

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street
Department A, Courtroom 11
Fresno, California

WEDNESDAY

JUNE 24, 2015

10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [14-12200](#)-A-7 ALVIN SOUZA, JR. AND STIPULATION TO DISMISS SECOND
[14-1082](#) ROBYN SOUZA KGL-1 THROUGH FIFTH CLAIMS FOR RELIEF
MILLER HAY AND TRUCKING, INC. 5-18-15 [[58](#)]
V. SOUZA, JR. ET AL

Tentative Ruling

Motion: Dismiss Second Through Fifth Causes of Action (11 U.S.C. § 727)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Denied without prejudice

Order: Civil minute order

Plaintiff Miller Hay prays an order approving a stipulation to dismiss the second through fifth causes of action, which are brought under 11 U.S.C. § 727. Finding fatal procedural defects, the motion will be denied without prejudice.

DISCUSSION

Defective Caption

Adversary proceedings must name the parties thereto. Fed. R. Civ. P. 10(a), incorporated by Fed. R. Bankr. P. 7010. In this case, the caption used by the movant does include the (1) parties to the chapter 7 case; (2) the chapter 7 case number; and (3) the adversary proceeding number. It does not name the parties. Below the name of the chapter 7 case it states only "And related Adversary Actions." This is insufficient.

Orders Must be Requested by Motion

"A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. *The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought.* Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). . . Fed. R. Bankr. P. 9013. (emphasis added). No motion has been presented. The movant has filed only the (1) Stipulation to Dismiss Second Through Fifth Claims, filed May 18, 2015, ECF # 58; (2) Notice of Hearing on Stipulation, filed May 17, 2015, ECF # 59; and (3) Proof of Service, filed May 18, 2015, ECF # 60. Without actual motion filed the court cannot grant relief. This is the second occasion that the court has called this problem to the attention of counsel for the movant. Civil Minutes, filed April 29, 2015, ECF # 47.

Defective Notice

This request for relief is supported by but one Certificate of Service. Proof of Service, filed May 18, 2015, ECF # 60. It confirms service on the United States Trustee, chapter 7 trustee James E. Salven and creditors. The notice states, "Notice is hereby given that a hearing will be held on the request of the Debtors and Miller hay and Trucking, Inc. for approval of a stipulation to dismiss the Second through the Fifth Claims for Relief in the above-referenced adversary action. A copy of the stipulation is attached as Exhibit A to this notice. . . ." Notice of Hearing on Stipulation, filed May 17, 2015, ECF # 59.

This notice does not comply with LBR 9014-1(d)(5). "Service of Notice Only. When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief." (emphasis added).

This notice is fatally defective. While it describes the relief requested in general terms, i.e. dismissal of the second through fifth causes of action, it omits the fact essential to determine whether to oppose the motion, i.e. that the dismissal is of claims under 11 U.S.C. § 727, which would benefit all creditors. Moreover, though the notice purports to attach the stipulation to the notice, the copy of the notice filed with the court does not do so.

For each of these reasons, the requested will be denied without prejudice.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Miller Hay's motion to approve stipulation dismissing the second through fifth causes of action has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the request,

IT IS ORDERED that the request is denied.

2. [15-10041](#)-A-7 GINA VAGNINO
[15-1057](#)
HUNG LU, D.D.S., INC. V.
VAGNINO
HUNG LU, D.D.S., INC./Atty. for pl.
DISMISSED 5/15/15
CLOSED

STATUS CONFERENCE RE: COMPLAINT
4-27-15 [[1](#)]

Final Ruling

The case dismissed, the status conference is concluded.

3. [14-10258](#)-A-7 HEATHER BRANDT
[14-1136](#)
MANFREDO V. BRANDT
GABRIEL WADDELL/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE:
COMPLAINT
11-5-14 [[1](#)]

No tentative ruling.

4. [14-10258](#)-A-7 HEATHER BRANDT
[14-1136](#)
MANFREDO V. BRANDT
GABRIEL WADDELL/Atty. for mv.

MOTION FOR SUMMARY JUDGMENT
5-27-15 [[14](#)]

Tentative Ruling

Motion: Summary Judgment

Notice: LBR 9014-1(f)(1); no written opposition filed

Disposition: Granted in part, denied in part without prejudice

Order: Prepared by the movant consistent with this ruling and prepared so that the order is self-contained, not requiring reference to any other document for comprehension (e.g., movant shall include a description of each individual asset sought by turnover in the order's enumeration of the partial findings of the court below)

PROCEDURE

Pursuant to Plaintiff Trudi Manfredo's notice of hearing and the local rules, opposition was required to be in writing and filed no later than 14 days before the hearing date. LBR 9014-1(f)(1). No opposition has been timely filed.

Local Rule 9014-1(f)(1) provides, "Without good cause, no party shall be heard in opposition to a motion at oral argument if written opposition to the motion has not been timely filed. Failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion or may result in the imposition of sanctions." The court finds that Defendant William Brandt has waived opposition to the motion for summary judgment, and Defendant may not hereafter oppose any of the court's partial findings of fact.

LEGAL STANDARD

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d

1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and supporting materials—including facts considered undisputed—show the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).

DISCUSSION

Turnover Actions under § 542(a)

Section 542(a) of the Bankruptcy Code requires the debtor and third parties to turn over to the chapter 7 trustee property, or the value of such property, that the trustee may use, sell, or lease. 11 U.S.C. § 542(a); *accord In re White*, 389 B.R. 693, 699 (B.A.P. 9th Cir. 2008). Property that is of inconsequential value or benefit to the estate is not required to be turned over to the trustee. *See id.* Other narrow exceptions and defenses are described in § 542. *See id.* § 542(b)–(d).

"Since the terms of § 363, in turn, permit a trustee to use, sell, or lease only property of the estate, an essential element of a turnover order, necessarily decided in every turnover ruling, is that the property to be turned over is property of the estate." *Id.* (internal quotation marks omitted).

The turnover obligation of § 542(a) extends to estate property not only to estate property that is presently in an entity's possession but also to estate property that has been in an entity's possession, custody, or control, *at any time during the case*. *See In re Newman*, 487 B.R. 193, 200 (B.A.P. 9th Cir. 2013).

"Moreover, the plain language of the statute provides a broader remedy than turnover of property itself." *Id.* Section 542 permits recovery of the value of estate property that is no longer in the possession, custody, or control of the entity from whom turnover is sought. *Id.* at 200-01. "In sum, . . . § 542(a) does not require the debtor to have current possession of the property which is subject to turnover. If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* (internal quotation marks omitted).

The trustee may compel the *debtor* to turn over property to the trustee by motion rather than by adversary proceeding. Fed. R. Bankr. P. 7001(1). Otherwise, an adversary proceeding is required. The trustee

bears the burden of proof, and must demonstrate that the property sought is property of the estate.

Property of the Estate

Section 542(a) describes property within its scope as "property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title." 11 U.S.C. § 542(a). The trustee may only use, sell, or lease property of the estate under § 363 of Title 11. Similarly, the debtor may exempt only property that is property of the estate. Section 522(b) provides in pertinent part, "Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection." *Id.* § 522(b)(1).

The movants have the burden on summary judgment to show the absence of a genuine dispute as to all material facts. Whether the property sought by turnover is property of the estate is a material fact that must be established for relief under § 542(a) to be warranted. The movant must show as a necessary (but not sufficient) condition for summary judgment that no genuine dispute exists as to whether the property sought by turnover is property of the estate.

All community property is not property of the estate. The Code defines what community property is also property of the estate: "All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--(A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable." 11 U.S.C. § 541(a)(2).

The requests for admissions, which the court accepts as having been deemed admitted, fail to address the fact that the turnover property constituted community property (as of the commencement of the case) that was "under the sole, equal, or joint management and control of the debtor." Nor have the facts deemed admitted offered evidence on the question whether the turnover property was, on the petition date, "liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

Thus, the property might be property that is not property of the estate if neither subparagraph (A) nor (B) of subsection (a)(2) are applicable. Accordingly, the movant has not shown that there is no genuine dispute as to the material fact of whether the property sought by turnover is property of the estate under § 541(a)(2). The movant is not entitled to summary judgment as a matter of law.

Established Facts under Rule 56(g)

Even though the relief requested by the motion is not being granted entirely as the court cannot enter summary judgment at this time, the court finds that it may enter an order establishing the material facts are not genuinely in dispute.

The court finds that the defendant never responded to the requests for admissions. Waddell Decl. ¶ 2-3, ECF No. 17. These requests were served January 27, 2015. As of the date of Waddell's declaration, May

27, 2015, no response had been made by defendant. "The automatic admission from a failure to respond [to a request for admissions] is a sufficient remedy for the party who made the request." 8B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice & Procedure* § 2265 (3d. ed. 2010). Therefore, the factual matters that are the subject of the admission requests are deemed admitted. Fed. R. Civ. P. 36(a)(3), *incorporated by* Fed. R. Bankr. P. 7036.

The following facts are hereby established in this adversary proceeding:

(1) Prior to filing this adversary proceeding, the plaintiff, the chapter 7 trustee, made a demand on defendant for turnover of the Business Assets, the Vehicles, and the Real Property as such terms are defined in the Declaration of Trudi Manfredo at ECF No. 16 (the "turnover property");

(2) Defendant as of May 27, 2015, has failed to turnover the Business Assets, the Vehicles, and the Real Property, as those terms are defined in the Declaration of Trudi Manfredo;

(3) Defendant's business is, and always has been, a sole proprietorship;

(4) All the turnover property constitutes community property and was purchased during the time the defendant was married to debtor Heather M. Brandt.

(5) All the turnover property was purchased with community assets of defendant's marriage with debtor Heather Brandt.

(6) The Real Property has not been used in the production, transmission or distribution for sale of electric energy or of natural or synthetic gas for heat, light, or power.

(7) The turnover property has consequential value and benefit to the estate. Manfredo Decl. ¶ 2-8.

CONCLUSION

The motion will be granted in part and denied in part. The court grants the motion in part as to the partial factual findings that are not genuinely in dispute and that are hereby established facts and conclusions of law in this adversary proceeding. Fed. R. Civ. P. 56(g), *incorporated by* Fed. R. Bankr. P. 7056. The motion is denied in part without prejudice to the extent it seeks entry of judgment against Defendant.

5. [15-10264](#)-A-7 JUAN CERVANTES
[15-1055](#)
BRUMFIELD AND HAGAN, LLP V.
CERVANTES
ROBERT BRUMFIELD/Atty. for pl.

STATUS CONFERENCE RE: COMPLAINT
4-23-15 [[1](#)]

Final Ruling

The case dismissed, the status conference is concluded.