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2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6

7)
8 In re) Case No. 07-26213-A-13G
9 ROXANA NAJERA,) Docket Control No. JMS-1
10 Debtor.) Date: November 5, 2007
11) Time: 9:00 a.m.
12)

13 On November 5, 2007 at 9:00 a.m., the court considered the
14 objection to confirmation of OCWEN Loan Servicing. The objection
15 was opposed by the chapter 13 debtor, Mary Ramos. The text of
16 the final ruling appended to the minutes of the hearing follows
17 below. This final ruling constitutes a "reasoned explanation"
18 for the court's decision and accordingly is posted to the court's
19 Internet site, www.caeb.uscourts.gov, in a text-searchable format
20 as required by the E-Government Act of 2002. The official record
21 of this ruling remains the ruling appended to the minutes of the
22 hearing.

23 **FINAL RULING**

24 The objecting creditor failed to set its objection to
25 confirmation of the proposed chapter 13 plan for a timely
26 hearing.

27 General Order 05-03, ¶ 3(c), dealing with the court's
28 chapter 13 procedures, provides:

*Creditors, as well as the Trustee, may object to the
confirmation of the chapter 13 plan and to the granting
of any valuation or lien avoidance motion included with
the plan. An objection and a notice of hearing must be
filed and served upon the debtor, the debtor's
attorney, and the Trustee within 7 calendar days after
the first date set for the meeting of creditors held
pursuant to 11 U.S.C. § 341(a). The objection shall be
set for hearing on the confirmation hearing date and*

1 time designated in the Notice of Chapter 13 Bankruptcy
2 Case, Meeting of Creditors, & Deadlines as the
3 confirmation hearing. The objection shall comply with
4 Local Bankruptcy Rule 9014-1(a)-(e), (f)(2), & (g)-(1),
5 including the requirement for a Docket Control Number
6 on all documents relating to the objection. The notice
7 of hearing shall inform the debtor, the debtor's
8 attorney, and the Trustee that no written response to
9 the objection is necessary. Absent a timely objection
10 and a properly noticed hearing on it, the court may
11 confirm the chapter 13 plan and grant the motions
12 without a hearing.

13 The Notice of Chapter 13 Case, Meeting of Creditors &
14 Deadlines ("the notice") was served by the trustee on September 6
15 on all creditors, including the objecting creditor. There has
16 been no contention by the objecting creditor that the trustee
17 failed to serve it or serve it correctly with the plan and the
18 notice.

19 The notice set a confirmation hearing on October 22, 2007 at
20 9:00 a.m. Creditors, including the objecting creditor, were
21 advised that the last date to file objections to the plan was
22 October 3 and, if objections were filed timely, they would be
23 heard at an October 22 confirmation hearing.

24 This creditor filed a timely objection but then failed to
25 set the objection for hearing at the October 22 confirmation
26 hearing.

27 Counsel for the objecting creditor maintains that the court
28 should not mete out sanctions for the failure to set the
29 objection for hearing on the earlier and correct date designated
30 by the court. This assertion is based on the fact that counsel
31 filed a request for special notice and served it on the trustee.
32 Despite this request and service, the trustee failed to serve the
33 plan and the notice on counsel.

1 A review of the docket shows the following chronology:

2 08-07-07 The debtor files the chapter 13 petition. The proposed
3 plan accompanies the petition.
4 08-22-07 Counsel for the objecting creditor files and serves on
5 the trustee as well as counsel for the debtor with a
6 request for service of all documents filed in the case.
7 09-06-07 The trustee files and serves the Notice of Chapter 13
8 Case, Meeting of Creditors & Deadlines on all
9 creditors. The notice informs all creditors that the
10 deadline for filing objections to confirmation is
11 October 3, 2007 and that timely objections will be
12 heard by the court on October 22, 2007. The objecting
13 creditor is served at two different addresses. Its
14 counsel, however, is not served.
15 09-22-07 Counsel for the objecting creditor files its objection
16 to confirmation of the plan. It is filed
17 electronically and it is filed timely. But, counsel
18 sets the objection for hearing on November 5 rather
19 than October 22, the confirmation hearing date
20 designated by the court in the notice. No other party
21 in interest objects to the confirmation of the plan.
22 10-22-07 The court holds no confirmation hearing as scheduled
23 because no party in interest both objects to
24 confirmation and sets the objection for hearing on this
25 date.

26 The court rejects the assertion by counsel for the objecting
27 party that its failure to set the objection for hearing on
28 October 22 should be excused because counsel was not served with
the plan and the notice by the trustee.

First, the fact that counsel was not served as he requested
has no impact on the validity of the service on the objecting
creditor. The objecting creditor was properly and timely served
with the notice and the plan by the trustee. It was given the
notice required by 11 U.S.C. § 342 Fed. R. Bankr. P. 2002(a) &
(b), 3015(d).

Second, according to the trustee's attorney, the trustee has
no record of receiving a request for notice from counsel for the

1 objecting creditor.

2 Third, and most important, despite the failure of the
3 trustee to serve counsel, counsel nonetheless obtained the plan
4 and was able to file a timely objection to confirmation of the
5 proposed plan. At the November 5 hearing, counsel admitted that
6 he obtained a copy of the plan from the court's Internet site.
7 Assuming he obtained a copy of the plan before the trustee filed
8 and served the notice on September 6, counsel would have been
9 unaware that the court had designated October 22 as the
10 confirmation hearing date. However, counsel regularly appears in
11 this court. He knew that the court schedules a confirmation in
12 every chapter 13 case in which the debtor files a proposed plan
13 prior to the trustee's service of the notice. He knew that the
14 notice would give the deadline for filing of the objection as
15 well as the confirmation hearing date. And, when the objection
16 was filed on September 22, the notice, like the plan, was
17 available, and had been available since September 6, on the
18 court's Internet site. But, despite using the court's Internet
19 site to obtain a copy of the plan and to file the objection,
20 counsel made no effort to ascertain the confirmation hearing
21 date. Instead, he set the objection for hearing on a date that
22 he selected.

23 Despite the foregoing, and because the court perceives no
24 prejudice to the debtor if the court considers the objection even
25 though it was set for hearing two weeks late, the court will
26 consider the merits of the objection. However, the court will
27 not countenance counsel for a creditor, at worst, ignoring the
28 confirmation hearing set by the court, or, viewed most

1 charitably, making no effort to ascertain the correct
2 confirmation hearing date when setting an objection for hearing.
3 Because this appears to be an isolated instance, the sanction
4 will be a minor one.

5 Counsel will be sanctioned \$25, payable to the court within
6 15 days. If not paid timely, the objection will be stricken and
7 the plan confirmed.

8 Assuming the sanctions are paid timely, the objection will
9 be sustained. The plan cannot be confirmed consistent with In re
10 Gavia, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982). The plan does
11 nothing more than maintain post-petition mortgage payments and
12 pay administrative expenses for 12 months. In the 13th month,
13 the debtor hopes to refinance her home and use the resulting loan
14 proceeds to pay the pre-petition arrears owed to the objecting
15 creditor as well as all other creditors holding pre-petition
16 claims. In other words, no debt that matured and fell due before
17 the filing of the petition will be paid from the debtor's future
18 income or earnings.

19 There no convincing proof that the debtor has the ability to
20 refinance the property during the next 12 months. Hence, the
21 debtor has not established the plan's feasibility as required by
22 11 U.S.C. § 1325(a) (6).

23 But, more important, even if feasible, the plan is not
24 really a chapter 13 plan. A chapter 13 plan is funded by the
25 "submission of all or such portion of [the debtor's] future
26 earnings or other income" to the trustee for the payment of
27 claims. This plan is not financed by the debtor's future income
28 or earnings. It is being funded entirely by a future loan.