

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

July 25, 2018 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1. 17-24417-D-12 JERRY WATKINS ORDER TO SHOW CAUSE
6-26-18 [71]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

2. 15-26623-D-7 HOLLY BURGESS MOTION TO REOPEN ADVERSARY
15-2227 ELG-3 PROCEEDING
MEYERS ET AL V. BURGESS 6-15-18 [71]

ADVERSARY PROCEEDING CLOSED:
08/14/2017

Tentative ruling:

This is the plaintiffs' motion to reopen this adversary proceeding. The defendant has not filed any response. For the following reasons, the motion will be granted, limited as specified below.

The plaintiffs seek to reopen the adversary proceeding in order to have a judgment entered against the defendant, pursuant to the terms of the parties' Stipulation Regarding Settlement, filed May 18, 2017 (the "Stipulation"). The motion states the defendant has defaulted by failing to make the quarterly payments required by the Stipulation. The motion incorrectly invokes Fed. R. Bankr. P. 5010 and § 350(b) of the Bankruptcy Code - that rule and statute govern the reopening of bankruptcy "cases," not adversary proceedings.¹ The court, however, has jurisdiction to reopen the adversary proceeding because it had "arising under" jurisdiction of the adversary proceeding when it was originally filed and while it was open. Goldman v. Gerard (In re Gerard), 2014 Bankr. LEXIS 4948, *13-16 (9th Cir. BAP 2014); Ander, 2015 Bankr. LEXIS 1352, at *10.

The motion does not specifically request entry of a judgment against the defendant; both the introduction and the conclusion state only that the plaintiffs seek to have the adversary proceeding reopened. The plaintiffs will need to pursue entry of a judgment by separate motion and will need to submit additional evidence. The only evidence in support of this motion is the plaintiffs' attorney's testimony that the facts in the motion are true and correct of his own knowledge. The Stipulation provided that the quarterly payments were to be made payable to the attorney's law firm "or to any other designated payee and/or location as directed by Plaintiffs." Stipulation at 2:7-9. As the attorney can testify of his personal knowledge only that the required payments have not been made to him, the plaintiffs will need to submit evidence demonstrating the payments have not been made as otherwise directed by them.

For the reasons stated, the court will grant the motion, reopen the adversary proceeding, and vacate the order dismissing it, filed July 27, 2017, DN 68. The court will hear the matter.

1 A bankruptcy case is commenced by the filing of a petition (§§ 301(a), 302(a), and 303(b)); an adversary proceeding is commenced by the filing of a complaint. Fed. R. Bankr. P. 7003, incorporating Fed. R. Civ. P. 3. They are not the same thing. See Estate of Kempton v. Clark (In re Clark), 2014 Bankr. LEXIS 4633, *17 (9th Cir. BAP 2014); ACK Family Ltd. P'ship v. Ander (In re Ander), 2015 Bankr. LEXIS 1352, *9-10 (Bankr. E.D. Cal. 2015).

3. 17-23626-D-7 PHYSICIANS SKIN AND MOTION FOR COMPENSATION FOR
DMW-4 WEIGHT CENTERS, INC. GABRIELSON & COMPANY,
ACCOUNTANT(S)
6-15-18 [66]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

4. 12-38234-D-12 CAROL SHACKELFORD MOTION FOR ENTRY OF DISCHARGE
SAC-6 5-7-18 [67]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for entry of Chapter 12 discharge under 11 U.S.C. § 1228 is supported by the record. As such the court will grant the motion and the moving party is to submit an appropriate order. No appearance is necessary.

5. 12-33136-D-7 GEORGE/IRENE ROSE MOTION TO AVOID LIEN OF
MKM-2 ACCURATE HEATING & COOLING
6-20-18 [25]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by Accurate Heating & Cooling, dba Delta A/C Supply (the "Creditor"). The motion will be denied because the moving parties failed to serve the Creditor in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served the Creditor by certified mail to the attention of an officer, managing or general agent, or agent for service of process, whereas service on a corporation, partnership, or other unincorporated association, such as the Creditor, that is not an FDIC-insured institution, must be by first-class mail, not certified mail. Compare Rule 7004(b)(3) and preamble to Rule 7004(b) with Rule 7004(h).

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

6. 17-22637-D-7 QUACKENBUSH'S PRODUCTION MOTION FOR COMPENSATION FOR
DMW-3 GOLDSMITHS, INC., A NORTHSTATE AUCTIONS, INC.,
AUCTIONEER(S)
6-11-18 [17]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for compensation for Northstate Auctions, Inc., auctioneer, in the amount of \$972.61 is supported by the record. As such the court will grant the motion by minute order. No appearance is necessary.

7. 17-21149-D-7 LESLEY REEVE CONTINUED MOTION APPROVE SALE
DNL-3 AGREEMENT
1-31-18 [44]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

8. 18-22163-D-7 JIENELLE HERNDON
APN-1
TOYOTA MOTOR CREDIT
CORPORATION VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
6-14-18 [16]

Final ruling:

This matter is resolved without oral argument. This is Toyota Motor Credit Corporation's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

9. 17-24066-D-7 HEATHER HAHN
KWS-2

MOTION FOR SANCTIONS FOR
VIOLATION OF THE DISCHARGE
INJUNCTION
5-31-18 [30]

Tentative ruling:

This is the debtor's motion for an order holding LoanMe, Inc. ("LoanMe") in contempt of court for violating the debtor's discharge. The debtor seeks an award of compensatory damages, deterrent sanctions, and reasonable attorney's fees and costs. LoanMe has filed opposition. For the following reasons, the motion will be denied.

"A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. . . . The party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified. . . . [T]he moving party 'must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.'" ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006) (citations omitted).

The debtor commenced this case on June 19, 2017 and received a chapter 7 discharge on October 2, 2017. The debtor testifies she received a phone call from LoanMe in late November or early December of 2017 and that she asked her attorney to send a notice to LoanMe to be sure they would not continue calling her. On February 28, 2018, the debtor's attorney's office purportedly sent a letter to LoanMe advising of the debtor's bankruptcy case and enclosing a copy of the discharge. The letter said the debtor had informed the office she had received multiple collection calls from LoanMe, despite notice of the discharge; the letter asked LoanMe to update its records to show the debtor had received a chapter 7 discharge. The letter is hearsay, as it was signed by someone other than the debtor's attorney, who is the individual who purports to testify to its authenticity. There is no evidence the debtor had, by the time the letter was sent, received multiple calls, only the one in late November or early December.

The debtor testifies she received additional collection calls from LoanMe on or about March 21 and April 17, 2018 and that she called her attorney each time and

advised him of the calls. There is no evidence her attorney or his office took any action in response to those calls from the debtor until May 31, 2018, when the debtor's attorney filed this motion. In the motion, the debtor's attorney claims his office spent 8.2 hours "litigating this discharge violation for [its] client" (Schumacher Decl., filed May 31, 2018, ¶ 4), for which the debtor seeks an award of \$2,980 in attorney's fees.

The debtor does not specify any other actual damages except as follows:

These phone calls have been extremely frustrating and concerning. I have been called while I am at work and cause [sic] me to feel very anxious and nervous trying to explain that I filed for bankruptcy relief. It is also embarrassing to have to explain this information to Loanme while I am at work. I also am very concerned, because my bankruptcy attorney continues to state that Loanme cannot collect this debt and should not be contacting me for collection, but they do not stop.

Hahn Decl., filed May 31, 2018, ¶ 6. The debtor does not specify which of the three phone calls she received when she was at work. She does not indicate she was forced to speak with LoanMe's representative in front of any co-workers.

LoanMe, on the other hand, has submitted the testimony of its Compliance Manager, John Vescera, who testifies he is familiar with LoanMe's books and records. He testifies LoanMe maintains detailed call logs reflecting all outgoing calls made to loan customers, which can be searched by phone number and account number, and that after LoanMe received the debtor's counsel's office's letter, in March of this year, LoanMe investigated and was unable to find any evidence it had called the debtor after the discharge date. Mr. Vescera testifies LoanMe informed the debtor's counsel by telephone that it had been unable to find any such evidence and asked that counsel contact LoanMe if the debtor received any further calls she believed were from LoanMe. Mr. Vescera states the debtor's counsel agreed to do so, but LoanMe received no further contact from the debtor's counsel until it received this motion. Finally, Mr. Vescera states that after he received the motion, LoanMe conducted another search of its call logs and could find no record that it made any phone calls to the debtor after the bankruptcy case was filed.

The court concludes the debtor has failed to establish by clear and convincing evidence that LoanMe knowingly violated her discharge. It is not certain the calls took place at all - resolution of that issue would require an evidentiary hearing, which neither party has requested. But if the calls were made, the debtor has failed to provide clear and convincing evidence of LoanMe's knowledge of the debtor's discharge at the time the calls were made.

[T]he Ninth Circuit has crafted a strict standard for the actual knowledge requirement in the context of contempt before a finding of willfulness can be made. This standard requires evidence showing the alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one.

Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 (9th Cir. BAP 2016). The debtor has not met this standard.

Further, the debtor has failed to submit evidence sufficient to support a

finding that the debtor suffered any type of compensable emotional distress. Her testimony is that she was frustrated, concerned, and embarrassed, although she does not tie those reactions to any of the particular telephone calls, but alleges them only in a conclusory last paragraph. Based on the current evidentiary record the court cannot find her reaction to the first phone call was at all severe, given that her counsel's office waited three months before sending a letter to LoanMe. Although the debtor claims she called her attorney after each of the other two calls, his office took no steps for six weeks after the last of the calls, when he filed this motion. Simply put, based on the evidence the court does not conclude that the debtor suffered significant harm, that LoanMe's conduct was egregious, or that it was obvious its conduct would cause a reasonable person to suffer significant emotional harm. See Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1149-50 (9th Cir. 2004) [emotional distress damages from violation of automatic stay].

Finally, the court concludes the debtor's attorney's fees - for a motion filed six weeks after the last phone call, where the debtor had incurred no other compensable damages - were not reasonably incurred. See Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 12 (9th Cir. BAP 2002) ["Courts especially scrutinize cases where the debtor's only injuries are those incurred in litigating the motion for sanctions"].

For the reasons stated, the motion will be denied. The court will hear the matter.

10. 18-23078-D-7 MELISSA FAVELLO MOTION FOR RELIEF FROM
JHW-1 AUTOMATIC STAY
CAB WEST, LLC VS. 6-12-18 [12]

Final ruling:

This matter is resolved without oral argument. This is CAB West, LLC's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

11. 18-23286-D-7 DONNA RAINER MOTION FOR RELIEF FROM
MET-1 AUTOMATIC STAY AND/OR MOTION
BANK OF THE WEST VS. FOR ADEQUATE PROTECTION
6-26-18 [11]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtor's Statement of Intentions indicates she will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

12. 17-20689-D-11 MONUMENT SECURITY, INC. CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
2-1-17 [1]

Final ruling:

**This Chapter 11 status conference is continued to August 8, 2018 at 10:00 a.m.
No appearance is necessary on July 25, 2018.**

13. 18-23396-D-11 METRO PALISADES, LLC CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
5-31-18 [1]

14. 15-23511-D-7 SCOTT COURTNEY ORDER TO SHOW CAUSE
15-2150 7-5-18 [65]
BAKER V. COURTNEY

15. 18-23918-D-7 JESSIAH GOODALL SR ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
7-5-18 [17]

Final ruling:

**This case was dismissed on July 9, 2018. As a result the order to show cause
will be removed from calendar as moot. No appearance is necessary.**

16. 18-23919-D-7 TIFFIANY MCINTYRE

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
7-5-18 [17]

17. 16-27672-D-7 DAVID LIND
GMW-5

CONTINUED MOTION FOR
COMPENSATION BY THE LAW OFFICE
OF GANZER & WILLIAMS FOR G.
MICHAEL WILLIAMS, OTHER
PROFESSIONAL(S)
6-8-18 [482]

18. 18-23874-D-7 MIA DUTTON

NOTICE OF INTENT TO DISMISS CASE
6-20-18 [3]

Tentative ruling:

This is the debtor's request for a hearing on the court's Notice of Incomplete Filing or Filing of Outdated Forms and Notice of Intent to Dismiss Case if Documents Are Not Timely Filed. That notice gave the debtor until July 5, 2018 to do one of the following: (1) file all missing documents; (2) file a motion for an extension of time to file the missing documents; or (3) file a notice of hearing on the notice of intent to dismiss. The debtor did two of these: she filed a motion for an order extending time to file the documents and she filed the notice of hearing that is the matter on this calendar. By order filed July 10, 2018, the court granted the debtor's motion for an extension of time in part, allowing her until July 20, 2018 to file the missing documents. The order stated that no further extensions would be granted.

The court recognizes that the debtor, in her motion for an order extending time, requested a 30-day extension, contending she had no knowledge of how to complete the documents accurately and she was seeking legal counsel to help her. The bankruptcy process is designed to follow certain time lines and these are matters a debtor filing a case in pro se is required to make herself aware of and to follow. The court finds the current extension, to July 20, 2018, is appropriate and no further relief is needed on this notice of hearing. Therefore, the court intends to deny debtor's request for any further extension.

The court will hear the matter.

19. 18-22453-D-11 ECS REFINING, INC.
FWP-17

MOTION TO SELL FREE AND CLEAR
OF LIENS O.S.T.
7-13-18 [312]