

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

November 29, 2016 at 1:00 p.m.

1. [16-26003](#)-B-13 ROBIN SWANSON ORDER TO SHOW CAUSE - FAILURE
Michael O'Dowd Hays TO PAY FEES
10-13-16 [[27](#)]
DEBTOR DISMISSED: 11/15/2016

Final Ruling: No appearance at the November 29, 2016, hearing is required. The case was dismissed on November 15, 2016.

The court will enter an appropriate minute order.

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to 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.

The court's decision is to dismiss the case.

First, the Debtor is delinquent to the Chapter 13 Trustee in the amount of \$207.00, which represents approximately 1 plan payment. By the time this matter is heard, an additional plan payment in the amount of \$207.00 is due. The Debtor has provided a response stating that it is difficult for her to make plan payments due to the fact that she only receives \$303.00 from CalWORKS between her and her daughter. The Debtor does not appear to be able to make plan payments proposed and has not carried the burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Second, the Debtor is not eligible for relief under the United States Bankruptcy Code pursuant to 11 U.S.C. § 109(h) since her certificate of competition from an approved nonprofit budget and credit counseling agency was not received during the 180-day period preceding the date of the filing of the petition. The briefing was instead received after the Debtor's petition was filed on September 23, 2016. Additionally, the Debtor has failed to request a 30-day temporary waiver of the requirement and has failed to provide an explanation of an exigent circumstance that merits a temporary waiver.

Third, the Debtor has not filed, set for hearing, and served a motion to confirm plan as required pursuant to Local Bankr. R. 3015-1(c)(3) and 3015-1(d)(1). Cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1).

Fourth, the Debtor has failed to submit to the Trustee proof of her social security number at the meeting of creditors as required pursuant to Fed. R. Bankr. P. 4002(b)(1)(B). Cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1).

Fifth, the Debtor has failed to provide certain items related to Debtor's operation of a business, Portia Bechtel Marketing, LLC, including but not limited to a completed business examination checklist, income tax returns for 2-year period prior to the filing of the petition, bank account statements for the 6-month period prior to the filing of the petition, proof of all required insurance and proof of required licenses and permits. It cannot be determined whether the business is solvent and necessary for reorganization. The Debtor has not complied with 11 U.S.C. § 521.

Sixth, the Debtor has failed to disclose six previous bankruptcy petitions in the past 6 years. The Debtor has not fully and accurately provided all information required by the petition, schedules, and Statement of Financial Affairs. The Debtor has not fully complied with the duty imposed by 11 U.S.C. § 521(a)(1).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court will enter an appropriate minute order.

3. [15-26933](#)-B-13 PETE GARCIA
PGM-3 Peter G. Macaluso

CONTINUED OBJECTION TO NOTICE
OF MORTGAGE PAYMENT CHANGE
9-12-16 [[86](#)]

Tentative Ruling: This matter was continued from November 1, 2016, to provide Wells Fargo Bank, N.A. ("Creditor") additional time to revisit its calculations. Debtor Pete Garcia ("Debtor") was also provided additional time to supplement his objection. The objection to the Notice of Mortgage Payment Change filed by Creditor on April 27, 2016, was originally set for hearing on the 28-days notice required by Local Bankruptcy Rule 9014-1(f)(1). Opposition was filed. 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.

The court's decision is to overrule the objection and deny Debtor's request for attorney's fees with prejudice.

Debtor objects to the Notice of Mortgage Payment Change filed by Creditor. Creditor seeks a mortgage payment increase from \$516.58 to \$623.68 plus shortage payment of \$133.88 for a total monthly escrow obligation of \$757.56. Debtor asserts that the new escrow obligation should be increased to only \$623.88. The Debtor further asserts that the escrow deficiency is provided for in the plan arrears and that the escrow analysis should start at zero (0). The Debtor filed a response on November 22, 2016, reiterating the same opposition.

The Notice of Mortgage Payment Change filed April 27, 2016, Proof of Claim No. 1 filed by the Creditor, and the objection and exhibits filed by the Debtor have been reviewed by the court. The court has also reviewed all supplements filed by the parties.

As stated above, Debtor objects to Creditor's Notice of Mortgage Payment Change which increases the Debtor's escrow payment from \$516.58 to \$757.59. There is no dispute with an increase in the escrow payment from \$516.58 to \$623.68. The dispute is over an additional increase of a \$133.88 per month escrow shortage, or from \$623.68 to \$757.56.

Creditor attributes the shortage, and thus the additional \$133.88 monthly increase, to unanticipated payments for county taxes which were more than initially projected and not included in its proof of claim. Debtor, on the other hand, asserts the \$133.88 increase is included in the arrears stated in the proof of claim and paid through the plan. The court finds Creditor's position more persuasive and supported.

Notices filed under Bankruptcy Rule 3002.1(b) and (c) are not entitled to the presumption of validity accorded proofs of claim under Bankruptcy Rule 3001(f). See Fed. R. Bankr. P. 3002.1(d); *In re Creggett*, 2013 WL 6737813 (Bankr. S.D. Tex. 2012). That means the burden of proof (production and persuasion) rests with the creditor filing the mortgage change notice. *In re Taylor*, 2013 WL 1276507 (Bankr. N.D. Miss. 2013); see also *In re Bodrick*, 498 B.R. 793, 803 (Bankr. N.D. Ohio 2013) (similar limiting provision in Rule 3002.1(g)); *In re Kreidler*, 494 B.R. 201, 204 (Bankr. M.D. Penn. 2013) (accord). A creditor satisfies its burden of proof by providing the "[d]ebtor and the [c]ourt with sufficient explanation to substantiate its entitlement to the [amount claimed] in the notice." *In re Mullenex*, 10-40194, Dkt. 36 at 8 (Bankr. N.D. Ohio 2013). Creditor has met that burden.

In both its initial opposition to the Debtor's objection and its supplement to its opposition, Creditor provides a logical, plausible, detailed, and persuasive explanation (supported by mathematical calculations) to substantiate the additional \$133.88 monthly escrow shortage increase above the undisputed increase to \$623.68. See dkts. 92, 98. Debtor, on the other hand, offers only conclusory statements that the disputed increase of \$133.88 is included in the proof of claim and provided for in the plan. See dkts. 86, 94, and 104. If that is indeed the case, the Debtor has not sufficiently explained it and the court declines to scour the record for the Debtor's benefit. See Fed. R. Bankr. P. 9013.

Therefore, for the foregoing reasons, the Debtor's objection to the Notice of Mortgage

Payment Change filed by Creditor on April 27, 2016, is ordered overruled and the Debtor's request for attorney's fees is ordered denied with prejudice.

The court will enter an appropriate minute order.

4. [16-26234](#)-B-13 ALLEN/ASHLEY WARRINGTON CONTINUED OBJECTION TO
JPJ-1 Scott D. Hughes CONFIRMATION OF PLAN BY JAN P.
JOHNSON AND/OR MOTION TO
DISMISS CASE
10-27-16 [[24](#)]

Final Ruling: No appearance at the November 29, 2016, hearing is required.

The Chapter 13 Trustee having filed a Notice of Withdrawal of the Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case, the objection and motion are dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The matter is removed from the calendar.

There being no other objection to confirmation, the plan filed September 20, 2016, will be confirmed.

The court will enter an appropriate minute order.

5. [16-26352](#)-B-13 RUTH ARMISTEAD
Dale A. Orthner

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
10-28-16 [[17](#)]

Tentative Ruling: The Order to Show Cause will be discharged and the case will remain pending but the court will modify the terms of its order permitting the Debtor to pay the filing fee in installments.

The court granted the Debtor permission to pay the filing fee in installments. The Debtor failed to pay the \$2.00 installment when due on October 24, 2016. While the delinquent installment was paid on October 31, 2016, the fact remains the court was required to issue an order to show cause to compel the payment. Therefore, as a sanction for the late payment, the court will modify its prior order allowing installment payments to provide that if a future installment is not received by its due date, the case will be dismissed without further notice or hearing.

The court will enter an appropriate minute order.

6. [16-25261](#)-B-13 SHAMEKA BATTE
Pro Se

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
10-17-16 [[28](#)]

DEBTOR DISMISSED: 10/28/2016

Final Ruling: No appearance at the November 29, 2016, hearing is required. The case was dismissed on October 28, 2016.

The court will enter an appropriate minute order.

7. [16-25881](#)-B-13 JOHN JENKINS ORDER TO SHOW CAUSE - FAILURE
Thru #8 Pro Se TO PAY FEES
11-7-16 [[31](#)]

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

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

The Order to Show Cause was issued due to Debtor's failure to pay \$65.00 due October 31, 2016. The court's docket reflects that the default has not been cured.

The court will enter an appropriate minute order.

8. [16-25881](#)-B-13 JOHN JENKINS MOTION TO DISMISS CASE
JPJ-2 Pro Se 11-2-16 [[26](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to 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.

The case was dismissed at Item # 7. The Debtor failed to pay the filing fee installment due October 31, 2016, and the Order to Show Cause was sustained and the case dismissed.

The court will enter an appropriate minute order.

9. [16-26594](#)-B-13 EULANDA MERRIWEATHER ORDER TO SHOW CAUSE - FAILURE
Thru #10 Pro Se TO PAY FEES
11-7-16 [[32](#)]

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

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

The Order to Show Cause was issued due to Debtor's failure to pay \$79.00 due November 2, 2016. The court's docket reflects that the default has not been cured.

The court will enter an appropriate minute order.

10. [16-26594](#)-B-13 EULANDA MERRIWEATHER SHOW CAUSE HEARING RE: MOTION
MWM-1 Pro Se FOR RELIEF FROM AUTOMATIC STAY
10-11-16 [[10](#)]

Tentative Ruling: As stated in the court's civil minute order (dkt. 34) dated November 7, 2016, Tuscaro Sterling, LLC, dba Tuscaro Apartments ("Creditor"), was ordered to show cause in writing by November 15, 2016, why it should not be sanctioned and required to pay Debtor damages in the amount of \$2,500.00 under 11 U.S.C. § 362(k) based on Creditor's admitted willful violation of 11 U.S.C. § 362(a)(1) and (a)(6). It was further ordered that a hearing on the court's order to show cause will be held before this court on November 29, 2016, at 1:00 p.m. and that the Creditor and its attorney shall appear personally.

Creditor responded to the court's order to show cause with a declaration of Selven Anderson, Esq., filed on November 4, 2016. Dkt. 28. Mr. Anderson was trial counsel for Creditor in the state court unlawful detainer/debt collection action that proceeded against the Debtor in state court on, and after, this Chapter 13 case was filed on October 3, 2016. That post-petition trial and judgment entered in the trial form the basis of the court's order to show cause.

According to the declaration, counsel was made aware of the Debtor's bankruptcy filing approximately seven minutes before the state court unlawful detainer/debt collection trial was set to begin at 1:30 p.m. on October 3, 2016. Counsel was told of the bankruptcy filing, and that the Debtor would not appear for trial, by the clerk of the state court. The Debtor did not file any notice of her bankruptcy with the state court and she did not provide the state court clerk with any identifiable information regarding her bankruptcy case. But she did file. This court's records reflect that the Debtor filed a Chapter 13 petition at 10:31 a.m. on October 3, 2016.

Based on prior experience in unlawful detainer proceedings in which defendants falsely report a bankruptcy filing to delay trial, Creditor's counsel was skeptical of the debtor's filing. Nevertheless, before trial commenced, Creditor's counsel contacted his paralegal and had her perform a nationwide PACER search for a bankruptcy case filed under the Debtor's name. Finding none, Creditor proceeded with trial after 1:30 p.m. on October 3, 2016, and obtained a judgment against the Debtor.

The state court unlawful detainer/debt collection action against the Debtor occurred post-petition and, thus, violated the automatic stay. At a minimum, the trial and the judgment entered by the state court following that trial are void.

The state court trial and judgment entered against the Debtor were also willful violations of the automatic stay: (1) Creditor and its counsel were informed by the

state court clerk that the Debtor filed bankruptcy (which turned out to be true) and would not appear for trial and (2) they proceeded with the trial and obtained a judgment against the Debtor. Knowledge and an intentional act are all that are required for a willful violation. Moreover, the Ninth Circuit has made it abundantly clear that § 362(a)(1) unambiguously imposes an "affirmative duty" on a creditor to discontinue all action against the debtor once it gains knowledge of a bankruptcy case. *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214-1215 (9th Cir. 2002).

The court is not aware of any "actual verification" exception to § 362(a) and Creditor cites none. Thus, a party acts at its own peril when it has knowledge of a bankruptcy filing that later turns out to be true. But even if there was a "verification" defense to § 362(a), the court would find it inapplicable here. Accepting that Creditor's counsel's paralegal could not locate the Debtor's bankruptcy case on PACER, neither counsel nor Creditor made any effort to simply call the bankruptcy court clerk. Creditor undoubtedly knew that the Debtor resided in Sacramento making this court the most logical place to check if a case had been filed. After all, Creditor was suing to evict the Debtor and recover rent under a written lease agreement for an apartment in Sacramento.

In sum, the court finds that: (1) Creditor, through its counsel, knew of the Debtor's bankruptcy filing having learned of it from the clerk of the state court at approximately 1:23 p.m. on October 3, 2016, and (2) with knowledge of the Debtor's bankruptcy filing proceeded with the trial after 1:30 p.m. on October 3, 2016, and obtained a judgment against the Debtor upon the conclusion of that trial.

Therefore, for the reasons stated above and also stated in the Amended Civil Minutes filed November 1, 2016 (dkt. 31), the court's tentative decision is to sustain the order to show cause and order Creditor to pay, as actual damages under § 362(k)(1), a modified lump sum of \$350.00 to the Debtor. See *Herbert v. United States (In re Herbert)*, 203 F.3d 831 (9th Cir. 1999). Payment shall be made within seven (7) days of entry of this court's order.

The court will enter an appropriate minute order.

11. [15-20996](#)-B-13 WARREN DITTMAR MOTION TO DISMISS CASE
JPJ-1 W. Scott de Bie 10-26-16 [[57](#)]

CONTINUED TO 12/13/16 AT 1:00 P.M. TO BE HEARD IN CONJUNCTION WITH DEBTOR'S MOTION TO MODIFY PLAN.

Final Ruling: No appearance at the November 29, 2016, hearing is required.

The court will enter an appropriate minute order.