

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

November 7, 2013 at 1:30 p.m.

1. [13-27771-E-11](#) ANGELA CATARATA MOTION TO DISMISS ADVERSARY
[13-2266](#) AFR-1 PROCEEDING
CATARATA V. WELLS FARGO HOME 10-10-13 [[10](#)]
MORTGAGE ET AL

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney and Office of the United States Trustee on October 10, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the hearing on the Motion to Dismiss to 1:30 p.m. on -----, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant Wells Fargo Bank, N.A., successor by merger with Wells Fargo Bank Southwest, N.A. f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Defendant") moves to dismiss the adversary complaint filed by Angela Catarata pursuant to Federal Rule of Bankruptcy Procedure 7012(A) and Federal Rule of Civil Procedure 12(b)(6).

However, Defendant failed to serve the Chapter 11 Trustee or his counsel. The court approved the appointment of the Chapter 11 Trustee in the underlying bankruptcy case on September 17, 2013. The Notice of Appointment was filed September 24, 2013. The Order Approving Employment of Attorney for Trustee was entered on October 22, 2013. The Trustee has filed a Notice of Appearance in this Adversary Proceeding pursuant to Federal Rule of Bankruptcy Procedure 6009.

Because the trustee is the representative of the estate, the debtor may not prosecute causes of action that belong to the estate. *In re Price*, 173 B.R. 434 (Bankr. N.D. Ga. 1994).

November 7, 2013 at 1:30 p.m.

The court continues the hearing to allow for service of this Motion on the Trustee and his counsel, for the Trustee to substitute in as the real party in interest or abandon the litigation, and for the Trustee to file a responsive pleading to the motion. The court notes the next Status Conference in the bankruptcy case is set for December 4, 2013.

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 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 hearing on the Motion is continued to 1:30 p.m. on xxxx, 2013.

2.	13-27771-E-11 ANGELA CATARATA 13-2266 EAT-1 CATARATA V. WELLS FARGO HOME MORTGAGE ET AL	MOTION TO DISMISS ADVERSARY PROCEEDING 10-23-13 [16]
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Local Rule 9014-1(f) (2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Plaintiff's Attorney, Chapter 11 Trustee, Counsel for the Chapter 11 Trustee, and Office of the United States Trustee on October 23, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion Dismiss Adversary Proceeding. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to

the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant NdeX West, LLC moves the court for an order dismissing the claims asserted in the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state any facts in support of a claim for relief against it.

However, there several issues with the pleadings.

First, the Movant has filed this motion pursuant to Local Bankruptcy Rule 9014-1(f)(2), with only 15 days notice. However, Local Bankruptcy Rule 9014-1(f)(2) expressly states "[t]his alternative procedure shall not be used for a motion filed in connection with an adversary proceeding." Local Bankr. R. 9014-1(f)(2)(A). This Motion to Dismiss has been filed in the adversary proceeding and therefore, cannot be served on shortened notice under Local Bankruptcy Rule 9014-1(f)(2).

Second, in Adversary Proceedings, Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 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.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

For the present motion, the sum total of attempting to plead with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, is that Defendant

hereby moves this Court pursuant to Federal Rules of Civil Procedure 12(b)(6), made applicable by Federal Rule of Bankruptcy Procedure 7012, for an order dismissing the claims asserted in the Complaint ("Complaint") filed by plaintiff and debtor Angela Gay Catarata ("Debtor" or "Plaintiff") based on the grounds that Plaintiff's Complaint fails to state any facts in support of a claim for relief against this Defendant. Plaintiff cannot save her Complaint by amendment. Therefore, the Court should grant NDeX's motion, without leave to amend.

Motion, Dckt. 16.

Defendant then directs the court to the Memorandum or Points and Authorities, Request for Judicial Notice and all other pleadings and papers filed in this matter. Rather than pleading with particularity in the Motion, the Plaintiff instructs the court to read multiple other pleadings filed to assemble for Plaintiff what are the actual grounds upon which he relies – distilling those grounds from the declarations, exhibits, arguments, citations, and quotations in those other pleadings. The court declines to do so.

Lastly, the court also notes that in the underlying Chapter 11 Bankruptcy, the court approved the appointment of the Chapter 11 Trustee on September 17, 2013. The Order Approving Employment of Attorney for Trustee was entered on October 22, 2013. The Notice of Appointment was filed September 24, 2013. The Trustee has filed a Notice of Appearance in this Adversary Proceeding pursuant to Federal Rule of Bankruptcy Procedure 6009.

Because the trustee is the representative of the estate, the debtor may not prosecute causes of action that belong to the estate. *In re Price*, 173 B.R. 434 (Bankr. N.D. Ga. 1994). The denial of this motion will allow the Trustee and his counsel time to file a responsive pleading to the motion. The court notes the next Status Conference in the bankruptcy case is set for December 4, 2013.

The Motion is denied without prejudice.

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

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

The Motion to Dismiss Adversary Proceeding filed by 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 is denied without prejudice.

3. [13-27771-E-11](#) ANGELA CATARATA
[13-2267](#) AFR-1
CATARATA V. WELLS FARGO HOME
MORTGAGE ET AL

MOTION TO DISMISS ADVERSARY
PROCEEDING
10-10-13 [[10](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney and Office of the United States Trustee on October 10, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the hearing on the Motion to Dismiss to 1:30 p.m. on xxxx, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant Wells Fargo Bank, N.A., successor by merger with Wells Fargo Bank Southwest, N.A. f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Defendant") moves to dismiss the adversary complaint filed by Angela Catarata pursuant to Federal Rule of Bankruptcy Procedure 7012(A) and Federal Rule of Civil Procedure 12(b)(6).

However, Defendant failed to serve the Chapter 11 Trustee or his counsel. The court approved the appointment of the Chapter 11 Trustee in the underlying bankruptcy case on September 17, 2013. The Notice of Appointment was filed September 24, 2013. The Order Approving Employment of Attorney for Trustee was entered on October 22, 2013. The Trustee has filed a Notice of Appearance in this Adversary Proceeding pursuant to Federal Rule of Bankruptcy Procedure 6009.

Because the trustee is the representative of the estate, the debtor may not prosecute causes of action that belong to the estate. *In re Price*, 173 B.R. 434 (Bankr. N.D. Ga. 1994).

The court continues the hearing to allow for service of this Motion on the Trustee and his counsel, for the Trustee to substitute in as the real party in interest or abandon the litigation, and for the Trustee to file a responsive pleading to the motion. The court notes the next Status Conference in the bankruptcy case is set for December 4, 2013.

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 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 hearing on the Motion is continued to 1:30 p.m. on xxxx, 2013.

4. [13-27771](#)-E-11 ANGELA CATARATA MOTION TO DISMISS ADVERSARY
[13-2273](#) DWE-1 PROCEEDING
CATARATA V. BANK OF AMERICA, 9-27-13 [[11](#)]
N.A. ET AL

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 27, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

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

Defendant Seterus, Inc., Mortgage Electronic Registration Systems, and Federal National Mortgage Association ("Defendants") move the court to dismiss with prejudice Plaintiffs complaint for failure to state a claim upon which relief can be granted.

However, there are two issues with the motion. First, the Defendants failed to serve the Chapter 11 Trustee or his counsel. The court approved the appointment of the Chapter 11 Trustee in the underlying bankruptcy case on September 17, 2013. The Notice of Appointment was filed September 24, 2013. The Order Approving Employment of Attorney for Trustee

was entered on October 22, 2013. The Trustee has filed a Notice of Appearance in this Adversary Proceeding pursuant to Federal Rule of Bankruptcy Procedure 6009.

Because the trustee is the representative of the estate, the debtor may not prosecute causes of action that belong to the estate. *In re Price*, 173 B.R. 434 (Bankr. N.D. Ga. 1994).

The denial of this motion will allow the moving party to properly serve the Trustee and his counsel and for the Trustee to file a responsive pleading to the motion. The court notes the next Status Conference in the bankruptcy case is set for December 4, 2013.

Second, the pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

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 Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

5. [09-22188-E-13](#) RICK SILLMAN
[12-2023](#)
SILLMAN V. WALKER ET AL

FINAL ARGUMENTS RE: AMENDED
COMPLAINT 1) TO VACATE COURT'S
ORDER DISMISSING DEBTOR'S CASE
IN ERROR, AND AFFIRMING THE
AUTOMATIC STAY WAS IN EFFECT,
ETC. AND 2) FOR RESCISSION,
ETC.
3-28-12 [[32](#)]

No Tentative Ruling.

The court having determined that the non-judicial foreclosure sale was void and that Walker did and has continued to violate the automatic stay, the court issued a scheduling order for conducting the second phase of this trial damages for violation of the automatic stay. The damages, as specified by 11 U.S.C. § 362(k) and as may be awarded pursuant to the inherent sanction power of this federal court, relate to the violation of the stay and not various other non-bankruptcy claims which the Plaintiff-Debtor has sought to assert against the Defendants in other proceedings and on occasion has referenced in this Adversary Proceeding.

The court ordered a continued hearing to take final arguments in this Adversary Proceeding; the oral arguments only addressing the issue of damages, including whether damages should be awarded, the cause of the damages, and the computation of damages. No further evidence may be presented, evidence having been closed with the completion of that phase of the trial on June 25, 2013.

PLAINTIFF'S ARGUMENT

Plaintiff asserts the following actual expenses:

Item	Cost
Moving Costs:	
Tow Truck	\$150.00
Circuit Breaker/Wire	\$60.00
Gas (5 days)	\$450.00
Moving men	\$1,400.00
Supplies for Fence	\$260.00
Stolen Items	\$570.00
TOTAL	\$2890.00
Repairs to New Mobile Home:	
Supplies for Power	\$400.00
Electric supplies	\$300.00
Entry Repair	\$1,500.00
Roof Repair	\$350.00
Roof coating	\$250.00
Telephone Wire/Cable	\$30.00
Locks	\$65.00

Entry stairs	\$150.00
TOTAL	\$3045.00

Labor for Repairs	\$12,500.00
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Plaintiff states that after Defendants violated the stay originally, they allowed their agents to cut numerous trees on the property and allowed their agents to bring in a large tractor to alter numerous areas, as well as allowing off-road vehicles to make numerous trails, all creating erosion and other damage. Plaintiff states he can verify 1-2 old growth 200-foot tall pine trees cut down, with perhaps 15-20 50 year old trees as well. Plaintiff states an appraisal he obtained states such trees have a replacement value of at least \$10,000.00 to \$20,000.00. Plaintiff also states a similar tractor could restore the topography in 1-3 days, and local rate is \$50.00 per hour plus fuel (\$200.00 per day).

Plaintiff states that at the time the Defendants violated the stay, he had been renting one space for a trailer for four hundred dollars a month, including utilities and had he rented the entire property it would be at least \$750.00 per month without utilities. This amount multiplies by 53 months since the sting of violations would result at a loss of revenue of \$21,000.00 for one rental space and up to \$39,750.00 for rental of the entire property. Plaintiff also argues that the 2 bedroom mobile fair market rental value would be \$400.00 to \$600.00 per month and the one bedroom house fair market rental value would be \$650.00 to \$850.00 per month, based upon current rents for similar mobiles or houses. Plaintiff states this would add to fair-market value, 18 multiplied by 53 months, would be \$61,650.00 to \$82,850.00.

Plaintiff states that even though the Defendants originally violated the stay on April 9, 2009, he was engaged in state actions prosecuting them for like causes of action after April 2009, as well as defending against the state unlawful detainer-in an attempt to recover other damages relating to other fraud. Plaintiff seeks \$9,691.43 for State Civil costs; \$1,149.64 for unlawful detainer costs; \$4,272.55 for Bankruptcy Adversary Proceeding costs; \$862.84 for additional witness costs;

Plaintiff also argues that punitive damages and criminal sanctions should be imposed by this court.

DEFENDANT'S ARGUMENT

Defendant states that since Plaintiff has chosen to prosecute this case in pro per, no attorney fees can be awarded.

Defendant also argues the actions in this case were without knowledge of the automatic stay and thus unintentional and not willful. The Defendant states that the Trustee's Deed Upon Sale has been rescinded and as such, there is no continuing violation.

Defendant states that in this instance, the Plaintiff has suffered no actual damages, nor does the record supply any evidence of damages. Defendant states that this case is not proper for punitive damages.

PLAINTIFF'S REPLY

Plaintiff attempts to re-argue the merits of the underlying complaint, rather than focus on the damages, as ordered by this court. The court is no longer taking any argument as to the merits of the case and will only consider the argument regarding determining damages.

EVIDENCE OF DAMAGES

A review of the evidence submitted at trial shows no evidence of damages. No direct testimony statements or authenticated exhibits provide the court with evidence of damages imparted on the Plaintiff. The court only has the arguments of the parties before it to determine damages.

DISCUSSION

Section 362(k) of the Bankruptcy Code provides for the imposition of sanctions, including actual damages and punitive damages, where an individual debtor suffers injury from a creditor's willful violation of the stay. The term "shall recover" in § 362(k) suggests that the award of actual damages, costs, and attorney's fees is mandatory if a willful violation of the automatic stay is found. *Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 7 (9th Cir. BAP 2002) (citation omitted). A "willful" violation is a condition precedent to the recovery of damages under § 362(k). *Id.*, citing *Fernandez v. GE Capital Mortgage Servs., Inc. (In re Fernandez)*, 227 B.R. 174, 180 (9th Cir. BAP 1998) *aff'd mem.*, 208 F.3d 220 (9th Cir. 2000).

The Bankruptcy Code requires the court to award the entire amount of actual damages reasonably incurred as a result of the stay violation. *Beard v. Walsh (In re Walsh)*, 219 B.R. 873, 876 (9th Cir. BAP 1998), citing *Stainton v. Lee (In re Stainton)*, 139 B.R. 232, 235 (9th Cir. BAP 1992).

Emotional distress damages may be awarded for a willful violation of the automatic stay, but only where the stay violation has also caused "significant economic loss." *Stinson v. Bi-Rite Restaurant Supply, Inc. (In re Stinson)*, 295 B.R. 109, 122 (9th Cir. BAP 2003).

Punitive damages will be awarded for a violation of the automatic stay only if the conduct was malicious, wanton or oppressive. *Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 590 (9th Cir. BAP 1995). In no event should punitive damages be awarded in the absence of actual damages. *McHenry v. Key Bank (In re McHenry)*, 179 B.R. 165, 168 (9th Cir. BAP 1995).