UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 11, 2014 at 1:30 p.m.

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1. 10-53637-E-13 G./KATHLEEN ULBERG
11-2122
ULBERG, JR. ET AL V. BANK OF AMERICA, N.A. ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-22-11 [1]

The parties having filed a stipulation resolving the Adversary Proceeding, the Status Conference is removed from the calendar.

2. 10-53637-E-13 G./KATHLEEN ULBERG
11-2122 JGD-2
ULBERG, JR. ET AL V. BANK OF AMERICA, N.A. ET AL

MOTION TO ENFORCE SETTLEMENT
11-14-14 [262]

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

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

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

Notice Provided. No Proof of Service has been filed with the Motion to Enforce Settlement. However, an Opposition has been filed and the court will consider the merits of the Motion.

The Motion to Enforce Settlement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is

considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Enforce Settlement is dismissed without prejudice.

Plaintiff-Debtors Wendell and Kathleen Ulberg ("Plaintiff-Debtors") filed the instant Motion to Enforce Settlement on November 14, 2014. Dckt. 262. Plaintiff-Debtors are seeking for the court to enforce a Release and Settlement Agreement reached between Plaintiff-Debtors and Pacific Crest Partners, Inc. and John Mudgett and Recontrust Company, N.A. Dckt. 265, Exhibit A.

In relevant part, the Release and Settlement Agreement provides that Pacific Crest Partners, Inc. would pay the Plaintiff-Debtors $3,000.00 if the Plaintiff-Debtors (1) vacate the Mineral Springs House on or before August 31, 2014 and (2) leave the Mineral Springs House free of any intentional damages. Additionally, the Release and Settlement Agreement provides that Pacific Crest Partners, Inc. would pay the Plaintiff-Debtors $1,000.00 if the Plaintiff-Debtors (1) vacate the Mineral Springs House on or before September 30, 2014 and (2) leave the Mineral Springs House free of any intentional damages.

Plaintiff-Debtors allege that they attempted to turnover possession of the Mineral Springs House on September 2, 2014. Based on this, Plaintiff-Debtors argue that under the terms of the Release and Settlement Agreement, the Plaintiff-Debtors are owed $3,000.00 less $133.32, or $2,866.58 (based on a proration of $66.66 a day). Alternatively, the Plaintiff-Debtors argue that it is undisputed that the Defendants accepted the keys on September 23, 2014, resulting in a required payment of $1,466.67.

PACIFIC CREST PARTNERS, INC. AND JOHN MUDGETT OPPOSITION

Pacific Crest Partners, Inc. and John Mudgett filed opposition to the instant Motion on November 21, 2014. Dckt. 266. In their opposition, Pacific Crest Partners, Inc. and John Mudgett state that on November 20, 2014, the parties agreed that Pacific Crest Partners, Inc. and John Mudgett would pay Plaintiff-Debtors $1,000.00 in order to resolve this Motion. On November 20, 2014, Pacific Crest Partners, Inc. and John Mudgett sent Plaintiff-Debtor's counsel $1,000.00 by overnight mail. Pacific Crest Partners, Inc. and John Mudgett allege that after the funds have been received and cleared the bank, Plaintiff-Debtors' counsel will file a stipulation and order withdrawing this Motion.

DISCUSSION

A review of the Motion and the Release and Settlement Agreement in conjunction with the opposition, the court finds that the parties have reached an amicable settlement addressing the concerns raised by the Plaintiff-Debtors. Therefore, because the parties have stipulated and settled, the Motion is dismissed without prejudice, having been resolved by stipulation.

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 Enforce Settlement filed by Plaintiff-Debtors 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 dismissed without prejudice, the matter having been resolved by stipulation between the parties.

3. 09-44339-E-13 GLEN PADAYACHEE
14-2266
PADAYACHEE V. U.S. BANK NATIONAL ASSOCIATION

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-9-14 [1]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Robert S. McWhorter

Adv. Filed: 9/9/14
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to the bankruptcy case)

Notes:

Continued from 11/12/14 to be heard in conjunction with the motion to dismiss.

4. 09-44339-E-13 GLEN PADAYACHEE
14-2266 NOS-1
PADAYACHEE V. U.S. BANK NATIONAL ASSOCIATION

MOTION TO DISMISS ADVERSARY PROCEEDING
10-8-14 [7]

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

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 8, 2014. By the court's calculation, 64 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Complaint is granted and the complaint is dismissed in its entirety without prejudice.

U.S. Bank National Association, Successor in Interest to the Federal Deposit Insurance Corporation, as Receiver for Downey Savings and Loan Association, F.A. ("Defendant") filed the instant Motion to Dismiss Complaint on October 8, 2014. Dckt. 7.

COMPLAINT

Glen Padayachee ("Plaintiff-Debtor") filed the instant Adversary Proceeding and complaint on September 9, 2014. Dckt. 1. The Plaintiff-Debtor asserts eleven different causes of actions in his complaint against the Defendant:

1. Declaratory Relief and Determination of Dischargeability under Fed. R. Bankr. P. 4007

2. Violations of Rosenthal Fair Debt Collections Practices Act California Civil Code §§ 1788-1788.32

3. Violation of California Consumer Credit Reporting Agencies Act

4. Unfair Practices under California Business & Professions Code Section 17200, et seq.

5. Intentional Infliction of Emotional Distress

6. Negligent Infliction of Emotional Distress

7. Violations of Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.

8. Breach of Contract

9. Conversion

10. Violation of Fed. R. Bankr. P. 3002.1

11. Attorney's Fees

The Plaintiff-Debtor states that Plaintiff-Debtor owns a home located at 9779 Ametrine Court, Elk Grove, California ("Property"). The Property is secured by a lien to Defendant. The debt to Defendant was listed on the Plaintiff-Debtor's schedule in the Plaintiff-Debtor's voluntary petition. Defendant filed a Proof of Claim. The debts of the Plaintiff-Debtor were discharged on August 25, 2014.

It is asserted that Defendant reported the obligation on the Plaintiff-Debtor's credit report stating the loan is in foreclosure and delinquent. The Plaintiff-Debtor has attempted multiple times to get Defendant to properly report the matter on their credit report but has been informed by the customer service department of Defendant that the credit report is lawfully reported and they will not be correcting the credit report.

Further, it is alleged that Defendant informed the Plaintiff-Debtor that his loan is in foreclosure and demanded in excess of $13,000.00 after August 25, 2014. Defendant has provided Plaintiff-Debtor a statement dated August 26, 2014 which states payments made post-plan completion were placed in suspense and paid for attorneys fees and cost.

As of the date of filing of the complaint, a Motion was pending before the court to determine that the arrearages were cured and post plan completion payments were paid on time. In response to said Motion, Defendant file a response that states "the amount required to cure the default in Proof of Claim #5-3 has been paid in full" and "Debtors are due for the August 1, 2014 monthly mortgage payment." Despite their acknowledgment that Plaintiff-Debtor cured the default and was only due and owing for the August 1, 2014 payment, they sent the statement which states that Plaintiff-Debtor is due for $13,613.96.

Specifically, the Plaintiff-Debtor requests that the court enter a final judgment which:

1. Grants declaratory relief to the Plaintiff-Debtor as to any amounts owed under the Deed of Trust;

2. Grants declaratory relief that U.S. Bank debt was discharged (in personam liability) on August 25, 2014, pursuant to Fed. R. Bankr. P. 4007;

3. Grants declaratory relief to the Plaintiff-Debtor that the Defendant cannot assess fees and misapply payments for the period during the bankruptcy plan and post discharge;

4. Grants declaratory relief to the Plaintiff-Debtor that the Defendant cannot report derogatory credit as to the Plaintiff-Debtor;

5. For violation of the Rosenthal Fair Debt Collection Practices Act in the amount of $1,000.00 plus attorney's fees;

6. Injunctive relief pursuant to Business and Professions Code § 17200 et seq. and attorney's fees;

7. Actual damages for emotional distress (intentional and negligent);

8. For violations of RESPA, $1,000.00 plus attorney's fees;

9. For breach of contract, proper accounting of payments and attorney's fees;

10. For conversion, return of funds expended;

11. Punitive damages in an amount no less than $1,000,000.00;

12. Attorney's fees and costs as allowed for in the contract between Plaintiff-Debtor and Defendant and by the statutes referenced herein under the reciprocal attorneys fees provision of the California Civil Code; and

13. For such other and further relief the court deems just and proper.

MOTION TO DISMISS

Defendant filed the instant Motion on October 8, 2014. Dckt. 7. The Defendant argues that the court should dismiss the entire complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Defendant begins by stating the factual background of the case. Plaintiff-Debtor filed a voluntary petition under chapter 13 on November 6, 2009. Plaintiff-Debtor filed Schedules and a Statement of Financial Affairs indicating that Defendant was owed $405,235.61, which was secured by a first deed of trust on the Property. Plaintiff-Debtor opined that the value of the Property was $360,000.00. On the same date, Plaintiff-Debtor filed a Chapter

13 Plan, which proposed to make monthly payments to cure all pre-petition arreaars owed to Defendant.

On January 4, 2010, Defendant timely filed a proof of claim asserting a total secured claim in the amount of $425,992.79, with the arrearage totaling $22,814.38. Defendant amended its claim on September 20, 2012. On August 25, 2011, Plaintiff-Debtor filed a Second Amended Plan. Under the Second Amended Plan, Plaintiff-Debtor agreed to pay $1,786.00 per month to cure all pre-petition arrears to satisfy Defendant's pre-petition arrearage totaling $22,814.38. The court entered an order confirming the Second Amended Plan on October 19, 2011.

On July 11, 2012, Plaintiff-Debtor filed an objection to the amount of the Defendant's claim and to Defendant's alleged change in the mortgage payments without complying with Fed. R. Bankr. P. 3002.1. On August 28, 2012, the court overruled Plaintiff-Debtor's objection to the Defendant's claim but sustained Plaintiff-Debtor's objection to Defendant's mortgage payment change. On May 30, 2014, Plaintiff-Debtor filed a motion to determine the final cure and payment amount under his confirmed plan. In the motion, Plaintiff-Debtor seeks an order confirming that he has cured his mortgage default and made all post-petition mortgage payments required under the plan. A hearing on this motion was scheduled for September 16, 2014.

On June 5, 2014, the Trustee filed a Final Report and Account, which reported that the Plaintiff-Debtor paid $79,814.27 out of Defendant's $425,992.79 claim. On August 5, 2014, the court entered an order approving the Trustee's Final Report and Account and discharging the Trustee from any further liability. On August 25, 2014, the court entered an order discharging the Plaintiff-Debtor pursuant to 11 U.S.C. § 1328(a). On September 9, 2014, Plaintiff-Debtor filed the instant Adversary Proceeding. On September 22, 2014, the court entered an order granting the Mortgage Payment Motion.

The Defendant first argues that the first claim for relief for declaratory relief and for determination of dischargeability under Fed. R. Bankr. P. 4007 fails. Defendant argues that Fed. R. Bankr. P. 4007 does not permit the entry of an order directing a creditor how or what to report to credit reporting agencies or to make a determination of the amount of a debt. Instead, Fed. R. Bankr. P. 4007 permits the filing of an action to determine whether a particular debt is excepted from a debtor's discharge. Defendant argues that the first claim for relief does not seek a dischargeability determination under § 523 but instead merely seeks a declaratory judgment that Defendant's debt has been discharged pursuant to the terms of the Second Amended Plan. The Defendant continues and argues that even if the court assumes Fed. R. Bankr. P. 4007(a) allows such declaratory relief, the first cause of action should be dismissed because such determination is moot. Specifically, the Defendant argues that 11 U.S.C. § 1328 governs the discharge of a debtor under Chapter 13. Because the court entered an order determining that the Plaintiff-Debtor has been discharged under the plan, the dischargeability issues raised in the first cause of action are moot.

Additionally, the Defendant argues that the first cause of action should be dismissed because there is no private right of action for discharge violation. Defendant states that Plaintiff-Debtor relies also on 11 U.S.C. § 105 to allege that Defendant somehow violated the discharge. However, Defendant argues that § 105 does not create a private right of action to

enforce an alleged discharge violation.

Lastly, as to the first cause of action, Defendant argues that Plaintiff-Debtor is not entitled to declaratory relief. Defendant argues that declaratory relief is not a cause of action, but a remedy. Defendant states that no cause of action exists. Defendant argues that no actual controversy exists because the Second Amended Plan only cures "pre-petition arrears" owed to Defendant and requires "all post-petition monthly contract installments falling due" to Defendant. Additionally, Defendant argues that since the court already ruled that Plaintiff-Debtor cured the mortgage default and made all payments to Defendant for its claim, there is no basis for declaratory relief.

Defendant next argues that the second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action fail on jurisdictional or abstention grounds. First, the Defendant argues that the court lacks subject matter jurisdiction over these claims because they assert state law damage claims for conduct that occurred post discharge after the petition and confirmation dates that do not relate to or arise in or under the Bankruptcy Code. The Defendant argues that the second through ninth causes of actions are not "related to" jurisdiction because they have no impact on the interpretation, implementation, consummation, execution, or administration of the Second Amended Plan. Specifically, Defendant alleges that the second through ninth causes of actions involve post-confirmation, post-discharge disputes between Defendant and Plaintiff-Debtor. Additionally, Defendant argues that these causes of action do not ask the court to interpret the Second Amended Plan or even applicable bankruptcy law.

Alternatively, the Defendant argues that the court should abstain from adjudicating the second through sixth, eighth, and ninth causes of action because these causes of actions are state law actions. Defendant state that under 11 U.S.C. § 1334(c)(1) and (2) the court should abstain because the substance of the state law claims are remote and not "related to the interpretation, implementation, consummation, execution, or administration of the confirmed plan. Additionally, in support, the Defendant states that the court could feasibly sever the state law claims from any alleged bankruptcy claims asserted in the complaint and the action can be efficiently and timely adjudicated in state court.

Next, the Defendant argues that the second through sixth, eighth, and ninth causes of action are preempted by federal law, namely by the Home Owners' Loan Act, 12 U.S.C. §§ 1461 et seq, and/or the National Bank Act, 12 U.S.C. § 24. Defendant asserts that courts have routinely held that the various state law claims asserted by Plaintiff-Debtor in the complaint are preempted by Home Owners' Loan Act and/or the National Bank Act because these claims seek to regulate the processing, origination, servicing, or participation in, mortgages. The Defendant argues that this preemption applies because thy seek to regulate the servicing, disclosures, and participating in loans.

Continuing, the Defendant next argues that the second and third causes of action fail to state a valid claim. Specifically, the Defendant argues that the second and third causes of action are barred by the Bankruptcy Code because Plaintiff-Debtor's exclusive remedy for the violation of the discharge lies under the Bankruptcy Code. There is no private right of action for damages under 11 U.S.C. § 524 and an adversary proceeding to enforce the discharge is unavailable. Further, Defendant states that relief is not available for claims

under the CRAA and the Rosenthal Act based on claims that a creditor is attempting to collect a discharged debt and continues to report the debt as delinquent to the various credit agencies.

The Defendant next argues that the second cause of action fails because Defendant is not a debt collector under the Rosenthal Act. Defendant argues that because California courts have declined to regard a residential mortgage loan as a "debt" under the Rosenthal Act, Defendant is not a "debt collector" under the Rosenthal Act. As to the third cause of action, Defendant argues that the third cause of action fails because there is no private right of action under California Civil Code § 1785.25(a). Defendant states that there is nothing in section 1785.25(a) that authorizes the filing of a private cause of action, or otherwise suggests that the legislature intended that such an action may be brought. Additionally, the Defendant argues that the third cause of action fails because reporting of a debt during or after bankruptcy proceeding is appropriate. Defendant states that neither the Bankruptcy code nor the CRAA bar a creditor from the reporting of late payments while a bankruptcy petition is pending, and a subsequent discharge does not render the late payment records retroactively inaccurate.

As to the fourth cause of action, Defendant argues that it fails because Plaintiff-Debtor failed to plead a valid claim under § 17200 because it is preempted by Home Owners' Loan Act and/or the National Bank Act and Plaintiff-Debtor failed to plead a valid claim for fraudulent business practices under section 17200. Defendant argues that the complaint does not allege that Plaintiff-Debtor expended, lost, or has been denied money or property as a result of unfair competition. Additionally , Defendant states that Plaintiff-Debtor cannot establish that Defendant engaged in fraudulent conduct.

Defendant next addresses the fifth cause of action for intentional infliction of emotional distress. Defendant argues this cause of action fails because Plaintiff-Debtor fails to properly plead intentional infliction of emotional distress. Instead Plaintiff-Debtor alleges mere conclusions and does not specify the alleged despicable conduct. Defendant argues that the complaint only identifies the nebulous conduct of demanding a "delinquency of over $13,000" based on Plaintiff-Debtor's failure to make payments during the period of March 1, 2014 to August 1, 2014.

As to the sixth cause of action for negligent infliction of emotional distress, Defendant argues that the complaint fails to plead a legal duty owed by Defendant to Plaintiff-Debtor. Defendant argues that the bare bones, vague claim for negligent infliction of emotional distress is insufficient to state a valid claim.

The Defendant then argues that the seventh and eighth causes of action for RESPA violation and breach of contract fail because Plaintiff-Debtor does not identify which portions of RESPA or its regulations Defendant allegedly violated. Defendant argues that these causes of actions fail because Defendant is contractually and statutorily authorized to deposit Plaintiff-Debtor's partial payments into a "suspense account" and to credit his payments once the amount in the suspense account equals a full payment. Specifically as the seventh cause of action, it fails for a second independent reason because it does not allege an actionable wrong under RESPA.

As to the ninth cause of action, conversion, Defendant argues it fails because Plaintiff-Debtor cannot establish that Defendant's acts were wrongful given that the Deed of Trust as well as federal regulations authorized the deposit of partial payments into a suspense account and the application of those funds once a full payment was received. Moreover, Defendant did not interfere with Plaintiff-Debtor's possession of property given that the payments were allocated to, and deposited into, a suspense account designated to Plaintiff-Debtor pursuant to the terms of the Deed of Trust. Furthermore, the Defendant argues that the Plaintiff-Debtor has not suffered any damages.

Defendant next argues that the tenth claim for relief alleging violation of Fed. R. Bankr. P. 3002.1 fails because: (1) it does not authorize the filing of an adversary proceeding; and (2) Defendant timely complied with the Rule.

Lastly, Defendant argues that the eleventh claim for relief requesting attorneys' fees fails because there is no cause of action for it. Defendant argues that because the other causes of actions fail, Plaintiff-Debtor is not entitled to recover attorneys' fees or costs.

OPPOSITION

Plaintiff-Debtor filed opposition to the instant Motion on November 28, 2014. Dckt. 14.

Plaintiff-Debtor first argues that Defendant is arguing new facts that are not part of the original complaint. Specifically, Plaintiff-Debtor states that the information concerning the Motion to Determine Final Cure on September 16, 2014 is evidence outside the scope of the complaint and impermissibly introduces evidence outside the scope of the pleadings.

Next, Plaintiff-Debtor argues that declaratory relief is necessary as an actual controversy continues as amounts discharged and how much is owed, despite the court's ruling on September 16, 2014. Plaintiff-Debtor states that declaratory relief is essential as Plaintiff-Debtor needs a final court judgment as to the amounts owed, which includes the amount of the principal balance, any outstanding charges due, if any, and the proper allocation of the payments made and that any claim of delinquency has been discharged that would be enforceable in any state court action that may become necessary to stop a threatened foreclosure.

Plaintiff-Debtor continues and argues that Plaintiff-Debtor is not looking for a private right of action related to a discharge action. Plaintiff-Debtor argues that he cannot merely rely on the confirmation of the plan and discharge to arrive at the proper amount and rights of the party. Because the Defendant is threatening to foreclose on the Property, Plaintiff-Debtor believes declaratory relief action is necessary to arrive at the actual dollar amounts owed, not related to any kind of modification.

Plaintiff-Debtor next argues that it is impossible that Plaintiff-Debtor is delinquent over $13,000.00. To date, Plaintiff-Debtor argues that he has paid to Defendant approximately $24,529.19. Plaintiff-Debtor states that the normal payment is $1,979.00. Using that monthly payment amount, Plaintiff-Debtor would be required to pay a total of $23,748.48 for the entire 2014 year. Plaintiff-Debtor alleges that Defendant contends Plaintiff-Debtor is not paid

ahead but is somehow delinquent by over $13,000.00.

Next, Plaintiff-Debtor argues that the state causes of actions that are post discharge are completely dependent of the Bankruptcy Code and not preempted. Specifically, Plaintiff-Debtor argues that no state court could rule on preventing a foreclosure by Defendant absent a judgment determining the amounts owed for which any other court would have to take into account the res judicata effect of such a determination. Plaintiff-Debtor contends that the complaint can only arise in the bankruptcy courts as any relief obtained is only derived from 11 U.S.C. § 1322(b)(2) and the application of the courts own order that the mortgage was cured in the plan and its final effect on the balance owed, any amounts in suspense, new attorney fee charges and myriad of charges a final determination. Plaintiff-Debtor argues that the state and federal causes of action pled in the complaint cannot survive "on their own" absent the reconciliation of declaratory relief on the amount determined by the court, utilizing 11 U.S.C. § 1322(b)(2) and its impact on the state imposed lien.

Addressing the Defendant's abstention argument, Plaintiff-Debtor argues that the court should not abstain on the second through sixth, eighth, and ninth causes of action because Plaintiff-Debtor is a debtor and has limited resources. Plaintiff-Debtor accuse Defendant of attempting to deny Plaintiff-Debtor a fresh start. Furthermore, Plaintiff-Debtor argues that the state causes of action all arise out of title 11 and no state cause of action survives without a final judgment out of Title 11.

Plaintiff-Debtor next argue that the court has jurisdiction on the Rosenthal and CCRA claims as contempt is only a partial remedy that co-exists with Rosenthal and CCRA. Plaintiff-Debtor supports this contention by merely citing case law concerning the Supremacy Clause and congressional intent.

Next, Plaintiff-Debtor summarily state that Defendant is a debt collector under Rosenthal, citing to Landry v. Bank of America, N.A., Adversary Proceeding No. 12-2675.

Plaintiff-Debtor continues and argues that Defendant was incorrect in stating that the credit reporting of the bankruptcy during and after the bankruptcy proceeding. Namely, Plaintiff-Debtor argues that Defendant misapplied the facts of *Mortimer v. Bank of America*, No. C-12-01959, 2013 WL 57856 (N.D. Cal. Jan. 3, 2013) because, in *Mortimer*, the reporting after discharge was of delinquencies in payment during the bankruptcy proceeding while in Plaintiff-Debtor's case, the reporting was of delinquencies owed after the bankruptcy proceeding. Plaintiff-Debtor argues that the facts are distinguishable and the *Mortimer* decision does not apply to the facts in the instant case.

Plaintiff-Debtor asserts that he has asserted knowledge of the inaccurate reporting as stated in paragraph 71 of the complaint.

Plaintiff-Debtor next argues that the conduct of Defendant post plan and discharge is an unfair business practice and not preempted by the bankruptcy law. Plaintiff-Debtor states that he has pled sufficient facts to support a UCL claim for "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiff-Debtor asserts that Defendant improperly assessed fees and misallocated payment in connection with

the loan they have with Plaintiff-Debtor. As to the "unlawful" prong, Plaintiff-Debtor states that he has asserted violations of several statutes related to credit reporting, debt collection, etc., that could be actionable under Section 17200. Plaintiff-Debtor states that he has properly predicated his UCL claim on a violation of another law and therefore it is a successful cause of action. As to the "unfair" prong of the UCL, Plaintiff-Debtor argues that he has linked his claim to a "legislatively declared" policy and has properly alleged that Defendant's conduct caused injury to the Plaintiff-Debtor or to others.

Plaintiff-Debtor asserts that he has properly asserted extreme and outrageous conduct resulting in harm in paragraphs 94 and 100 of the complaint. Plaintiff-Debtor asserts that he could plead additional facts detailing the harm, medical issues related to depression and difficulty sleeping in addition to other matters of extreme conduct if leave was granted to amend.

Plaintiff-Debtor next alleges the Defendant is pleading new facts related to the RESPA and breach of contract causes of actions, specifically that partial payments have been placed in suspense accounts. Plaintiff-Debtor alleges that all of the matters referenced to existing law and the contract are premised on partial payments, which are not at issue in the complaint and therefore should not be dismissed as Defendant has requested.

Plaintiff-Debtor further argues that Defendant is pleading new facts related to the conversion cause of action, specifically that Defendant relies on partial payments to support their request for dismissal which are not at issue.

As to the notice of mortgage payment change, pd asserts that all notices of mortgage payment change provided by Defendant during the bankruptcy case were properly and successfully challenged and any reference to anything to the contrary is inaccurate.

Lastly, Plaintiff-Debtor argues that he should be given leave to amend if the court finds that deficiencies exist in any of the causes of action and because new evidence has arisen. Specifically, Plaintiff-Debtor states this new evidence consists of such things as: (1) the court's ruling on September 22, 2014; and (2) new billing statement to Plaintiff-Debtor by Defendant, further claiming a delinquency of over $13,000.00 owed to defendant, asserted post-discharge, demanded for each month after the court's ruling on September 22, 2014.

DEFENDANT'S REPLY

Defendant filed a reply in support of the instant Motion on December 4, 2014. Dckt. 16.

Defendant begins by first repeating its argument concerning the first cause of action as to Fed. R. Bankr. P. 4007, 11 U.S.C. § 105, and jurisdictional issues as stated in the Motion. Defendant does add that the Plaintiff-Debtor cannot rewrite the first cause of action avoid dismissal. Specifically, Defendant states that it is not until Plaintiff-Debtor's opposition does the Plaintiff-Debtor mention § 1322(b)(2). Furthermore, the Defendant states that ignoring the fact it was the first time Plaintiff-Debtor mentioned the section, § 1322(b)(2) does not create a private right of action.

Defendant also addresses Plaintiff-Debtor's contention that the court's order on September 22, 2014 which found that Plaintiff-Debtor cured his mortgage default and made all post-petition mortgage payment required to Defendant under the Plan. Defendant argues the court may take judicial notice of the order and consider it for a Fed. R. Civ. P. 12(b)(6) motion since it is a public record. Defendant next argues that the first claim for relief is moot because of the September 22, 2014 order. Defendant argues that the court has already redressed the claims and arrearages between the parties and, because of this, no actual controversy exists.

Defendant then argues that the Plaintiff-Debtor's opposition did not address the Defendant's preemption argument under Home Owners' Loan Act and/or the National Bank Act.

Defendant then re-addresses the subject-matter jurisdiction argument to the second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action. Addressing Plaintiff-Debtor's opposition, Defendant argues that Plaintiff-Debtor's argument that the state law claims constitute core proceedings under 18 U.S.C. § § 157(b)(2)(I), (K), (L), and (O) is incorrect. Defendant states that the state law claims do not determine the dischargeability of Defendant's debt, do not seek to determine the extent or nature of Defendant's lien, and do not pertain to the confirmation of Plaintiff-Debtor's plan.

As to the Defendant's argument that the second and third causes are barred by the Bankruptcy Code, the Defendant addresses the Plaintiff-Debtor's opposition. Defendant argues that Plaintiff-Debtor neither addresses the cases cited by the Defendant nor provides any analysis as to why the CRAA and Rosenthal Act claims are not barred by the Bankruptcy Code.

Defendant highlights that Plaintiff-Debtor in his opposition ignores the argument that the third cause of action fails because there is no private right of action under California Civil Code § 1785.25(a).

Defendant states that as to his argument that the third cause of action fails because reporting of a debt during or after bankruptcy proceeding is appropriate, the Plaintiff-Debtor does not point to any provision of the bankruptcy code or the CRAA that prohibits the reporting of historically accurate information or that bars a creditor from the reporting of late payments while a bankruptcy petition is pending. Defendant states that Plaintiff-Debtor merely improperly attempts to distinguish the Mortimer decision from this case, without offering a single case or statute to stand for the contrary proposition.

Defendant next addresses the argument that the fourth cause of action for violation of California Business and Professions Code § 17200 fails. Defendant states that Plaintiff-Debtor ignored this argument and the Plaintiff-Debtor failed to demonstrate that he suffered an injury in fact.

As to the fifth and sixth causes of action for intentional and negligent infliction of emotional distress, Defendant argues that Plaintiff-Debtor should not be given leave to amend because injury to mere financial interests is insufficient to state a claim for intentional infliction of emotional distress and that paragraphs 94 and 100 of the complaint were not sufficient to sustain the two claims for infliction of emotional distress.

Defendant argues that the Plaintiff-Debtor failed to address the Defendant's argument that the seventh and eighth causes of action for RESPA violations and breach of contract fail because the seventh cause of action does not allege actionable wrong under RESPA. As to the second grounds that the seventh and eighth causes of action fail because federal regulations adopted under RESPA permit the placement of funds in suspense accounts, Defendant argues that Plaintiff-Debtor improperly argued that the complaint does not reference "partial payments" and dismissed the federal regulations cited by Defendant in the Motion. Defendant argues that this is incorrect because the mortgage statement attached as an exhibit to the complaint shows that $25.29 was held in "suspense(unapplied funds)."

As to the ninth cause of action for conversion, Defendant states that the Plaintiff-Debtor's opposition ignores all of Defendant's arguments raised in the motion and instead raises the same insufficient "partial payment" argument. Defendant believes that the three other grounds stated in the Motion are sufficient to show that the ninth claim fails.

Defendant argues that its argument that the tenth claim for relief for violation of Fed. R. Bankr. P. 3002.1 fails was not addressed by the Plaintiff-Debtor. While the Defendant does note that Plaintiff-Debtor acknowledges that Defendant filed and served Notices of Mortgage Payment Changes and that all such notices have been previously addressed by the court, the Defendant states that neither the complaint nor opposition identify any violations of Fed. R. Bankr. P. 3002.1 apart from these notices. Therefore, the Defendant argues that the tenth claim for relief is now moot and/or there is no present controversy. Alternatively, Defendant argues that it is deficient because it fails to give notice of a claim as required under Fed. R. Bankr. P. 7008 and Fed. R. Civ. P. 8(a).

Defendant restates his argument that the request for attorneys' fees fails because there is no cause of action and points out that Plaintiff-Debtor does not address the argument in the opposition.

Lastly, Defendant argues that Plaintiff-Debtor should not be granted leave to amend because Plaintiff-Debtor could not cure the deficiencies in the complaint with additional allegations. Defendant argues that additional allegations will not correct this court's lack of jurisdiction, the preemption, or the other legal issues discussed in the Motion and reply.

In conclusion, Defendant requests that all the causes of action are dismissed with prejudice without leave to amend pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(1) and (6).

APPLICABLE LAW

<u>28 U.S.C. § 1334 – JURISDICTION</u>

Federal court jurisdiction in bankruptcy cases is established pursuant to 28 U.S.C. § 1334(a), which provides that the United States District Court shall have original and exclusive jurisdiction over all cases under title 11 (the Bankruptcy Code). Congress further provided that the United States District Courts shall have original, but not exclusive, jurisdiction over all civil proceedings arising under title 11 or arising in or related to a case under title 11. 28 U.S.C. § 1334(b). This is a very broad grant of

jurisdiction, often needed to address the various matters relating to a bankruptcy case in an expeditious manner to allow for the proper administration of the bankruptcy estate.

Congress then created the bankruptcy courts, which are part of the United States District Courts, 28 U.S.C. § 151, as a specialized court to allow for the sufficient prosecution of bankruptcy and bankruptcy related cases. Each United States District Court is empowered to transfer any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 to a bankruptcy judge in that district. The United States District Court for the Eastern District of California has so referred all such matters to the bankruptcy judges. E.D. Cal. Gen. Orders 182, 223.

Bankruptcy judges are empowered to determine all cases under title 11 and enter final judgments and orders in all core proceedings arising under title 11 or arising in a case under title 11. 28 U.S.C. § 157(b)(1). Core proceedings are generally defined in 28 U.S.C. § 157(b)(2), and by their nature are matters for which Congress has created rights and remedies under the Bankruptcy Code. Bankruptcy jurisdiction extends to four types of title 11 matters: cases "under title 11," cases "arising under title 11," proceedings "arising in a case under title 11," and cases "related to a case under title 11." *See Stoe v. Flaherty*, 436 F.3d 209, 216 (3rd Cir. 2006). A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1081 (9th Cir. 2000) (*quoting Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of a bankruptcy case.'" *Id.* A proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate." *Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.)*, 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (*citing Fietz v. Great Western Savings (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988)).

Matters other than a case under title 11, or arising under title 11 or in a case under title 11 are referred to as "related to matters." These matters arise under nonbankruptcy law and are only before the bankruptcy judge (rather than general trial courts such as the United States District Court and California Superior Court) because a bankruptcy case has been filed. A bankruptcy judge hearing and deciding a related-to matter raises Constitutional issues as to the exercise of the federal judicial power which resided in the judiciary under Article III of the United States Constitution. *See Stern v. Marshall*, 131 S. Ct. 2594 (2011), for a discussion of the exercise of federal court powers and the scope of an Article I judge's ability (such as a bankruptcy judge) to enter final judgments and orders on related to matters.

Congress has addressed the Constitutional issue of an Article I judge exercising federal-court power for related to matters in 28 U.S.C. § 157(c)(1) and (2). This provides that for related to matters the bankruptcy judge shall either (1) hear the matter and make proposed findings of fact and conclusion of law to the district court judge, who shall review them *de novo*, or (2) if the parties consent, the bankruptcy judge shall issue the final judgment and orders in the related to matter. *See Executive Benefits Insurance Agency v. Arkison*, ___ U.S. ___, 189 L.Ed. 2d 83, 2014 U.S. LEXIS 3993 (2014), affirming the *de novo* review procedure provided in 28 U.S.C. § 157(c)(1).

DISCUSSION

First Cause of Action

The court begins its analysis with the first cause of action, framed as "Declaratory Relief and Determination of Dischargeability under FRBP § 4007" by Plaintiff-Debtor. From the court's reading of the complaint and the accompanying prayer, the Plaintiff-Debtor is seeking a declaratory judgment as to what amounts, if any, are owed by the Plaintiff-Debtor to the Defendant under the Deed of Trust. Under this reading, there are two time frames in which the Plaintiff-Debtor may be seeking this "relief": (1) The amount due under the Deed of Trust during the life of the Chapter 13 Plan; or (2) The amount due after the completion of the plan.

Addressing the potential time frame during the life of the plan first, a review of the Motion to Determine Final Cure and Mortgage Payment in the underlying bankruptcy case is necessary.

In the underlying bankruptcy case, Plaintiff-Debtor filed a Motion to Determine Final Cure and Mortgage Payment on May 30, 2014. Case No. 09-44339, Dckt. 186. Plaintiff-Debtor sought an order confirming that he has cured his mortgage default and made all post-petition mortgage payments required under the plan, pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h). Plaintiff-Debtor asserted that the Trustee filed a Notice of Final Cure Payment for U.S. Bank, N.A. and in response, U.S. Bank, N.A. filed a Response to Notice of Final Cure Payment claiming six (6) payments in the total amount of $11,530.34 was owed. Plaintiff-Debtor disputed these amounts and asserted that all payment had been paid on time. Declaration, Dckt. 189. Debtor argued that U.S. Bank, N.A.'s website records indicate the payments were in fact made and statements from his bank acknowledge the payments.

The Motion was set for hearing on June 24, 2014. The court continued the hearing to be conducted at 3:00 p.m. September 16, 2014. The court ordered that Amended Opposition and supporting pleadings must be filed and served on or before July 23, 2014, and any Reply thereto filed and served on or before July 30, 2014. Order, Dckt. 200.

U.S. Bank, N.A. did not provide any declarations or properly authenticated exhibits in opposition to the Motion. Fed. R. Evid. 601, 602, 901, 902. This Creditor's counsel filed an opposition which argued facts which U.S. Bank, N.A. asserted showed that the additional amounts owning were correct. Unauthenticated Exhibits (Dckt. 196) were filed, which U.S. Bank, N.A. sought to have the court rely.

To address this evidentiary shortcoming, the court continued the hearing to allow U.S. Bank, N.A. to file supplemental pleadings. No supplemental filings were submitted by either the Plaintiff-Debtor nor U.S. Bank, N.A. in connection with this Motion.

Pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h), on motion of the debtor or trustee, after notice and hearing, the court shall determine whether the debtor has cured the default and paid all required post-petition amounts. Here, Creditor filed a Response to Notice of Final Cure Payment within 21 days after the service of the notice as required by Federal Rule of Bankruptcy Procedure 3002.1(g) stating that Debtor has not made all required

payments. However, a review of the Notice of Final Cure Payment indicates that debtor made all payments under the plan for arrears to U.S. Bank, N.A. and Debtor's records show that payments were in fact made for the dates disputed by U.S. Bank, N.A.

The court issued an order on September 22, 2014, from which no appeal has been taken and is a final determination between these parties, which states:

> **IT IS ORDERED** that the Motion is granted and the court finds Glen Padayachee, Debtor, has cured the mortgage default and made all payments to U.S. Bank, N.A. for its claim, including arrearage, as required by the Chapter 13 Plan, as of the date completion of this Chapter 13 Plan March 7, 2014 (Chapter 13 Trustee's Final Report, Dckt. 191).

Dckt. 211.

With the context of the Order determining that Plaintiff-Debtor has cured the mortgage default, including arrearage, as required by the Chapter 13 Plan through March 7, 2014, a discussion on what constitutes a "final judgment" is necessary to understand the effect of such an order.

The "doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered a final judgment on the merits of the claim in a previous action involving the same parties or their privies." *Robertson v. Isomedix, Inc.* (*In re Intl. Nutronics*), 28 F.3d 965, 969 (9th Cir.1994). Thus, "'[r]es judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action.'" Id. (alteration in original) (citation omitted). That applies to matters decided in bankruptcy. *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 528-29 (9th Cir. 1998)

The Ninth Circuit has specifically stated that a "court's order, entered in the peculiar context of a bankruptcy proceeding, conclusively determined a separable dispute in the case, and constitutes a 'final judgment, order, or decree' appealable under 28 U.S.C. § 1293(b). *In re Yermakov*, 718 F.2d 1465, 1469 (9th Cir. 1983); *see In re Saco Local Development Corp.*, 711 F.2d 441, 445-46 (1st Cir.1983).

A look at California law concerning the finality of a judgment is also illustrative. A judgment in California is not final for all purposes until "all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment has been exhausted." *Mid-Century Ins. Co. v. Superior Court*, 41 Cal.Rptr.3d 833, 835 (Ct. of App. 2006); Cal. Code Civ. Proc. § 1235.120. "Final" for this purpose means that either an appeal from the underlying judgment has been concluded or the time within which to appeal has passed. Id. at 836. Moreover, in California, a notice of appeal must be filed on or before the earliest of 180 days after entry of judgment. Cal. Rules of Court, Rule 8.104.

In the context of this Adversary Proceeding and Plaintiff-Debtor's first cause of action, the court's order on September 22, 2014 is a final judgment that would be given preclusive effect as to the determination of default and arrearages through the life of the Plan. No party has attempted to

appeal this order. The language of the order specifically found that through March 7, 2014, the Plaintiff-Debtor "cured the mortgage default and made all payments to U.S. Bank, N.A. for its claim, including arrearage, as required by the Chapter 13 Plan." Dckt. 211. Therefore, as to this first potential time frame in which the Plaintiff-Debtor may be seeking declaratory relief, the issue has been determined and a final judgment has been issued with such determination. In essence, there has already been a final, binding, judgment on the issues the Plaintiff-Debtor appears to be seeking declaratory "relief." Since the court has already made such determination, the first cause of action is precluded by the court's prior Order and dismissed.

Alternatively, turning to the second potential time frame - the amount owed since the completion of the plan – the court finds that this is not a "bankruptcy issue." As discussed supra, under 28 U.S.C. § § 157(b)(1) and 1334, bankruptcy judges are empowered to determine all cases under title 11 and enter final judgments and orders in all core proceedings arising under title 11 or arising in a case under title 11. The Plaintiff-Debtor in the underlying bankruptcy case has completed his Chapter 13 Plan, the Trustee has been discharged, and the Plaintiff-Debtor himself has been discharged.

The Plaintiff-Debtor is seeking to have the bankruptcy court to make a determination of amounts owed after the completion of the Chapter 13 Plan. This is an improper extension of the bankruptcy court's jurisdiction. The relief requested does not have a close nexus with the bankruptcy proceeding that would be interpreted as arising under title 11 or arising in the case to justify the court exercising jurisdiction. The Plaintiff-Debtor is requesting the court to make a post-confirmation, post-discharge determination on what amounts are owed under Defendant's Deed of Trust – a request that is outside the purview of the bankruptcy court's jurisdiction. Because there is no federal question arising under title 11 or arising in the underlying bankruptcy case, the first cause of action is dismissed.

Second through Eleventh Causes of Actions

The remaining causes of action are:

2. Violations of Rosenthal Fair Debt Collections Practices Act California Civil Code §§ 1788-1788.32

3. Violation of California Consumer Credit Reporting Agencies Act

4. Unfair Practices under California Business & Professions Code Section 17200, et seq.

5. Intentional Infliction of Emotional Distress

6. Negligent Infliction of Emotional Distress

7. Violations of Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.

8. Breach of Contract

9. Conversion

10. Violation of Fed. R. Bankr. P. 3002.1

11. Attorney's Fees

These remaining causes of action are all state law or non-bankruptcy federal law causes of action, which once again fall outside of the bankruptcy court's subject matter jurisdiction. While the alleged violation of Rule 3002.1 is a federal procedural rule, Plaintiff has not shown that a cause of action exists in the context of this Adversary Proceeding. Specifically, with the first cause of action either being precluded because of the court's prior final determination as to the Plaintiff-Debtor's default and arrearages or because it is also outside the court's jurisdiction, the remaining causes of action fail.

Much like a house, the foundational level of the Plaintiff-Debtor's complaint was the declaratory relief to determine the amount owed. Under the court's reading of the complaint, the remaining causes of action were attempting to invoke the "related to" jurisdiction of the court. However, as discussed supra, the first cause of action is dismissed as either being precluded or outside the court's jurisdiction. With that dismissal of the first cause of action, the remaining causes of action fail. The court cannot and will not make determinations on causes of actions that are outside the court's jurisdiction. Therefore, because the remaining causes of actions are not arising under title 11 or arising in a bankruptcy case, the second through eleventh causes of action are dismissed.

Therefore, the court grants the Motion to Dismiss and dismisses the complaint without prejudice in its entirety.

The court does not grant leave for the Plaintiff-Debtor to amend the complaint. If the Plaintiff believes that proper jurisdiction exists, the Plaintiff-Debtor may file a motion for leave with a proposed amended complaint attached to the motion on or before January 16, 2014.

Additionally, from what the court can gather from the complaint, if the Plaintiff-Debtor believes that the Defendant has somehow violated the discharge injunction, the Plaintiff-Debtor has avenues in which to seek relief. As discussed by the Ninth Circuit Court of Appeals in *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), a claim alleging a violation of the discharge injunction (11 U.S.C. § 524(a)) cannot be the basis for a private right of action under the FDCPA. The proper remedy for an alleged violation of the bankruptcy discharge injunction is to seek relief through the federal court contempt powers. Therefore, if the Plaintiff-Debtor wishes to pursue a claim for violation of the discharge injunction, the Plaintiff-Debtor is free to make a motion for contempt, if he determines such is warranted.

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 Complaint 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 granted and the complaint is dismissed in its entirety.

IT IS FURTHER ORDERED that Plaintiff-Debtor is not given leave to amend the complaint.

5. 09-46360-E-13 13-2313 MARGUERITE GALVEZ AFR-3 GALVEZ V. WELLS FARGO BANK, N.A.

CONTINUED MOTION TO STAY 10-9-14 [113]

Final Ruling: No appearance at the December 11, 2014 hearing is required.

Defendant Wells Fargo Bank, N.A., as successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage FSB, formally known as World Savings Bank, FSB having filed a Withdrawal of the Motion to Stay, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Stay was denied without prejudice, and the matter is removed from the calendar.**

6. **09-46360-E-13 MARGUERITE GALVEZ** **CONTINUED MOTION FOR PROTECTIVE ORDER**
13-2313 AFR-4 **10-14-14 [134]**
GALVEZ V. WELLS FARGO BANK, N.A.

Final Ruling: No appearance at the December 11, 2014 hearing is required.

Defendant Wells Fargo Bank, N.A., as successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage FSB, formally known as World Savings Bank, FSB having filed a Withdrawal of the Motion for Protective Order, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion for Protective Order was denied without prejudice, and the matter is removed from the calendar.**

7. **09-46360-E-13 MARGUERITE GALVEZ** **CONTINUED MOTION TO COMPEL**
13-2313 PLC-7 **9-12-14 [83]**
GALVEZ V. WELLS FARGO BANK, N.A.

Final Ruling: No appearance at the December 11, 2014 hearing is required.

Defendant Wells Fargo Bank, N.A., as successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage FSB, formally known as World Savings Bank, FSB having filed a Withdrawal of the Motion to Compel, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Compel was denied without prejudice, and the matter is removed from the calendar.**

8. 09-46360-E-13 MARGUERITE GALVEZ — **CONTINUED MOTION TO COMPEL**
13-2313 PLC-8 — **10-13-14 [120]**
GALVEZ V. WELLS FARGO BANK, N.A.

Final Ruling: No appearance at the December 11, 2014 hearing is required.

Defendant Wells Fargo Bank, N.A., as successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage FSB, formally known as World Savings Bank, FSB having filed a Withdrawal of the Motion to Compel, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Compel was denied without prejudice, and the matter is removed from the calendar.**

9. 13-27293-E-7 CHRISTOPHER/TANA CROSBY — **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT**
13-2306 — **9-12-14 [42]**
SANDOVAL ET AL V. CROSBY

Plaintiff's Atty: Sean Gavin
Defendant's Atty: Stephen C. Ruehmann

Adv. Filed: 9/30/13
Answer: 11/1/13

Amd Cmplt Filed: 9/12/14
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury
Declaratory judgment

Notes:

Continued from 12/3/14 to be conducted in conjunction with the motion to dismiss.

10. 13-27293-E-7 CHRISTOPHER/TANA CROSBY — MOTION TO DISMISS ADVERSARY PROCEEDING
13-2306 SCR-6
SANDOVAL ET AL V. CROSBY — 10-30-14 [53]

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

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

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

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

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

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

Jaime and Marie Sandoval ("Plaintiffs") filed the instant case on September 30, 2013, objecting to the discharge of debts incurred by Christopher Crosby ("Defendant-Debtor") from a construction contract between the Plaintiffs and Defendant-Debtor. Defendant-Debtor filed the instant motion to dismiss the complaint for failure to state a claim on which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

The motion states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the relief is based:

A. Plaintiffs' First Amended Complaint fails to state claims on which relief can be granted.

B. Defendant is entitled to judgment as a matter of law.

C. Plaintiffs have failed to adequately plead their claim under 11 U.S.C. § 523(a)(2) as they have not alleged facts which, if true, would establish that Defendant-Debtor,

1. Knowingly made a false statement of material fact

2. With the intention to defraud Plaintiffs and

3. That Plaintiffs reasonably relied upon any statement made by Defendant-Debtor.

D. Plaintiffs have failed to adequately plead a claim under 11 U.S.C. § 523(a)(6) as they have not alleged facts which, if accepted as true, would establish that Defendant-Debtor,

1. Willfully and maliciously injured Plaintiffs.

E. Plaintiffs' First Amended Complaint fails for the same reasons their initial Complaint failed on Defendant-Debtor's prior motion for judgment on the pleadings (Dckt. 27).

No opposition has been filed by Plaintiffs.

OVERVIEW OF LITIGATION

I. Underlying State Contract and Fraud Case

On or about June 26, 2007, Plaintiffs entered into a "Fixed Contract Amount" with Crosby Homes, Inc., a California Corporation, and Debtor for the construction of a single-family residence located at 4981 Breeze Circle, El Dorado Hills, California (the "Property"). Complaint ¶ 4.

On October 7, 2009, BMC West Corp., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in El Dorado County superior Court, No. PCL 20091195. The case named Plaintiffs and Defendant-Debtor as defendants. On February 23, 2010, the Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Defendant-Debtor successfully compelled contractual arbitration of the cross-complaint. Complaint ¶ 5.

On October 2, 2009, Masters Wholesale Distributing and Manufacturing, Inc., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in el Dorado County Superior Court, No. PCL 20091175. The case named Plaintiffs and Defendant-Debtor as defendants. On March 24, 2010, Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Thereafter, the Plaintiffs and Defendant-Debtor entered into a stipulation to resolve the cross-complaints through binding arbitration. Complaint ¶ 6.

On August 31, 2011, after arbitration, Judge Person, the arbitrator, issued a Final Award in favor of the Plaintiffs and against Defendant-Debtor

and Crosby Homes, Inc., jointly and severally. Complaint ¶ 10.

Judge Person awarded Plaintiffs the sum of 1,114,462, plus interest and costs of $1,410, against Defendant-Debtor and Crosby Homes, Inc., jointly and severally for delay damages. Complaint ¶ 11.

Plaintiffs subsequently filed a Petition to Confirm Arbitration Award. On March 15, 2012, the El Dorado County Superior Court issued a judgment against Defendant-Debtor and Crosby Homes, Inc. Complaint ¶ 11. FN.1.

FN.1. Neither party, in the complaint, answer, nor any other pleading, provide the court with the judgment order from the El Dorado County Superior Court. However, because it is undisputed whether an order of judgment was ever entered, the court will consider it as fact.

II. Arbitration Final Award

The Arbitration Final Award, in relevant part, states:

> 1. "[Plaintiffs] contended that [Defendant-Debtor] knew when the contract was entered into and when he represented the construction schedule to [Plaintiffs], that the project would not be completed on time. However, the evidence admitted by [Plaintiffs] relates to events that took place after those critical times and thus do not necessarily bear on [Defendant-Debtor]'s then present state of mind." Dckt. 28, at 8:25-9:5.
>
> 2. "[Plaintiffs] also claimed that [Defendant-Debtor] misrepresented the move in ready status of the project but they did not sufficiently prove what [Defendant-Debtor] did or did not know at the time." Dckt. 28, at 9:6-9:8.
>
> 3. "Finally, [Plaintiffs] contended that either or both Respondents diverted funds from the project. [Plaintiffs] did not submit sufficient evidence to sustain their burden of proof on this contention." Dckt. 28, at 9:9-9:12.
>
> 4. "[Plaintiffs] did not prove malice in fact necessary to justify an award of punitive damages." Dckt. 28, at 9:12-9:3.

III. Original Complaint for Declaratory Relief and Objecting to Dischargability of Debt

On September 30, 2013, Plaintiffs filed the instant Adversary Proceeding. Plaintiffs allege in their complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the Complaint (Dckt. 1.), Plaintiff's allege the following causes of action:

A. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were:

1. incurred by false pretenses, a false representation or

actual fraud.

a. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed;

(1) whether Defendant would complete construction on the house at all;

(2) whether the work Defendant completed on the house would be of the quality originally promised; and

(3) whether Defendant would pay the subcontractors he hired for the construction.

b. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

B. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were:

1. incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs.

2. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

Defendant-Debtor filed an answer on November 1, 2013, asserting thirteen separate affirmative defenses. Dckt. 8.

On July 31, 2014, Defendant-Debtor filed a Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment. Dckt. 27. The court conducted a hearing on the Motion on August 28, 2014. The court granted Defendant-Debtor's Motion for Judgment on the Pleadings as to both the first and second cause of action. Dckt. 41. Additionally, the court granted the Defendant-Debtor's Motion for Summary Judgment as to the first cause of action (11 U.S.C. § 523(a)(2)(A)- fraud) and denied the Motion as to the second cause of action (11 U.S.C. § 523(a)(6) - willful and malicious injury). Dckt. 41. In the court's order, pursuant to the stipulation between the parties, the Plaintiffs were given leave to file and serve an amended complaint on or before September 12, 2014. Dckt. 41. If this amended complaint was timely filed, Defendant-Debtor had until October 10, 2014 to file an answer or other responsive pleadings. Dckt. 41.

IV. First Amended Complaint for Declaratory Relief and Objecting to Dischargability of Debt

On September 12, 2014, Plaintiffs filed their First Amended Complaint. Dckt. 42. Plaintiffs allege in their amended complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the Amended Complaint (Dckt. 42), Plaintiff's allege the following causes of action:

A. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were:

1. incurred by false pretenses, a false representation or actual fraud.

   a. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed;

      (1) whether Defendant would complete construction on the house at all;

      (2) whether the work Defendant completed on the house would be of the quality originally promised; and

      (3) whether Defendant would pay the subcontractors he hired for the construction.

2. In support, the Plaintiffs state:

   a. In the Summer of 2007, and before Plaintiffs hired Defendant-Debtor to construct their home, Defendant-Debtor told Plaintiffs that he could complete the home in six months or less

   b. In reality, Defendant-Debtor knew that he could not complete construction of Plaintiff's home in six months or less, and he did not intend to do so. In fact, Defendant-Debtor had applied ot be a featured builder in a competition known as "Street of Dreams." Pursuant to their contract, construction on Plaintiff's home was to begin on August 15, 2007. Six months from that date would have been February 15, 2008.

   c. Defendant-Debtor knew that the "Street of Dreams" competition would make its selection in January 008 and he expected to be selected. In fact, Defendant-Debtor publicized his entry in the competition even before he had been selected, thus highlighting his belief that he would be selected.

   d. Defendant-Debtor also knew that construction on the "Street of Dreams" project would begin in February 2008 and that significant time and effort would be necessary to prepare prior to beginning construction.

   e. As a result, Defendant-Debtor knew in the Summer of 2007 that he could not complete construction of Plaintiff's house within six months, but he made that promise anyway. Defendant-Debtor made that promise because Plaintiffs indicated that they intended to sign a contract with the contractor who could complete the work the fastest. This was because they could obtain a

more favorable rate on their construction loan with a shorter time period. Defendant knew that promising to complete construction on the home within six months would enhance his chance of securing the contract with Plaintiffs and taking their money to build the home, so he did so even though he knew he did not intend to honor that promise.

f. Between August 15, 2007 and February 15, 2007, Defendant-Debtor let the Plaintiffs' house sit idly with no construction being done at all for large blocks of time. Indeed, Plaintiffs would often drive by the home day after day for weeks and observe that no one was working on their home at all.

g. Even after the original six months expired. Defendant-Debtor continued to promise Plaintiffs that he would complete the home quickly.

h. Based on these representations, Plaintiffs obtained a nine-month construction loan and permitted Defendant-Debtor to make progress-based withdrawals from those funds.

i. Additionally, Plaintiffs made arrangements for Mrs. Sandoval's father to move in their home once it was completed. Defendant-Debtor knew this was Plaintiffs' plan insofar as they explained that to him when they requested an elevator be installed from the garage to the main living floor that was large enough to accommodate a wheelchair.

j. Plaintiffs had no reason to disbelieve Defendant-Debtor's representations and did not believe those representations. Instead, Plaintiffs' relied on his representations when agreeing to a construction loan and when arranging for the sale of the home in which they lived during the pendency of the original six-month construction period.

k. Plaintiffs were harmed by their reliance on Defendant-Debtor misrepresentations insofar as they were forced to extend the period of time of the construction loan, at great monetary expense. Additionally, they were forced to convert the construction loan into a conventional mortgage before construction of the home was complete and before they were able to move into the home. As a result, Plaintiffs were forced to pay two mortgages for longer than they anticipated and longer than they were financially able. Plaintiffs were unable to pay two mortgages for such an extended period of time, as a result of which their previous home was foreclosed on, eliminating the equity they had in that house and substantially damaging their credit rating.

3. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

B. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were:

1. incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs.

2. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

3. In support, Plaintiffs state:

a. In the summer of 2007, and before Plaintiffs hired Defendant-Debtor to construct their home, Defendant-Debtor told Plaintiffs that he could complete the home in six months or less.

b. In reality, Defendant-Debtor knew that he could not complete construction of Plainitffs' home in six months or less, and he did not intend to do so. In fact, Defendant-Debtor had applied to be a featured builder in a competition known as "Street of Dreams." Pursuant to their contract, construction on Plaintiffs' home was to begin on August 15, 2007. Six months from that date would have been February 15, 2008.

c. Defendant-Debtor knew that the "Street of Dreams" competition would make its selection in January 008 and he expected to be selected. In fact, Defendant-Debtor publicized his entry in the competition even before he had been selected, thus highlighting his belief that he would be selected.

d. Defendant-Debtor also knew that construction on the "Street of Dreams" project would begin in February 2008 and that significant time and effort would be necessary to prepare prior to beginning construction.

e. As a result, Defendant-Debtor knew in the Summer of 2007 that he could not complete construction of Plaintiff's house within six months, but he made that promise anyway. Defendant-Debtor made that promise because Plaintiffs indicated that they intended to sign a contract with the contractor who could complete the work the fastest. This was because they could obtain a more favorable rate on their construction loan with a shorter time period. Defendant knew that promising to complete construction on the home within six months would enhance his chance of securing the contract with Plaintiffs and taking their money to build the home, so

he did so even though he knew he did not intend to honor that promise.

f. Between August 15, 2007 and February 15, 2007, Defendant-Debtor let the Plaintiffs' house sit idly with no construction being done at all for large blocks of time. Indeed, Plaintiffs would often drive by the home day after day for weeks and observe that no one was working on their home at all.

g. Even after the original six months expired. Defendant-Debtor continued to promise Plaintiffs that he would complete the home quickly.

h. Based on these representations, Plaintiffs obtained a nine-month construction loan and permitted Defendant-Debtor to make progress-based withdrawals from those funds.

i. Additionally, Plaintiffs made arrangements for Mrs. Sandoval's father to move in their home once it was completed. Defendant-Debtor knew this was Plaintiffs' plan insofar as they explained that to him when they requested an elevator be installed from the garage to the main living floor that was large enough to accommodate a wheelchair.

j. Plaintiffs had no reason to disbelieve Defendant-Debtor's representations and did not believe those representations. Instead, Plaintiffs' relied on his representations when agreeing to a construction loan and when arranging for the sale of the home in which they lived during the pendency of the original six-month construction period.

k. Plaintiffs were harmed by their reliance on Defendant-Debtor misrepresentations insofar as they were forced to extend the period of time of the construction loan, at great monetary expense. Additionally, they were forced to convert the construction loan into a conventional mortgage before construction of the home was complete and before they were able to move into the home. As a result, Plaintiffs were forced to pay two mortgages for longer than they anticipated and longer than they were financially able. Plaintiffs were unable to pay two mortgages for such an extended period of time, as a result of which their previous home was foreclosed on, eliminating the equity they had in that house and substantially damaging their credit rating.

4. Accordingly, Defendant-Debtor is prevented from obtaining a discharge from the debt owed to creditor due to willfully and malicious causing these injuries to Plaintiffs.

FEDERAL RULE OF CIVIL PROCEDURE RULE 12
STANDARD FOR MOTION TO DISMISS

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

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

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

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.

Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007.

Federal Rule of Civil Procedure 8(a) requires that pleadings which include a claim for relief must contain "(1) a short and plain statement of the grounds for the court's jurisdiction... (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). This rule expressly applies to adversary proceedings in bankruptcy court, as well as some additional requirements which are not relevant for the instant motion. Fed. R. Bankr. P. 7008(a).

The "notice pleading requirements" of Rule 8(a) apply to any cause of action in a complaint. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). When certain claims – like fraud – are made, the required elements in Rule 8(a) must be plead with more specificity. *Id.* at 1105; Fed. R. Civ. P. 9. To properly plead a claim in which fraud is an essential element, the complaint "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Particularity" can be satisfied by stating in the complaint "the who, what , when, where, and how" of the wrongful conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). The policy behind the heightened specificity is to allow defendants a better opportunity to defend themselves against specific fraud allegations, which can be harmful to a defendant's reputation if the charges are unsubstantiated. *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018–1019 (9th Cir. 2001).

11 U.S.C. § 523(a)(2) – Fraud

In order to prevail on § 523(a)(2)(A) exception to discharge claim, the moving party needs to prove by a preponderance of the evidence:

(1) that the debtor made material misrepresentations;

(2) that the debtor knew the misrepresentations were false at the time they were made;

(3) that the debtor made the misrepresentations with the intention and purpose of deceiving the creditor;

(4) that the creditor justifiably relied on such misrepresentations and

(5) that the creditor sustained a loss or injury as a proximate result of the misrepresentation having been made."

In re Vidov, No. CC-13-1421-KiBlPa, 2014 Bankr. LEXIS 3268, at *8 (B.A.P. 9th

Cir. July 31, 2014). Fraud for purposes of § 523(a)(2)(A) includes actual fraud as well as false pretenses and representations. 4 COLLIER ON BANKRUPTCY ¶ 523.08 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

11 U.S.C. § 523(a)(6) - Willful and Malicious Injury

Under § 523(a)(6), a debt will be excepted from discharge when it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). "A simple breach of contract is not the type of injury addressed by § 523(a)(6)" but instead it must be "[a]n intentional breach. . . accompanied by malicious and willful *tortuous* conduct." *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (emphasis original). In order for § 523(a)(6) to apply, "a breach of contract must be accompanied by some form of tortuous conduct that gives rise to willful and malicious injury." *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir. 2001)(internal quotations omitted).

For the underlying claim to be considered tortuous conduct for § 523(a)(6), California state tort law provides that "[c]onduct amounting to a breach of contract becomes tortuous only when it also violates an independent duty arising from principles." *Id.* (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994)). Tort recovery for the bad faith breach of a contract is permitted only when, "in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state." *Id.* (citing *Rattan v. United Servs. Auto. Assoc.*, 84 Cal. App. 4th 715 (2001)).

The Supreme Court has clarified that "it is insufficient under §523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently." *Id.* (citing *Kawaauhau v. Geiger*, 238 F.3d 1202, 1207 (1998)). To prove malicious injury, the party seeking to except a debt from being discharged must show that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1144-45 (9th Cir. 2002); Littleton v. Transamerica Commercial Finance, 942 F.2d 551, 554 (1991).

DISCUSSION

Defendant-Debtor has established on the face of the First Amended Complaint that there are not factual allegations that "raise a right to relief above the speculative level." For Plaintiffs, even if they proved every allegation in the First Amended Complaint it would not establish a basis for the court determining the debt nondischargeable.

The cause of action under 523(a)(2) requires that the moving party to show an intentional and purposeful misrepresentation, among other elements. Here, Plaintiffs once again have only provided generalized facts to prove the elements of both causes of actions, without allegations on the issue of reliance and the damages flowing from such reliance. While the Plaintiffs have provided more factual information in support of their first cause of action, all Plaintiffs provide is a narrative of the past six years of interaction with Defendant-Debtor arising from the construction contract. It is alleged that the

generally stated allegations, while more specific than the original Complaint, assert that Defendant-Debtor:

A. Made a false representation about when construction would be completed;

B. Whether Defendant-Debtor would complete construction at all;

C. Whether the work by Defendant-Debtor on the house would be of the quality promised; and

D. Whether the Defendant-Debtor would payoff the subcontractors.

First Amended Complaint, Dckt. 42.

While the Plaintiffs have provided information on what they believe were the misrepresentation, the Plaintiffs still do not allege that (1) Defendant-Debtor knew that the misrepresentations were false at the time made by him, (2) Defendant-Debtor made such statements with the intention and purpose of deceiving the Plaintiffs, (3) that the alleged misrepresentations were made by Defendant-Debtor to induce reliance by Plaintiffs, (4) Plaintiff justifiably relied on any misrepresentations, (5) that Plaintiffs incurred damages which flowed from the alleged misrepresentations.

As the Defendant-Debtor states in the accompanying Memorandum of Points and Authority, the facts alleged by the Plaintiffs, specifically the alleged verbal promise of six-month completion time line, conflicts with the contract which has the time of commencement to be August 15, 2007 and an approximate completion date of May 15, 2008 - a nine-month time line. Dckt. 55 & Dckt 42, paragraph 13. The Plaintiffs do not provide a factual basis on why or how the Plaintiffs came to rely on the alleged verbal promise of the Defendant-Debtor over the explicit time line provided for in the construction contract. The Plaintiffs do not allege any facts besides merely stating that Defendant-Debtor "told Plaintiffs that he could complete the home in six months or less" to indicate any justifiable reliance when it directly contradicts the explicit terms of the contract. While the First Amended Complaint is an improvement from the original Complaint, the Plaintiffs still fail to provide the factual basis that would support a 11 U.S.C. § 523(a)(2) claim since the Plaintiffs have failed to provide sufficient information concerning the alleged fraudulent representation and how the Plaintiffs came to rely on that alleged promise in lieu of the contractual terms. There remains the problem of bare-bone allegations and statements of "facts" that do not provide sufficient basis to "raise a right to relief above the speculative level."

Plaintiffs fair no better in their Second Cause of Action. The Plaintiffs merely reiterate the identical "factual" basis of the first cause of action in the second cause of action. Nowhere do the Plaintiffs allege Defendant-Debtor was willful nor malicious. Plaintiffs do not allege that an Defendant-Debtor engaged in "a wrongful act done intentionally" which "necessary produces the harm" that is "without just cause or excuse." *Littleton v. Transamerica*, 942 F.2d. 554. Much like the issues with the first cause of action, the Plaintiffs fail to provide factual information that gives rise to a plausible claim. It is once again generic allegations without providing the grounds of malicious injury or the willful nature of Defendant-Debtor. Instead, it appears that the Plaintiffs assume the court to read into

the First Amended Complaint those necessary elements in a mildly more detailed complaint.

Plaintiffs provide bare-bones causes of actions that simply restate the legal elements of the two causes of actions without providing any allegations on how the factual circumstances of the underlying state court contract claim support or even relate to relief sought in the instant Adversary Proceeding.

> "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid.; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), 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 the elements of a cause of action will not do,..."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009),

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* [*Twombly*], at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted)."

As the First Amended Complaint currently stands, even taking the Plaintiffs' allegations as true, it does not provide sufficient information to find that either under 11 U.S.C. § 523(a)(2) or 11 U.S.C. § 523(a)(6) the judgment from the state court case is excepted from discharge. At best, the First Amended Complaint pleads that the Plaintiffs and Defendant-Debtor entered into a contract to build a home. The contract required that the home be built in a certain way and to be completed within a certain time period. It was not and Plaintiffs assert that they suffered damages because the contract was not performed fully and timely by Defendant-Debtor. Such a breach of contract claim does not nondischargeable fraud, or willful and malicious injury claim make. The court will not infer and construct for Plaintiffs essential allegations which are not stated in the Complaint.

Therefore, the court grants Defendant-Debtor's Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6)).

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 Plaintiffs' First Amended Complaint for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6)) filed by Christopher Beck Crosby ("Defendant-Debtor") for all claims asserted in the Complaint filed by Jaime Sandoval and Mary Sandoval ("Plaintiffs") 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 Plaintiffs' First Amended Complaint for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6))is granted, and the First Amended Complaint, and all causes of Action stated therein, is dismissed.