

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 6, 2021 at 11:00 a.m.

1.	<u>19-25936-E-7</u> NUR BANO <u>20-2152</u> Gary Fraley CARELLO V. NISHA	MOTION FOR ENTRY OF DEFAULT JUDGMENT 11-25-20 [25]
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Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Defendant on November 25, 2020. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion for Entry of Default Judgement is continued to 11:00 a.m. on XXXXX, 2021.

Sheri L. Carello, the Chapter 7 Trustee ("Plaintiff"), filed the instant Motion for Default Judgment on November 25, 2020. Dckt. 25. Plaintiff seeks a default judgment against Ashvin Nisha ("Defendant") in the instant Adversary Proceeding No. 20-02152.

The instant Adversary Proceeding was commenced on September 15, 2020. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on September 15, 2020. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 7.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 16, 2020. Dckt. 21.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint to avoid two preferential transfers and to recover the property or its value for the bankruptcy estate. The Complaint contains the following general allegations as summarized by the court:

- A. This is an action pursuant to 11 U.S.C. § 547(b) to avoid the transfer of interests in property of the Debtor to the Defendant.
- B. Prior to the filing of the bankruptcy, Debtor made two payments to Defendant, one on August 16, 2019 and another one on September 4, 2019 in the total sum of \$12,000.
- C. Plaintiff alleges that these payments were made on account of an antecedent debt.
- D. Defendant is the nephew of the Debtor and is therefore an insider defined by the Bankruptcy Code.
- E. Debtor was insolvent at the time of the transfer.
- F. Defendant obtained more than he would have received if the transfer had not been made.

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

- A. A judgment avoiding the preferential transfer, and
- B. An order for Defendant to turn over \$12,000 to the bankruptcy estate.

REVIEW OF THE MOTION FOR ENTRY OF DEFAULT JUDGMENT

On November 25, 2020, Plaintiff filed the instant Motion for Entry of Default Judgment pursuant to Fed. R. Bankr. P. 7055. Dckt. 25. Plaintiff filed the Motion for Default Judgment, accompanied by, the Declaration of Sheri L. Carello, Dckt. 27, and Exhibits A through D, Dckt. 28.

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

- 1. In Debtor's original bankruptcy schedules, Debtor failed to disclose that she paid to Defendant the sum of \$12,000 in two payments, one on August 4, 2019 and the other on August 16, 2019.

2. Debtor disclosed these payments during the October 20, 2019 meeting of creditors.
3. On November 19, 2019, Debtor amended her Statement of Financial Affairs to disclose the payments to Defendant.
4. On November 22, 2019, Debtor amended her Schedule E/F to add Defendant as creditor in the amount of \$12,000, with the debt having been incurred in 2013.
5. Debtor provided to Plaintiff-Trustee copies of the two checks to Defendant dated August 4, 2019 for \$2,000 and August 16, 2019 for \$10,000.
6. Entry of default judgment is appropriate because the transfer was made within one year of the filing of Debtor's Chapter 7 petition and at the time of the transfer Debtor was insolvent.
7. As a result, the transfer allowed Defendant to obtain more than he would receive if the transfer had not been made.

Motion, Dckt. 25.

DOCUMENTS FILED WITH THE MOTION

Next, Plaintiff filed the Declaration of Sheri L. Carello, in support of the motion. Dckt. 27. Plaintiff testifies under penalty of perjury that at the Meeting of Creditors conducted on October 20, 2019, Debtor testified that two large withdrawals from her bank account, one of \$2,000 and another one for \$10,000, were payments made to pay back her nephew (Defendant) from whom she had borrowed money.

Plaintiff also filed four Exhibits in support: Exhibit A, Debtor's Original Bankruptcy Schedules filed October 7, 2019; Exhibit B, Debtor's Amended Statement of Financial Affairs filed on November 19, 2019; Exhibit C, Debtor's Amended Schedule E/F filed November 22, 2019; and Exhibit D, copies of cancelled checks to Defendant August 4, 2019 and August 16, 2019. Dckt. 28.

Exhibit D is properly authenticated by Plaintiff in her Declaration. The exhibit are copies of two checks. *Id.*, at 41-42. The first check dated August 4, 2019, reflects a payment of \$2,000 from Nur Bano (Debtor) to Ashvin Nisha (Defendant) from Debtor's Golden 1 Credit Union account. *Id.*, at 41. The second check dated August 16, 2019, reflects a payment of \$10,000 from Nur Bano (Debtor) to Ashvin Nisha (Defendant) from Debtor's Golden 1 Credit Union account. *Id.*, at 42.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (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.*

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. 3d 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, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that 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. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

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.

Avoidance of Preferential Transfer pursuant to 11 U.S.C. § 547(b)

Section 547(b) of the Bankruptcy Code provides:

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—

(A) on or within 90 days before the date of

the filing of the petition; or
(B)between ninety days and one year before
the date of the filing of the petition, if such
creditor at the time of such transfer was an
insider; and

(5) that enables such creditor to receive more than such
creditor would receive if—

(A)the case were a case under chapter 7 of
this title;
(B)the transfer had not been made; and
(C)such creditor received payment of such
debt to the extent provided by the provisions
of this title.

As explained in Collier on Bankruptcy,

The purposes of the preference section are twofold. First, by permitting a trustee to avoid transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor's property during the debtor's slide into bankruptcy. The protection thus afforded the debtor often enables the debtor to work a way out of a difficult financial situation through cooperation with all of the creditors. Second, and more importantly, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of its class may be required to disgorge the payment so that all may share equally.

5 Collier on Bankruptcy P 547.01 (16th 2020).

DISCUSSION

Plaintiff filed this Motion for Entry of Default Judgement on August 21, 2020. Defendant has not provided opposition.

Report of Settlement In Process

On December 28, 2020, Plaintiff filed a Supplemental Declaration. Dckt. 34. Plaintiff informs the court that after filing the instant motion, she received a call from Abdul Kaiyum, a relative of Defendant, who indicated that he was going to pay the \$12,000 back to the estate on behalf of the Defendant. *Id.*, ¶ 3. Plaintiff also informs the court that on December 7, 2020 she received a \$6,000 check from Mr. Kaiyum which has now cleared the estate's bank account. *Id.*, at ¶ 4. Per her conversation with Mr. Kaiyum, Trustee expects another \$6,000 payment in the middle of January 2021. *Id.*, at ¶ 5.

At the hearing, **xxxxxxx**

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 Sheri L. Carello (“Plaintiff-Trustee”) 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
XXXXXXX

Tentative Ruling: 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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on November 23, 2020. By the court's calculation, 44 days' notice was provided. 14 days' notice is required.

The Motion to Strike was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----
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The Motion to Strike is dismissed without prejudice.

Steven C. Sanders and Sanders & Associates, the Plaintiffs, ("Plaintiff" or "Movant") requests the court dismiss Defendants Shon and Jill Treanor's answers as non-responsive or to strike all redundant, immaterial, impertinent, or scandalous matters from Defendants' answer pursuant to Federal Rule of Civil Procedure 12(f). Specifically, the motion seeks to strike certain statements made by Defendant-Debtors in their answer regarding, among other things, to Plaintiffs' representation of Defendant-Debtor in a Solano County Superior court case.

The Complaint in this Adversary Proceeding requests that the court allow Plaintiffs Steven Sanders and Sanders & Associate ("Plaintiff") a secured claim against the Debtors' interest in certain real property in Fairfield, California that are assets in the Cheryl Gortemiller Living Trust ("Trust") of which Debtors are beneficiaries. Debtors Shon and Jill Treanor ("Defendant-Debtors") have filed a counterclaim alleging malpractice related to past services as Debtors' legal counsel ("Malpractice Claim").

Hank M. Spacone, the Chapter 7 Trustee and real party in interest (“Trustee”) filed a Motion to Intervene on December 2, 2020 which was set for hearing at 11:00 a.m. on January 6, 2020. Dckt. 29. Trustee seeks to intervene as the real party in interest on the basis that he has an unconditional right to intervene pursuant to Federal Rule of Civil Procedure 24 (a)(1) where both the Debtors' interest in the Trust and the Malpractice Claim are included under 11 U.S.C. § 541(a).

On December 23, 2020, Trustee filed a Special Status Report. Dckt. 44. Trustee again asserts that Debtors are not the real party in interest and as such they cannot prosecute this adversary proceeding because the rights and interests that are subject of this adversary proceeding are property of the bankruptcy estate to be administered by the Trustee. Moreover, Trustee argues that the parties would be best served by dismissal of this proceeding without prejudice and the Complaint should be treated as a timely filed informal proof of claim.

A status conference for this Adversary Proceeding and a special status conference regarding the identification of the real parties in interest and relief requested were scheduled for January 6, 2020 at 2:00 p.m. Both conferences will be conducted in conjunction with the instant motion and the Motion to Intervene.

Dismissal of Motion Without Prejudice

As the court has addressed on the Trustee’s Motion to Intervene, the Complaint does not request relief against the real party in interests with respect to asserted interests in property of the estate. Though Plaintiff has spent significant time concerning issues and disputes with the Debtors that Plaintiff names as Defendants, this Motion relates to a claim being asserted against persons who are not parties in interest.

At this juncture, before a motion to strike pleadings on the substance of the pleadings filed by Debtors as the named Defendants, the court must first find that they are real parties in interest for purposes of the exercise of federal judicial power as provided in Article III of the Constitution. Rather, it appears that they may likely be dismissed from this Adversary Proceeding, and thereafter have the various pleadings dismissed without prejudice.

In his Status Report, the Defendant-Trustee substituting in suggests that rather than pressing forward with this litigation, Plaintiff file a proof of claim that asserts a secured claim, the Defendant-Trustee can then determine whether he has any objection thereto, and if so, the Defendant-Trustee can commence an objection to claim (which, if it requires a determination of the extent, validity, or priority of Plaintiff’s interest in the property of the estate, would have to be filed as an adversary proceeding - Fed. R. Bankr. P. 7001(a)(2), 3007(b)).

At the hearing, **XXXXXXX**

Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor (*pro se*) and Plaintiff on December 2, 2020. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Intervene has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Intervene is granted.

Hank M. Spacone, the Chapter 7 Trustee, ("Movant") requests the court allow him to intervene in this Adversary Proceeding pursuant to Federal Rule of Civil Procedure 24, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7024.

The Complaint in this adversary proceeding requests that the court allow Plaintiffs Steven Sanders and Sanders Associate ("Plaintiff") a secured claim against the Debtors' interest in certain real property in Fairfield, California that are assets in the Cheryl Gortemiller Living Trust ("Trust") of which Debtors are beneficiaries. Debtors Shon and Jill Treanor ("Defendant-Debtors") have filed a counterclaim alleging malpractice related to past services as Debtors' legal counsel ("Malpractice Claim").

Movant asserts that he has an unconditional right to intervene pursuant to Federal Rule of Civil Procedure 24 (a)(1) where both the Debtors' interest in the Trust and the Malpractice Claim are included under 11 U.S.C. § 541(a).

A status conference for this Adversary Proceeding and a special status conference regarding the identification of the real parties in interest and relief requested were scheduled for January 6, 2020 at 2:00 p.m. Both conferences will be conducted in conjunction with the instant motion.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 24(a), the court must permit anyone to intervene who has been given an unconditional right to intervene by federal statute and said right must appear in unequivocal federal statute. A Trustee in a bankruptcy case as the representative of the estate has the capacity to sue and be sued. Federal Bankruptcy Code § 323(b).

Section 541(a) lists six general categories of property that are included as property of the estate—

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

As discussed in Collier on Bankruptcy, section 541(a) defines the property comprising the estate very broadly, which includes all legal or equitable interests of the debtor in property, wherever located or by whomever held, as of the commencement of the case. 5 Collier on Bankruptcy P 541.03 (16th 2020). As provided in 11 U.S.C. § 542, all property of the bankruptcy estate shall be delivered to the bankruptcy trustee.

Here, Defendant-Debtors have alleged a counterclaim for malpractice, a legal interest that is property of the estate under § 541(a)(1). Additionally, Defendant-Debtors' are the beneficiaries of the Trust and thus this interest is property of the estate as listed under § 541(a)(5). Movant argues that as Trustee he has an unconditional right to intervene and thus an interest in the subject matter of the litigation on the basis that Defendant-Debtors' interests are property of the estate subject to his administration as Trustee.

Further, as discussed in Moore's Federal Practice for permissive intervention, there is a mandatory three-step criteria for intervention: interest, impairment, and inadequate representation.

[a] All Three Criteria Must Be Met

In the absence of statutory authority granting a right to intervene (see §24.02), a movant must make a timely motion (see §24.21) and establish all three of the following criteria in order to qualify for intervention of right:

1. The movant claims an interest in the subject matter of the litigation;
2. Disposing of the litigation may as a practical matter impair or impede the movant's ability to protect that interest; and
3. The existing parties to the action do not adequately represent the movant's interest.

6 Moore's Federal Practice - Civil § 24.03 (2020)

Here, Movant claims an interest in the subject matter of the litigation because the Defendant-Debtors' interest in the Trust, which contains the Fairfield property, is property estate. Moreover, the counterclaim is also property of the bankruptcy estate as provided by § 541(a)(5). Movant herself has assigned all rights to the Chapter 7 Trustee. As for step two, Movant argues that disposition of this action may as a practical matter impede the Trustee's ability to protect the bankruptcy estate's interest. While no explanation is provided by Movant as to how it would impede his ability to protect the interest, it is obvious that if the Defendant-Debtor purport to adjudicate rights of the estate in property of the estate, the Trustee's ability to administer the property of the estate is impaired.

Lastly, Defendant-Debtors are the existing parties to the action and cannot adequately represent Movant's interest where Movant as Trustee has the power to administer the bankruptcy estate once Debtors' filed for bankruptcy protection under Chapter 7. Defendant-Debtors do not have standing to adjudicate rights and interests in and of the property of this Chapter 7 bankruptcy estate.

The court finding that Movant as Trustee is the real party of interest and that any litigation

concerning a lien that may be granted by Defendant-Debtors concerning the Trust which became property of the bankruptcy case when Defendant-Debtors filed the Chapter 7 case make the Chapter 7 Trustee the real part in interest. Further, to the extent that the Defendant-Debtors assert that they have claims against Plaintiffs, then the real party in interest who can assert and enforce such rights is also the Chapter 7 Trustee.

As discussed in the status conference for this Adversary Proceeding, a basic principal of American Jurisprudence is that the real parties in interest whose rights and interests are put at issue must be the parties to the federal court litigation, this is the Constitutional requirement referred to as “standing.” Here, Defendant-Debtors cannot assert claims or rights in which they have no interest since the filing of the bankruptcy. At the time of filing, the interest passed to the Chapter 7 Trustee.

The Motion is granted.

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 Intervene filed by Hank M. Spacone, the Chapter 7 Trustee (“Movant”), 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 Intervene is granted.