay of thirty days "to determine if a reissued summons is necessary or to move forward with an entry of default."

This request leaves the court perplexed. A reissued summons would only be necessary if Plaintiff-Debtor had failed to properly serve the original summons or is having to amend the Complaint to state a real party in interest not previously named.

Though the Complaint states many complex claims, it appears that this may well be a simple "quiet title" action in which the Plaintiff-Debtor has completed a Chapter 13 Plan that provided for payment in full of the amount of Defendant's secured claim as determined pursuant to 11 U.S.C. § 506(a). No obligation securing Defendant's deed of trust remaining, Plaintiff-Debtor seeks a simple judgment determining that the deed of trust is void as a matter of California and Bankruptcy Law. See *Martin v. CitiFinancial Servs. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013), for this court's prior discussion of this process, the effect of the 11 U.S.C. § 506(a) and confirmation of the Chapter 13, satisfaction of the § 506(a) determined secured claim, and the applicable law.

Such "simple claim" and relief is lost in the Complaint, with the court having to stretch the Second Cause of Action to interpret it as a request to quiet title. One could read the "plain language" of the Second Cause of Action to be an admission that Defendant holds a valid deed of trust, but some law exists by which the court could void and destroy that valid interest in the real property.

It appears that Plaintiff-Debtor has elected not to prosecute this Adversary Proceeding. Now, more than seven months into this Adversary Proceeding, Plaintiff-Debtor is unsure if the Complaint has been properly served. The one named defendant is reported by the California Secretary of State to not exist. Other than wasting the court's time in having to read, re-read, re-re-read the Complaint and "no action" Status Reports filed by Plaintiff-Debtor, nothing is being done to prosecute this Adversary Proceeding.

Federal Rule of Civil Procedure 4(m) requires that the court "must" dismiss the adversary proceeding if the Complaint has not been served within ninety days of the filing of the Complaint. The court

may grant a plaintiff additional time to serve if that plaintiff can show "good cause" for the failure of service. Here, it now appears that Plaintiff-Debtor admits that a new summons is required and the original summons issued in this case has not been effectively served.

At the Status Conference, when presented with the application of Federal Rule of Civil Procedure 4(m), counsel for the Plaintiff-Debtor argued xxxxxxxxxxxxxxxxxxxxx.

~~Therefore, due to the lack of prosecution, the court dismisses the Adversary Proceeding without prejudice. Plaintiff-Debtor has demonstrated that Plaintiff-Debtor is not diligently prosecuting this Adversary Proceeding. If Plaintiff-Debtor thought it was being prosecuted against a person that existed, defaults would have been entered long ago and a judgment (to the extent Plaintiff-Debtor actually can establish such claims) entered. Plaintiff-Debtor could have been enforcing the judgment, obtained clear title to the Property at issue, and enforcing any monetary judgment obtained.~~

MARCH 29, 2017 STATUS CONFERENCE

In Plaintiff-Debtor's 2nd Status Report filed on March 22, 2017, it is stated that no response or communication has been received from defendant U.S. Bank Consumer Finance. No information is provided as to what Plaintiff-Debtor has done to actively prosecute this Adversary Proceeding.

At the Status Conference, Plaintiff-Debtor reported that he will be propounding discovery, formal or informal, on U.S. Bank, N.A. to locate the "creditor" identified on Proof of Claim No. 14 as U.S. Bank. Consumer Finance, whose address is stated to be 425 Walnut Street, Cincinnati, Ohio—the same address as the FDIC lists as the headquarters for U.S. Bank, N.A.

Summary of Complaint

The basic allegations of the Complaint are that: (1) Defendant had a claim secured by a junior deed of trust in Plaintiff-Debtor's Chapter 13 bankruptcy case; (2) a motion to value Defendant's secured claim was granted (though it does not alleged that it was valued at $0.00); (3) Plaintiff-Debtors Chapter 13 Plan provides that the lien of Defendant shall be void and stripped upon completion of the [Chapter 13] case; (4) the Chapter 13 Plan has been completed; and (5) Defendant (named First Financial Services, LLC dba The Lending Center aka U.S. Bank Consumer Finance) has not reconveyed the deed of trust that is now void.

Defendants in the Complaint

In the Caption of the Complaint, two defendants are named: (1) U.S. Bank Consumer Finance and (2) First NLC Financial Services DBA The Lending Center. The Certificate of Service does not indicate that First NLC Financial Services has been served with the Complaint. Dckt. 6.

In Plaintiff-Debtor's Chapter 13 Bankruptcy Case, Proof of Claim No. 14 was filed for an entity identified as U.S. Bank Consumer Finance. The address for that entity is listed as being located in Cincinnati, Ohio. The Proof of Claim also indicates that the entity was formerly known as First Finance and Star Bank Finance.

The Deed of Trust attached to Proof of Claim No. 14 identifies First NLC Financial Service, LLC, DBA The Lending Center as the lender and beneficiary. Proof of Claim 14, p. 3.

The California Secretary of State does not list any entity known as U.S. Bank Consumer Finance as being registered to do business in California. https://businesssearch.sos.ca.gov. For First NLC Financial Services, LLC, its status is listed as FTB FORFEITED. *Id.*

Stated Causes of Action

The First Cause of Action seeks Declaratory Relief. It appears that this may actually be a claim for quiet title and a determination that the deed of trust is void and does not encumber the property.

The Second Cause of Action is titled as one for Extinguishment of the Second Deed of Trust Claim. This Cause of Action appears to assert that the deed of trust is not void, but in full force and effect. It requests that the court then extinguish the not void deed of trust.

The Third Cause of Action asserts that Defendant failed to reconvey the deed of trust once no obligation existed for it to secure, and based thereon Plaintiff-Debtor has a statutory damages claim arising under California Civil Code § 2941(d). The statutory damages claim is stated in the amount of $500 and all attorneys fees and costs, as allowed for in the contract between the parties.

A Fourth Cause of Action for Breach of Contract is asserted based on the failure to reconvey the deed of trust.

A Fifth (intentional) and Sixth (negligent) Cause of Action are asserted for violation of the Federal Fair Credit Reporting Action, citing 15 U.S.C. § 1681(w). That specific code section relates to the Federal Trade Commission and several other entities issuing regulations relating to the disposal of consumer records. This Cause of Action then states that defendant(s) deliberately and/or recklessly did not maintain reasonable procedures to protect against reporting erroneous personal financial information in violation of 15 U.S.C. § 1681. Nothing other than a legal conclusion is stated in this Cause of Action.

The Seventh Cause of Action states that Defendant is liable for negligence per se for reporting (unidentified) financial information in violation of 15 U.S.C. § 1681. Nothing other than a legal conclusion is stated in this Cause of Action.

Plaintiff-Debtor requests attorney's fees and costs based on contract (deed of trust) and statutory (Cal. Civ. § 2941).

In the Prayer of the Complaint, the specific relief requested by Plaintiff-Debtor is stated to be:

> "A. The court issue a judgment that the deed of trust is an unsecured lien and that the lien should be treated as an unsecured claim.
>
> B. The court issue a judgment voiding the second deed of trust.

C. Award of attorneys fees based on contract and statute.

D. $500.00 Civil Penalty.

E. For further relief."

No relief is requested for the various Fair Credit Reporting Act and Gramm-Leach-Bliley legal conclusions stated in the Complaint.