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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

FILED October 10, 2019

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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4 In re) Case No. 18-14689-B-7
5 JAVIER GONZALEZ,)
6 Debtor.) DCN: FW-5
7)
8)
9)

10
11 RULING ON TRUSTEE'S MOTION TO COMPEL ANNA GONZALEZ'S
12 RESPONSES TO DISCOVERY REQUESTS

13 The court issued a tentative ruling that Ms. Gonzalez's
14 default on the motion would be entered but that no relief
15 requested by movant would be ordered because Ms. Gonzalez is not
16 a "party" to the Trustee's turnover motion and Ms. Gonzalez is
17 not a defendant in an adversary proceeding brought against her
18 by the Trustee. Hearing on this motion was held October 9, 2019.
19 Appearances were noted in the record. The court took the matter
20 under advisement.

21 This motion was set for hearing on 28 days' notice as
22 required by Local Rule of Practice ("LBR") 9014-1(f)(1). The
23 failure of the creditors, the debtor, the U. S. Trustee, or any
24 other party in interest to file written opposition at least 14
25 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may
26 be deemed a waiver of any opposition to the granting of the
27 motion. Cf. Ghazali v. Moran, 46 F. 3d 52, 53 (9th Cir. 1995).
28 (9th Cir. 2006). Therefore, the default of Ms. Gonzalez is

1 entered. Upon default, factual allegations will be taken as true
2 (except those relating to amount of damages). Televideo Systems,
3 Inc. v. Heidenthal, 826 F. 2d 915, 917 (9th Cir. 1987).

4 Constitutional due process requires that a movant make a prima
5 facie showing that they are entitled to a default which the
6 movant has done here. But the relief requested cannot be
7 granted as explained below.

8 The trustee has moved to compel the turnover of property,
9 which was opposed both by the debtor and Anna Gonazlez.
10 Trustee's interrogatories and requests for production in
11 connection with the turnover motion directed to Ms. Gonzalez
12 have not been answered. Doc. #48.

13 Anna Gonzalez, through counsel, appeared at the first
14 hearing on the turnover motion and opposed the Trustee's request
15 for relief. One ground of opposition was that an adversary
16 proceeding would be the appropriate forum for this dispute. Anna
17 Gonzalez is not a debtor. A request for turnover against a non-
18 debtor must be by adversary proceeding. Fed. R. Bankr. Proc.
19 7001(1).

20 The court is aware there is a dispute as to ownership of
21 the property subject to Trustee's turnover motion. An adversary
22 proceeding has not been filed against Ms. Gonzalez. So, even
23 though Ms. Gonzalez has not opposed this discovery motion, it is
24 questionable whether she can be compelled to respond to
25 discovery demands that are only authorized against parties. The
26 docket does not reflect Ms. Gonzalez's agreement to be bound by
27 a ruling on the turnover motion. At oral argument on this
28 motion, Trustee's counsel conceded that but also urged that Ms.

1 Gonzalez's counsel said at the first hearing on the turnover
2 motion that she would cooperate with discovery requests.

3 Agreeing to cooperate with discovery requests by a non-
4 party is not consenting to the application of party discovery
5 rules. Ms. Gonzalez is subject to subpoena under Fed. R. Civ.
6 Proc. 45 (applicable in bankruptcy cases by Fed. R. Bankr. Proc.
7 9016). On the record at the hearing on this motion, counsel for
8 Ms. Gonzalez stated that he would accept service of a subpoena
9 on behalf of Ms. Gonzalez and that subpoena can include document
10 requests.

11 Fed. R. Civ. Proc. 37(a)(3)(B)(iii) is made applicable to
12 this contested matter by operation of Federal Rule of Bankruptcy
13 Procedure 9014 and 7037 and permits the Trustee to move for an
14 order compelling answers to interrogatories propounded to a
15 party under Rule 33.

16 Fed. R. Civ. Proc. 37(a)(3)(B)(iv) is made applicable to
17 this contested matter by operation of Fed. R. Bankr. Proc. 9014
18 and 7037 and permits the Plaintiff to move for an order
19 compelling production if a party fails to produce documents or
20 failing to permit inspection of documents as requested under
21 Rule 34.

22 Ms. Gonzalez has not responded to any of the Trustee's
23 communications regarding the production of documents and
24 interrogatories. Doc. #51. But she is not a "party" to the
25 motion and there is no record she has ever agreed to be a party.

26 At oral argument, Trustee's counsel referred the court to
27 an unpublished Ninth Circuit Bankruptcy Appellate Panel
28 decision, Diatom, LLC v. Committee of Creditors Holding

1 Unsecured Claims, et al (In re Gentile Family Industries), BAP
2 CC-13-1563-KiTAD, 2014 WL 4091001 (BAP 9th Cir. August 19, 2014).


3 The court has reviewed the Memorandum Decision. It has no
4 precedential value. See 9th Cir. BAP Rule 8013-1. Notably that
5 court found that it was error (albeit "harmless error") for the
6 bankruptcy court to rule on the validity of an unexpired lease
7 in a contested matter. Id. at *5-*6. But that court did not need
8 to reach that conclusion because in Gentile "for all practical
9 purposes an adversary proceeding was held in the case." Id. Not
10 the case here based on the record before the court.

11 Gentile is also distinguishable. There, objection to the
12 forum was not fully presented to the bankruptcy court. Id. at
13 *6. The parties there had ample time to air their positions
14 which has not occurred here since the underlying issue—ownership
15 of property—has not been tried. Also, in Gentile, there were few
16 material facts and the issue was primarily one of law. Id.
17 Again, not the case here. This dispute is in the early discovery
18 stages. The court is not going to now rule that proceeding
19 against Anna Gonzalez in this contested matter will not affect
20 her substantial rights or be consistent with substantial
21 justice.

22 Default of Ms. Gonzalez will be entered. No relief will be
23 granted. The court will prepare a separate order.

24 Dated: Oct 10, 2019

By the Court

25
26 
27 René Lastrero II, Judge
28 United States Bankruptcy Court