

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: AUGUST 31, 2016
CALENDAR: 9:00 A.M. CHAPTER 7 CASES

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.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S 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 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 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. [15-14909](#)-A-7 AGUSTIN JAUREGUI
TMT-1
TRUDI MANFREDO/MV
MARK ZIMMERMAN/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

MOTION TO SELL
7-26-16 [[20](#)]

Tentative Ruling

Motion: Sell Property

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

Disposition: Granted

Order: Prepared by moving party

Property: 2005 Chevy Uplander

Buyer: Debtor

Sale Price: \$3400 (\$500 cash plus \$2900 exemption credit)

Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f) (1) (B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b) (1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b) (1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a) (1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

2. [15-10215](#)-A-7 ERIC MCKINLEY
JTW-2
JANZEN, TAMBERI & WONG/MV
JERRY LOWE/Atty. for dbt.

MOTION FOR COMPENSATION FOR
JANZEN, TAMBERI & WONG,
ACCOUNTANT(S)
7-26-16 [[43](#)]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

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

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f) (1) (B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true.

TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

In this Chapter 7 case, Janzen, Tamberi & Wong, accountant for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$1072.50 and reimbursement of expenses in the amount of \$9.30.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

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.

Janzen, Tamberi & Wong's application for allowance of final compensation and reimbursement of expenses 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 application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$1072.50 and reimbursement of expenses in the amount of \$9.30.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

KYOUNG HAN/MV
DISMISSED
OPPOSITION

Tentative Ruling

Motion: Contempt

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

Disposition: Denied

Order: Civil minute order

Movant prays damages for violation of the stay. This court grant stay relief to allow West Ridge Rentals, LLC to evict tenants at 811, 813 and 815 North Beaudry Avenue, Los Angeles, California. Order, filed July 5, 2016, ECF # 42. That order was effective July 5, 2016. *Id.* The guts of the debtors motion is that West Ridge Rentals, LLC broke into the subject property and changed the locks on June 29, 2016, approximately one week prior to the date the stay relief order was effective.

DISCUSSION

The stay comes to life on the date the order for relief, which in most cases is the date on which the petition is filed, issues. 11 U.S.C. § 362(a). It precludes creditors from seeking to collect pre-petition debts or affecting control over property of the estate. *Id.* In this case, the stay terminated by order of this court, effective July 5, 2016. Order, filed July 5, 2016, ECF # 42.

The debtor alleges a violation of the stay by breaking into the subject residence and changing the locks on June 29, 2016. But the movant offers no admissible evidence in support of the motion. In contrast, the respondent has declaration of Olivia Reyes that specifically states that the respondent did not break into or changes locks until the Sheriff did so on August 8, 2016. Reyes decl. ¶¶ 14-18, filed August 15, 2016, ECF # 56. As a consequence, the motion will be denied.

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.

Kyoung Han's motion for contempt has been presented to the court. Having considered the motion and supporting documents, as well as the opposition,

IT IS ORDERED that the motion is denied.

CHANG WOO/MV
DISMISSED
OPPOSITION

Tentative Ruling

Motion: Contempt

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

Disposition: Denied

Order: Civil minute order

Movant prays damages for violation of the stay. This court grant stay relief to allow West Ridge Rentals, LLC to evict tenants at 811, 813 and 815 North Beaudry Avenue, Los Angeles, California. Order, filed July 5, 2016, ECF # 42. That order was effective July 5, 2016. *Id.* The guts of the debtors motion is that West Ridge Rentals, LLC broke into the subject property and changed the locks on June 29, 2016, approximately one week prior to the date the stay relief order was effective.

DISCUSSION

The stay comes to life on the date the order for relief, which in most cases is the date on which the petition is filed, issues. 11 U.S.C. § 362(a). It precludes creditors from seeking to collect pre-petition debts or affecting control over property of the estate. *Id.* In this case, the stay terminated by order of this court, effective July 5, 2016. Order, filed July 5, 2016, ECF # 42.

The debtor alleges a violation of the stay by breaking into the subject residence and changing the locks on June 29, 2016. But the movant offers no admissible evidence in support of the motion. In contrast, the respondent has declaration of Olivia Reyes that specifically states that the respondent did not break into or changes locks until the Sheriff did so on August 8, 2016. Reyes decl. ¶¶ 14-18, filed August 15, 2016, ECF # 57. As a consequence, the motion will be denied.

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.

Change Woo's motion for contempt has been presented to the court. Having considered the motion and supporting documents, as well as the opposition,

IT IS ORDERED that the motion is denied.

KIO YOON/MV
DISMISSED
OPPOSITION

Tentative Ruling

Motion: Contempt

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

Disposition: Denied

Order: Civil minute order

Movant prays damages for violation of the stay. This court grant stay relief to allow West Ridge Rentals, LLC to evict tenants at 811, 813 and 815 North Beaudry Avenue, Los Angeles, California. Order, filed July 5, 2016, ECF # 42. That order was effective July 5, 2016. *Id.* The guts of the debtors motion is that West Ridge Rentals, LLC broke into the subject property and changed the locks on June 29, 2016, approximately one week prior to the date the stay relief order was effective.

DISCUSSION

The stay comes to life on the date the order for relief, which in most cases is the date on which the petition is filed, issues. 11 U.S.C. § 362(a). It precludes creditors from seeking to collect pre-petition debts or affecting control over property of the estate. *Id.* In this case, the stay terminated by order of this court, effective July 5, 2016. Order, filed July 5, 2016, ECF # 42.

The debtor alleges a violation of the stay by breaking into the subject residence and changing the locks on June 29, 2016. But the movant offers no admissible evidence in support of the motion. In contrast, the respondent has declaration of Olivia Reyes that specifically states that the respondent did not break into or changes locks until the Sheriff did so on August 8, 2016. Reyes decl. ¶¶ 14-18, filed August 15, 2016, ECF # 58. As a consequence, the motion will be denied.

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.

Kyoung Han's motion for contempt has been presented to the court. Having considered the motion and supporting documents, as well as the opposition,

IT IS ORDERED that the motion is denied.

6. [16-10834](#)-A-7 JEANETTE MORGAN
TMT-2
TRUDI MANFREDO/MV
RICHARD STURDEVANT/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

MOTION TO DISMISS CASE
7-29-16 [[35](#)]

Tentative Ruling

Motion: Dismiss Case

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

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The Chapter 7 trustee moves to dismiss this case because the debtor has not appeared at two scheduled meetings of creditors. The debtor appeared at the initial meeting of creditors, but the meeting was continued several times for the trustee to obtain documents from the debtor. Debtor did not appear at the June 20, 2016, and July 25, 2016, meetings of creditors.

Failure to appear at multiple meetings of creditors is grounds for dismissal of a case for cause based on unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 707(a)(1). The court will dismiss this case on this ground.

7. [12-60054](#)-A-7 DWIGHT/NELLIE LONG
JLG-2
GROSS MORTGAGE CORPORATION/MV

LAYNE HAYDEN/Atty. for dbt.
HANNO POWELL/Atty. for mv.
OPPOSITION

CONTINUED OBJECTION TO CLAIM OF
GILMORE, WOOD, VINNARD &
MAGNESS, P.C., CLAIM NUMBER 16
5-12-16 [[299](#)]

Final Ruling

At the suggestion of the parties in interest, the hearing is continued to October 13, 2016, at 9:00 a.m. Not later than 14 days prior to the continued hearing, the parties shall file a status report.

8. [16-12263](#)-A-7 SARA CHILSON
APN-1
FORD MOTOR CREDIT COMPANY/MV
WILLIAM COLLIER/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.
NON-OPPOSITION

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-29-16 [[15](#)]

Final Ruling

Motion: Stay Relief

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

Disposition: Granted

Order: Civil minute order

Subject: 2014 Ford Escape

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f) (1) (B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

STAY RELIEF

Section 362(d) (2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d) (2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a) (3) will be waived. No other relief will be awarded.

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.

Ford Motor Credit Company's motion for relief from the automatic stay 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 motion,

IT IS ORDERED that the motion is granted. The automatic stay is vacated with respect to the property described in the motion, commonly known as a 2014 Ford Escape, as to all parties in interest. The 14-day stay of the order under Federal Rule of Bankruptcy Procedure 4001(a) (3) is waived. Any party with standing may pursue its rights against the property pursuant to applicable non-bankruptcy law.

IT IS FURTHER ORDERED that no other relief is awarded. To the extent that the motion includes any request for attorney's fees or other costs for bringing this motion, the request is denied.

9. [16-11267](#)-A-7 SONIA CANALES MOTION TO SELL
TMT-1 7-26-16 [[26](#)]
TRUDI MANFREDO/MV
MARIO LANGONE/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

Tentative Ruling

Motion: Sell Property

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

Disposition: Granted

Order: Prepared by moving party

Property: 2006 Nissan Altima

Buyer: Debtor

Sale Price: \$3,976 (\$1076 cash plus \$2900 exemption credit)

Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f) (1) (B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b) (1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b) (1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a) (1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

10. [05-60471](#)-A-7 JOSEPHINE BELLARDITA

JOSEPHINE BELLARDITA/MV

CONTINUED AMENDED MOTION FOR
SANCTIONS, AND AMENDED MOTION
TO RECOVER DAMAGES FOR
VIOLATION OF THE DISCHARGE
INJUNCTION
7-7-16 [[78](#)]

JOSEPHINE BELLARDITA/Atty. for mv.
OPPOSITION

[This matter will be called subsequent to the debtor's motion for contempt, filed June 20, 2016, ECF # 73.]

Final Ruling

Motion: Sanctions and Counter-motion for Sanctions

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

Disposition: Motion-denied without prejudice; counter-motion-denied without prejudice

Order: Civil minute order

DISCUSSION

This motion is substantively identical, though less well defined, than Bellardita's motion for contempt, filed June 20, 2016, ECF # 73, and Cyril A. Lawrence's request for sanctions. It is denied for the same reasons and the court's findings of fact and conclusions of law are incorporated by reference.

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.

Josephine Bellardita's motion for sanctions and Cyril A. Lawrence's request for Rule 9011 sanctions have 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 motion and the request,

IT IS ORDERED that Bellardita's motion is denied without prejudice and Cyril A. Lawrence's request for sanctions is denied without prejudice.

JOSEPHINE BELLARDITA/MV
JOSEPHINE BELLARDITA/Atty. for mv.

[This matter will be called prior to the debtor's amended motion for sanctions, filed July 7, 2016, ECF # 78.]

Tentative Ruling

Motion: Contempt and Counter-motion for Sanctions

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

Disposition: Motion-denied without prejudice; counter-motion-denied without prejudice

Order: Civil minute order

Debtor Josephine Bellardita ("Bellardita") moves for civil contempt and to impose liability under the federal Fair Debt Collection Practices Act against Cyril A. Lawrence, Cyril A. Lawrence, Inc. and Sean McLeod (collectively "Cyril A. Lawrence"). Bellardita contends that Cyril A. Lawrence's actions to renew his abstract of judgment violated the discharge injunction and Fair Debt Collection Practices Act because (1) her debt was discharged; (2) the renewed abstract included post-judgment interest that was not awarded in the original judgment; (3) she owned no property on the date of the petition and an abstract of judgment does not create a lien on property acquired after bankruptcy. Mot. Contempt ¶ 8, filed June 20, 2016, ECF # 73. Cyril A. Lawrence opposes the motion and requests Rule 11 sanctions of \$1,250.00.

DISCUSSION

Evidentiary Issues and Judicial Notice

This motion is unsupported by admissible evidence. Though Bellardita filed a declaration, it is not sworn under penalty of perjury. Bellardita Decl., filed June 20, 2016, ECF # 75; Fed. R. Bankr. P. 9006(d); Fed. R. Civ. P. 56(c)(4), *incorporated by* Fed. R. Bankr. P. 7056; 28 U.S.C. § 1746. As a consequence, the court gives that document no weight.

However, pursuant to Federal Rule of Evidence 201, the court takes judicial notice of the following records: (1) pleadings and papers in *In re Bellardita*, No. 05-60471 (Bankr. E.D. Cal. 2005); (2) pleadings and papers in *Stratton v. Vita Bella Group Homes, Inc.*, No. 06-1100 (Bankr. E.D. Cal. 2006); (3) judgment in *Cyril A. Lawrence, Inc. v. Bellardita*, No. 146416 (Merced County Superior Court 2005); (4) order taxing and awarding costs in *Cyril A. Lawrence, Inc. v. Bellardita*, No. 146416 (Merced County Superior Court 2005); (5) Cyril A. Lawrence's recorded abstract of judgment in *Cyril A. Lawrence, Inc. v. Bellardita*, No. 146416 (Merced County Superior Court 2005) dated May 2005; and (6) Cyril A. Lawrence's renewal of judgment in *Cyril A. Lawrence, Inc. v. Bellardita*, No. 146416 (Merced County Superior Court 2005) dated January 2015, in the amount of \$273,556.40, and re-recorded abstract of judgment dated March 2015.

Facts

In 2005, prior to Bellardita's chapter 7 bankruptcy, Cyril A. Lawrence obtained a judgment against Bellardita for \$138,431.84. Cyril A. Lawrence recorded an abstract of this judgment in Merced County.

Prior to 2005, Bellardita acquired ownership of real property known as (1) 919 D. Street, Merced, California, (2) 1791 West 8th Street, Merced, California, and (3) 3156 Juneau Court, Merced, California. But in early 2005, Bellardita transferred these properties to Vita Bella Group Homes, Inc.

Later in 2005, Bellardita filed a chapter 7 bankruptcy. Schedule A filed with her petition indicated that she owned no real property. Her transfer of the Merced real properties was not disclosed in her schedules. Beth Stratton ("Stratton") was appointed the chapter 7 trustee.

Stratton discovered the transfers and brought an avoidance action. *Stratton v. Vita Bella Group Homes, Inc.*, No. 06-1100 (Bankr. E.D. Cal. 2006). After trial, Stratton prevailed and the court issued a judgment restoring title to Bellardita's bankruptcy estate.

The lien, if any, created by Cyril A. Lawrence's recordation of an abstract of judgment was not avoided during Bellardita's bankruptcy.

While the litigation remained pending, real property prices dropped and by the time Stratton received judgment, the value of each of the three properties was less than the amount of valid liens and encumbrances. In the end, Stratton was unable to sell the properties. Eventually, she issued her final report abandoning the properties to the debtor.

In 2015, Cyril A. Lawrence renewed his abstract of judgment. By the time he did so, the judgment had risen (according to Cyril A. Lawrence) to \$273,556.40. The renewed abstract was again recorded in the Office of the Merced County Recorder.

Bellardita's Motion

Fair Debt Collection Practices Act

Bellardita contends that Cyril A. Lawrence's "attempt to collect a debt discharged in bankruptcy may also violate the federal Fair Debtor Collections Practices Act (FDCPA). . ." Mot. Contempt ¶ 2, filed June 20, 2016, ECF # 73.

Such an argument has been foreclosed by *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). In this case, the plaintiff Walls attempted to assert causes of action for violation of the Fair Debt Collection Act predicated on a violation of the discharge injunction. Finding contempt as the appropriate remedy, the Ninth Circuit rejected Walls's argument, stating, "Walls argues that § 524 creates substantive rights in favor of the debtor; therefore § 105(a) should be available to enforce these rights and should not be limited only to authorizing a cause of action for contempt. She points out that 105(a) permits a court to issue 'any' order, and that pursuant to it a court on its own may take any action necessary to prevent an abuse of process. Further, Walls posits that violation of the discharge

injunction is an abuse of process, therefore the district court has power to issue any order enforcing the injunction. Walls particularly relies on *Besette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000), which she reads as recognizing that § 105(a) acts as a mechanism for enforcing any violation of substantive rights in the Code, specifically, a private cause of action under § 524. We disagree that *Besette* goes so far, but regardless, are persuaded that violations of that section may not independently be remedied through § 105 absent a contempt proceeding in the bankruptcy court." *Id.* at 506.

The court continued, "But we decline Walls's invitation to expand the remedies available under the Bankruptcy Code for violating § 524. Walls suggests that § 105 may be used to create substantive rights in the Code, therefore a private right of action is appropriate because § 105 empowers the bankruptcy court to use 'any' means necessary to advance the purpose of the Code." *Id.* at p. 507.

Finally, the court stated, "Walls contends that, contrary to what the district court held, the Bankruptcy Code does not preclude a simultaneous claim under the FDCPA. . . There is no escaping that Walls's FDCPA claim is based on an alleged violation of § 524. As the district court noted, this necessarily entails bankruptcy-laden determinations. . . To permit a simultaneous claim under the FDCPA would allow through the back door what Walls cannot accomplish through the front door—a private right of action. This would circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating the discharge injunction to contempt. '[A] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code . . . demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.' *MSR Exploration*, 74 F.3d at 914 (state law malicious prosecution claim based on bankruptcy filings preempted). Nothing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code. . ." *Id.* at 510.

Because the Ninth Circuit has spoken articulately and unequivocally against the position proffered by Bellardita, the court will deny the motion insofar as it asserts a cause of action under the FDCPA based on a violation of the discharge injunction.

Discharge Injunction

"A party who knowingly violates the discharge injunction under § 524(a)(2) can be held in contempt under § 105(a). 'The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.' *In re Bennett*, 298 F.3d at 1069. In *Bennett*, the Ninth Circuit went on to say that '[a]s discussed by the Eleventh Circuit in *Hardy*, to justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.' *Id.* (citing *In re*

Hardy, 97 F.3d at 1390 (citing *Jove Eng'g, Inc. v. Internal Revenue Serv.*, 92 F.3d 1539, 1555 (11th Cir.1996))." *In re Taggart*, 548 B.R. 275, 286 (B.A.P. 9th Cir. 2016), appeal docketed, *In re Emmert v. Taggart*, No. 16-60043 (9th Cir. May 26, 2016); see also *Desert Pines Villas Homeowners Ass'n. v. Kabiling (In re Kabiling)*, 551 B.R. 440, 444-45 (B.A.P. 9th Cir. 2016).

As to the first element of the civil contempt standard, the *Taggart* court further clarified the showing required. "First, the court made clear that whether a party has *actual knowledge of the injunction* is a fact-based inquiry and *must be found*; it can neither be presumed nor imputed. *In re Zilog*, 450 F.3d at 1007-08. Second, the Ninth Circuit further explained *there must be evidence showing that the alleged contemnor was aware of the discharge injunction and that it was applicable to his or her claim*. *Id.* at 1009. . . Taken together, *Bennett, Dyer, and Zilog*, demonstrate that the 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. Of course, subjective self-serving testimony may not be enough to rebut actual knowledge when the undisputed facts show otherwise." *Taggart*, at 287-88 (emphases added).

As to the second element of the civil contempt standard, the *Taggart* court observed: "In connection with the second prong's intent requirement, we have previously observed that 'the bankruptcy court's focus is not on the offending party's subjective beliefs or intent, but on whether the party's conduct in fact complied with the order at issue.' *Rosales v. Wallace (In re Wallace)*, BAP No. NV-11-1681-KiPaD, 2012 WL 2401871, at *5 (9th Cir. BAP June 26, 2012) (citing *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R. 747, 758 (9th Cir. BAP 2000), *rev'd on other grounds*, 285 F.3d 882 (9th Cir. 2002) (stating that courts have applied an objective test in determining whether an injunction should be enforced via the contempt power) (citing *In re Hardy*, 97 F.3d at 1390); see also *In re Dyer*, 322 F.3d at 1191 (noting that a 'willful violation' does not require a specific intent to violate the automatic stay)." *Id.* at 288.

The court suspects (but does not find) that Bellardita alienated these three parcels before Cyril A. Lawrence's lien attached. The court bases this on its review of the Findings of Fact and Conclusions of Law (at 2:17-20) dated September 19, 2008, ECF # 225, in *Stratton v. Vita Bella Group Homes, Inc.*, No. 06-1100 (Bankr. E.D. Cal. 2006, which show a transfer date of March 15, 2005, and comparing that date to Cyril A. Lawrence's Abstract of Judgment, recorded May 27, 2005, (an unnumbered exhibit in support of the motion), which reflects a recordation date of the judgment as of May 27, 2005). If true, Cyril A. Lawrence's judgment would be ineffective to create a lien on the property recovered and thereafter abandoned by Stratton when Bellardita received her discharge. 11 U.S.C. § 524(a)(2). In *California Correctional Peace Officers Ass'n v. Corbett (In re Corbett)*, No. 08-10861-A-7, 2016 WL 1045667, at *5 (Bankr. E.D. Cal. Mar. 14, 2016), this court stated: "Section 524(a)(2) precludes a creditor from creating a lien against a debtor's property that is based on a discharged debt. See *Matter of Paepflow*, 972 F.2d 730,

734-35 (7th Cir.1992); see also *Harris Mfrs. Nat'l Bank*, 457 F.2d 631, 635-36 (6th Cir.1972) (holding that a joint creditor's post-discharge in rem and quasi in rem actions against entirety property are impermissible unless the joint creditor has first obtained a judicial lien against such property *before* the discharge issues)."

But this court need not reach this issue to resolve this motion. Bellardita's motion does not show that Cyril A. Lawrence met the knowledge prong of the *Taggart* analysis. Bellardita must show that Cyril A. Lawrence was aware of the discharge injunction and knew it applied to his claim. As to the first prong of the civil contempt standard, it is most certainly true that Cyril A. Lawrence was served by mail with the discharge. See *Discharge of Debtor*, filed Jan. 31, 2006, ECF # 16. But as *Taggart* reminds us, "whether a party has actual knowledge of the injunction is a fact-based inquiry and must be found; it can neither be presumed nor imputed." And mailing does not show receipt. But more importantly, Bellardita has not demonstrated that respondent Cyril A. Lawrence knew that the discharge was applicable to his claim. And for that reason Bellardita has not sustained her burden and the motion will be denied.

Cyril A. Lawrence's Opposition

Cyril A. Lawrence prays for Rule 9011 sanctions against Bellardita in the amount of \$1,250. See *Opp'n* at. 4, filed July 12, 2016, ECF # 84.

Even if a counter-request for relief could be included in an opposition, and not brought by counter-motion, Fed. R. Bankr. P. 9013, respondent Cyril A. Lawrence has not complied with the safe harbor provisions of Rule 9011(c)(1)(A), so the motion will be denied on that basis.

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.

Josephine Bellardita's motion for contempt and Cyril A. Lawrence's request for Rule 9011 sanctions have been presented to the court. Having considered the motion, and all papers filed in support and opposition to it, and having considered the counter-request for relief in the opposition,

IT IS ORDERED that Bellardita's motion is denied without prejudice and Cyril A. Lawrence's request for sanctions is denied without prejudice.

12. [16-12771](#)-A-7 ROBERT/JACQUELINE HALL ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
8-15-16 [[11](#)]

RAYMOND ISLEIB/Atty. for dbt.
\$335.00 FILING FEE PAID

Final Ruling

The fee paid, the order to show cause is discharged and the case will remain pending.

13. [16-12982](#)-A-7 JOHN TAPIA MOTION FOR TEMPORARY WAIVER OF
FC-1 THE CREDIT COUNSELING
JOHN TAPIA/MV REQUIREMENT
8-16-16 [[7](#)]

JOHN TAPIA/Atty. for mv.
ORDER #11

No tentative ruling.

14. [16-11589](#)-A-7 ALFONSO ZINZUN OBJECTION TO DEBTOR'S CLAIM OF
TGM-2 EXEMPTIONS
PETER FEAR/MV 7-20-16 [[25](#)]
ERIC ESCAMILLA/Atty. for dbt.
PETER FEAR/Atty. for mv.

Tentative Ruling

Objection: Objection to Claim of Exemptions
Notice: LBR 9014-1(f) (1); written opposition required
Disposition: Sustained
Order: Civil minute order

EXEMPTIONS IN BANKRUPTCY

"California has opted out of the federal exemption scheme and limited [debtors in bankruptcy] to the exemptions debtors may claim in non-bankruptcy cases." *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1198 (9th Cir. 2012) (citations omitted); accord 11 U.S.C. §§ 522(b) (2), 522(b) (3) (A), 522(d); Cal. Civ. Proc. Code §§ 703.010(a), 703.130, 703.140.

In determining the scope or validity of an exemption claimed under state law, the court applies state law in effect on the date of the petition. 11 U.S.C. § 522(b) (3) (A); *Wolfe*, 676 F.3d at 1199 ("[B]ankruptcy exemptions are fixed at the time of the bankruptcy petition.").

Article 4 of Part 2, Title 9 (Enforcement of Judgments), Division 2, Chapter 4 of the California Code of Civil Procedure provides for an exemption known as the "automatic" homestead exemption. See Cal. Civ. Proc. Code §§ 704.710-704.850; *Kelley v. Locke (In re Kelley)*, 300

B.R. 11, 17-20 (B.A.P. 9th Cir. 2003). This exemption is conceptually distinct from the declared homestead exemption provided in Article 5 of Part 2, Title 9, Division 2, Chapter 4 of the California Code of Civil Procedure. See §§ 704.910-704.995; *Kelley*, 300 B.R. at 18-19.

The automatic homestead exemption under Article 4 is limited to the "principal dwelling" of the debtor or the debtor's spouse. A "dwelling" is defined by statute to include any place a person "resides." Cal. Civ. Proc. Code § 704.710(a), (c). Section 704.710 further provides that the term "'homestead' means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead." *Id.* § 704.710(c).

Additionally, "the factors a court should consider in determining residence for homestead purposes are [(i)] physical occupancy of the property and [(ii)] the intention with which the property is occupied." *Kelley*, 300 B.R. at 21 (citing *Ellsworth v. Marshall*, 16 Cal. Rptr. 588, 589 (Cal. Ct. App. 1961)); accord *In re Pham*, 177 B.R. 914, 918 (Bankr. C.D. Cal. 1994).

"[T]he automatic homestead exemption can only be claimed by a debtor who resides (or who is related to one who resides) in the homestead property at the time of a forced judicial sale of the dwelling." *Kelley*, 300 B.R. at 21 (citing Cal. Civ. Proc. Code §§ 704.710(a)-(c), 704.720, 704.730, 704.740). The bankruptcy petition constitutes a "forced sale" for purposes of the Article 4 automatic exemption under sections 704.710-704.850. See *id.* at 17, 20, 21 (citing *In re Pike*, 243 B.R. 66, 70 (B.A.P. 9th Cir. 1999)). Thus, to claim an automatic homestead exemption, the debtor must reside (or be related to one who resides) at the homestead property on the petition date. *Id.* at 21 (stating that the debtor did not reside at a particular property at the time of the petition's filing).

ANALYSIS

The debtor has listed two real properties in his schedules: (1) 220 Fresno Street, Fresno, CA, and (2) 228 Fresno Street, Fresno, CA. Both of these properties were exempted under § 704.730 of the California Code of Civil Procedure.

The debtor admitted at the § 341 meeting on June 6, 2016, that he lived at the 220 Fresno Street property on the date the petition was filed and had resided there for the last 15 years. The debtor also admitted that he has not lived at 228 Fresno Street since 1990.

Because 228 Fresno Street is not the debtor's principal dwelling, the debtor cannot claim that property exempt.

The debtor's attorney has indicated in a declaration, moreover, that the exemption claimed in the 228 Fresno Street property was incorrect and that amended schedules are being filed.

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.

The chapter 7 trustee, Peter L. Fear, has filed an objection to the debtor's exemption in real property located at 228 Fresno St., Fresno, CA. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is sustained.