

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

September 18, 2013 at 1:30 p.m.

1. [09-45610-E-13](#) RICK LAMB MOTION FOR ENTRY OF DEFAULT
[13-2130](#) DBJ-2 JUDGMENT
LAMB V. CITIMORTGAGE, INC. 8-1-13 [[22](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant CitiMortgage, Inc., Chapter 13 Trustee and the Office of the U.S. Trustee on August 1, 2013. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Entry of Default Judgment 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted. No appearance required.

Plaintiff Rick Charles Lamb seeks entry of a default judgment against CitiMortgage Inc., the Defendant, in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced on April 17, 2013. Dckt. 1. Summons was issued by the Clerk of the United States Bankruptcy Court on April 17, 2013. The complaint and summons were properly served on Defendant CitiMortgage, Inc.

Defendant failed to file a timely answer or response or a request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on May 24, 2013. Dckt. 9.

September 18, 2013 at 1:30 p.m.

FACTS

Defendant is the beneficiary under a second deed of trust recorded against Debtors' residence, purporting to secure a promissory note with an approximately balance of \$58,970.00 ("Defendant's Secured Claim"). On December 8, 2009, Plaintiffs filed a plan that provided for the payment of the Defendant's Secured Claim, which claim was valued at \$0.00 by the court pursuant to 11 U.S.C. § 506(a).

Plaintiff obtained a discharge in their bankruptcy case on April 9, 2013. The Debtor has completed the confirmed Chapter 13 Plan and the payment of Defendant's Secured Claim. Defendant failed to execute a reconveyance after the completion of the Chapter 13 Plan and the Defendant's Secured Claim having been paid. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extend of Defendant's lien.

ANALYSIS

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may

refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.

SERVICE

Service is proper because the Motion and supporting pleadings were served to a designated agent for Creditor, C T Corporation System. The copies that were sent to various post office boxes for the Creditor are viewed as only informational. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

DISCUSSION

Applying the above stated factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and her interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant CitiMortgage Inc. has not filed an answer to the complaint, contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of \$0.00 or confirmation of the final Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party. Plaintiffs state Paragraph 4(D) and of the note and

Paragraph 17 of the Deed of Trust specifically provide for an award of attorney fees. Plaintiffs asserts that as a result of the failure of CitiMortgage Inc. to provide a reconveyance, they have incurred attorney fees totaling \$1,995.00.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiffs direct the court to two specific contractual provisions for attorney fees: Paragraph 4(D) of the note and Paragraph 17 of the Deed of Trust. Paragraph 4(D) of the Note similarly provides for the Note Holder to have costs and expenses, including reasonable attorney fees, for enforcing the note. Paragraph 17 of the Deed of Trust provides for Acceleration and Remedies for the Lender, including reasonable attorney's fees.

Plaintiff's counsel has also provided a billing statement, showing approximately 7 hours working on the letter to the Defendant, complaint, status conference, and the Motion for Default Judgment. The hourly rate for attorney fees is \$285.00. The court finds the rate and time charged reasonable.

The court therefore grants Plaintiff's request for attorney's fees in relation to the Motion for Entry of Default in the amount of \$1,995.00.

CONCLUSION

The court grants the default judgment in favor of the Plaintiff and against the Defendant, CitiMortgage Inc. and holds that the deed of trust is void. The court further awards attorney fees in the amount of \$1,995.00.

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 for Entry of Default Judgment filed by the Plaintiff 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 for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by CitiMortgage Inc. against the real property commonly known as 935 A Street, Orland, California, APN 040-226-005, recorded on May 29, 2007, with the County Recorder for Glenn County, California, Document No. 2007-3165 is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that CitiMortgage Inc. has no interest in the real property pursuant to the Second Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiffs are granted attorney fees in the amount of \$1,995.00 as part of the judgment, in addition to allowable costs.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment, including attorneys fees and stating any costs allowed Plaintiff shall be enforced as part of the judgment, consistent with this Order.

2. [10-21236-E-13](#) MATTHEW/NOELL THOMPSON
[13-2184](#) DBJ-1
THOMPSON ET AL V.
CITIMORTGAGE, INC.

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
7-16-13 [[11](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant CitiMortgage, Inc., Chapter 13 Trustee and the Office of the U.S. Trustee on July 16, 2013. By the court's calculation, 64 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Entry of Default Judgment 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted. No appearance required.

Plaintiffs Matthew Robert Thompson and Noell LaTriece Thompson seek entry of a default judgment against CitiMortgage Inc., the Defendant, in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced on June 5, 2013. Dckt. 1. Summons was issued by the Clerk of the United States Bankruptcy Court on June 6, 2013. The complaint and summons were properly served on Defendant CitiMortgage, Inc.

Defendant failed to file a timely answer or response or a request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on July 11, 2013. Dckt. 9.

FACTS

Defendant is the beneficiary under a second deed of trust recorded against Debtors' residence, purporting to secure a promissory note with an approximately balance of \$559,000.00 ("Defendant's Secured Claim"). On January 29, 2010, Plaintiffs filed a plan that provided for the payment of

the Defendant's Secured Claim, which claim was valued at \$0.00 by the court pursuant to 11 U.S.C. § 506(a).

Plaintiff obtained a discharge in their bankruptcy case on June 3, 2013. The Debtor has completed the confirmed Chapter 13 Plan and the payment of Defendant's Secured Claim. Defendant failed to execute a reconveyance after the completion of the Chapter 13 Plan and the Defendant's Secured Claim having been paid. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extend of Defendant's lien.

ANALYSIS

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

SERVICE

Service is proper because the Motion and supporting pleadings were served to a designated agent for Creditor, C T Corporation System. The copies that were sent to various post office boxes for the Creditor are

viewed as only informational. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

DISCUSSION

Applying the above stated factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and her interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant CitiMortgage Inc. has not filed an answer to the complaint, contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of \$0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party. Plaintiffs state Paragraph 4(D) and of the note and Paragraph 17 of the Deed of Trust specifically provide for an award of attorney fees. Plaintiffs asserts that as a result of the failure of CitiMortgage Inc. to provide a reconveyance, they have incurred attorney fees totaling \$1,482.00.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956).

California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiffs direct the court to two specific contractual provisions for attorney fees: Paragraph 4(D) of the note and Paragraph 17 of the Deed of Trust. Paragraph 4(D) of the Note similarly provides for the Note Holder to have costs and expenses, including reasonable attorney fees, for enforcing the note. Paragraph 17 of the Deed of Trust provides for Acceleration and Remedies for the Lender, including reasonable attorney's fees.

Plaintiff's counsel has also provided a billing statement, showing approximately 5.2 hours working on the letter to the Defendant, complaint, Default request, status conference, and the Motion for Default Judgment. The hourly rate for attorney fees is \$285.00. The court finds the rate and time charged reasonable.

The court therefore grants Plaintiff's request for attorney's fees in relation to the Motion for Entry of Default in the amount of \$1,482.00.

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendant, CitiMortgage Inc. and holds that the deed of trust is void. The court further awards attorney fees in the amount of \$1,482.00.

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 for Entry of Default Judgment filed by the Plaintiff 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 for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by CitiMortgage Inc. against the real property commonly known as 655 Campbell Avenue, Gridley, California, APN 024-170-028,

September 18, 2013 at 1:30 p.m.

protect the Defendants's constitutional rights a stay must be imposed. Defendants state that John Kelly Robinson is merely a subject of the investigation at this time and is not currently a suspect, but that his status could change during the criminal investigation.

Defendants state that the criminal investigation overlaps to a significant degree with the issues concerning the adversary proceeding. While none of the "overlaps" are stated in the Motion or the Memorandum of Points & Authorities, the Haheesy Declaration states that Mr. Haheesy, the attorney representing Defendant in the criminal investigation, states,

I subsequently spoke to the Special Agent, who confirmed that the FBI was conducting an investigation. He also informed me that the investigation, while separate from the civil suit, concerns also some of the matters I understand are involved in the civil suit. It is my understanding that the civil suit to which he was referring is this adversary proceeding.

Dckt. 36. FN.1.

FN.1. Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that motions state with particularity the grounds upon which the requested relief is based. It is not for parties in interest and the court to canvas other pleadings and the file to discern what possible grounds that the movant is asserting (subject to Fed. R. Bank. P. 9011) and what is mere argument or speculation. More importantly (from a litigator's perspective) clearly setting forth the grounds in the motion assists the court in understanding why a meritorious motion should be granted.

Defendants argue that Plaintiffs will not be prejudiced by a stay of this matter because they caused the federal investigation to occur and only recently filed this action on June 12, 2012. Defendants also argue that allowing the stay will likely narrow the civil issues and expedite discovery. However, no examples of this are given in the pleadings provided.

PLAINTIFF'S OPPOSITION

Plaintiff, Grant Bishop Motors, Inc., dba Modesto European, ("Plaintiff") objects to the imposition of a stay in the present proceedings. Plaintiff argues that the request for the stay is premature, as Defendant Robinson is only a subject of an investigation. Plaintiff also argues that Defendant has either explicitly or implicitly waived his fifth amendment rights by virtue of his testimony at the 341 meeting before the chapter 7 Trustee and by the filing of the petition.

Plaintiff states that prejudice will occur to it if this action is stayed, as the alleged wrongdoing of Defendant is now more than two or three years old. The Plaintiff argues that if the court were inclined to abate the proceedings, that the court allow discovery to proceed as to any third parties or entities.

DISCUSSION

This adversary proceeding was commenced on January 17, 2013. Plaintiff alleges that Defendant John Kelly Robinson, as the General Manager of Plaintiff, committed fraud, defalcation, embezzlement and tortious conduct against plaintiff and its property while in its employ, which resulted in damages in excess of \$348,550.00. Dckt. 1.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. Cal. 1989). However, a court may, in its discretion, decide to stay civil proceedings when the interests of justice require such action. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995)(citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980)).

A court must decide whether to stay civil proceedings in the face of parallel criminal proceedings in light of the particular circumstances and competing interests involved in the case, as well as the extent to which the defendant's fifth amendment rights are implicated. *Molinaro*, 889 F.2d at 902. Other factors the court should consider include:

- (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;
- (2) the burden which any particular aspect of the proceedings may impose on defendants;
- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (4) the interests of persons not parties to the civil litigation; and
- (5) the interest of the public in the pending civil and criminal litigation.

Id. at 903.

Generally, the strongest case for a stay is made where the civil and criminal cases involve the same subject matter. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980). In such situations, "[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of [federal discovery rules], expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Id.*

The Fifth Amendment of the United States Constitution states (emphasis added),

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor **shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him. *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

However, a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. *Keating*, 45 F.3d at 326. As stated by the United States Supreme Court, not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even necessitating invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in that civil proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

The Complaint in this Adversary Proceeding seeks the following relief,

- A. The Defendant-Debtors should be denied their discharge pursuant to 11 U.S.C. § 727(a)(4) for failure to accurately disclosed all of the income they received from the Plaintiff.
- B. The Defendant-Debtors obligations to Plaintiff should not be discharged pursuant to 11 U.S.C. § 523(a)(2)(A) and 2(B)(i)-(iv), (a)(3), (a)(4), (a)(6) because they improperly and without authorization withdrew monies from the Plaintiff's bank accounts.
- C. Plaintiff also seeks the creation of a trust over the monies allegedly improperly taken and the proceeds thereof.

Here, the court begins with the fact that the only evidence it has been presented is that a criminal *investigation* is pending. It does not appear that any criminal charges or an indictment have been made or that a criminal trial is underway. Additionally, Defendants have not provided any evidence or argument as to what facts, if any, would overlap with this potential criminal case and this current civil proceeding. This may be due to the fact that no criminal charges have been made, making it difficult to identify issues that overlap, when none currently exist on the criminal side.

Equally important is the fact that Defendant John Robinson is currently a subject, rather than a suspect, in this criminal investigation, based on Defendant's own evidence provided to this court. Hahesy Declaration, Dckt. 36. However, this court recognizes that law enforcement and investigatory agencies do not immediately run out and broadcast that someone is a "suspect" before properly investigating the matter.

Mr. Hahesy testifies that Mr. Robinson has been aware of being a "subject" of an investigation since at least April 2013 when Mr. Hahesy was engaged as counsel. Putting the brakes on any proceedings in this case

would effectively create a hiatus for more than one year from when Mr. Robinson was aware of the criminal investigation.

The evidence presented to the court regarding the potential criminal investigation and Mr. Robinson's potential involvement is too attenuated for the court to grant a six month stay. Furthermore, the court draws no negative inferences from a party electing to avail themselves of their Fifth Amendment Rights, if Defendant chooses to do so.

The court is concerned of potential harm to the Plaintiff in light of the requested constructive or resulting trust request. If the imposition of a trust is proper, then merely staying the trust proceedings leaves the parties in limbo and potential trust property not properly protected.

The Plaintiff provides the constructive suggestion that discovery can proceed as to all person other than the Defendant John Kelly Robinson, IV, to allow Plaintiff to diligently prosecute its case. The parties can defer the deposition and written responses to discovery from John Kelly Robinson, providing him a "Fifth Amendment breathing space" without putting the Plaintiff's case in the freezer. It is not asserted that Kristine Robinson, the co-Defendant-Debtor is the subject of a criminal investigation.

The motion is denied. The court shall issue an order extending the discovery schedule and rescheduling the pre-trial conference to the court's calendar. The court will leave it, for the time being, to the parties to work out how and when the deposition of Mr. Robinson.

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 Stay Adversary Proceedings filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

IT IS FURTHER ORDERED that the court's Pre-Trial Conference and Discovery Scheduling Order is amended to reset the following dates and deadlines:

- A. Non-Expert Close of Discovery: ----, 201x
- B. Supplemental Disclosure of Experts: ----, 201x
- C. Expert Close of Discovery: ----, 201x
- D. Hearing of Dispositive Motions: -----, 2014
- E. Pre-Trial Conference: 2:30 p.m. on -----, 2014

