

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

September 20, 2016 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.	16-24001-D-13 RDG-3	ARMANDO/LINDA MARTINEZ	OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS 8-12-16 [26]
----	------------------------	------------------------	--

Final ruling:

This is the trustee's objection to the debtors' claim of exemptions. The trustee objected on the ground the debtors had failed to indicate the dollar amount of their claimed exemption in their residence. On September 8, 2016, the debtors filed an amended Schedule C on which they claimed an exemption in a specific dollar amount. As a result of the filing of the amended Schedule C, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

2. 16-23803-D-13 JUSTIN HERRMANN AND OBJECTION TO DEBTORS' CLAIM OF
RDG-2 CHRISTINE KYDD-HERRMANN EXEMPTIONS
8-18-16 [22]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response has been filed. The objection is supported by the record. The court will sustain the trustee's objection to debtors' claim of exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

3. 16-24005-D-13 JENNIFER LAURETA OBJECTION TO DEBTOR'S CLAIM OF
RDG-1 EXEMPTIONS
8-12-16 [19]

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. The trustee alleged in his objection that the debtor improperly utilized California exemption statutes whereas she did not meet the residency requirement. On August 18, 2016, the debtor filed an amended Schedule C on which she claimed exemptions under the laws of the State of Virginia. As a result of the filing of the amended Schedule C, the trustee's objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

4. 16-24522-D-13 GERARDO MARTINEZ OBJECTION TO CONFIRMATION OF
PLAN BY U.S. BANK TRUST, N.A.
8-23-16 [25]

Final ruling:

This case was dismissed on August 24, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

5. 16-20826-D-13 MOHAMMED ALHAJI-HUSSAINI MOTION TO CONFIRM PLAN
PBG-1 7-25-16 [61]

Final ruling:

This case was dismissed on August 20, 2016. As a result the motion will be denied by minute order as moot. No appearance is necessary.

6. 15-25828-D-13 FRED NEELEMAN MOTION TO MODIFY PLAN
PK-3 7-20-16 [57]
7. 14-21631-D-13 MICHAEL/NANNETTE FARIA CONTINUED MOTION TO MODIFY PLAN
HWW-2 6-30-16 [71]
8. 14-21631-D-13 MICHAEL/NANNETTE FARIA OBJECTION TO CLAIM OF VENETIAN
HWW-4 BRIDGES ASSOCIATION, CLAIM
NUMBER 8
8-16-16 [84]
9. 14-21631-D-13 MICHAEL/NANNETTE FARIA OBJECTION TO CLAIM OF BAYVIEW
HWW-5 LOAN SERVICING, LLC, CLAIM
NUMBER 2
8-16-16 [89]

10. 14-29932-D-13 JOSE/GLORIA HERNANDEZ MOTION TO MODIFY PLAN
JCK-2 8-12-16 [48]

11. 16-23337-D-13 JUAN LOPEZ COVARRUBIAS MOTION TO REFINANCE
CJY-1 AND VERONICA ARAUJO DE 8-23-16 [17]

Final ruling:

This motion was withdrawn by the moving party on September 8, 2016, prior to any opposition being filed. Matter removed from calendar. No appearance is necessary.

12. 16-22638-D-13 LOLITA WALKER MOTION TO VALUE COLLATERAL OF
SLH-3 CAMBRIDGE PLACE OWNERS
ASSOCIATION
8-10-16 [39]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Cambridge Place Owners Association at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Cambridge Place Owners Association's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

13. 16-21940-D-13 JUAN/KIMBERLY MARTINEZ MOTION TO CONFIRM PLAN
PGM-1 7-27-16 [19]

14. 16-20646-D-13 JEWELL WONG
PGM-1

MOTION TO CONFIRM PLAN
8-9-16 [60]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because the moving party failed to serve the several creditors added to her Schedule E/F by amendment filed August 10, 2016. Thus, the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b).

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

15. 16-22063-D-13 RANDY/ROSELYN GAJARDO
SJS-1

MOTION TO CONFIRM PLAN
8-8-16 [25]

Tentative ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The trustee has filed opposition. For the following reasons, the motion will be denied.

The debtors originally proposed a plan with a \$630 plan payment and a 0% dividend on general unsecured claims estimated at \$59,352. The trustee objected on the grounds that the debtors' Schedule I included (1) monthly deductions totaling \$1,012 for voluntary 401(k) contributions; (2) a \$631 deduction for ESPP, which the debtor had testified is a voluntary contribution; and (3) deductions totaling \$693 for repayment of 401(k) loans that would be paid off during the term of the plan. The trustee objected to the first two deductions as not reasonably necessary for the support of the debtors or a dependent. As to the third, the trustee objected to the plan because the debtors did not propose to increase the plan payment when the loans are paid off.

The objection was sustained and the debtors filed the present motion and amended plan, which proposes a 100% dividend on unsecured claims incorrectly estimated at only \$12,053. The motion states that, by increasing the dividend to 100%, the debtors believe "the trustee's objections to the withholdings from their wages have been satisfied."

The trustee does not agree. The amended plan addresses only one of his objections to the original plan, listed above - the debtors have removed the \$631 ESPP deduction from their income. However, they are still deducting the \$1,012 in voluntary 401(k) contributions and they do not propose to increase their plan payment when the 401(k) loans are paid off. The trustee has again objected as to both of these issues. The debtors have not explained why they should be exempt from the general rule of Parks v. Drummond (In re Parks), 475 B.R. 703, (9th Cir. BAP 2012), regarding voluntary contributions to retirement plans or why they should not increase their plan payment once the retirement loans are paid off.

The debtors appear to believe both of these strategies should be permitted simply because they have proposed a 100% plan. The court, however, agrees with the trustee as to both issues. The trustee notes the debtors are not required to remain

in a 100% plan for purposes of the liquidation test. Thus, their determination to retain for themselves \$1,012 per month and the income that will be freed up once the retirement loans are paid off unreasonably leaves creditors with the risk of a future drop in income or increase in expenses, either of which would necessitate a decrease in the dividend. The trustee notes that even without considering the retirement contribution and retirement loan issues (that is, even if the debtors are permitted to retain for themselves the benefit of that extra income), their monthly net income, now that the \$631 ESPP contribution has been removed, is \$1,267 whereas they propose to increase their plan payment by only \$250, to \$880. Thus, they propose to retain for themselves \$387 per month plus the \$1,012 per month retirement contributions plus the extra income they will have once the retirement loans are paid off, leaving creditors to hope the debtors' circumstances will not change for the negative during the 60-month term of the plan.

For the reasons stated, the court concludes the debtors have failed to satisfy their burden of demonstrating the plan has been proposed in good faith. Accordingly, the motion will be denied. The court will hear the matter.

16. 15-27067-D-13 MARLENE DOUGLAS
PGM-4

MOTION FOR COMPENSATION FOR
PETER G. MACALUSO, DEBTOR'S
ATTORNEY
8-15-16 [80]

Tentative ruling:

This is the motion of the debtor's counsel ("Counsel") for approval of attorney's fees in the amount of \$5,452.50 incurred in the filing and prosecution of an adversary proceeding against S & S Auto for violating the automatic stay. At the end of the trial, the Honorable David E. Russell, who heard the matter, found that S & S had violated the stay by failing to return a repossessed vehicle; he awarded the debtor \$1,000 in attorney's fees pursuant to § 362(k)(1) of the Bankruptcy Code. Judge Russell awarded no other damages to the debtor. Counsel acknowledges he has received the \$1,000 from S & S; he seeks approval for payment of the balance, \$4,452.50, from the debtor through her chapter 13 plan. The trustee has filed opposition on two grounds: (1) approval of the fees will render the plan not feasible; and (2) no plan modification has been proposed to provide for the fees. Counsel has filed a reply. For the following reasons, the court intends to deny the motion.

First, the court does not find it appropriate that the debtor be required to pay the balance of the fees when Judge Russell awarded Counsel fees of \$1,000. Implicit in this award is a determination by Judge Russell that the \$1,000 is a reasonable amount Counsel's services. This alone is dispositive of the motion and Counsel has offered no basis on which to conclude otherwise. Second, the debtor is in a confirmed 60-month plan that will pay a 0% dividend to general unsecured creditors. Assuming the debtor is paying all her net disposable income into the plan, as appears to the court to be the case, she will not have any income available to pay the \$4,452 in attorney's fees. According to the debtor's schedules, her income is limited to social security income and food stamps, a total of \$2,065 per month, from which she supports herself and two children, ages 12 and 14. Her expenses are very modest for a family of three, and her monthly net income is just \$385, which is the amount of her plan payment.

Third, it appears from Counsel's billing statement that by the time S & S Auto returned the debtor's vehicle, Counsel had spent only two hours on the problem,

19. 16-21783-D-13 HECTOR PEREZ MOTION FOR ADMINISTRATIVE
FRB-2 EXPENSES
8-22-16 [69]
20. 14-20996-D-13 FRANCISCO/MARIA PADILLA MOTION TO MODIFY PLAN
PGM-3 8-4-16 [106]
21. 14-30697-D-13 CAROLE PETERSEN MOTION TO COMPROMISE
PGM-3 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH MICHAEL E.
MECHILL
8-16-16 [185]
22. 16-22099-D-13 RUBEN VALLEJO CONTINUED MOTION TO DISMISS
RDG-2 CASE
7-12-16 [31]

23. 16-23999-D-13 MARCO ALONSO CARRASCO AND MOTION FOR RELIEF FROM
MDE-1 MARIA CABRAL DE ALONSO AUTOMATIC STAY AND/OR MOTION
TOYOTA MOTOR CREDIT FOR ADEQUATE PROTECTION
CORPORATION VS. 8-16-16 [17]

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 debtors are 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.

24. 16-25617-D-13 DOLAN PARKER MOTION TO EXTEND AUTOMATIC STAY
GMW-1 9-6-16 [15]

Tentative ruling:

This is the debtor's motion to extend the automatic stay pursuant to § 362(c)(3)(B) of the Bankruptcy Code. The motion was noticed pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, the court has preliminary concerns, both procedural and substantive.

First, the court has concerns about service of the motion. It is clear from the moving papers the creditor that will be most affected by extending the automatic stay is the debtor's mortgage lender, Regent Financial, LLC ("Regent"). Specifically, this case was filed four days before a scheduled foreclosure sale and the debtor states in his declaration his objective in filing this case is to avoid foreclosure so he can sell the property and realize its equity to pay unsecured creditors. The debtor served this motion on Regent but did not serve the attorney who objected to two of the debtor's proposed plans in his prior case and who, one week before this motion was filed, filed a motion for relief from stay on behalf of Regent in the present case. Although service on that attorney was not technically required, the court finds that the failure to serve Regent through that attorney was a method of service not reasonably calculated to give notice of this motion.

Second, the debtor states in his supporting declaration that in addition to the mortgage on the property in question, "[t]here is also a judgment lien on the Property with an approximate balance due of \$90,000.00." Debtor's Decl., DN 17, at 2:18-19. There is no judgment lien creditor listed on the debtor's schedules in this or the prior case; thus, that judgment lien creditor was not given notice of anything that transpired in the prior case and was not given notice of this motion. Further, the debtor's schedules in both cases are incomplete, and thus, in contravention of his duty of careful, complete, and accurate reporting in his schedules filed in the case. See Hickman v. Hana (In re Hickman), 384 B.R. 832, 841 (9th Cir. BAP 2008), citing Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 417 (9th Cir. BAP 2007). Finally, that creditor was not provided for in any of the three plans the debtor proposed in the prior case and is not provided

for in his proposed plan in this case.

Turning to the substance of the motion, the debtor has not presented clear and convincing evidence of a change in his financial or personal circumstances since the dismissal of his prior case or any other reason for the court to find that this case will be concluded with a confirmed plan that will be fully performed. The debtor testifies in support of the motion his income "has increased by approximately \$2,450.00 per month over and above what [he] was previously receiving." Decl. at 3:1-2. He states he will be receiving \$1,100 per month in social security income beginning next month and has rented out his trailer for \$1,350 per month. What he has not mentioned is that his business income, according to his Schedules J, was \$4,500 in the prior case (filed just five months before this one) but is only \$2,600 in this case, for a drop of \$1,900 per month.¹ This results in an overall increase in income of just \$550 per month rather than the \$2,450 stated in the declaration. Because the debtor has added a deduction of \$350 to his Schedule J for income taxes, the increase in his monthly net income is only \$200 per month. Thus, the moving papers are substantially misleading. Further, given the relative insignificance of the \$200 per month increase in monthly net income, together with the precipitous unexplained drop in the debtor's business income, the court is not persuaded the debtor's financial affairs have changed sufficiently to conclude that a plan, if confirmed, will be completed.

For the reasons stated, the debtor has failed to meet his burden of demonstrating by clear and convincing evidence that this case has been filed in good faith. The court would, in any event, not consider granting the motion until Regent's counsel is apprised of the motion and has an opportunity to weigh in and would not consider granting the motion as against the judgment lien creditor until that creditor has been noticed of the case and the motion. The court will hear the matter.

1 The debtor failed to file with his Schedule J in either case the statement of gross receipts, business expenses, and monthly net income for the business, as required by the terms of the form Schedule J, so the court has no way to determine what factors have caused the debtor's business income to drop so substantially in such a short time. On his Schedule J in the prior case, where asked whether he expected any changes in income in the following year, the debtor answered No, and in support of two motions to confirm amended plans in the prior case, he made no mention of a drop in income.

26. 12-24748-D-13 ANGELO/CAROLYN DIMAS
TPH-2

MOTION TO INCUR DEBT
8-31-16 [52]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

27. 16-25149-D-13 THEODORE MADZEY
HSB-1
STATE FARM BANK, F.S.B. VS.

MOTION TO DISMISS CASE AND/OR
MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-30-16 [19]

Tentative ruling:

This is the motion of State Farm Bank, F.S.B., (the "Bank") to dismiss this case or, in the alternative, for relief from the automatic stay. The debtor has filed opposition and the Bank has filed a reply. As to the request for dismissal, the court is not prepared to consider the motion because it was served only on the debtor and not on the trustee or creditors. See Fed. R. Bankr. P. 1017(a). The court will consider continuing the hearing to permit the Bank to provide such notice if it so chooses. As for the request for relief from stay, provided the Bank is not seeking any affirmative relief against the debtor, the court is prepared to grant the motion to extent of finding that the automatic stay does not apply to the pending state court action between the parties, as it was brought by the debtor. The automatic stay does not apply to actions by, not against, the debtor. Parker v. Bain (In re Parker), 68 F.3d 1131, 1138 (9th Cir. 1995).

To the extent, if any, the stay does apply, it is appropriate to lift it for the purpose of permitting the state court action to go forward except for the purpose of enforcing any judgment obtained or determining issues of dischargeability of debt. The action was initiated by the debtor to determine his rights as regards the Bank's loan, the issues involve predominantly state law, not bankruptcy law, and the state court is more familiar with the issues than this court.

The court is not persuaded the stay should be lift for any other purpose. The motion is brought pursuant to § 362(d)(1) and (4) only; that is, for cause and bad faith. As support, the Bank points to the debtor's prior bankruptcy cases - two cases in 2012 in one of which the debtor received a chapter 7 discharge and two chapter 13s - one in 2013 and one in January of 2014, both dismissed for failure to file schedules and statements. Two years and five months elapsed between the time the debtor's last prior case was dismissed and the time the debtor filed the present case. The Bank relies solely on those prior filings for its motion, concluding "[t]he aforementioned multiple/successive bankruptcy filings have prevented Movant from lawfully exercising its state law remedies with regard to the Real Property."

The evidence, however, does not support that conclusion. The Bank's attorney, Jessica Scott, testifies in her declaration that the debtor defaulted on the loan on November 2, 2013. Ms. Scott offers no indication of how she comes to have personal knowledge of that fact, but assuming it is true, only the third and fourth of the debtor's prior cases could have had any impact on the Bank's rights as regards the loan. The debtor commenced his third bankruptcy case on October 10, 2013 and his

fourth on January 6, 2014. The cases were dismissed November 26, 2013 and March 3, 2014, respectively. Thus, at most, the prior cases impacted the Bank's rights only between November 2, 2013 and March 3, 2014. Ms. Scott testifies the parties entered into a loan repayment agreement on April 4, 2014. Until he filed the present case, over two years later, the debtor took no action to affect the Bank's rights by utilizing bankruptcy law. The court finds the prior filings are too remote in time and too unconnected with the Bank's loan to support a finding of either cause or bad faith.

The court will hear the matter.

28. 15-27290-D-13 ALBERT/MARY HAYNES MOTION TO COMPROMISE
JGL-2 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH HEBREW HOME
9-6-16 [45]
29. 16-24395-D-13 NELLIE YANEZ OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
8-29-16 [14]
30. 16-24397-D-13 ABBIE IBRAHIM OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
8-29-16 [16]

Tentative ruling:

This is the debtor's motion to extend the automatic stay pursuant to § 362(c) (3) (B) of the Bankruptcy Code. The motion was noticed pursuant to an order shortening time; thus, the court will entertain opposition, if any, at the hearing. However, the court has preliminary concerns, both procedural and substantive.

First, the court has concerns about service of the motion. It is clear from the moving papers the creditor that will be most affected by extending the automatic stay is the debtor's first mortgage lender, Ocwen Loan Servicing ("Ocwen"). This case was filed four days before a scheduled foreclosure sale and the debtor states in his declaration he filed this case as an emergency "skeleton" case to halt the foreclosure. The debtor served this motion on Ocwen at the address listed on its proof of claim in the prior case as the address where payments were to be sent but not the address on the proof of claim where notices should be sent, and did not serve the attorney who objected to confirmation of the debtor's plan in his prior case or the attorneys who filed a request for special notice in the prior case. (The proof of claim and request for special notice were filed in the name of U.S. Bank as the creditor: it appears the Bank is the actual creditor and Ocwen is the loan servicer.) Although service at that address and on those attorneys was not technically required, the court finds that the failure to serve them was a method of service not reasonably calculated to give notice of this motion.

Second, the debtor's schedules in the prior case disclose the existence of a second position deed of trust against the same property, held by Sharna Parekh, securing a \$39,000 debt, and property taxes of \$3,600 owed to the San Joaquin County Tax Collector, yet neither of those parties was listed on the debtor's master address list in this new case and neither was given notice of this motion. Thus, any order issuing as a result of the motion will not apply to either of those creditors. As far as the master address list is concerned, the court recognizes the debtor filed this as a "skeleton" case; however, that does not excuse his failure to include two creditors obviously known to him whose names and addresses were ready to hand.¹

Turning to the substance of the motion: the motion goes into some detail about the circumstances the debtor's counsel alleges have changed, including an alleged emergency medical situation counsel claims caused unforeseen expenses in the prior case and certain changes made to the debtor's budget that will result in his plan payment being \$740 per month lower than in the prior case. However, these changes are not detailed in the debtor's declaration, which states only: "I, in conjunction with my attorney, have conducted a more careful analysis of my income and expenses and believe that based on my revised budget, I will be able to afford all plan payments going forward." Debtor's Decl., DN 15, at 2:1-3. It is the debtor's burden to present clear and convincing evidence of a change in his financial or personal circumstances since the dismissal of his prior case or some other reason for the court to find that this case will be concluded with a confirmed plan that will be fully performed. The unsworn allegations of his counsel, who demonstrates no personal knowledge of those circumstances, is not sufficient.

For the reasons stated, the debtor has failed to meet his burden of demonstrating by clear and convincing evidence that this case has been filed in good faith. The court would, in any event, require additional service on Ocwen and U.S. Bank, as described above, so as to ensure they have an opportunity to weigh in. The court will hear the matter.

- 1 A debtor is required to include on the master address list the names and addresses of "each entity included or to be included" on his schedules. Fed. R. Bankr. P. 1007(a)(1).