UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

October 9, 2014 at 1:30 p.m.

---

1. 14-20309-E-13 PATRICK/JENNIFER RESTORI
14-2187
RESTORI ET AL V. NATIONSTAR MORTGAGE LLC

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-15-14 [11]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Bernard J. Kornbert

Adv. Filed: 6/26/14
Amd Complaint Filed: 8/15/14

Answer: none

Nature of Action:
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Continued from 9/10/14 to be conducted in conjunction with Defendant's Motion to Dismiss the First Amended Complaint.

2. 14-20309-E-13 PATRICK/JENNIFER RESTORI — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2187 BJK-2 — 8-29-14 [16]
RESTORI ET AL V. NATIONSTAR MORTGAGE LLC

Tentative Ruling: The Motion to Dismiss First Amended Complaint for Failure to State a Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on August 28, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss First Amended Complaint for Failure to State a Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss First Amended Complaint for Failure to State a Claim is granted as to the Second Cause of Action and denied as to the First and Third Causes of Action.

Defendant Nationstar Mortgage, LLC ("Nationstar") filed the instant Motion to Dismiss First Amended Complaint for Failure to State a Claim on August 29, 2014. Dckt. 16.

MOTION

Nationstar argues that Patrick and Jennifer Restori ("Plaintiff-Debtors") failed to state a claim against Nationstar pursuant to Fed. R. Civ.

P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012.

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, must:

A. be in writing unless made during a hearing or trial;

B. **state with particularity the grounds** for seeking the order; and

C. state the relief sought.

Fed. R. Civ. P. 7(b)(emphasis added).

In the present Motion, the below grounds are stated with particularity. Defendant alleges the following:

1. The first cause of action for objection to claim fails as the complaint to allege any facts that would defeat the prima facie validity of the claim.

2. The second cause of action for declaratory relief fails as the complaint does not allege any cognizable defect in the claim. Further Plaintiff-Debtors may not bring a claim for declaratory relief when it duplicates a cause of action created by the bankruptcy code.

3. Plaintiff-Debtors' final cause of action for attorneys' fees fail as Plaintiff-Debtors are not the prevailing party. Cal. Civ. Code § 1717(a).

Dckt. 16.

FED. R. CIV. P. 12(b)(6) STANDARD

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*,

365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

DISCUSSION

A. First Cause of Action - Objection to Claim

Nationstar in the instant motion argues that the first cause of action for objection to claim fails as the complain fails to allege any facts that would defeat the prima facie validity of the claim.

A review of the Complaint in light of the court's preference of deciding matters on the merits rather than dismissal, the court finds that there are sufficient facts in which grounds for relief may exist. While the causes of actions listed in the complaint are convoluted and not clearly set out, paragraph 16 of the complaint provides enough of a factual question that, if proven, would entitle Plaintiff-Debtors to relief. Paragraph 16 states:

> According to the Court's Claims Docket, NMLLC has filed a claim (Claim No. Claim No 5) on this case with an asserted classification of Secured in the amount of $319,372. A copy of the filed claim is attached as Exhibit A. Said amount has no reasonable relationship to the amounts owed as on their claim, Part 1, they state the principal balance is $285,723.86 and the cure amount is $44,128.01 which totals $329,851. The difference being over $10,479.00.

Dckt. 11., paragraph 16.

Under the Fed. R. Civ. P. 12(b)(6) standard, the court, taking the factual allegations of the complaint as true, finds that the factual allegations raise to the level of more than mere speculation, namely that the proof of claim filed by Nationstar does not state correctly the amount owed by the Plaintiff-Debtors. On the proof of claims face, there appears to be an internal inconsistency on the calculation of the actual claim amount. While the

Plaintiff-Debtors' complaint contains superfluous and convoluted allegations, the fact that a dispute exists on the amount owed and that the Plaintiff-Debtors provide preliminary evidence to support their allegations allows the First Cause of Action to survive a 12(b)(6) motion.

Nationstar's response appears to assume that Plaintiff-Debtors were required to provide all evidence and arguments at this early stage in pleading to survive. This is an incorrect assumption. As discussed supra, the standard is whether, beyond doubt, that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. Here, Plaintiff-Debtors provide enough facts that would entitle them to relief. Specifically, the discrepancy in the total claim amount raises enough of a question of fact that it would be inappropriate to dismiss the cause of action at this early stage in litigation. While Nationstar provides its own calculations of how that $10,479.45 deviation between the secured amount listed on the claim and the principal and cure amounts, it does not conclusively show that Plaintiff-Debtors allegations are, beyond a doubt, not valid. Additionally, the fact that Nationstar spends approximately five pages in its points and authorities to explain its calculation of the secured claim indicates that the math Nationstar claims is so simple is, in fact, not as black and white as Nationstar wishes the court to believe. These conflicting calculations raises to the level of a factual dispute which should be determined on the merits.

While Nationstar is correct that Plaintiff-Debtors will have to provide evidence to rebut the presumption of validity for a proof of claim, the law does not require that all the evidence be presented at the time of filing the complaint. Plaintiff-Debtors have provided sufficient facts and pleadings for the First Cause of Action to survive a Fed. R. Civ. P. 12(b)(6) motion.

Furthermore, Nationstar's motion and supplemental responses utilize sarcastic and unnecessarily insulting jabs such as "Nationstar understands that math is hard and that it is much easier to blindly object to claims with unsupported allegation." Dckt. 18, pgs. 6-7. Such extraneous and, frankly, rude comments more often than not detracts from the persuasiveness of the party's argument. Here, Nationstar and their counsel throw sarcastic rhetoric into its pleadings just to belittle the Plaintiff-Debtors. This is not a persuasive form of argumentation and the court urges Nationstar and its attorneys to avoid such petty means of pleading.

B. Second Cause of Action - Declaratory Judgment

Nationstar argues that the second cause of action for declaratory relief fails as the complaint does not allege any cognizable defect in the claim. Further, Plaintiff-Debtors may not bring a claim for declaratory relief when it duplicates a cause of action created by the bankruptcy code.

The First Amended Complaint states that "Plaintiff seeks a Declaratory Judgment to FRBP §7001(7) as the Plaintiff needs equitable relief and FRBP § 7001(9) as declaratory relief is needed to determine the rights of the parties and the actual amounts owed by the Debtor/Plaintiff since it appears [Nationstar has] failed to submit a claim that can be reconciled." Dckt. 11, paragraph 48.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims

for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. §2201 provides:

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Here, the declaratory judgment sought is subsumed into the first cause of action objection to claim.

First, the court notes that Fed. R. Bankr. P. 7001 is merely an operative procedural rule that states that "An adversary proceeding is governed by the rules of this Part VII." The rule, itself, does not provide for a cause of action but instead just requires that an adversary proceeding be filed when a party is seeking a declaratory or equitable relief.

Furthermore, the Debtor is seeking a declaratory and/or equitable relief on the matter "to determine the rights of the parties and the actual amounts owed by the Debtor/Plaintiff." The question of what the actual amount owed on the secured claim is one that will be determined in the First Cause of Action on the objection to claim. It will be necessary when ruling on the

objection to claim to determine what the actual value of the secured claim.

While the Plaintiff-Debtors do argue in their opposition that the declaratory relief is also asking "to determine the rights of the parties applying contract law regarding the controversy created related to the issue of breaching the contract and conversion," (Dckt. 21, pg. 7) the First Amended Complaint does not provide for any causes of actions under either breach of contract or conversion. Instead, the First Amended Complaint in the first cause of action makes generalized and opaque allegations concerning the note and deed of trust and accusations of breach of contract and conversion. These do not rise to a level of individual, stand-alone causes of actions that the court needs to determine the rights of the parties nor is it the declaratory relief the Debtor explicitly requests in the complaint. The court will not issue advisory opinions on what causes of actions the Plaintiff-Debtors may or may not be able to bring.

Because the second cause of action seeks a determination of the value of the secured claim held by Nationstar, which is subsumed into the first cause of action, the court grants the Motion as to the second cause of action and dismisses the second cause of action for declaratory relief.

C. Third Cause of Action - Attorneys' Fees

Nationstar argues that Plaintiff-Debtors' final cause of action for attorneys' fees fail as Plaintiff-Debtors are not the prevailing party under Cal. Civ. Code § 1717(a).

The First Amended Complaint states that:

> 51. By contract, the underlying obligation with the [Plaintiff-Debtors], [Plaintiff-Debtors] contends the contract has an attorney's fees provision. As such, under California Civil Code § 1717, a reciprocal contractual attorneys' fees statute, the Plaintiff is entitled to reimbursement of attorney's fees.
>
> 52. By statute, pursuant to California Civil Code § 1670.5, [Plaintiff-Debtors] is entitled to attorneys fees as the prevailing party in this action.

Dckt. 11, pg 8.

The requirements of claims for attorneys' fees in the Bankruptcy Code are set out by Federal Rule of Bankruptcy Procedure 7008(b), which provides that

> A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third party complaint, answer, or reply as may be appropriate.

Courts have split on the issue of what constitutes a party having properly "pleaded as a claim in a complaint...., answer or reply" the right to attorneys' fees. This court identifies one line of cases from bankruptcy courts

holding that a "claim" for attorney's fees does not need to be pleaded in the body of a complaint. *See First Nat'l Bank v. Bernhardy* (In re Bernhardy), 103 B.R. 198, 199 (Bankr. N.D. Ill. 1989) (holding, without discussing Rule 7008(b), that "[t]here is no provision in the Code or the rules that requires [a debtor] to plead a request for attorney's fees" and that if there were such a provision requiring specific pleading, a prayer for "'such other relief as is just' is sufficient"); accord, *Thorp Credit, Inc. v. Smith* (*In re Smith*), 54 B.R. 299, 303 (Bankr. S.D. Iowa 1985) ("[T]here [is no] good reason to hold that such pleading is required. 'Since § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs.'") (quoting *Commercial Union Ins. Co. v. Sidore* (*In re Sidore*), 41 B.R. 206, 209 (Bankr.W.D.N.Y.1984)).

This court applies a plain language reading of the requirements of Federal Rule of Bankruptcy Procedure 7008 (a) and (b), and Federal Rule of Civil Procedure 8(b). FN.2.

FN.2. The Supreme Court has been very clear in reading and applying 30 the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, LTD., 484 U.S. 365, 371 (1988). This court will not presuppose that the Supreme Court or Congress, in adopting the Federal Rules of Bankruptcy Procedure, did so expecting that the inferior court would not first look to the plain language meaning of the Rule.

This is consistent with the holding of the Bankruptcy Appellate Panel in *In re Carey*, finding,

> [t]he Complaint clearly stated in its first paragraph that Appellant sought an award of attorney's fees from the Debtor. In Paragraph 1 of the Complaint, Appellant identified the Promissory Note as a basis for its claim. In Paragraph 7 of the Complaint, Appellant referenced the Debtor's execution of the Replacement Guarantee. In Paragraph 10 of the Complaint, Appellant noted that it previously filed a complaint against the Debtor in the Marin County Superior Court seeking damages including attorney's fees. In its First Claim for Relief in the Complaint, Appellant realleged the first 18 paragraphs of the Complaint, including Paragraphs 1, 7 and 10. Finally, in its Prayer for Relief, Appellant requested a judgment for damages "including principal, accrued and accruing interest, costs, and attorney's fees."

In re Carey, 446 B.R. at 392.

The general pleading requirements for a complaint in federal court were addressed by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550

U.S. 544 (2007), and restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In discussing the minimum pleading requirement for a complaint, which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id*. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id*. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Here, the Plaintiff-Debtors merely cite to some California statutes that may or may not be applicable to the instant adversary proceeding FN.3.

FN.3. For instance, the Plaintiff-Debtors state that pursuant to California Civil Code § 1670.5, Plaintiff-Debtors are entitled to attorney's fees. California Civil Code § 1670.5 states:

> Cal. Civ. Code § 1670.5. Unconscionable contract
>
> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

However, nowhere in the complaint does the Debtor does not allege that the note and deed of trust are unconscionable. The court is not able to discern why § 1670.5 would be proper grounds to allow attorney's fees when the Plaintiff-Debtors have not once suggested it was an unconscionable contract. This lack of specificity to support the attorney's fees cause of action is why the court is requiring supplemental pleadings for clarification.

Nationstar's argument that the Plaintiff-Debtors are not the prevailing party is a premature conclusion, given that there has been the litigation has not been concluded and no judgment rendered in the case to make a determination on who in fact is the prevailing party.

However, the court does find that Plaintiff-Debtors have not pleaded properly under Fed. R. Bankr. P. 7008(b). The Plaintiff-Debtors have not provided enough information to state grounds for relief or to properly explain why the contract and the two California statutes that the Plaintiff-Debtors

base their claim on entitles them to the relief sought.

Because of Plaintiff-Debtors' failure to properly plead a cause of action for attorney's fees, coupled with the court's desire to adjudicate issues on the merits rather than through dismissal, the court denies Nationstar's motion to dismiss as to the third cause of action and shall order the Plaintiff-Debtors to file a Supplement to the Third Cause of Action of the First Amended Complaint, stating with particularity and sufficient factual matter the grounds in which the Plaintiff-Debtors are entitled to attorney's fees stating a "claim" as required by Federal Rule of Bankruptcy Procedure 7008(b) on or before October 17. Nationstar shall file and serve an answer, if any, to the First Amended Complaint, and the supplement to the Third Cause of action, if any, on or before November 7, 2014..

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 First Amended Complaint for Failure to State a Claim filed by Nationstar Mortgage, LLC 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 First Amended Complaint for Failure to State a Claim is granted as to the Second Cause of Action and denied as to the First and Third Cause of Action.
>
> **IT IS FURTHER ORDERED** that on or before October 17, 2014, Patrick and Jennifer Restori ("Plaintiff-Debtors") shall file and serve a Supplement to the Third Cause of Action of the First Amended Complaint, which Supplement when filed shall be deemed to be part of the First Amended Complaint, stating a "claim" as required by Federal Rule of Bankruptcy Procedure 7008(b) in a complaint sufficient factual matters and grounds upon which the Plaintiff-Debtors are entitled to attorney's fees.
>
> **IT IS FURTHER ORDERED** that Nationstar Mortgage, LLC shall file and serve an answer to the First Amended Complaint, and the Supplement to the Third Cause of Action, if any, on or before November 7, 2014.