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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7 SACRAMENTO DIVISION
8

9 In re) Case No. 11-29544-E-13
10 ANDREW BYRON RATHBONE,) Docket Control No. ABR-3
11)
12 Debtor(s).)
_____)

13 This memorandum decision is not approved for publication and may
14 not be cited except when relevant under the doctrine of law of the
15 case or the rules of claim preclusion or issue preclusion.

16 MEMORANDUM OPINION AND DECISION

17 Andrew Rathbone, the Chapter 13 Debtor in the above captioned
18 case has presented the court with an *Ex Parte* Verified Emergency
19 Petition for an order vacating the September 7, 2011 order of this
20 court dismissing the Chapter 13 bankruptcy case. The *Ex Parte*
21 Verified Emergency Petition was presented to the court at 4:15 p.m.
22 on September 19, 2011.

23 The *Ex Parte* Verified Emergency Petition asserts the following
24 as grounds for vacating the dismissal of the Chapter 13 case:

25 1. The court entered its order dismissing the Chapter 7 case
26 on September 8, 2011.

27 2. The order was entered pursuant to a motion filed by the
28 Chapter 13 Trustee through his attorney Neil Enmark.

1 3. Neil Enmark admitted that he is not authorized to
2 practice in the Eastern District of California, citing the court to
3 a September 13, 2011, declaration filed by Neil Enmark.¹

4 4. The court relied upon the Motion filed by Neil Enmark
5 when he had not been admitted to appear in this district in
6 dismissing the Debtor's Chapter 13 bankruptcy case.

7 5. The Debtor has suffered a damage to his inherent right to
8 procedural due process under the Federal Rules of Civil Procedure,
9 Local Rules of the District Court, and Local Rules of the
10 Bankruptcy Court.

11 6. The order dismissing the case must be vacated in the
12 interests of good faith, fair dealing, and the inherent principle
13 of reason being the soul of the law.

14 7. The emergency petition is timely as the order dismissing
15 the case was entered on September 8, 2011, and Neil Enmark
16 confirmed his failure to be admitted in the Eastern District of
17 California on September 13, 2011.

18 8. If the September 7, 2011 order is not vacated, the Debtor
19 stands in imminent damage of being displaced from his homestead
20 without just cause. The Sheriff has posted a Notice to Vacate with
21 a demand that the Debtor vacate the premises or be forcefully
22 removed.

23 9. Other issues of law on scheduled to be heard concerning
24

25 ¹ The September 13, 2011 declaration, Dckt. -, states that
26 Mr. Enmark believed that he was admitted to appear in the Eastern
27 District of California in 1992, but cannot prove that he was so
28 admitted. He cannot obtain copies of checks or bank records from
1992. Within 24 hours of learning that a question existed as to
whether he was admitted to appear in the Eastern District, he
filed an application on September 9, 2011 and was admitted to
appear in this district.

1 alleged fraudulent conduct of the Law Office of Les Zieve (attorney
2 for the party seeking to have the Debtor evicted) been damaged
3 prejudiced because with his bankruptcy case dismissed.

4 10. Given the current real estate market and that foreclosed
5 homes stand empty and unattended, it is greater prejudice to the
6 Debtor than the party seeking to evict him (Federal National Home
7 Mortgage).

8 11. The Debtor believes that he has a substantial likelihood
9 of success on the merits of a motion to strike set for hearing on
10 September 20, 2011, and a motion on the merits based on Neil Enmark
11 not being qualified to represent the Chapter 13 Trustee.

12 12. Therefore, the Debtor seeks to have the order dismissing
13 the Chapter 13 case vacated so that the automatic stay can go back
14 into effect and prevent the Sheriff from evicting him.

15 **Consideration of *Ex Parte* Verified Emergency Petition**

16 While phrased as an *Ex Parte* Verified Emergency Petition, the
17 pleading is a motion to vacate pursuant to Fed. R. Civ. P. Rule
18 60(a) and Fed. R. Bankr. P. 9024. Though not referenced anywhere
19 in the instant pleading, the court is aware that the Debtor has
20 knowledge of this provision and the correct law upon which the
21 requested relief is to be based. On August 19, 2011, the Debtor
22 filed a Motion For Relief From Order in which he express addresses
23 the provisions of Fed. R. Civ. P. 60(b) and Fed. R. Bank. P. 9024
24 in seeking to vacate an order granting relief from the automatic
25 stay. Dckt. 55. No discussion of those provisions is provided in
26 support of the present Motion or any basis for granting such relief
27 under those Rules stated. Rather, general reference is made to due
28 process and interests of good faith, fair dealing, and the inherent

1 principle of reason being the soul of the law.

2 The current *Ex Parte* Verified Emergency Petition does not
3 contain any explanation or reason why, if the order dismissing the
4 case was entered on September 8, 2011, why the Debtor is
5 approaching the court after 4:00 p.m. on September 19, 2011, the
6 eve of the pending eviction. The 11 days in between have expired
7 without comment. Though the Debtor states that it is not until
8 September 13, 2011 that Neil Enmark confirmed that he had not been
9 admitted to appear in the Eastern District of California, the
10 Debtor knew and asserted that Mr. Enmark was not admitted prior to
11 September 6, 2011. This is clear in the record as the Debtor filed
12 a motion to strike the Trustee's motion to dismiss on September 6,
13 2011, alleging that Neil Enmark was not admitted to appear in the
14 Eastern District of California. Clearly, the Debtor has known of
15 the grounds he now asserts for at least two weeks, and only seeks
16 the assistance of the court at the very last minute.

17 The Debtor also states that he believes that he has a
18 likelihood of success on the merits of striking the motion to
19 dismiss. However, the first obstacle facing the Debtor is that no
20 motions to strike are permitted with respect to other motions.
21 Fed. R. Bank. P. 9014 which governs the bankruptcy court law and
22 motion practice does not incorporate Fed. R. Bank. P. 7012 and Fed.
23 R. Civ. P. 12 into law and motion proceedings. Fed. R. Civ. P. 12
24 is the rule providing for motions to strike.

25 Second, the Debtor's general reference to the lack due process
26 is not well founded. The Debtor was afforded notice of the motion
27 to dismiss (Dckt. 41, certificate of service, July 14, 2011), the
28 filing of an opposition to the motion to dismiss (Dckts. 63, 64,

1 and 66, opposition, declaration, and exhibits, respectively), and
2 a hearing on August 31, 2011. The Debtor was provided with every
3 procedure and proceeding provided under the substantive and
4 procedural laws to have the matter properly presented to the court.
5 Even assuming that Neil Enmark, serving as counsel for the Trustee,
6 was not admitted to practice before the Eastern District of
7 California during the period that the motion was filed and the
8 hearing, such does not impair the Debtor's due process rights.

9 The court issued its ruling on the motion to dismiss on August
10 31, 2011. Dckt. 67. The motion sought dismissal due to the
11 Debtor's failure to file tax returns as required by 11 U.S.C.
12 § 521(e)(2)(A).² As the statute provides, if the Debtor has not
13 provided copies of Federal income tax returns for the year most
14

15 ² (e) (1) If the debtor in a case under chapter 7 or 13 is
16 an individual and if a creditor files with the court at any time
17 a request to receive a copy of the petition, schedules, and
18 statement of financial affairs filed by the debtor, then the
19 court shall make such petition, such schedules, and such
20 statement available to such creditor.

21 (2) (A) The debtor shall provide-

22 (i) not later than 7 days before the date first set for
23 the first meeting of creditors, to the trustee a copy of the
24 Federal income tax return required under applicable law (or at
25 the election of the debtor, a transcript of such return) for the
26 most recent tax year ending immediately before the commencement
27 of the case and for which a Federal income tax return was filed;
28 and

(ii) at the same time the debtor complies with clause
(i), a copy of such return (or if elected under clause (i), such
transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii)
of subparagraph (A), the court shall dismiss the case unless the
debtor demonstrates that the failure to so comply is due to
circumstances beyond the control of the debtor.

1 immediately due, **the court shall dismiss the case** unless the debtor
2 demonstrates that the failure to do so is due to circumstances
3 beyond the control of the debtor. In enacting this provision of
4 the Bankruptcy Code, Congress mandated dismissal unless the debtor
5 could establish the failure to file the return was due to
6 circumstances beyond the Debtor's control.

7 As set forth in the court's findings of fact and conclusions
8 of law in support of the motion to dismiss, Dckt. 67, the Debtor in
9 this case offered the following as the basis for showing that the
10 failure to file the return was due to circumstances beyond his
11 control:

12 1. The Chapter 13 Trustee had failed to comply with 5 U.S.C.
13 § 556(d), a portion of the Administrative Procedures Act governing
14 administrative proceedings before certain administrative bodies.
15 The court determined that proceeding before the bankruptcy court
16 are not governed by the Administrative Procedures Act. 5 U.S.C.
17 §§ 553-554, 28 U.S.C. §§ 1334, 151, and 157(b).

18 2. Second, the Debtor argued that it was the burden of the
19 Trustee to first establish that the Debtor where the law imposes an
20 obligation on him to file a tax return. This seeks to invert the
21 law as written by Congress. The Debtor never asserted that no tax
22 return was due, only that the Trustee must first prove that a tax
23 return was due.

24 3. Third, the Debtor argued that the Bankruptcy Code was
25 unenforceable because Congress had not authorized regulations to
26 implement the Code. This is clearly wrong, as Congress has the
27 power pursuant to Article I of the United States Constitution to
28 create statutes. If it chooses to delegate power to administrative

1 agencies to supplement the statutes it may elect to so do, but
2 there is no requirement that any regulations be authorized. *Yakus*
3 *v. United States*, 321 U.S. 414, 424-427 (1944). Further, to accept
4 the Debtor's argument that the Bankruptcy Code is in effective
5 because there are no regulations would also render the purported
6 Chapter 13 case a nullity and the sought after automatic stay
7 nonexistent. The court rejects this argument, the Bankruptcy Code,
8 obligation of the Debtor to provide copies of the tax returns, and
9 mandatory dismissal if the returns are not provided are fully
10 effective.

11 The court properly dismissed the case and there is little
12 likelihood of the Debtor prevailing on a motion to strike (if such
13 a motion were proper).

14 The Chapter 13 bankruptcy case was filed on April 18, 2011,
15 and dismissed on September 7, 2011. The document filed by the
16 Debtor titled "Plan," Dckt. 7, states that he has \$16.00 a month in
17 projected monthly disposable income. This is inconsistent with
18 Schedule J which discloses monthly net income of \$166. There are
19 no Class One, Class Two, or Class Four secured claims to be paid.
20 The Debtor states that he will pay 0.00% to creditors holding
21 general unsecured claims. The court sustained an objection to
22 confirmation of this plan. Dckt. 29. The court's findings of
23 fact and conclusions of law sustaining the objection to
24 confirmation are in the Civil Minutes of the hearing. Dckt. 28.

25 **Conclusion**

26 In the limited time afforded the court by the filing of this
27 *Ex Parte* Verified Emergency Petition by the Debtor, the court has
28 endeavored to seriously consider and rule on this request. Rather

1 than merely ignoring this request, the court dropped the other
2 matters pending for the court's September 20, 2011 calendar and
3 invested more than one hour of time considering this emergency
4 request. Upon such consideration, the court determines that the
5 requested relief is not warranted. The court is firmly convinced
6 that this is the correct decision, which would not change if more
7 time was afforded the court. Merely because a party waits until
8 the eleventh hour, fifty ninth minute, and fifty ninth second
9 before an adverse event does not result in an automatic granting of
10 the requested relief.

11 Further, from this motion, the arguments, evidence and
12 pleadings on the motion to dismiss, and the files in this case, it
13 is clear that the bankruptcy case is being used by the Debtor after
14 failing in his attempts in state court. The Debtor has and retains
15 all of his rights to be enforced in the state court proceeding.
16 Nothing has been presented to the court to indicate that the Debtor
17 has any intent or ability to proceed with a reorganization. There
18 are no proper grounds for this court to grant the dismissal.

19 The court shall issue a separate order denying the *Ex Parte*
20 *Verified* Emergency Petition. This Memorandum Opinion and Decision
21 constitutes the court's findings of fact and conclusions of law
22 pursuant to Fed. R. Civ. P. 52 and Fed. R. Bankr. P. 9014 and 7052.
23 Dated: September 19, 2011

24
25 /s/ Ronald H. Sargis
26 RONALD H. SARGIS, Judge
27 United States Bankruptcy Court
28