UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 26, 2017, at 11:00 a.m.

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1. 11-37716-E-13 MILTON/TANISHA FLOWERS
17-2138
FLOWERS ET AL V. U.S. BANK NATIONAL ASSOCIATION ET AL

MOTION TO DISMISS JPMORGAN CHASE BANK, N.A.
9-15-17 [14]

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. FN.1.

FN.1. Defendant has not specified clearly how the Motion is noticed, whether written opposition is required, a deadline for opposition, or who must be served, which violates Local Bankruptcy Rule 9014-1(d)(3)(B). Local Bankruptcy Rule 9014-1(f)(2)(A) provides that it does not apply to motions in adversary proceedings. The Notice of Motion states that a hearing will be held and will be based upon submitted pleadings as well as argument at the hearing. Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on September 15, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 to Dismiss Adversary Proceeding is denied.

JPMorgan Chase Bank, N.A. ("Defendant") moves for the court to dismiss all claims against it in Milton Flowers and Tanisha Gordon-Flowers's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(5) & (6). FN.2.

FN.2. Defendant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Review of Minimum Pleading Requirements for a Motion

Federal Rule of Civil Procedure 7(b) states,

"(b) Motions and Other Papers

(1) In General. A request for a court order must be made by motion. The motion 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). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic

stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Defendant has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by Defendant are:

A. "Plaintiffs failed to properly serve Chase, and fail to state an actionable claim for relief against Chase . . . ."

Those "grounds" are merely conclusions of law by Defendant. Presumably, Defendant believed that the court would make these conclusions, but the "grounds" cannot merely state the anticipated conclusions.

Defendant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion states that grounds are found in:

A. Memorandum of Points and Authorities;
B. Defendant's Request for Judicial Notice;
C. Exhibits;
D. All other pleadings and papers on file; and
E. Anything else that may be presented to the court at or before the hearing.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Defendant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9004-2(c)(1), a motion and a memorandum of points and authorities are separate documents. The court has not waived that Local Rule for Defendant.

Review of Twelve-Page Points and Authorities Appended to the "Motion"

Alleged Defect in Service

For what is purported to be a "simple" request for relief, Defendant has found it necessary to provide the court with a twelve-page points and authorities. Dckt. 14. The complexity of the points and authorities requires a one-page table of contents and two-and-one-half pages of case and statutory citations. The need for such complexity in the points and authorities belies a contention that the basis for relief is "obvious."

The basis for the requested relief is Federal Rule of Civil Procedure 12(b)(6), which is incorporated into Federal Rule of Bankruptcy Procedure 7026. These grounds are based on the pleadings filed by the Plaintiff-Debtor, not additional facts added by Defendant.

Defendant first contends that Plaintiff-Debtor failed to comply with Federal Rule of Bankruptcy Procedure 7004(h) for service on Defendant, a federally insured financial institution. From the twelve-page points and authorities, the court believes that the argument advanced is:

> "As a federally insured financial institution, Plaintiffs must serve Chase by certified mail addressed to an officer of the bank. Plaintiffs, however, only mailed the pleadings to "Chase C/O Five Lakes Agency, Inc." in Rochester, Michigan, "Chase C/O Shermeta, Adams & Von Allemn, P.C." in Rochester, Michigan, and to other addresses without anyone's attention in Columbus, Ohio and Arlington, Texas. See Adv. ECF No. 6. This does not meet the requirements under Bankruptcy Rule 7004(h)."

Points and Authorities appended to Motion, p. 11:9–14; Dckt. 14. It appears that the major heartburn for Defendant is that the notices were not addressed to "anyone's attention."

Federal Rule of Bankruptcy Procedure 7004(h), which is at the core of this basis (not stated in the Motion) for dismissal of the Complaint states:

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> >
> > (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

The court notes that the 1111 Polaris Parkway address used by Debtor is the one listed as the "Headquarters" on the FDIC website for finding federally insured banks. FN.3.

FN.3 https://research.fdic.gov/bankfind/detail.html?bank=628&name=JPMorgan Chase Bank, National Association&searchName=jp morgan chase bank&searchFdic=&city=&state=&zip =&address=&searchWithin=&activeFlag=&searchByTradename=false&tabId=2

The court cannot readily identify any officers of Defendant on the FDIC website. There is a link to the "Corporate Website" on the FDIC website, which is identified as http://www.jpmorganchase.com.

That link takes a person to the website for JPMorgan Chase & Co., not JPMorgan Chase Bank, N.A. Clicking on the "About Us" tab, the information provided is:

> "About Us
>
> JPMorgan Chase (NYSE: JPM) is one of the oldest financial institutions in the United States. With a history dating back over 200 years, here's where we stand today:
>
> •We are a leading global financial services firm with assets of $2.6 trillion.
>
> •We operate in more than 60 countries.
>
> •We have over 240,000 employees.
>
> •We serve millions of consumers, small businesses and many of the world's most prominent corporate, institutional and government clients.
>
> •We are a leader in investment banking, financial services for consumers and small businesses, commercial banking, financial transaction processing and asset management.
>
> •Our stock is a component of the Dow Jones Industrial Average."

https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm.

To the right of the above text is the following additional informational links provided by JPMorgan Chase & Co. "About Us:"

> "About Us
>
> Art Collection
>
> Global Business Resiliency
>
> Historical Prime Rate
>
> History of Our Firm
>
> Media Contacts
>
> Newsroom"

Id. Conspicuously absent is any information about officers of Defendant JPMorgan Chase Bank, N.A. Looking at the JPMorgan Chase & Co. website (from the FDIC link), the court could not identify any links to or information about JPMorgan Chase Bank, N.A.

It appears that the actual officers of Defendant are hidden behind a screen of the parent company. Defendant offers no explanation about how the identity of such officers would be found—from a reliable source.

It further appears that JPMorgan Chase Bank, N.A. is asserting that mailing a summons and complaint to the address listed at its headquarters by the FDIC is not reasonably calculated for it to be delivered to the proper officer (of Defendant's choice) to receive such documents. Thus, it appears that Defendant's assertion is that it does not have the proper systems in place to receive summons and complaints, its mail room does not know what to do with summons and complaints, and that its record keeping and management systems are not up to the task of receiving and properly handling summons and complaints.

Appearance in Adversary Proceeding by Defendant

On August 22, 2017, Defendant JPMorgan Chase Bank, N.A., acting through its current counsel, filed a notice that it elected to appear in this Adversary Proceeding. Dckt. 7. The **Notice of Appearance** (as stated in bold on the title to the pleading) states:

> "TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:
>
> PLEASE TAKE NOTICE that Defendant, JPMORGAN CHASE BANK, N.A., hereby appears in the above-entitled action by and through Joseph E. Addiego III of DAVIS WRIGHT TREMAINE LLP and requests that all further papers, pleadings, filings, and electronic filings, except original process, be served upon these attorneys at both of the addresses and email addresses above stated."

In the **Notice of Appearance**, Defendant and Defendant's counsel expressly instruct **that all further pleadings**, which appears to acknowledge/admit the service of prior pleadings, be served from that point forward on Defendant's counsel. Interestingly, in the present points and authorities Defendant asserts that it has not appeared by counsel in this Adversary Proceeding, which "appears" to conflict with the plain language of the **Notice of Appearance** filed by Defendant and Defendant's counsel. Thus, it "appears" that Defendant has admitted that it has been served, is a party to this Adversary Proceeding, and that "further...pleadings..." are to be served directly on the counsel for Defendant appearing in this Adversary Proceeding.

This Notice of Appearance pleading is not made for any special purposes, such as to challenge service or in personam jurisdiction.

As noted by the Ninth Circuit Court of Appeal in *Republic International Crop. Amco Engineers, Inc.*, 516 F.2d 161, 164 (9th Cir. 1975), making a "general appearance" in federal court did not waive the right of a defendant to assert a defect in service, with "special appearances" to challenge jurisdiction no longer required under the Federal Rules of Civil Procedure. See *In re Hijazi*, 589 F.3d 401, 413 (7th Cir. 2008) for a more recent restatement of this principle; Moore's Federal Practice, Civil ¶ 13.21[2].

The fact that Defendant filed the current motion seeking relief pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012 is not a waiver of a defense based on a defect in service. In the points and authorities, Defendant argus that the complaint was not served as required by the Federal Rules of Bankruptcy Procedure. What Defendant does not address is the effect of having elected to file the Notice of Appearance that:

A. "JPMORGAN CHASE BANK, N.A., hereby appears in the above-entitled action..."

B. "and request that all further papers, pleadings, filings, and electronic filings, except original process, be served upon [its attorneys]...."

Notice of Appearance, Dckt. 7.

It appears that Defendant wants to have its cake and eat it too. Defendant states that it has appeared in this Adversary Proceeding. While saying that it does not request that the original process, which pre-dates the Notice of Appearance, be served on the attorneys, it does say that Defendant "hereby appears" in this Adversary Proceeding.

At the end of the day on this point, Plaintiff-Debtor served the summons and complaint at the headquarters, as reported by Defendant by the FDIC, where its officers apparently are located. It was sent to an address reasonably calculated to have the summons and complaint delivered by Defendant's mail room to the correct officer (rather than some person selected by Plaintiff-Debtor) of Defendant's choosing.

On the contention that JPMorgan Chase Bank, N.A. has not been properly served, the motion is denied.

Asserted Additional Factual Grounds That Defendant No Longer Has Any Interest In or Control of the Deed of Trust At Issue

In the twelve-page points authorities, interwoven in the all of the case and statutory citations, is a contention that Defendant does not claim title to the property at issue and Defendant does not assert an interest in the property. In making that contention, Defendant first recites the history of the failing of Washington Mutual, travels through Bank of America, N.A., and then to Defendant. The points and authorities then recounts the history of the bankruptcy case, and asserts that "[Defendant] filed a Transfer of Claim in Plaintiffs' bankruptcy case. (See RJN, Ex. C.)" Points and Authorities, p. 2:26–27; Dckt. 14. Exhibit C is a "Transfer of Claim Other Than for Security," by which Defendant JPMorgan Chase Bank, N.A. purports to transfer the claim stated in Proof of Claim No. 2 in case no. 11-37716, to U.S. Bank, N.A., as successor trustee to Bank of America, N.A., successor in interest to LaSalle Bank, N.A., as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-OA2 Serviced by Select Portfolio Servicing, Inc. Exhibit C, Dckt. 18.

Proof of Claim No. 2 was filed in the Plaintiff-Debtor's bankruptcy case on August 25, 2011. The creditor stated on Proof of Claim No. 2 is: "U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to Lasalle Bank, National Association as Trustee for WaMu Mortgage." Thus, as of the August 25, 2017 filing, U.S. Bank, N.A., as Trustee, was already the creditor in the case.

The court is unsure as to what "claim" Defendant JPMorgan Chase Bank, N.A. was transferring when it filed a Transfer of Claim purporting to transfer Claim No. 2, which was already filed by U.S. Bank, N.A., Trustee, to U.S. Bank, N.A., Trustee.

Defendant then states that it is no longer servicing this loan, thus there is no claim that could be stated against it. The court is unsure of what new evidence Defendant is trying to introduce for this motion to dismiss based on the pleadings.

Lack of Reasonableness in Prosecution of Defense

In considering Defendant's contention that dismissal is proper and so simple to show, the court notices that there is no reference to, nor is there a copy of a polite, professional letter sent by counsel for Defendant to counsel for the Plaintiff-Debtor providing the information that Defendant was no longer the servicer and enclosing a simple stipulation dismissing Defendant pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rule of Bankruptcy Procedure 7041. Likely, such would have resulted in the dismissal of Defendant, saved Defendant and counsel for Defendant filing a **Notice of Appearance** in this Adversary Proceeding, and Defendant incurring the cost and expense of a one-page motion and a twelve-page points and authorities.

Ruling

If the facts as alleged in the twelve-page points and authorities are accurate and Defendant is no longer the loan servicer and has no interest in the Note, then it is likely that Defendant will be quickly dismissed from this Adversary Proceeding.

However, Defendant has not provided sufficient grounds to dismiss the Complaint as to Defendant. The Motion to Dismiss is denied.

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 JPMorgan Chase Bank, N.A. ("Defendant") 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. Defendant shall file and serve its Answer on or before November 13, 2017.