UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 21, 2014 at 10:00 a.m.

1.	13-30417-A-13	PATRICK FAGUNDES	MOTION TO
	13-2261	GMN-5	DISMISS
	FAGUNDES V. JPMORGAN CHASE ET AL		6-20-14 [146]

Tentative Ruling: The motion will be granted and this adversary proceeding will be dismissed.

The defendant, Jesbir Brar, moves for dismissal of this adversary proceeding, arguing that the plaintiff's (Patrick Fagundes') most recent chapter 13 case, Case No. 13-33496, was dismissed on May 28, 2014.

The plaintiff opposes the motion, contending that the plaintiff cannot establish ownership of the plaintiff's foreclosed house.

The facts giving rise to the instant proceeding are as follows. In December 2005, the plaintiff borrowed funds from Long Beach Mortgage Company to finance his purchase of a home in Rocklin, California. LBMC assigned the deed of trust to Washington Mutual in May 2008. WaMu was acquired by JPMorgan Chase Bank in September 2008, along with its interest in the property. Because of a default by the plaintiff under the loan, the property was sold at foreclosure in January 2013 to Mr. Brar.

The plaintiff filed a chapter 13 bankruptcy case, Case No. 13-30417, on August 7, 2013. He filed this adversary proceeding on August 21, 2013. The causes of action asserted in this proceeding also pertain to the January 2013 foreclosure sale and include:

- quiet title,
- intentional infliction of emotional distress (IIED),
- negligence,
- fraud,
- conversion,
- violations of the California Foreclosure Protection Act, and
- breaches of the covenants of good faith and fair dealing.

The plaintiff seeks rescission, restoration and restitution, and is seeking declaratory relief that the defendant has no interest in the property.

Bankruptcy Case No. 13-30417 was dismissed on August 30, 2013. On October 18, 2013, the plaintiff filed another chapter 13 bankruptcy case, Case No. 13-33496. The court has been treating the instant adversary proceeding as if it was filed in the plaintiff's latest bankruptcy case, Case No. 13-33496.

On January 30, 2014, the court entered an order abstaining from adjudication of the claims asserted against JPMorgan Chase Bank. Docket 87.

The plaintiff's latest bankruptcy case, Case No. 13-33496, was dismissed by this court on May 28, 2014.

"Federal courts are always 'under an independent obligation to examine their own jurisdiction,' . . . and a federal court may not entertain an action over which it has no jurisdiction." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)(citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) and Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)). See also Fed. R. Civ. P. 12(h)(3), as made applicable by Fed. R. Bankr. P. 7012(b)("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action").

Bankruptcy jurisdiction extends to four types of title 11 matters, any or all cases "under title 11," any or all proceedings "arising under title 11," any or all proceedings "arising in a case under title 11," and any or all proceedings "related to a case under title 11." See Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006); see also 28 U.S.C. §§ 1334, 157.

The first three types of title 11 matters are termed as core proceedings by 28 U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to- (A) matters concerning the administration of the estate; . . . (F) proceedings to determine, avoid, or recover preferences; . . . [and] (K) determinations of the validity, extent, or priority of liens."

On the other hand, "related to a case under title 11" proceedings are noncore, meaning that the bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1).

The one exception to the court's limited jurisdiction over "related to" proceedings is consent by the defendant. 28 U.S.C. § 157(c)(2). Consent can be express or implied.

More recently, the bankruptcy court's jurisdiction over core proceedings has been curbed by Supreme Court cases such as Stern v. Marshal, 131 S. Ct. 2594 (2011) and Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014). Those cases have become an extension of an earlier line of cases that have shaped bankruptcy court jurisdiction, including Katchen v. Landy, 382 U.S. 3223 (1965), Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Granfinanciera v. Nordberg, 492 U.S. 33 (1989), and Langenkamp v. Culp, 498 U.S. 42 (1990).

In short, the Supreme Court has ruled that, even if a bankruptcy court may have statutory authority under 28 U.S.C. § 157 to finally resolve proceedings identified by that statute as core, the bankruptcy court does not necessarily have constitutional authority to resolve such proceedings. Specifically, the Supreme Court has ruled that the bankruptcy court does not have constitutional authority to finally resolve (*i.e.*, enter final judgments) in fraudulent conveyance actions, even though such actions are on the list of core proceedings in 28 U.S.C. § 157(b)(2). Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014).

Nevertheless, the Supreme Court has made it clear now that - similar to its

authority to deal with non-core claims - the bankruptcy court may issue proposed findings of fact and conclusions of law in a core proceeding over which the court lacks constitutional authority to enter a final judgment.

Thus, the Supreme Court has created three categories of matters over which bankruptcy court jurisdiction may extend:

- core proceedings as defined by 28 U.S.C. § 157(b), that the bankruptcy court has constitutional authority to finally resolve (*i.e.*, enter final judgments),

- non-core proceedings as defined by and subject to 28 U.S.C. § 157(c), and

- core proceedings as defined by 28 U.S.C. § 157(b), that the bankruptcy court does not have constitutional authority to finally resolve, but which - at least for the time being - will likely be treated as the non-core proceedings that are subject to the consent exception of 28 U.S.C. § 157(c)(2).

This last category of proceedings has been termed as "gap" or Stern claims.

Bellingham Insurance left at least two questions open: whether a party may consent to the bankruptcy court's rendition of a final judgment in a matter in which the court would otherwise lack constitutional authority to issue such a judgment (or is consent to bankruptcy court's jurisdiction constitutionally permissible) and whether such consent may be found by implication.

Cases "under title 11" are the only ones over which district courts have original and exclusive jurisdiction. 28 U.S.C. § 1334(a). As to proceedings "arising under," "arising in," and "related to a case under title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of bankruptcy case.'" Id. Finally, a proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)).

None of the claims in this proceeding invoke a substantive right provided by title 11 or could arise only in the context of the plaintiff's bankruptcy case. The plaintiff's claims are based on state tort, real property and foreclosure law principles. Hence, the claims fall under the rubric of a non-core proceeding as they can be only "related to" the plaintiff's bankruptcy case.

However, as there is no pending bankruptcy case to which the claims could be related, this court does not have "related to" jurisdiction any longer. The plaintiff's underlying bankruptcy case was dismissed on May 28, 2014. As such, this court does not have subject matter jurisdiction over the plaintiff's claims. Accordingly, this adversary proceeding will be dismissed.

Finally, to the extent applicable, the court exercises its discretion to decline to exercise jurisdiction under Carraher v. Morgan Elec., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992). The motion will be granted.

2. 14-25729-A-13 ROMUALDO TAVORA — MOTION TO VALUE COLLATERAL
CA-1 — 6-27-14 [13]
VS. INTERNAL REVENUE SERVICE

Final Ruling: The motion will be dismissed without prejudice because the court does not hear matters in chapter 13 cases on its 10:00 a.m. calendars.

3. 12-35330-A-12 BETTE SPAICH — MOTION TO MODIFY PLAN
BS-15 — 6-10-14 [210]

Tentative Ruling: The motion will be conditionally granted.

The debtor wants permission to modify the plan to extend only the "initial" annual payment date under the plan from July 15, 2014 to December 15, 2014. See Docket 208 at 14.

11 U.S.C. § 1229(a)(2) allows the court to extend or reduce the time for payments due under the plan.

The reason for the extension is that the debtor has suffered some unexpected losses from her crop. Someone stole 10 bins of her crop, before the crop reached the processor, causing approximately $9,673 in losses. She also caught a contractor working on her neighbor's property using her water without permission, leading to her incurring approximately $475 in additional electricity expenses.

Given the above setbacks, the court will grant the motion and modify the plan to extend the deadline for the making of the initial annual plan payment, subject to one condition. The deadline will be extended to December 15, 2014, only with respect to the 2014 payment, subject to the debtor confirming that she is current on her monthly plan payments and clarifying the amount that would be due under the initial annual plan payment. This is not clear from the debtor's declaration in support of this motion.

4. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C. — MOTION TO APPROVE DISCLOSURE STATEMENT
CAH-13 — 6-9-14 [142]

Final Ruling: The motion will be dismissed without prejudice because it violates Fed. R. Bankr. P. 2002(b), which requires at least 28 days' notice of the time for filing objections to the approval of a disclosure statement. The notice of hearing for the instant motion was not served until June 11, 2014, giving parties in interest only 26 days notice of the time to file objections to the approval of the disclosure statement. Dockets 146 & 147.

In addition, in the narrative, the notice of hearing directs parties to appear in Department C's courtroom 35, even though the caption for the notice of hearing identifies the location for the hearing on the instant motion in Department A's courtroom 28. Docket 146. The notice of hearing is deficient as it is confusing about the location of the hearing.

5. 09-40357-A-7 ANGIE STRAUB — ORDER TO APPEAR FOR EXAMINATION RE: ANGIE STRAUB
09-2800 — 6-23-14 [115]
G4 MARKETING, INC. V. STRAUB

Tentative Ruling: None. Ms. Straud shall present herself to the courtroom

deputy clerk immediately prior to the call of the calendar to be sworn. Thereafter she shall be examined by the judgment creditor. The courtroom deputy will make a conference room available if desired.

6. 13-36164-A-7 DENIS BONFILIO — MOTION FOR SUMMARY JUDGMENT
14-2071
RLED, L.L.C. V. BONFILIO — 6-5-14 [15]

Tentative Ruling: The motion will be denied.

The plaintiff, RLED, L.L.C., seeks summary judgment on its 11 U.S.C. § 523(a)(4) embezzlement and larceny claims and on its 11 U.S.C. § 523(a)(6) claim.

The defendant, Denis Bonfilio, opposes the motion, arguing that the motion is not supported by admissible evidence because the exhibits attached to the motion have not been properly authenticated. The defendant complains that:

- "the supporting material referred to by the moving party in its motion is exclusively contained in a single document entitled "Exhibits in Support of Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment,"

- "none of [the exhibits] is self-authenticating,"

- "[t]here is then an unsworn signature by the moving party's counsel, and nothing more," and

- "what is being offered is simply, and only, incompetent hearsay."

The plaintiff has filed a reply, disputing the lack of proper authenticity for the exhibits.

The motion will be denied because the exhibits submitted in support of the motion are inadmissible. As the defendant has raised issues about authenticity and hearsay, the court must examine those issues in detail.

Fed. R. Evid. 901(a) provides that "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

Fed. R. Evid. 901(b)(1) says that "The following are examples only — not a complete list — of evidence that satisfies the requirement: (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be."

In this case, the plaintiff has chosen to authenticate the exhibits to the motion by the declaration of Edward Hackney. Docket 20. This is the only declaration in support of the motion. The declaration identifies each of the 12 exhibits to the motion and states that each of the exhibits is a true and correct copy of the identified document. The exhibits include:

- Exhibit A, the notice of entry of judgment, judgment and arbitration award,

- Exhibit B, the order granting preliminary injunction,

- Exhibit C, the permanent injunction,

- Exhibit D, the JAMS Comprehensive Arbitration Rules,

- Exhibit E, the plaintiff's Rule 17 disclosure,

- Exhibit F, the plaintiff's statement of claims,

- Exhibit G, the defendants' statement of claims,

- Exhibit H, the defendants' witness list,

- Exhibit I, the defendant's expert witness disclosures,

- Exhibit J, the defendants' document production request,

- Exhibit K, the defendants' counter claim, and

- Exhibit L, the plaintiff's pretrial statement.

However, Mr. Hackney's authentication of the exhibits is improper because he does not provide a foundation of his personal knowledge of the exhibits.

Fed. R. Evid. 602 provides: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."

The only personal knowledge attested to by Mr. Hackney in the declaration is that: he is "the representative of [the plaintiff]," he has "personal knowledge of the following facts which [he] knows [them] to be true and accurate," "[i]f called as a witness, [he] could and would accurately testify thereto." Docket 20 at 1.

First, Mr. Hackney's statement that he is a "representative" of the plaintiff is not helpful. A "representative" is a generic term that may include attorneys, accountants, consultants, officers, etc. Hence, stating that someone is a representative of an entity does not necessarily communicate personal knowledge of all matters pertaining to that entity's affairs.

Limited liability companies, such as the plaintiff, are not managed by representatives. They are managed by members and are typically represented by their managing members. Yet, Mr. Hackney does not state that he is the plaintiff's managing member.

The court will not speculate what entitles Mr. Hackney to be a representative of the plaintiff and will not speculate about his personal knowledge of the plaintiff's affairs by virtue of him being a representative.

In short, telling the court that Mr. Hackney is a representative of the plaintiff is unhelpful.

Second, even if Mr. Hackney identified himself as a managing member of the debtor, privy to all of the plaintiff's legal affairs, the declaration does not state when Mr. Hackney became the plaintiff's managing member. For instance, his testimony would not be helpful if he became the plaintiff's managing member the day before he executed the subject declaration.

Third, just because Mr. Hackney may be a person who is familiar with the

plaintiff's affairs, does not mean that he is familiar with the plaintiff's legal affairs, and specifically with the litigation history between the parties. The court needs more information about his familiarity with the plaintiff's legal affairs and specifically with the history of the instant litigation.

Fourth, Mr. Hackney's declaration does not state that he has reviewed the documents he is attempting to authenticate. Stating that he has "personal knowledge of the following facts which [he] knows [them] to be true and accurate" is a legal conclusion and not a statement of fact that can be classified as evidence.

Fifth, as Mr. Hackney's declaration contains insufficient personal knowledge that may serve as foundation for his authentication of the exhibit documents, the documents have not been properly authenticated, in violation of Fed. R. Evid. 901(a).

Sixth, the plaintiff's entire motion is based on the findings of fact and conclusions of law of the arbitrator's award, which was apparently confirmed by the state court. But, the court does not have in the record the order confirming the arbitration award and adopting the arbitrator's findings and conclusions. Without that order, the arbitrator's findings and conclusions are not self-authenticating. The court cannot accept them as public documents or documents that are part of the public record. See Fed. R. Evid. 902(1), (2), (4).

Seventh, without the order confirming the arbitration award and adopting the arbitrator's findings and conclusions, the arbitrator's findings and conclusions are inadmissible hearsay and are not admissible under the public records exception of Fed. R. Evid. 803(8) because the arbitrator is not a holder of a public office. Fed. R. Evid. 803(8) provides that:

"The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . .

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness."

Without the state court order confirming the award and adopting the arbitrator's findings of fact and conclusions of law, the findings and conclusions cannot be admitted under the public records exception to the hearsay rule.

Finally, for summary judgment to be granted, the movant must show "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. Bankr. P. 7056. The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252. The court must evaluate whether there is a genuine issue of material fact with regard to each element of the plaintiff's claim.

As the motion is not supported by admissible evidence, the plaintiff has not met its burden of going forward and its ultimate burden of persuasion. Accordingly, the motion will be denied.

7. 13-36164-A-7 DENIS BONFILIO — STATUS CONFERENCE
14-2071 — 3-7-14 [6]
RLED, L.L.C. V. BONFILIO

Tentative Ruling: None.

8. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO VALUE COLLATERAL
SAC-8 — 6-6-14 [89]
VS. ALLY FINANCIAL

Final Ruling: This motion has been resolved by stipulation that has been approved by the court. Dockets 130 & 154.

9. 14-21673-A-12 GLORIA AVILA — MOTION TO CONFIRM PLAN
TOG-5 — 5-31-14 [23]

Tentative Ruling: The motion will be denied.

The debtor moves for confirmation of her chapter 12 plan filed on May 31, 2014. Docket 26.

The motion will be denied for the following reasons:

(1) The debtor's Schedule D lists a $3,470 pre-petition claim for property taxes in favor of San Joaquin County secured by the real property on Briggs Road. Docket 10. According to Schedule D, the claim is for property taxes due in the 2012-13 and 2013-14 years. This case was filed on February 21, 2014.

However, the debtor's proposed chapter 12 plan states that this claim has been paid in full. Docket 26 at 5.

It appears then that the debtor has paid a pre-petition claim post-petition outside of a confirmed plan of reorganization and without court authorization. The court sees no orders on the case docket authorizing the debtor to pay this

claim post-petition outside the plan.

(2) Although the debtor has failed to list general unsecured creditors in her master address list and Schedule F, Ally Financial filed a general unsecured proof of claim for $924.27 on March 11, 2014. The master address list should be amended to include this creditor. This will allow that creditor to be included in all future notices.

(3) The plan does not take into account the debtor's personal living expenses, as listed in Schedule J, including, without limitation, the debtor's mortgage and property taxes on her residence in Lathrop, California. Exhibit A to the plan lists only the debtor's monthly business expenses.

(4) The plan does not take into account that the mortgage on the debtor's residence in Lathrop, California, which property is owned by the debtor, is not being paid by her. The debtor's Schedule J indicates that the debtor pays only 25% of the mortgage and utilities for her residence in Lathrop, California. The other 75% share of the mortgage and utilities on that property is paid by her three sons, who also reside on the property. Docket 10, Schedule J, Questions 24.

The plan does not list the debtor's sons as leasing part of her residence from her and the court does not have declaration from the debtor's sons that they are able and willing to continue to pay for the 75% of the mortgage and utilities on the residence. The plan is not clear about and does not address these issues.

Specifically, the debtor's proposed chapter 12 plan payments to Wells Fargo Home Mortgage, the only mortgagee on the debtor's residence, are $581.60. The plan should be clear whether this is 100% of the mortgage payment to that creditor, in light of the statement in Schedule J that the debtor's three sons pay 75% of the mortgage.

(5) The court is not convinced that the plan is feasible and that it cash flows, given a host of inconsistencies in the debtor's financial reporting. For instance, in the statement of financial affairs, item 1, the debtor's gross income in 2012 was only $28,750 and in 2013 was only $30,000. Also, although the debtor filed this case on February 21, 2014, nearly two months into 2014, she listed her 2014 income as $0.00. Statement of Financial Affairs, item 1.

On the other hand, the debtor's average monthly income in Schedule I is $4,500, which translates into an annual income of $54,000.

Yet, unexplainably, the debtor's projected average monthly income, for purposes of plan confirmation, is $5,500. Docket 27, Ex. A.

Further, in Schedule I, the debtor lists $850 in monthly income from her rental of the real property in Stockton, California. The court does not see this income reflected in the plan.

The debtor's declaration in support of this motion makes no effort to explain the above discrepancies.

Finally, even if the debtor could confirm a plan with less income than what is represented in the instant plan, the above inconsistencies raise greater questions that pertain to the debtor's veracity as to all her income and expenses.

(6) The plan does not list the debtor's lease of the 10 acre property, which is reflected on the monthly expense attachment to Schedule I. The plan also does not list the lease of the debtor's rental property in Stockton, California. The only lease mentioned by the plan is the lease for the 15 acre property. Docket 26 at 6.

(7) The plan should set a deadline for objections to proofs of claim, in the event it becomes necessary for the debtor to file such objections.

(8) If and when the debtor renotices this motion for hearing, the debtor's name should be corrected in the narrative of the notice of hearing. The debtor's in the notice of hearing for this motion is identified as Frank Coelho. Docket 24 at 1. Also, future notices to Wells Fargo Home Mortgage / Wells Fargo Bank should be sent also to the address listed on the proof of claim filed on June 23, 2014.

10. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — STATUS CONFERENCE
13-2069 — 2-25-13 [1]
CARDILLO V. FABIE ET AL

Tentative Ruling: None.

11. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION FOR SUMMARY JUDGMENT
13-2069 LP-9 — 1-30-14 [17]
CARDILLO V. FABIE ET AL

Tentative Ruling: None. The parties have informed the court that this adversary proceeding has been settled and that they are still in the process of documenting the settlement.