UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 26, 2019 at 11:00 a.m.

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1. **17-26202-E-7** **WILLIAM/FRAYBA TIPTON** **CONTINUED MOTION FOR SUMMARY JUDGMENT, MOTION FOR SUMMARY JUDGMENT**
17-2235 **David Smyth**
NATIONWIDE INSURANCE COMPANY OF AMERICA V. TIPTON ET AL
6-28-19 [41]

1 thru 2

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, on February 28, 2019, 2019. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Summary Judgment is xxxxxxxxxxxxxxxxxxxxx.

Nationwide Insurance Company of America ("Plaintiff") filed the instant Adversary Proceeding on December 11, 2017, against the defendants, William Tipton and Frayba Tipton ("Defendant-Debtor"). The Adversary Proceeding centers around a $1,292,245.48 judgement received in *William and Frayba Tipton v. Nationwide Insurance Company Of America, et al.*, the Superior Court of California, County of San Joaquin, Case No. 39-2011-00266271-CU-BC-STK ("State Court

Litigation").

Plaintiff seeks a determination that Plaintiff's claim is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). Dckt. 1. The Complaint makes the following allegations:

A. On May 10, 2016, NICOA [Plaintiff] filed a cross-complaint in the Superior Court of California, Count of Joan Joaquin, asserting the causes of action for fraud, breach of contract, and equitable subrogation as result of Debtor's insurance fraud claim on their homeowner's insurance policy. *Id*., ¶ 11.

B. Plaintiff had previously issued to Defendant-Debtors homeowner's insurance with limits of $694,000.00 for Dwelling; $69,400.00 for Other Structures; and $485,800.00 for Personal Property (the "Insurance Policy"), providing insurance coverage for real property commonly known as 27771 South Fagin Drive, Tracy, California (the "Property"). *Id*., ¶ 12.

C. After a fire on July 4 or 5, 2008, Defendant-Debtor made a claim under the Insurance Policy. The Tracy Fire Department reported that the fire appeared incendiary. *Id*., ¶ 13.

D. Defendant-Debtor claimed personal property losses of $1,090,000, including claims for an original Van Gogh painting and Rolex watches. *Id*., ¶¶ 14, 15, 20.

E. In reliance on Defendant-Debtor's false representations of financial hardship and need to pay living expenses (Defendant-Debtor not actually paying rent), Plaintiff paid $105,947.52 for 'additional living expenses' ("ALE") under the Insurance Policy. *Id*., ¶¶ 17-19, 21-22, 24-26, 35.

F. On December 1, 2009, Plaintiff paid $616,643.82 Bank of America, as the mortgagee and loss payee, pursuant to the Insurance Policy. *Id*., ¶ 23. Plaintiff also advanced $33,805.11 for dwelling coverages relating to debris removal, demolition, permits and board-up costs and expenses. *Id*.

G. Criminal charges were brought against Defendant-Debtor for arson and insurance fraud. *Id*., ¶ 30. Defendant-Debtor (William Tipton and Frayba Tipton) were convicted on charges of embezzlement, perjury, and insurance fraud. *Id*., ¶¶ 31, 39.

H. Plaintiff served a cross-complaint on Defendant-Debtor. *Id*., ¶ 40. After Defendant-Debtor failed to appear, judgement was entered against Defendant-Debtor on January 30, 2017, in the amount of $1,292,245.48. *Id*.

I. Plaintiff's claim is non-dischargeable because it is a debt for money,

property, services, or an extension, renewal, or refinancing of credit, that was obtained by false pretenses, a false representation, or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A). *Id*., ¶ 44.

J. Plaintiff's claim is non-dischargeable because it is a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny pursuant to 11 U.S.C. § 523(a)(4). *Id*., ¶ 47.

K. Plaintiff's claim is non-dischargeable because it is a debt for willful and malicious injury caused by Defendant-Debtor. *Id*., ¶ 50.

Motion for Summary Judgment

On June 28, 2019, Plaintiff filed the instant Motion for Summary Judgment pursuant to FED. R. BANKR. P. 7056. Dckt. 41. The Motion argues there is no triable fact as to the following issues:

1. The amount of $105,947.52, plus pre-judgment interest of $84,330.25, for ALE and personal property coverage paid to the Defendant-Debtor is not dischargeable under Bankruptcy Code § 523(a)(2)(A) because it is a debt for money that was obtained by actual fraud on the part of the Defendant-Debtor.

2. The amount of $33,805.11, plus pre-judgment interest of $25,561.04, for dwelling coverages paid relating to debris removal, demolition, permits and board-up costs and expenses, as part of the Default Judgment, is not dischargeable under Bankruptcy Code § 523(a)(2)(A) because it is a debt for money that was obtained by actual fraud on the part of the Debtors. In the alternative, this debt is not dischargeable under Bankruptcy Code § 523(a)(6) because it is a debt for willful and malicious injury caused by Debtors.

3. The amount of $616,643.82 paid to Debtors' lender, Bank of America, plus prejudgment interest of $425,897.74, as part of the Default Judgment, is not dischargeable under Bankruptcy Code § 523(a)(6) because it is a debt for willful and malicious injury caused by Debtors.

DEFENDANT-DEBTOR'S OPPOSITION

Defendant-Debtor filed an Opposition Memorandum on July 23, 2019. Dckt. 71. Defendant-Debtor argues the following:

1. The issues decided in the State Court Litigation were not identical to the issues in this Adversary Proceeding because Plaintiff's bad faith was the only issue decided in the default judgement on the First Amended Complaint.

2. The Judgement on Plaintiff's Cross-Complaint was based on a conclusion and not well pleaded facts and should not be entitled to collateral estoppel.

3. Collateral estoppel should not apply because the presiding judge in the State Court Litigation instructed the Defendant-Debtor the case was over prematurely, where the entry of default judgement still could have been opposed.

4. The presence of $39,000.00 in cash in the Property indicates Defendant-Debtor did not cause the fire.

5. Application of collateral estoppel would cause an unfair result because Defendant-Debtor could not have caused the fire.

PLAINTIFF'S REPLY

Plaintiff filed a Reply Memorandum on July 31, 2019. Dckt. 75. Plaintiff argues the following:

1. The issue of fraud was necessarily decided in the Statue Court Litigation.

2. The default judgement on the Second Amended Cross-Complaint was based on well pleaded facts.

3. Defendant-Debtor has a full and fair opportunity to litigate the claims because Defendant-Debtor was not misled, demonstrated by an appeal filed.

4. The presence of $39,000.00 in cash is irrelevant to issue preclusion, and does not indicate Defendant-Debtor did not cause the fire.

5. Public Policy supports issue preclusion here where Defendant-Debtor engaged in intentional misconduct.

APPLICABLE LAW

Motion For Summary Judgement

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome

of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Issue Preclusion

The bankruptcy court may give preclusive effect to a state court judgment as the basis for excepting a debt from discharge. *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir. 2001). The court applies the forum state's law of issue preclusion. *Id.* Here, as was the case in *Harmon*, California is the relevant state law and under California law issue preclusion is only appropriate when five threshold factors are met : (1) the judgment is final; (2) the issue(s) are identical; (3) the proceeding was actually litigated; (4) the issue was necessarily decided in the former proceeding; and (5) the parties are the same or were in privity. *Id.* at 1245; *see also In re Riley*, 2016 WL 3351397, at *4 (B.A.P. 9th Cir. June 8, 2016) (*citing DNK Holdings, LLC v. Faerber,* 61 Cal.4th 813, 825 (2015)). A matter is "actually litigated" if there is an express finding or if the issue was necessarily decided. *In re Harmon,* 250 F.3d at p. 1248.

Moreover, the court is not required to apply issue preclusion even if the five threshold factors are met because the court is also charged with determining whether issue preclusion "furthers the public policies underlying the doctrine." *Id.* at p. 1245 (citing *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342–42 (1990)). In short, the decision to apply issue preclusion is discretionary. Under California law, the presence or absence of a full and fair opportunity to litigate is relevant to the public policy inquiry. *Id.* at p. 1240.

The party asserting issue preclusion "carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007).

Debts for Money, Property or Services Obtained by False Pretenses or Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate five elements:

(1) the debtor made ... representations;

(2) that at the time he knew they were false;

(3) that he made them with the intention and purpose of deceiving the creditor;

(4) that the creditor relied on such representations; [and]

(5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz,* 523 U.S. 213, 215 (1998).

Debt for Willful and Malicious Injury Pursuant to 11 U.S.C. § 523(a)(6)

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby),* 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury "involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted).

For a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the "ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

DISCUSSION

Plaintiff's award of damages in the amount of $1,292,245.48 resulted from a default judgement on Plaintiff's Second Amended Cross-Complaint ("SACC") in the State Court Litigation. Exhibit 18, Dckt. 55. The SCC included the following causes of action:

1. Fraud based on Defendant-Debtor's misrepresentations as to personal

property losses, financial stability, and living expenses resulting in damages of $33,805.11 for dwelling coverages and $105,947.52 for ALE. Exhibit 7, Dckt. 52. at ¶¶ 49-65.

2. Breach of Contract claim based on failure to cooperate with Plaintiff's investigation, concealment of material information, and providing fraudulent, untruthful, and false information resulting in damages of $105,947.52 for ALE, $33,805.11 for dwelling coverages, and $616,643.82 for property repairs paid to Bank of America. *Id.*, ¶¶ 66-75.

3. Equitable Subornation claim based on the willful and intentional discretion of the Property by starting a fire, resulting in damages of $616,643.82 for property repairs paid to Bank of America. *Id.*, ¶¶ 76-84.

The State Court Litigation also resulted in a judgement based on the Defendant-Debtor's First Amended Complaint ("FAC"). Exhibit 1, Dckt. 47. The FAC asserted claims of breach of contract, breach of the covenant of good faith and fair dealing, and negligence.

A judgement on the FAC was issued after a summary judgement motion. Exhibit 23, Dckt. 57. The FAC Judgement included detailed findings of fact and conclusions of law, including that "[t]he undisputed facts clearly show that [Defendant-Debtor] committed intentional fraud and misrepresentation." *Id*. The court found misrepresentations were made as to claims for damaged property (including an "original" Van Gogh painting), about where Defendant-Debtor's were living, and about their financial status. *Id*.

The FAC Judgement found the Insurance Policy was void as a result of Defendant-Debtor's fraudulent conduct.

The Plaintiff has not provided the court with the copy of a judgment on the FAC to which the Summary Judgment findings would relate. At the hearing, **xxxxxxxxxxxxxxxxxxxxxxx**

Issue Preclusion Applied to 11 U.S.C. § 523(a)(2)(A)

There is no dispute that ~~the FAC Judgement~~ and SACC Judgment are final and the parties are the same.

Therefore, issue preclusion will apply if the issues are identical, the proceeding was actually litigated, and the issue was necessarily decided in the former proceeding.

11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate the debtor made knowingly false representations to deceive the creditor, and the creditor was damaged after relying on the representations.

Here, it is clear that the state court found Defendant-Debtor intentionally made fraudulent misrepresentations as to claims for damaged property, where Defendant-Debtor was living, and as to Defendant-Debtor's financial status. Exhibit 23, Dckt. 57; Exhibit 18, Dckt. 55; *see also* Exhibit 7, Dckt. 52.

The damages of $33,805.11 for dwelling coverages and $105,947.52 for ALE were only alleged in the SACC to stem from fraudulent misrepresentations made by Defendant-Debtor. Exhibit 7, Dckt. 52. at ¶¶ 49-65.

~~Based on the aforementioned, the issues in this Adversary Proceeding and the State Court Litigation are identical, were actually litigated, and necessarily decided.~~

~~Public policy here supports application of issue preclusion so Defendant-Debtor does not get to relitigate issues already determined. Therefore, issue preclusion applies and Plaintiff is entitled to summary judgement that its claims of $105,947.52 and $33,805.11, including all interest, fees, costs, expenses, and other amounts arising under applicable state law are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).~~

Issue Preclusion Applied to 11 U.S.C. § 523(a)(6)

There is no dispute that the FAC Judgement and SACC Judgment are final and the parties are the same.

Therefore, issue preclusion will apply if the issues are identical, the proceeding was actually litigated, and the issue was necessarily decided in the former proceeding.

The FAC and the FAC Judgement do not address the issue of whether Defendant-Debtor caused the fire damage. Exhibit 1, Dckt. 47; Exhibit 23, Dckt. 57.

The SACC Default Judgment is based on the SACC, which asserted the damages of $616,643.82 were caused by breach of contract and equitable subrogation of Bank of America's claim based on Defendant-Debtor's allegedly causing the fire damage to the Property. Exhibit 7, Dckt. 52.

Because there was only a default judgement, no express findings were made. Furthermore, because the SACC based the $616,643.82 damages on both breach of contract and equitable subordination, the issue of whether Defendant-Debtor caused the fire damage was not necessarily determined.

The issue of fire damage was not "actually litigated" because there is no express finding and the issue was not necessarily decided. *In re Harmon,* 250 F.3d at p. 1248. Therefore, issue preclusion does not apply and summary judgement is not granted as to Plaintiff's claim of $616,643.82.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Nationwide Insurance Company of America ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion For Summary Judgment ~~is granted. The court shall enter judgment for Plaintiff determining that the claims of $105,947.52 and $33,805.11 arising out of the judgement entered in *William and Frayba Tipton v. Nationwide Insurance Company Of America, et al.*, the Superior Court of California, County of San Joaquin, Case No. 39-2011-00266271-CU-BC-STK ("State Court Litigation"), including all interest, fees, costs, expenses, and other amounts arising under applicable state law, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).~~

~~Counsel for Plaintiff Nationwide Insurance Company of America shall lodge within fourteen days of the entry of this Order a proposed judgment consistent with this Order.~~

~~Requests for costs, expenses, and fees, if any, shall be made as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.~~

2. **17-26202-E-7** **WILLIAM/FRAYBA TIPTON** **CONTINUED PRE-TRIAL CONFERENCERE: AMENDED COMPLAINT**
17-2235 **1-5-18 [8]**

NATIONWIDE INSURANCE COMPANY OF AMERICA V. TIPTON ET AL

Plaintiff's Atty: Benjamin Carson, Tuyet Tran, Christine M. Emanuelson
Defendant's Atty: David Ashley Smyth

Adv. Filed: 12/11/17
Answer: none
Amd. Cmplt. Filed: 1/5/18
Answer: 2/5/18

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Notes:
Continued as a pretrial scheduling conference to be heard in conjunction with the Motion for Summary Judgment by order filed 8/20/19 [Dckt 84]

3. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **MOTION TO DISMISS ADVERSARY**
18-2090 **LBG-3** **Pro Se** **PROCEEDING/NOTICE OF REMOVAL**
PUTNAM V. THOMAS, JR. ET AL **9-11-19 [83]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Sufficient Notice Not Provided. The Notice of Hearing purported to set the hearing on the Motion To Dismiss pursuant to Local Bankruptcy Rule 9014–1(f)(2). The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, the Chapter 7 Trustee, and Office of the U.S. Trustee on September 11, 2019, providing only 15 days' notice.

> Local Bankruptcy Rule 9014–1(f)(2) states the following:
>
> 2) *Motions Set on 14 Days' Notice.* Alternatively, unless additional notice is required by the Federal Rules of Bankruptcy Procedure or these Local Rules, the moving party may file and serve the motion at least fourteen (14) days prior to the hearing date.
>
> A) **This alternative procedure shall not be used for a motion filed in connection with an adversary proceeding.**
>
> Thus, the hearing was set improperly and insufficient notice was provided.

The Motion for Summary Judgment is denied without prejudice.

Based on insufficient notice having been provided as discussed above, the Motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion To Dismiss filed by William Carter Thomas Jr. and Faye Wales Thomas ("Defendants") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion To Dismiss is denied without prejudice.

4. **10-27435-E-7 THOMAS GASSNER**
19-2006 SGB-1 Richard Chan
HUSTED V. MEPCO LABEL SYSTEMS ET AL

MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR MOTION FOR MANDATORY ABSTENTION
8-12-19 [28]

4 Thur 5

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, on February 28, 2019, 2019. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion for Summary Judgment is continued to 11:00 a.m. on XXXXX, 2019..

In the Thomas A. Gassner Bankruptcy Case, No. 10-27435, related to this Adversary Proceeding, the parties to this Adversary have filed a Motion To Approve Settlement. 10-27435, Dckt. 161. That Motion seeks to settle disputes between Georgene Gassner and the Chapter 7 Trustee Kimberly Husted by determining which party can pursue which claims in the Adversary Proceedings related to the Thomas A. Gassner case regarding the Gassner Trust.

Only after there is the order issued on the Settlement will the court have established for the Defendants who has and is asserting the rights concerning the MEPCO stock and interests therein.

The court shall continue the hearing to **XXXX** to allow the order to be issued to set the undisputed party in interest asserting such rights.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Summary Judgment filed by Nationwide Insurance Company of America ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Summary Judgment is continued to **10:30 a.m. on xxxxxxxxx, 2019.**

5. **10-27435-E-7** **THOMAS GASSNER** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
19-2038 **3-12-19 [1]**

GASSNER V. GASSNER ET AL

Plaintiff's Atty: Holly A. Estioko
Defendant's Atty:
Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner]
Charles L. Hastings [Laura Strombom]

Adv. Filed: 3/12/19
Answer:
4/11/19 [Laura Strombom]
4/11/19 [Alfred M. Gassner; Carol L. Gassner]

Amd. Cmplt. Filed: 7/12/19
Answer:
8/5/19 [Alfred M. Gassner; Carol L. Gassner]
8/13/19 [Laura Strombom]
Amd. Answer: 8/13/19 [Alfred M. Gassner; Carol L. Gassner]
8/26/19 [Alfred M. Gassner; Carol L. Gassner]

Nature of Action:
Sanctions for willful violation of automatic stay (against Settlors and Strombom)
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
Declaratory judgment
Injunctive relief - other

Notes:
Continued from 7/11/19 to allow the Parties to hone their claims and determine the rights and issues for which they had standing.

First Amended Complaint filed 7/12/19 [Dckt 20]

Status Conference Statement of Plaintiff Georgene Gassner filed 9/18/19 [Dckt 31]

Defendants Carol L. Gassner and Alfred M. Gassner's Defendant's Status Conference Statement filed 9/19/19 [Dckt 33]

6. **11-44540-E-13** **MERCEDES PEREZ** **ORDER TO SHOW CAUSE**
18-2041 **RHS-1 Dan Nelson** **8-22-19 [34]**
PEREZ V. STOCKTON MORTGAGE ET AL

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Plaintiff, Plaintiff's Counsel, and Office of the U.S. Trustee as stated on the Certificate of Service on August 25, 2019. The court computes that 32 days' notice has been provided.

The Order to Show Cause is xxxxxxxxx

Mercedes Perez, the Plaintiff-Debtor, commenced this Adversary Proceeding on April 5, 2018. No answer or other responsive pleading has been filed. On August 3, 2018, the entry of the default of "Stockton Mortgage," the sole named defendant, was entered. Dckt. 9.

Attached to the Complaint as Exhibit A is a copy of a deed of trust in which the trustee and beneficiary is identified as "Stockton Mortgage Incorporated." Id. at 12.

Attached as Exhibit "B" to the Complaint is a copy of an order of this Court determining that the secured claim of John Frey, Tesibel Frey, Elizabeth Kreuger, Leslie Merl Frey, and Ruth Frey has a value of $0.00 as a secured claim. Id. at 19.

The Certificate of Service for the Summons and Complaint state that they were served on the defendant as follows:

STOCKTON MORTGAGE

ROSS F. CARDINALLI JR, AGENT FOR SERVICE OF PROCESS
6820 PACIFIC AVENUE
STOCKTON, CA 95207

Dckt. 7. When the court has sent documents to "Stockton Mortgage" at that address, they have been returned as undeliverable. Dckt. 12 and August 17, 2018 Docket Entry.

An Amended Complaint was filed by Plaintiff-Debtor on March 15, 2019, a year after the original Complaint was filed. Dckt. 29. This was after the court denied Plaintiff-Debtor's Motion for Entry of Default Judgment. Civil Minutes, Dckt. 24.

The First Amended Complaint now names the following persons as the defendants against whom a judgment is sought:

> JOHN H. FREY AND TESIBEL E. FREY, TRUSTEES OF THE FREY FAMILY TRUST, DATED JUNE 12, 1981,
>
> ELIZABETH KREUGER, TRUSTEE OF THE ELIZABETH KREUGER LIVING TRUST, DATED JULY 17, 1996,
>
> LESLIE MERL FREY AND RUTH ELIZABETH FREY, TRUSTEES OF THE LESLIE MERL FREY AND RUTH ELIZABETH FREY REVOCABLE TRUST, DATED JANUARY 28, 1992

Dckt. 29.

No Certificate of Service has been filed for the Amended Complaint filed on March 15, 2019.

Prosecution of Adversary Proceeding

At the March 25, 2019 Continued Status Conference, Counsel for Plaintiff-Debtor reported that he is conducting discovery to identify the correct trustees for the defendants and then the amended complaint (which presumably would have to amended again to name the correct trustees) would be served. Civil Minutes, Dckt. 32.

Then seventy-five (75) days after the Amended Complaint had been filed, on May 29, 2019, the court held a further Continued Status Conference. The updated status report that was filed by Plaintiff-Debtor provides the following information:

> 1. Plaintiff amended the complaint, has a Subpoena out to obtain service addresses for the Defendants.
>
> 2. Plaintiff will likely have the Summons re-issued again because the service address for the amended Defendants has yet to be ascertained.
>
> 3. Plaintiff requests the Status Conference be continued 60 days to allow for service of the Summons and opportunity for Defendants to answer.

Dckt. 31. Counsel for Plaintiff reported at the further Continued Status Conference that he was still trying to identify the defendants that the Plaintiff-Debtor should be suing. Civil Minutes, Dckt. 33. The court then continued the Status Conference to August 21, 2019.

The August 21, 2019 Continued Status Conference, which was one-hundred fifty-nine (159) days after the Amended Complaint was filed, was conducted. No appearance was made by Counsel for Plaintiff-Debtor. No updated Status Report was filed by Counsel for Plaintiff-Debtor. Nothing has been filed in this Adversary Proceeding by Plaintiff-Debtor indicating that this Adversary Proceeding is being prosecuted.

PLAINTIFF'S REPLY

Plaintiff filed a Reply on September 12, 2019. Dckt. 37. Plaintiff states the following:

> 1. Plaintiff propounded discovery on Defendant which resulted in a Declaration that no records exist in their possession.
>
> 2. Plaintiff's investigator has been searching for the Trustees of the three Trusts which are the real parties in interest. One of the named Trustees has been located.
>
> 3. The remaining Trustees appear to be deceased.
>
> 4. Plaintiff's investigator is continuing to research possible beneficiaries of the Trust to locate a trustee to serve. The investigation should be complete by the end of September 2019.

DISCUSSION

This Adversary Proceeding has been with the court, not being prosecuted by the Plaintiff-Debtor for five hundred four (504) days since the Complaint was filed. No potential defendants have been served by Plaintiff-Debtor. It appears that Plaintiff-Debtor has not identified the defendants against whom relief should properly be sought.

Federal Rule of Civil Procedure 4 and Federal Rule of Bankruptcy Procedure 7004 expressly provide a time limit for which an adversary proceeding may sit idle before it must be dismissed.

> (m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, **the court**--on motion or on its own after notice to the plaintiff--**must dismiss the action without prejudice against that defendant or order that service be made within a specified time**. But if the **plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.** This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

Fed. R. Civ. P. 4(m) (emphasis added).

In this Adversary Proceeding the court has allowed Plaintiff-Debtor four and one-half times the 90 days permitted under the Rule. This has been in the form of informal extensions, none having been requested by Plaintiff.

At the hearing, xxxxxxxxxxxxxx.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is xxxxxxxxx