UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 29, 2020 at 11:00 a.m.

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1. **20-20978-E-7** **JEFFREY ANDERSEN** **CONTINUED MOTION TO COMPEL**
20-2111 **GK-16 Jeffrey Meisner** **10-5-20 [97]**
KELLY V. ANDERSEN 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.

Local Rule 9014-1(f)(2) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor's Attorney on October 1, 2020. By the court's calculation, 15 days' notice was provided. The court required no less than 10 days' notice. *See* Dckt. 33.

The Motion to Compel Production of Documents, Set One was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Defendant-Debtor were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Compel Production of Documents is xxxxx.

The court will address the Motion to Compel and scheduling order with the parties at the hearing.

At the October 29, 2020 hearing, xxxxxxxxxxxxxx

2. **17-22481-E-7** **WILLIAM LANDES** **CONTINUED MOTION TO DISMISS**
20-2130 **SGO-1** **Douglas Jacobs** **ADVERSARY PROCEEDING/NOTICE OF REMOVAL**

REGER V. ESSEX BANK **8-17-20 [21]**

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 Plaintiff-Trustee, Defendant-Creditor, and Office of the United States Trustee on August 17, 2020. By the court's calculation, 38 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 xxxxx.

Essex Bank ("Defendant") moves for the court to dismiss all claims against it in John Reger's ("Plaintiff-Trustee") Complaint according to Federal Rule of Civil Procedure 12(b)(6). The Complaint (eleven pages in length with ninety-one pages of exhibits attached) seeks to have the court determine whether $12,426.48 of monies held by the Plaintiff-Trustee are subject to the asserted liens of Defendant. This is another step in the going battles between the parties that has resulted in $20,000 cash in hand sales proceeds lost, and seemingly endless hours of attorney's fees expended for which there appears to be little, if any, actual money to pay such fees.

The Complaint now focuses the dispute of the parties on $13,000 of monies the Trustee received from the Debtor for the Debtor to recover the non-exempt equity in two vehicles ($12,500) and two bank accounts ($500). The Trustee elected not to file a motion for approval of the sale of the Estate's interest, but opted to do so by notice and opportunity to sell.

The judge to whom this case is assigned has inherited it after all of these transactions have occurred. The court reviews the sale documents in the file in this decision. The Notice of Intent to Sell Equity in Property was filed on April 26, 2017. 17-22481; Dckt. 13. It states that the property to be:

> sold consists of the debtor(s) non-exempt equity in a 2009 Audi A 4 convertible, with 60,000 miles (exempted for $3,000.00) and a 1992 Lexus with 230,000

miles. Vehicles valued at $15,050.00 and $500.00 respectively.

Id., ¶ 3. The terms of the sale are stated to be:

> These properties are being sold as is, where is, subject to all existing liens and encumbrances and without any warranty or representations of any kind. There is no right of refund or return. The trustee has received an offer from the debtor to purchase these properties for $12,500.00, with a onetime payment of $12,500.00. Source of payment is a credit line.

Id., ¶ 4. The Certificate of Service of the Notice of Intent to sell includes Stephen G. Opperwall, Esq., the attorney for Defendant in the bankruptcy case. No opposition was filed in response to the Notice, and the Plaintiff-Trustee's Report of Sale was filed on May 18, 2017. *Id.*, Dckt. 15.

Review of Complaint

The court summarizes the claims and grounds upon which the relief is requested in the Complaint. Prior to the April 14, 2017 filing of bankruptcy by William Landes ("Debtor"), his then wife, Marie Landes, filed a petition for dissolution of marriage in 2011 ("Dissolution Action"). Prior to the 2017 filing of Debtor's Chapter 7 petition, no property division had occurred in the Dissolution Action.

On July 17, 2017, Defendant filed a Proof of Claim #4-1. On December 29, 2018, Defendant filed an Amended Proof of Claim for $857,159.86. The Amended Proof of Claim was based on (1) money loaned, (2) a Judgment, (3) Abstract Judgment, (4) a Notice of Judgment Lien ("JL-1"), and (5) a Notice of Lien that was filed in the Dissolution Action ("Notice of Lien").

On April 14, 2017 Debtor listed a 2009 Audi S4, valued at $15,000.00 and a 1992 Lexus, valued at $500.00 ("Vehicles") in Schedule A/B. Ownership of the Vehicles is listed as being solely in the Debtor's name and the box showing the vehicles as community property is not checked.

Pursuant to Schedule A/B, Debtor listed a checking account with Northern California National Bank, valued at $250.00 and a business checking account with Tri Counties Bank valued at $250.00 in Schedule A/B.

On April 26, 2017 Debtor entered into an agreement with Trustee for the non-exempt equity in the Vehicles. Exhibit C, Dckt. 1. By check dated April 28, 2017, from Landes Medical Group dba Skypark Walk in Medical Center ("Landes Medical"), Debtor purchased the non-exempt equity in the two vehicles for $12,500.00 and turned over the $500.00 in the two bank accounts.

The sale proceeds of $13,000.00 minus the monthly bank charge and the yearly bond fees total approximately $12,426.48 ("Funds in Dispute"). The Funds in Dispute are in the custody of Plaintiff-Trustee.

In an unrelated transaction, the Plaintiff-Trustee filed a motion to approve the sale of artwork and firearms that were property of the bankruptcy estate to Marie Landes for $20,000.00. On December 10, 2018, the bankruptcy court granted Trustee's motion for authorization to sell the personal property. Dckt. 76. Defendant Essex appealed the sale.

On December 17, 2019 the United States Bankruptcy Appellate Panel reversed the bankruptcy court's decision stating, "The bankruptcy court erred, and thus abused its discretion, in ruling as a matter of law that Essex Bank did not have a California Code of Civil Procedure § 708.410 lien on the guns and artwork simply because the Notice of Lien was filed in a marital dissolution proceeding." FN.1.

FN. At this juncture the court notes that the judge to whom this case was previously assigned did not purport to sell the property free and clear of any lien and the motion to sell was not an adversary proceeding to determine the extent, validity, and priority of any interest of Defendant in the property sold or the $20,000.00 in proceeds. The court did not agree with the Defendant's assertion that it had a lien on the property sold, stating:

> The court sees nothing grounded in law or in fact that gives Essex Bank a security interest in any of the assets being sold. The bank has not established a colorable security interest in the art collection or firearms.

17-22481; Civil Minutes, Dckts. 74. The Ruling in the Civil Minutes expressly states that the sale is approved pursuant to 11 U.S.C. § 363(b), which is not a sale free and clear of liens (§363(f)).

This is not to say that Defendant was not warranted in pressing its asserted lien. As discussed below, the Bankruptcy Appellate Panel concluded that the Notice of Lien, California Code of Civil Procedure § 708.410, filed in the dissolution proceeding, attached to the artwork and guns sold by the Plaintiff-Trustee. The Bankruptcy Appellate Panel then reversed the sale order, stating that while the bankruptcy judge did not purport to sell the property free and clear of Defendant's lien, because the judge said that he did not see any security interest, the ruling would be reversed. The decision does not discuss, and it may not have been argued, that the 11 U.S.C. § 363(b) was one made subject to liens, and that Plaintiff might assert that it had a lien on the proceeds of the sale as well.

In the First Cause of Action Plaintiff-Trustee seeks to have the court determine the extent, validity, and priority of Defendant's lien. Plaintiff-Trustee alleges that Defendant does not have a security interest in the Funds in Dispute arising from the judgment liens created by the Abstract, JL-1, and Notice of Lien. Plaintiff-Trustee alleges that the judgment lien created by the Abstract applies only to real property pursuant to C.C.P. § 697.310 (a); and the judgment lien created by the JL-1 applies only to personal property and not to post-petition assets as specified under C.C.P. § 697.530 and 11 U.S.C. § 552(a). The Funds in Dispute are post-petition assets and are neither personal property nor real property. Therefore, neither one created a judgment lien against the Funds in Dispute.

Plaintiff-Trustee further alleges that the Notice of Lien did not create a judgment lien against the Funds in Dispute for the following reasons:

1. The Notice of Lien only created a judgment lien on (1) the Debtor's cause of action for money or property arising in the Dissolution Action and (2) the rights of the Debtor to money or property under a judgment obtained in the Dissolution Action as stated in C.C.P. § 708.140. The Funds in Dispute were not created by sale of a cause of action nor rights under a judgment obtained in the Dissolution Action. Dckt. 1. Therefore, the Funds in Dispute are not subject to the lien.

2. The Bankruptcy Appellate Panel decision did not determine whether Defendant had a judgment lien on the Funds in Dispute or the extent of any judgment lien arising from the Notice of Lien against the Funds in Dispute.

3. Further, the Notice of Lien did not create a judgment lien against Debtor's ownership interest in Landes Medical which is subject to division in the Dissolution Action. Trustee alleges Debtor's ownership interest is represented by the value of stock in Landes Medical. Only a licensed physician can own stock in a medical corporation and Marie Landes is not a licensed physician. *See* California Corporations Code §§ 13401 and 13401.5. Therefore, the ownership interest is not subject to division in the Dissolution Action and the Notice of Lien cannot attach.

Plaintiff-Trustee alleges that even if the non-exempt equity was subject to the Notice of Lien, the Notice of Lien does not apply to the proceeds from the sale of property that is subject to the judgment lien. C.C.P. § 708.410. The sale of the non-exempt equity in the vehicles was subject to all existing liens and encumbrances on the vehicles. Thus, even if Defendant had a valid judgment lien on those vehicles, the sale of the non-exempt equity did not harm or prejudice Defendant.

In the Second Cause of Action Plaintiff-Trustee states an Objection to the Secured Proof of Claim filed by Defendant. Plaintiff-Trustee requests that the court confirm his objection to the Original Proof of Claim and the Amended Proof of Claim since the Defendant does not have a security interest over the Funds in Dispute arising from the judgment liens created by the Abstract, JL-1, and Notice of Lien.

The Third Cause of Action seeks to have the court disallow Defendant's Secured Proof of Claim. Plaintiff-Trustee alleges that pursuant to 11 U.S.C. § 502(d), Defendant cannot collect from the bankruptcy estate since Defendant has received an avoidable transfer and has not surrendered it back to the estate. Plaintiff-Trustee contends that the Notice of Lien filed in the Dissolution Action was a transfer of property under 11 U.S.C. § 101(54)(A) and was preferential under 11 U.S.C. § 547(b). Therefore, since the Defendant has not surrendered the avoidable transfer back to the estate, the Defendant is not allowed to collect anything.

Further, Plaintiff-Trustee's failure to file an adversary action to avoid the preferential transfer does not defeat the requirement under 11 U.S.C. § 502(d) that Defendant's claim be disallowed.

A Fourth Cause of Action stated as Declaratory Relief is advanced by the Plaintiff-Trustee. He requests an "order" from the court confirming there is no security interest in favor of Defendant Essex against any of the Funds in Dispute arising from the Abstract, the JL-1 or the Notice of Lien; confirming his objection to the Original Claim and the Amended Claim; disallowing the Original Claim and Amended Claim to the extent they are based on the Notice of Lien and confirming the estate's ability to distribute the Funds in Dispute free and clear of any claim by Defendant. [FN.2.]

FN. 2. It is not clear to the court why the court would issue a judgment on the first three causes of action, and then issue an order restating what is stated in the judgment. 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.

Here, there does not appear to be a basis for "declaratory relief," but for the court to adjudicate the rights and interests of the parties in entering judgment on the first three causes of action.

APPLICABLE LAW

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 a complaint have 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 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 that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. 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 Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), 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 reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION & MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Defendant filed a Motion to Dismiss on August 17, 2020. Dckt. 21. Defendant seeks to

dismiss all causes of action in the Adversary Proceeding complaint on the basis of res judicata, claim preclusion, issue preclusion, and collateral estoppel. Further, Defendant alleges that the second cause action fails to state a claim upon which relief can be granted because Plaintiff-Trustee failed to object to the Defendant's Proof of Claim. Lastly, Defendant seeks to dismiss the third cause of action since the Trustee did not exercise reasonable due diligence and the transaction was not at arms' length.

Defendant argues that under *res judicata*, parties are precluded from "relitigating issues that were or could have been raised" from a "final judgment on the merits of an action." *Allen v. McCurry*, 449 U.S. 90, 93 (1980). Defendant alleges that all of the Plaintiff-Trustee's claims were litigated in the previous Bankruptcy Appellate Panel Decision in that the court held that Defendant "has a secured creditor position on all assets, income, proceeds, etc. of Debtor and Debtor's non-filing separated spouse," as a result of the Notice of Lien that Defendant filed in the Dissolution Action. Defendant argues that the Funds in Dispute are included within such assets, incomes, proceeds, etc.

Based on the language in the transaction, Defendant also argues that the Bankruptcy Appellate Panel holding is even more compelling in this adversary proceeding since the transaction at issue here provided that it was "subject to all existing liens and encumbrances."

Further, Defendant alleges that even if the Plaintiff-Trustee's claims were not litigated, the claims could have been raised by Plaintiff-Trustee. Defendant contends that Plaintiff-Trustee did not object to Defendant's Proof of Claim.

Defendant alleges that the first cause of action fails to state a claim upon which relief can be granted because the Plaintiff-Trustee is attempting to allege that a Notice of Lien does not apply to a dissolution action. Defendant asserts that the Bankruptcy Appellate Panel has already concluded this issue.

Defendant argues that the second cause of action fails to state a claim upon which relief can be granted because Plaintiff-Trustee failed to object to the secured proof of claim filed three years ago. Further, Plaintiff-Trustee has not alleged sufficient facts as to why he is currently objecting to Defendant's Proof of Claim.

Defendant alleges that the third cause of action fails to state a claim upon which relief can be granted because Plaintiff-Trustee did not exercise "reasonable due diligence" to avoid the transfer pursuant to 11 U.S.C. § 547(b). Additionally, Defendant contends that the "cause of action is based on the argument that the money came from [Debtor's] corporation." *Id*. Further, Defendant questions whether the transaction was negotiated at arms' length given that the buyer was Debtor's medical corporation.

Defendant alleges the fourth cause of action requesting an order confirming that the disputed funds are not subject to Defendant's lien and may be disbursed by Trustee fails because it conflicts with the Bankruptcy Appellate Panel decision.

PLAINTIFF-TRUSTEE'S OPPOSITION

Plaintiff-Trustee filed an Opposition on September 4, 2020. Dckt. 32. In response, first Plaintiff-Trustee contends that Defendant misinterprets the language that the transaction was "subject to all existing liens and encumbrances." The language did not mean that the Funds in Dispute were subject

to any lien or encumbrance of the Defendant but rather the language is a warning to Debtor that the payment of the non-exempt equity would not remove any liens or encumbrances that were on the Vehicles.

Second, Plaintiff-Trustee asserts that there is not a claim preclusion issue where the Bankruptcy Appellate Panel decision held that the Notice of Lien created a secured creditor position for only the firearms and artwork. The Bankruptcy Panel did not make a determination as to the sale for the non-exempt equity of the Vehicles.

Third, Plaintiff-Trustee contends that there is not a time requirement to file an Objection to a Proof of Claim and that the Second Cause of Action states a claim for relief since the reasons for objecting mirror the argument.

Finally, Plaintiff-Trustee asserts that Defendant fails to understand the claim stated in the Third Cause of Action. The cause of action seeks disallowance based on the preferential transfer of Debtor's property that occurred when Defendant Essex filed its Notice of Lien in the Dissolution Action. The transfer based on the funds from Debtor's medical corporation was not preferential and does not effect this Cause of Action. Additionally, Plaintiff-Trustee asserts that the source of the funds does not negate the sale.

DEFENDANT'S REPLY

Defendant filed a Reply on September 16, 2020. Dckt. 39. Defendant contends that the language "subject to all existing liens" establishes that Defendant's lien created by the Notice of Lien applies to the Vehicles and the Funds in Dispute. Additionally, Debtor for the first time in reply, brings up the parol evidence rule to argue that the court should not apply a different meaning to the unambiguous language ("subject to all existing liens").

Further, Defendant asserts that the Bankruptcy Appellate Panel decision merely affirmed California law and that C.C.P. § 708.410 establishes that Defendant has a lien on all assets that are involved in the Dissolution Action. Additionally, Defendant alleges that Plaintiff-Trustee failed to do his due diligence.

Lastly, Defendant raises the argument that since Debtor's corporation paid Plaintiff-Trustee, Debtor had an account receivable owed to him by his business entity. Therefore, since Debtor arranged to have his entity pay Plaintiff-Trustee, this triggers the JL-1 lien that was filed with the Secretary of State.

DISCUSSION

As an initial matter, there is some confusion as to what was sold and what the monies held by the Plaintiff-Trustee are proceeds of.

The court is unable to determine what the Notice of Lien attaches to because there has not been a judgment in the Dissolution Action. In this case, the court is not presented with an order from the Dissolution Action as to division of community and separate property that would allow this court to determine what satisfies the Defendant's Notice of Lien. This is distinguishable from *In re Marriage of Katz* where in that case the creditor "secured such an order...which directed that any judgment due to

[Debtor] in this dissolution of marriage matter shall be applied to the satisfaction of the lien of judgment creditor...Rothe." *In re Marriage of Katz*, 234 Cal.App.3d at 1720.

Also, the Plaintiff-Trustee's method and description of the property sold creates some confusion on this point. The Notice of Intent to Sell states, in part, the following:

> DESCRIPTION OF PROPERTY TO BE SOLD: The property to be sold consists of the **debtor(s) non-exempt equity** in a 2009 Audi A 4 convertible, with 60,000 miles (exempted for $3,000.00) and a 1992 Lexus with 230,000 miles. Vehicles valued at $15,050.00 and $500.00 respectively.

17-22481, Dckt. 13, at 1:16-19 (Emphasis added.).

As stated in the Notice, Trustee sold non-exempt equity-- this is the bankruptcy estate's right to retain that value of the property. As drafted, the Plaintiff-Trustee appears to have sold only the estate's right to recover whatever value may exist, and not sell the vehicles themselves.

I. The Claims are not barred by res judicata.

Defendant moves to dismiss Plaintiff-Trustee's Complaint on the basis that all claims are barred by res judicata. "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). *Res judicata* only applies if there is "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties." *Id*.

The Ninth Circuit of Appeals has provided guidance for how a court should approach in making the determination that res judicata applies:

> Whether two suits involve the same claim or cause of action requires us to look at four criteria, which we do not apply mechanistically: (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions."

Mpoyo v. Litton Electro-Optical Systems, 430 F.3d 985, 987 (9th Cir. 2005).

For reasons set forth below, the Court finds that to the extent the Motion to Dismiss is based on the doctrine of *res judicata*, the motion is denied because the disputes do not involve the same claim or cause of action.

A. *Res judicata* does not bar the claims because the claims do not arise from the same facts as alleged in the prior Bankruptcy Appellate Panel Decision.

The "central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts."

Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (quoting *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000)). "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005).

There is insufficient evidence to support Defendant's contention that the prior Bankruptcy Appellate Panel ("B.A.P.") decision "is res judicata in [Defendant's] favor." [citation] "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005). The prior litigation arose from a transaction in 2019 between the Trustee and Marie Landes, Debtor's non filing separated spouse, to purchase certain personal property. In that transaction, Trustee entered into a Buy-Sell Agreement for the purchase of firearms and artwork. In contrast, this action arose from a 2017 transaction between Plaintiff-Trustee and Debtor. (Exhibit C, Dckt. 1). In the current transaction at issue, Debtor purchased the non-exempt equity in the two vehicles for $12,500.00 and turned over the $500.00 in the two bank accounts. *Id*. Thus, absent the same transactional nucleus of facts, there is not an identity of claims.

Therefore, since there is not an identity of claims, the first element of claim preclusion is not met.

B. *Res judicata* does not bar the claims because the rights and interests established in the Bankruptcy Appellate Decision will not be impaired by the current action.

Application of the second factor requires the court to determine "whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action." *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005).

The rights and interests established in the prior B.A.P. decision will not be impaired by the current action. The B.A.P. in the prior case recognized, "The bankruptcy court erred, and thus abused its discretion, in ruling as a matter of law that Essex Bank did not have a C.C.P. § 708.410 lien on the guns and artwork simply because the Notice of Lien was filed in a marital dissolution proceeding." Exhibit I, Dckt. 1. In that case, the court determined that the Notice of Lien was properly filed in the marital dissolution proceeding and that the Notice of Lien created a secured judgment lien status in the firearms and artwork. *Id*. The court did not determine that the Notice of Lien created a secured judgment lien status in the Vehicles and accounts. *Id*. Therefore, any rights as to the guns and artwork will not be impaired by the current suit, involving the Vehicles at issue.

Therefore, since the rights and interests established in the prior dispute will not be impaired by the current action, there is not an identity of claims.

C. *Res Judicata* does not bar the claims because the cases do not involve infringement of the same right.

The B.A.P. decision did not involve infringement of the same right. The Court will determine "whether the two suits involve infringement of the same right." *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005). In the prior case, Defendant alleged "that it had a lien on the guns and artwork under several theories, including the Notice of Lien filed in the divorce

case." Exhibit I, Dckt. 1. Defendant argued that it had a right to claim a lien under the Notice of Lien for the guns and artwork, and that this right was infringed. *Id*. However, in the current case, Defendant is alleging that the 2017 transaction involving the sale of the non-exempt equity in the Vehicles was subject to the Notice of Lien. Dckt. 23, at 22:24-26. Therefore, in the current case Defendant is arguing infringement of its right to claim a lien under the Notice of lien for the non exempt equity in the Vehicles. *Id*. Thus, the two suits do not involve infringement of the same right. The prior case involved infringement of Defendant's lien over guns and artwork; whereas in this case Defendant is arguing infringement over the funds resulting from the sale of non-exempt equity.

Since, the cases do not involve infringement of the same right, there is not an identity of claims. Thus, this element of claim preclusion is not met.

Although there may be some overlap in evidence that could support Defendant's claim for res judicata, courts have "held the common nucleus criterion to be outcome determinative under the first res judicata element." *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 988 (9th Cir. 2005). Therefore, the Court concludes that the first element of claim preclusion: identity of claims is not met. Accordingly, to the extent that Defendant's motion to dismiss is based on the argument that Plaintiff-Trustee's claims are based on res judicata, the motion is denied.

II. The Claims are not barred by collateral estoppel.

"Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in the previous litigation between the same parties." *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997). "The party asserting collateral estoppel must first show that the estopped issue is identical to an issue litigated in a previous action. In addition, in order for collateral estoppel to apply, the issue to be foreclosed in the second litigation must have been litigated and decided in the first case." *Id*. at 912.

Defendant has not shown that the prior B.A.P. decision found that Defendant had a valid security interest with respect to the Funds in Dispute. The party asserting collateral estoppel must first show that the estopped issue is identical to an issue litigated in a previous action. *Id*. The B.A.P. decided the issue of whether "the bankruptcy court abused its discretion in granting the sale motion." (Exhibit I, Dckt. 1). Further, the B.A.P. held "the bankruptcy court erred, and thus abused its discretion, in ruling as a matter of law that Essex bank did not have a C.C.P. § 708.410 lien on the **guns and artwork** simply because the Notice of Lien was filed in a marital dissolution proceeding. Accordingly we must REVERSE the Sale Order." *Id*. (Emphasis added.) Therefore, since the B.A.P. did not decide the issue of whether the Notice of Lien applied to the current Funds in Dispute, Defendant has not met its burden in showing that the estopped issue is identical to an issue litigated in the previous action.

The court notes that it finds no basis in Defendant's overarching argument that the B.A.P.'s decision "decided that [Defendant] has and had a valid security interest in all property, income, proceeds, etc by virtue of the abstract of Judgment, the Jl-1 Form, and the Notice of Lien." As explained above, the B.A.P.'s decision involved a narrow set of facts.

Thus, the Motion to dismiss is denied as to the first cause of action.

III. Motion to Dismiss the Second Cause of Action is granted.

The second cause of action is dismissed because the Trustee does not present a valid objection. Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do."). In the Complaint, Trustee merely "requests an order from this court confirming there is no security interest in favor of Essex Bank against any of the Funds in Dispute arising from the Abstract, the JL-1, or the Notice of Lien and confirming his objection to the Original Claim and Amended Claim on that basis." Dckt. 1. Therefore, this general assertion does not satisfy Plaintiff-Trustee's obligation to provide the grounds of his entitlement to relief.

Moreover, as to the proof of claim, the B.A.P. found that Defendant had a valid lien. The issue at hand is whether the lien has attached to the Disputed Funds. Thus, Defendant's Amended Proof of Claim 4-2 adding the Notice of Lien filed in the Dissolution Action is valid.

The issue to be determined is the extent, validity, and priority of the lien, when the Bankruptcy Appellate Panel has ruled exists. That is being determined in the First Cause of Action. There is no reason for the court to enter an "order" on an objection to claim stating what the court states in the judgment is the extent, validity, and priority of Defendant's lien with respect to the funds at issue.

The court concludes that the Motion to Dismiss the second cause of action is granted, and the second cause of action is dismissed.

IV. Motion to Dismiss the Third Cause of Action is denied.

Plaintiff-Trustee asserts in the Third Cause of Action that to the extent that Defendant has a lien on property of the bankruptcy estate and a secured claim in this case, such secured claim shall be disallowed as provided in 11 U.S.C. § 502(d), which states (emphasis added):

> (d) Notwithstanding subsections (a) and (b) of this section, the court **shall disallow any claim** of any entity **from which property is recoverable under section** 542, 543, **550,** or 553 of this title **or** that is a transferee **of a transfer avoidable under** section 522(f), 522(h), 544, 545, **547**, 548, 549, or 724(a) of this title, **unless such entity or transferee has** paid the amount, or **turned over any such property**, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

In the Third Cause of Action it is alleged that the Notice of Lien, upon which Defendant relies, was filed in the state court dissolution action (the transfer/lien attached to property of the Debtor) on February 14, 2017. Debtor commenced his bankruptcy case on April 14, 2017 - fifty-nine (days) later.

Defendant's creation of a lien, as confirmed by the Bankruptcy Appellate Panel, is a transfer of an interest in the property of the Debtor, to the extent that Defendant asserts it created a lien on the

property, subject to avoidance as a preference pursuant to 11 U.S.C. § 547. See 11 U.S.C. § 101(54) defining transfer to include creation of a lien.

The transfer being within 90 days of the filing of the bankruptcy case, it is within the preference period stated in 11 U.S.C. § 547(b)(4) for a non-insider creditor.

Though the Plaintiff-Trustee has not filed an adversary proceeding to avoid the transfer and recover for the benefit of the bankruptcy estate the lien created on assets of the Debtor (11 U.S.C. § 551), the Ninth Circuit Court of Appeals has ruled that such failure to avoid does not render the 11 U.S.C. § 502(d) "shall disallow any claim" mandate of that section ineffective.

> Although KF Dairies dealt with the time bar provided in § 549, the analysis is equally applicable to § 546's bar of an avoidance action. Similar to § 545, § 549 provides for the avoidance of a transfer, but § 549 provides its own statute of limitations, whereas the limitations period for § 545 is found in § 546. We therefore adopt the reasoning of KF Dairies to conclude that **the limitations period in § 546 does not apply to § 502(d)**. *Accord In re Mid Atlantic Fund, Inc.*, 60 B.R. 604, 609-11 (Bankr. S.D.N.Y. 1986) (holding that the limitations period in § 546 does not apply to § 502(d)).
> . . .
> *Conclusion*
>
> El Paso's tax lien was avoidable under § 545, and it has not relinquished its lien. Section 502(d) therefore operates to disallow its claim, and the disallowance is not barred by the limitations period of § 546. The order of the district court affirming the bankruptcy court is AFFIRMED.

El Paso v. America West Airlines, Inc. (In re America West Airlines, Inc.), 217 F.3d 1161, 1167-1168, (9th Cir. 2000) [emphasis added].

Defendant's contention that "the cause of action is based on the argument that the money came from William's corporation" misconstrues the third cause of action in the Complaint. Dckt. 23. The Complaint relies on the preferential transfer that arose when the Defendant filed the Notice of Lien in the Dissolution Action within the time line provided by statute for Trustee to avoid a transfer. Defendant filed the Notice of Lien in the Dissolution Action on February 14, 2017. The bankruptcy petition was filed on April 14, 2017, fifty-nine (59) days after Defendant's filing of the Notice of Lien. Within this time line, the Trustee has the power to avoid a transfer. A lien is a transfer subject to § 502. See § 101(54)(A).

In advancing the creation of a lien within the 90 day preference period gives Defendant the right to the monies by virtue of the lien, Defendant plays directly into the application of 11 U.S.C. § 502(d).

Defendant also offers that a judgment lien was filed with the Secretary of State on January 3, 2017. This is computed to be 101 days before the April 14, 2017 filing of bankruptcy Debtor – more than the 90 day non-insider creditor preference period. It is asserted that the lien encumbered accounts receivable and that any monies paid to the Plaintiff-Trustee by the Debtor's professional corporation would be accounts receivable encumbered by that lien. [FN.3.]

FN. 3. As Defendant asserts, California Code of Civil Procedure § 697.530 provide for the filing of a notice of lien with the Secretary of State to perfect a judgment line on specified personal property, which includes "accounts receivable." The terms "account receivable" is statutorily defined in California Code of Civil Procedure § 680.130, which then cross references California Commercial Code § 9102. Whether the monies at issue were from "accounts receivable" or something else will be the subject of evidence presented to the court.

For this Motion to Dismiss, the court does not have the evidence of such lien and is not able to determine the extent of such lien if any. That will have to be determined in evidentiary proceedings in this Adversary Proceeding.

IV. Motion to Dismiss the Fourth Cause of Action is granted.

Plaintiff-Trustee's Fourth Cause of Action for declaratory relief requests an order from the court confirming that Defendant does not have a valid secured interest in the disputed funds, confirming his objection and disallowing Defendant's Proof of Claim to the extent they are based on the Notice of Lien and confirming Trustee's ability to disburse the funds free and clear of Defendant's claims.

Defendant argues that the declaration sought is against the applicable law of the case and thus the cause of action should be dismissed. As explained above, the B.A.P. decision is not applicable to these Disputed Funds thus Defendant's argument fails.

However, the court reads the declaratory relief request to merely be a duplicate request for an order saying what relief the court has granted on the first cause of action (extent, validity, and priority of lien) and the third cause of action (disallowance of the claim based on 11 U.S.C. § 502(d)). The court does not issue orders declaring what relief is granted in a judgment.

The Motion to Dismiss the fourth cause of action is granted.

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 Adversary Proceeding filed by Essex Bank ("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 as to the First Cause of Action and Third Cause of Action; and granted as to the Second Cause of Action and the Fourth Cause of Action.

3. **17-22481-E-7** **WILLIAM LANDES** **CONTINUED MOTION FOR SUMMARY**
20-2130 **MPD-1** **Douglas Jacobs** **JUDGMENT**
REGER V. ESSEX BANK **8-11-20 [12]**

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 Plaintiff-Trustee, Defendant and Office of the United States Trustee on August 11, 2020. By the court's calculation, 65 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 xxxxx.

John Reger ("Plaintiff-Trustee") filed the instant adversary proceeding on July 20, 2020, against Essex Bank ("Defendant"). Plaintiff filed a Motion for Summary Judgment on August 11, 2020. Dckt. 12. No answer has yet been filed, Defendant having filed a Motion to Dismiss the Complaint. The court has granted in part the Motion to Dismiss, with the second and fourth causes of action dismissed; and denied in part as to the first cause of action (to determine the extent, validity, priority of lien of Defendant in the monies at issue in this Adversary Proceeding) and the third cause of action (the Objection to Claim based on 11 U.S.C. § 502(d)).

OVERVIEW OF MOTION AND UNDERLYING FACTS
APPEARING NOT TO BE IN DISPUTE

Plaintiff-Trustee requests the court determine that Defendant has no security interest over the funds in dispute; that the court sustain his objection to Defendant's proof of claim; seeks a determination that Defendant's Proof of Claim is disallowed, and further seeks declaratory relief confirming that Plaintiff may distribute the funds in dispute free and clear of Defendant's claim. Dckt. 1.

William Landes, the Chapter 7 Debtor, commenced his voluntary Chapter 7 bankruptcy case, 17-22481, on April 14, 2017. Six years prior to that, Marie Landes (Debtor's wife at the time) filed a petition for dissolution of marriage in 2011. No property division had occurred in the Dissolution Action ("Dissolution Action") prior to the commencement of the bankruptcy case, and no information

about any such division has been provided to this court.

On April 26, 2017, Plaintiff-Trustee, as the Chapter 7 Trustee in Debtor's bankruptcy case, filed and served a Notice of Intent to Sell Equity in Property. A copy of the Notice of Intent is included as part of the 113 page exhibit document filed in support of the present Motion. Dckt. 19.

The Notice of Intent includes the following information (identified by paragraph number used in the Notice of Intent) relating to the property to be sold as relevant to this Adversary Proceeding:

> 3. DESCRIPTION OF PROPERTY TO BE SOLD: The property to be sold consists of the debtor(s) non-exempt equity in a 2009 Audi A 4 convertible, with 60,000 miles (exempted for $3,000.00) and a 1992 Lexus with 230,000 miles. Vehicles valued at $15,050.00 and $500.00 respectively.
>
> 4. TERMS AND CONDITIONS OF SALE: These properties are being sold as is, where is, subject to all existing liens and encumbrances and without any warranty or representations of any kind. There is no right of refund or return. The trustee has received an offer from the debtor to purchase these properties for $12,500.00, with a onetime payment of $12,500.00. Source of payment is a credit line.
> . . .
> 7. AMOUNT OF LIENS AND IDENTITY OF LIEN HOLDERS: Reger is not aware of any liens or lien holders against the property to be sold. All prospective purchasers should conduct their own independent investigation as to the nature and status of any liens and lien holders against the property to be sold.
>
> 8. IDENTITY OF PURCHASER AND RELATIONSHIP, IF ANY, TO ANY CREDITOR OR PARTY IN INTEREST: Reger has received an offer from the debtor to purchase the property for $12,500.00, with a onetime payment. Reger wishes to accept this offer. Upon expiration of the time to object and completion of the sale Reger will file a Report of Sale.

Exhibit 3; Dckt. 13. The Certificate of Service for the Notice of Intent includes Defendant, providing services as follows:

> Essex Bank
> 9954 Mayland Drive Suite 2100
> Richmond VA 23233-1482

Exhibit 4; *Id*.

On May 18, 2017, Plaintiff-Trustee filed his Report of Sale, which states that the sale "to allow the Debtor(s) to buy back the equity in his 2009 Audi and a 1992 Lexus for $12,500.00" had been consummated. Exhibit 7; *Id*.

Proofs of Claim Filed by Defendant
In Debtor's Bankruptcy Case

On July 17, 2017, Defendant filed a Proof of Claim #4-1 in Debtor's bankruptcy case. A

copy of Proof of Claim 4-1 is filed as Exhibit 15 in support of the Motion. *Id*. The information and documentation provided in and with Proof of Claim 4-1 is summarized as follows:

A. The amount of the claims is $857,159.86.

B. The Basis of the Claim is stated to be:

1. Judgment

a. Attached to the Proof of Claim as Exhibit 1 is a copy of a judgment from the Superior Court for the County of Butte in favor of Defendant and against JSB, LLC and Debtor in the amount of $739,994.08 ("Essex Judgment").

2. Abstract of Judgment

a. Attached to the Proof of Claim as Exhibit 2 is an Abstract of Judgment for the Essex Judgment, which in the upper right hand corner has information stating that it was recorded in Butte County, California on January 31, 2017.

3. Form JL-1

a. Attached to the Proof of Claim as Exhibit 3 is Notice of Judgment Lien (Form JL-1) for the Essex Judgment, which in the upper right hand corner has information stating that it was filed with the California Secretary of State on January 3, 2017.

(1) The name of the judgment debtor listed on the JL-1 is William Landes, the Chapter 7 Debtor, and JSB, LLC.

C. Security for the Claim is stated to be:

1. Real Property

2. Personal Property

3. With perfection of lien by recorded Abstract of Judgment and filed Form JL-1.

On December 29, 2018, Defendant filed Amended Proof of Claim 4-2, which is filed as Exhibit 16. *Id*. The Amended Proof of Claim includes the same information as in Proof of Claim No. 4-1, with the following additions or changes as relevant to the Motion now before the court:

A. For the basis of claim (Part 2, § 8 of Proof of Claim 4-2), "Notice of Lien" has been added.

B. For the identification of security for the claim (Part 2, § 9 of Proof of Claim 4-2),

"Ntc of Lien" and "[See attached Summary and Exhibits 1, 2, 3, and 4]" have been added.

C. In the Proof of Claim Summary, page 4 of Exhibit 16, the following additional summary information has been added:

> A Notice of Lien regarding the 9/22/15 Judgment from the Butte County Superior Court civil case was filed in the Butte County Superior Court family law case regarding the pending divorce of William Landes and Marie Landes [Exhibit 4] and served on counsel for both of those parties, thereby creating a lien on everything involved in that case and preventing any actions involving William Landes and Marie Landes about their property without either a court order from that Superior Court or the written approval of Essex Bank.
>
> The Notice of Lien attached as Exhibit 4 affects the community personal property (guns, artwork, etc.) that William Landes and the Chapter 7 trustee proposed to sell to Marie Landes. That personal property was community property of William Landes and Marie Landes subject to the claims and liens and rights of Essex Bank. Essex Bank claims a right to 100% of the proceeds of that "sale". That "sale" is a sham sale between a husband and a wife of community property through a bankruptcy trustee where the purpose was to enrich William Landes, enrich Marie Landes, enrich the trustee, and enrich the trustee's attorney to the detriment of Essex Bank.

D. Added as Exhibit 4 to Proof of Claim No. 4-2 is a Notice of Lien for the Essex Judgment filed on February 14, 2017, in the *Marie Landes v. William Landes* dissolution proceeding in Butte County. *Id*.

In the Debtor's Bankruptcy Case, the Plaintiff-Trustee filed a Motion to Sell property of the bankruptcy estate identified as artwork and firearms for $20,000.00 to Marie Landes, the spouse of Debtor who commenced the 2011 dissolution action in state court. The bankruptcy judge entered an order approving the sale pursuant to 11 U.S.C. § 363(b). 17-22481; Motion and Order, Dckt. 63, 76.

DEFENDANT'S OPPOSITION AND CLAIM FOR SUMMARY JUDGMENT IN ITS FAVOR

Defendant filed an Opposition to the Motion to Sell, asserting a lien on the property to be sold and the right to 100% of the proceeds of the sale. *Id*.; Dckt. 70. Defendant asserted liens pursuant to the Abstract of Judgment, JL-1 filed with the Secretary of State, and Notice of Lien filed in the dissolution proceeding. The bankruptcy judge to whom the case was assigned granted the Motion and authorized the sale, stating that he did not believe that the liens had attached to the property sold. *Id*.; Civil Minutes, Dckt. 74. The court's findings and order clearly state that the sale is authorized pursuant to 11 U.S.C. § 363(b), and do not approve the sale as being free and clear of liens pursuant to 11 U.S.C.

§ 363(f).

Defendant appealed the court's order authorizing the sale pursuant to 11 U.S.C. § 363(b), and on the issue of whether there was a lien created on the assets sold, Defendant prevailed. On this point, the decision of the Bankruptcy Appellate Panel includes the following:

> We also agree with the bankruptcy court that the JL-1 did not create a lien on the guns and artwork. In California, a JL-1 lien is similar to a UCC-1 lien and provides a judgment lien on a variety of personal property. See CCP § 697.530.5 Essex Bank argued at the sale hearing that the buy/sell agreement constituted an "accounts receivable" to William, which was covered by its JL-1 lien. The court disagreed, finding that the postpetition contract between Trustee on behalf of the bankruptcy estate and Marie was not a contract or receivable of William. And even if it was, the JL-1 lien did not encumber postpetition assets. § 552(a).
>
> However, we disagree with the bankruptcy court's ruling that the Notice of Lien did not create a lien on the guns and artwork and that Essex Bank was a general unsecured creditor and not entitled to any of the sale proceeds. . .
>
> If a judgment creditor has a money judgment against a judgment debtor who is a party to a pending action or special proceeding, the creditor **may acquire a lien to the extent necessary to satisfy the judgment on (a) any cause of action of the debtor for money or property that is the subject of the action or proceeding, and (b) the rights of the debtor to money or property under any judgment subsequently procured in the action or proceeding**. CCP § 708.410(a); 8 Witkin, Cal. Proc., Enforcement of Judgment § 297 (5th ed. 2008). The judgment debtor can be the plaintiff or the defendant. *Fleet Credit Corp. v. TML Bus. Sales, Inc.*, 65 F.3d 119, 121 (9th Cir. 1995). An action or proceeding remains "pending" until the time for appeal expires or an appeal is finally determined. CCP § 708.410(d).
>
> To obtain this type of lien, **the judgment creditor files in the pending action or proceeding a notice of lien and an abstract or certified copy of the judgment creditor's money judgment.** CCP § 708.410(b). The judgment creditor must also serve a copy of the filed notice of lien on all of the parties to the "action or special proceeding. . . . " CCP § 708.410(a). The notice of lien must contain certain language, which serves as a notice to the judgment debtor of his or her rights. CCP § 708.420.
>
> . . .
>
> It is undisputed, and the record establishes, that **Essex Bank did everything required to obtain and perfect a lien under CCP § 708.410.** It filed the Notice of Lien, which contained the necessary language under CCP § 708.420, and a copy of the Abstract of Judgment **in the Divorce Case**. It also served the Notice of Lien on the parties to the Divorce Case, including Marie and her divorce counsel. No one has asserted that William sought or obtained an exemption from the lien in accordance with CCP § 708.450.7 Thus, the lien appears to be prima facie valid.

> . . .
>
> While a marital dissolution proceeding might not seem like a "cause of action" that would fall under the statute, California courts have ruled that CCP § 708.410 liens do apply in such proceedings. *See In re Marriage of Katz*, 234 Cal. App. 3d 1711, 1719-21 (1991) (ruling that CCP § 708.410 liens and the associated remedies apply in marital dissolution proceedings and that wife's transfer to husband of more than one-half of community property interest during dissolution proceeding gave rise to liability to judgment creditor under CCP § 708.470(c)); *In re Marriage of Kerr*, 185 Cal. App. 3d. 130 (1986) (applying CCP § 708.410 in marital dissolution).
>
> The bankruptcy court erred, and thus abused its discretion, in ruling as a matter of law that Essex Bank did not have a CCP § 708.410 lien on the guns and artwork simply because the Notice of Lien was filed in a marital dissolution proceeding. Accordingly, we must REVERSE the Sale Order.

Essex Bank v. Reger et al, 2019 Bankr. LEXIS 3943 (B.A.P 9th 2019); copy filed as Exhibit 19, Dckt. 19.

The Bankruptcy Appellate Panel reversed the sale order. When it returned to the Bankruptcy Court, the sale "fell through" and the $20,000.00 of sales proceeds was lost.

Asserted Lien on Proceeds from Sale of Non-Exempt Equity in the Vehicles

Defendant has asserted that it has a blanket lien on all assets of the Debtor and Marie Landes (who is identified as the "ex-wife," though the court is not aware of a conclusion to the Dissolution Action). Therefore, it has a lien on the $12,500.00 of proceeds from the sale of the non-exempt equity in the two vehicles back to the Debtor.

From the thirty pages of points and authorities, the court distills the following legal basis asserted by Defendant for having such a lien. First, the JL-1 filed lien with the Secretary of State, that lien has attached to the $12,500.00 paid to the Plaintiff-Trustee. It is asserted that the JL-1 Lien includes any accounts receivable that were owed to Debtor. As discussed below, Defendant asserts that the $12,500.00 paid to the Plaintiff-Trustee by a check issued by Landes Medical Group (the Debtor's medial corporation) necessarily had to be an accounts receivable that was owed by the Medical Group to the Debtor that was subject to the JL-1 Lien.

Defendant states that this JL-1 Lien was filed with the Secretary of State, and thereby perfected, 1010 days before Debtor filed his bankruptcy case (therefore, outside of the ninety-day non-insider preference period).

Second, Defendant asserts that the Notice of Lien filed in the dissolution proceeding has attached to the $12,500. Defendant cites to the Bankruptcy Appellate Panel decision stating that such lien was created by the filing of the Notice of Lien in the Dissolution Action. As discussed above, this lien was created, and the transfer made thereby, within the ninety day preference period.

Third, Defendant argues that since the Plaintiff-Trustee's Notice of Intent to Sell states that "These properties are being sold as is, where is, subject to all existing liens and encumbrances," means that the entire transaction, including the monies paid to the Plaintiff-Trustee were subject to the liens, if any, that encumbered the property sold - the nonexempt equity in the vehicles. In substance, Defendant seems to argue that the Plaintiff-Trustee could create a lien on property without court authorization. *See* 11 U.S.C. § 364(c).

Fourth, Defendant argues that the Plaintiff-Trustee waived the mandate imposed by Congress in 11 U.S.C. § 502(d) for the disallowance of a claim by virtue of the language used in the Notice of Intent to Sell. This appears to be an argument that the Plaintiff-Trustee created a lien on the monies received by saying that the property sold was subject to the liens and encumbrances on such property sold.

The Defendant also asserts that because the deadline to file an action to avoid the transfer created by filing the Notice of Lien in the dissolution proceeding on the eve of Debtor's bankruptcy filing has expired, the disallowance of the claim pursuant to 11 U.S.C. § 502(d) is time barred.

These position are asserted long on argument and short on legal authorities and evidence. Defendant asserts a number of "it must be" as opposed to evidence of "this is."

PLAINTIFF-TRUSTEE'S GROUNDS ASSERTED FOR SUMMARY JUDGMENT IN HIS FAVOR

Plaintiff-Trustee begins first with the assertion that an Abstract of Judgment lien attaches only to real property, citing to California Code of Civil Procedure § 697.310.(a). Therefore, since the monies at issue are not related to any real property interest, there cannot be a lien pursuant to the Abstract of Judgment.

Going to the JL-1 Lien filed with the Secretary of State, the Plaintiff-Trustee cites to California Code of Civil Procedure § 697.530(a) to identify the personal property that is subject to a JL-1 Lien. Included in the list of items is "accounts receivable," which is what Defendant asserts the monies paid to the Plaintiff-Trustee were. Neither the Trustee nor Defendant provide the court with what constitutes, legally, an "account receivable" for purposes of the JL-1 Lien.

The Plaintiff-Trustee then addresses the Notice of Lien asserted to have been created within ninety days of the filing of the bankruptcy case pursuant to California Code of Civil Procedure § 708.5410. The Plaintiff-Trustee argues that the monies paid to the Plaintiff-Trustee by the Landes Medical are not monies that would be subject to the Notice of Lien since they are not "rights to money or property under a judgment" obtained in the Dissolution Action.

Then, the Plaintiff-Trustee asserts that the Bankruptcy Appellate Panel did not determine that a lien exists on the $12,500.00 in monies received for the sale of the non-exempt interest in the vehicles. While it is true that the $12,500.00 was not at issue on that appeal, as between Defendant and the Plaintiff-Trustee it has been adjudicated that a lien was created on various assets by the filing of the Notice of Lien in the Dissolution Action on the eve of Debtor filing bankruptcy.

The Plaintiff-Trustee further asserts that California Code of Civil Procedure § 708.410 does

not state that the lien created by the Notice of Lien applies to proceeds from the sale of property subject to such a lien.

With respect to the two vehicles and the asserted liens, the Plaintiff-Trustee cites to California Code of Civil Procedure § 697.530(d), which specifies the personal property subject to a judgment lien. Within this section is a specific exclusion from a judgment lien – vehicles:

> § 697.530. Property subject to judgment lien
>
> (a) A **judgment lien on personal property** is a lien on all interests in the following personal property that are **subject to enforcement of the money judgment against the judgment debtor pursuant to Article 1** (commencing with Section 695.010) of Chapter 1 at the time when the lien is created if the personal property is, at that time, any of the following:
>
> > (1) Accounts receivable, and the judgment debtor is located in this state.
> >
> > (2) Tangible chattel paper, as defined in paragraph (79) of subdivision (a) of Section 9102 of the Commercial Code, and the judgment debtor is located in this state.
> >
> > (3) Equipment, located within this state.
> >
> > (4) Farm products, located within this state.
> >
> > (5) Inventory, located within this state.
> >
> > (6) Negotiable documents of title, located within this state.
>
> (d) Notwithstanding any other provision of this section, **the judgment lien does not attach to**:
>
> > (1) A **vehicle** or vessel required to be registered with the Department of Motor Vehicles or a mobilehome or commercial coach required to be registered pursuant to the Health and Safety Code.

Cal. C.C.P. § 697.530. Included within Article 1 referenced in § 697.530(a) above is the JL-1 lien pursuant to California Code of Civil Procedure § 697.550 and this applies to the judgment lien created by the JL-1 filing with the Secretary of State. The Plaintiff-Trustee does not provide the legal tie in from Chapter 2 Liens, Article 1 for liens on real and personal property of the California Code of Civil Procedure to Chapter 6 Miscellaneous Remedies, Article 5 for liens in pending actions.

The Plaintiff-Trustee cites the court to established Ninth Circuit law that the expiration of the time allowed in 11 U.S.C. § 546(a) to bring an action to avoid a preferential transfer does not waive or make the provisions of 11 U.S.C. § 502(d) ineffective or unenforceable. In *In re America West Airlines, Inc.,* 217 F.3d 1161, 1163 (9th Cir. 2000), the Ninth Circuit Court of Appeals determined no prohibition against the trustee's asserting section 502(d) as an affirmative defense to a claim of a creditor even if the trustee's claim is time-barred or otherwise nonrecoverable. Plaintiff-Trustee asserts that even if

Plaintiff-Trustee failed to bring an action to disallow the Notice of Lien under § 502(d) within the two-year statute of limitations, the Notice of Lien is an avoidable transfer pursuant to § 547(b) subject to disallowance. The Notice of Lien in the Dissolution Action was filed on February 14, 2017, 60 days prior to the filing of the bankruptcy, which was filed on April 14, 2017. Collier on Bankruptcy further elucidates this finding explaining that

> [t]he courts have based their holdings on several observations about section 502(d). First, the wording of section 502(d) refers to transfers "avoidable" under various sections and not to claims that have been avoided. Arguably, an avoidable transfer is one that meets the statutory requirement for avoidance despite a potential time-bar defense. Second, the purpose of section 502(d) is to promote the pro-rata sharing of the bankruptcy estate among all creditors as well as the coercion of the payment of judgments obtained by the trustee. Creditors who have received avoidable transfers to the detriment of the pool should not be entitled to make additional demands on the assets of the estate. The logic of cases permitting invocation of section 502(d) even when the trustee's avoidance claims are time-barred likely would not apply to claims that are outside a statute of repose treated under state law as an essential element of the cause of action.

4 Collier on Bankruptcy P 502.05 (16th 2020)

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT AND OBJECTION TO CLAIM

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.

For an objection to claim, Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b).

It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

DISCUSSION

For the Motion before the court, there appear to remain some evidentiary holes. Defendant contends that whatever money came from the Medical Group had to be an account receivable. But what can legally constitute an accounts receivable from a professional corporation where one is employed is not presented to the court.

The Dissolution Action was commenced in 2011. The sale of the non-exempt equity occurred in 2017, six years after the Dissolution Action was commenced. The court has not been presented with evidence of the Medical Group and Debtor's employment was subject to the Dissolution Action - or not subject to the Dissolution Action.

What has been established is that when the Notice of Lien was filed in the Dissolution Action on February 14, 2017 - fifty-nine (59) days before the filing of the Debtor's Chapter 7 bankruptcy case. Though the Plaintiff-Trustee has not connected the dots, based on the evidence presented by the Plaintiff-Trustee and Defendant, it appears that the elements of 11 U.S.C. § 547(b) for avoiding the transfer (the lien) are satisfied. The Plaintiff-Trustee did not seek to avoid the lien. Amended Proof of Claim 4-2 adding the Notice of Lien as a basis for securing Defendant's claim was not filed until December 29, 2018 - twenty months after the bankruptcy case was filed. It is not clear when the Plaintiff-Trustee was given notice of this additional lien being asserted by Defendant.

Notwithstanding the failure to avoid the transfer, well established Ninth Circuit law provides that the provisions of 11 U.S.C. § 502(d) shall apply and the court shall "shall disallow any claim of any

entity . . . that is a transferee of a transfer avoidable under section . . . 547 . . . ." Such a disallowance is based on the court determining that a lien on the vehicles was created by the Notice of Lien - which lien Defendant not only admits, but affirmatively asserts. But the Plaintiff-Trustee asserts that vehicles are excluded from the Notice of Lien.

The parties do not address the law, federal and state, that applies to the administration of a bankruptcy estate asset subject to a judgment lien. They do not address state law as to a purchaser of an asset from a judgment debtor subject to a judgment lien, and whether actual knowledge of the judgment lien is required.

At the hearing **xxxxxxx**