

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**January 9, 2019, at 11:00 a.m.**

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1. **11-44540-E-13**      **MERCEDES PEREZ**  
**18-2041**  
**PLC-1**

**MOTION FOR ENTRY OF DEFAULT  
JUDGMENT**  
**11-27-18 [\[17\]](#)**

**PEREZ V. STOCKTON MORTGAGE**

**No Tentative 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).

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.**

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Office of the United States Trustee on November 27, 2018. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment 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). 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 non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and

**January 9, 2019 at 11:00 a.m.**

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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 XXXXXXXXXXXXXX.**

Mercedes Perez ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on November 27, 2018. Dckt. 17. Plaintiff-Debtor seeks an entry of default judgment against Stockton Mortgage ("Defendant") in the instant Adversary Proceeding No. 18-02041.

The instant Adversary Proceeding was commenced on April 5, 2018. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on April 5, 2018. Dckt. 1. 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 August 3, 2018. Dckt. 9.

**REVIEW OF COMPLAINT**

Plaintiff-Debtor filed a complaint for injunctive relief against Defendant. The Complaint contains the following general allegations as summarized by the court:

- A. Plaintiff-Debtor owns real property commonly known as 6 Fourth Ave. Isleton, California ("Property"). Plaintiff-Debtor resides there as a primary residence.
- B. As of October 14, 2011, the date of the filing of the Chapter 13 bankruptcy case, the Property had a fair market value of approximately \$150,000.
- C. Plaintiff-Debtor's Modified Chapter 13 Plan was confirmed on February 26, 2015; Plaintiff-Debtor completed the Plan, and an order of discharge was signed on September 6, 2016.
- D. Plaintiff-Debtor owned the Property at the time of filing for bankruptcy, and the Property was secured by two loans: a primary mortgage in favor of Beneficial and second mortgage in favor of Defendant, who is alleged to be Stockton Mortgage.
- E. Plaintiff-Debtor filed a Motion to Value Secured Claim of Defendant Stockton Mortgage regarding the Property, which was granted on April 28, 2014, and the secured claim was determined to be in the amount of \$0.00 and wholly unsecured.
- F. On September 6, 2016, Defendant Stockton Mortgage was served with the order of discharge.

- G. On April 3, 2018, Plaintiff-Debtor's counsel telephoned Defendant Stockton Mortgage and was instructed "there is no need to reconvey.

**First Claim for Relief—Extinguishment of the Second Trust Deed Claim**

Plaintiff-Debtor alleges the following for the First Cause of Action:

- A. Plaintiff is informed and believes that Defendant Stockton Mortgage's Second Deed of Trust is completely unsecured and under applicable law has been determined to be a general unsecured claim.
- B. Under applicable law, upon completion of Debtor's chapter 13 plan, the Court has the authority to void the Second Deed of Trust if the Defendant Stockton Mortgage does not remove the lien as required by State law and to quiet the title of the Plaintiff.
- C. The Plaintiff-Debtor has completed the Chapter 13 Plan which required the Defendant Stockton Mortgage to reconvey their loan; Defendant Stockton Mortgage has not reconveyed via a deed of reconveyance.
- D. The court should issue an Order directing Defendant Stockton Mortgage to reconvey title.
- E. Plaintiff-Debtor requests an award of attorney's fees as allowed for in the contract with Defendant Stockton Mortgage. Plaintiff is entitled to attorney fees under California Civil Code §1717, a reciprocal contractual attorneys' fees statute, under the contract.

**Second Claim for Relief—Violation of California Civil Code § 2941(d)**

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. On May 11, 2016, Plaintiff-Debtor completed her Chapter 13 plan which required the Defendant Stockton Mortgage to reconvey the Deed of Trust on said property.
- B. California Civil Code §2941(b)(1) requires that within 30 days after an obligation secured by a deed of trust has been satisfied, the beneficiary or the assignee, Defendant Stockton Mortgage herein, shall cause to be executed and delivered a full reconveyance. More than 30 days have passed from the date that the Defendant Stockton Mortgage time began in which to reconvey and Defendant Stockton Mortgage have not reconveyed.
- C. As a proximate result of this failure and refusal of Defendant Stockton

Mortgage to reconvey, Plaintiff-Debtor has been required to file an adversary proceeding, at substantial cost, which is a direct breach of Defendant Stockton Mortgage's statutory duty and has damaged Plaintiff by this cost.

- D. Defendant Stockton Mortgage received notice of the Trustee's Final Report and Account and Order Fixing Deadline for Objecting Thereto; Intent to Enter Chapter 13 Discharge; Discharge of Debtor; and Final Decree.
- E. Damages are ongoing (including from slander of title by continuing the lien on the property), and Debtor requests that any ongoing damages be reimbursed to the Debtor. Pursuant to California Civil Code §2941(d), Plaintiff-Debtor requests damages sustained by the Plaintiff, including all attorneys fees, costs, and the statutory penalty of \$500.00.

### **Third Claim for Relief—Attorney's Fees**

Plaintiff-Debtor alleges the following for the Third Cause of Action:

- A. Plaintiff is entitled to attorney's fees pursuant to the terms of the contract between the parties.
- B. Plaintiff is entitled to attorneys fees as the prevailing party in this action.
- C. Plaintiff requests an award of attorney's fees, in an amount the court determines to be reasonable.

### **Prayer**

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

- A. Extinguish the Second Deed of Trust;
- B. Award attorneys' fees and costs;
- C. Award ongoing actual damages;
- D. Award statutory damages in the amount of \$500.00;
- E. Award punitive damages according to proof at trial, for the slander of title; and
- F. For such other relief as the court deems just and proper.

### **Exhibits Attached to the Complaint**

Exhibit A is identified as the Second Deed of Trust which secures the claim which was valued

at \$0.00 pursuant to 11 U.S.C. § 506(a). Dckt. 1 at 12. The entity named as Defendant in this Adversary Proceeding is identified as Stockton Mortgage Incorporated in the Second Deed of Trust. The Second Deed of Trust identified Stockton Mortgage Incorporated as the trustee, with the “beneficiary” stated to be “SEE EXHIBIT “A” ATTACHED HERETO AND MADE A PART HEREOF” (emphasis in original) on the first page of the Second Deed of Trust. *Id.* at 11. Exhibit A to the Deed of Trust is the legal description of the Property, not a list of the beneficiaries. However, as discussed below, buried at the bottom of the same page on which Exhibit “A” is located is an Exhibit “B.”

This was discussed by the court in connection with the original motion to value this secured claim (11-44540; Civil Minutes, 162). The Exhibit B buried (confusingly) right under the legal description of the property, states:

**Exhibit “B”**

**JOHN H. FREY AND TESIBEL E. FREY, TRUSTEES OP THE FREY FAMILY TRUST,  
DATED JUNE 12, 1981 as to an undivided 20.735% interest.  
ELIZABETH KREUGER, TRUSTEE OP THE ELIZABETH KREUGER LIVING TRUST,  
DATED JULY 17, 1996 as to an undivided 37.839% interest.  
LESLIE MERL FREY AND RUTH ELIZABETH FREY, TRUSTEES OF THE LESLIE  
MERL FREY AND RUTH ELIZABETH FREY REVOCABLE TRUST, DATED JANUARY  
28, 1992 as to an undivided 41.426% interest.**

The above stated percentages of undivided interests total 100%. This led to the order of the court valuing the secured claim of the above parties.

**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-Debtor’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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

## **DISCUSSION**

### **Motion for Entry of Default Judgment**

Plaintiff-Debtor’s Motion contains a(n appropriately) brief summary of the property, valuation of secured claim, completion of plan and Plaintiff-Debtor asserting the right to obtain clear title to the Property. The Motion makes reference to the court determining that the “SECOND DEED OF TRUST” (emphasis in original) was secured to have a “secured value of zero.” This is a slight confusion of what the court ordered, which was a determination that the secured claim had a value of zero, not the second deed of trust. It is the secured claim of the actual creditor, for which the second deed of trust is the security instrument, has a value of zero - not that a deed of trust has zero value.

The relief requested in the Motion expressly seeks that the court “extinguishes the lien of Stockton Mortgage.” However, as discussed below, it does not appear that “Stockton Mortgage” has a lien, but is now only the trustee of the actual creditors holding the secured claim.

### **Refusal to Reconvey**

The Motion states grounds that include counsel for Plaintiff-Debtor having contacted Stockton Mortgage to request that the Second Deed of Trust be reconveyed. The Motion further asserts,

“To date, [Plaintiff-Debtor’s] counsel had a telephone conversation with Stockton Mortgage wherein Stockton Mortgage stated the loan was good and did not need to be reconveyed. See Declaration of Peter Cianchetta filed concurrently herewith.”

Motion, p. 3:13.5-15.5; Dckt. 17.

Plaintiff-Debtor’s counsel’s declaration filed in support of the Motion, Dckt. 19, provides testimony in support of the Motion as it relates to communications with Stockton Mortgage, which includes:

- A. “3. Since the filing of the Adversary Complaint in the above referenced matter, I have not received any communication from anyone at Chase except correspondence that they were investigating the account nor have I hear from anyone purporting to represent them in this case.”

Declaration ¶ 3, Dckt. 19. This statement appears to contain a typographical error as there does not appear to be a party named “Chase” in this Adversary Proceeding.

No other testimony is provided as to communications with Stockton Mortgage, refusals to reconvey, or assertions that Stockton Mortgage has affirmatively sought to assert an interest in the Property pursuant to the Second Deed of Trust after the completion of the Chapter 13 Plan.

### **Improper Service—Failure to Name Party in Interest**

A preliminary matter in this Adversary Proceeding is to ensure that Defendant has been served properly according to the applicable rules.

Plaintiff-Debtor initially sought to value the secured claim of Defendant by a motion filed February 17, 2012. Bankr. E.D. Cal. No. 11-44540, Dckt. 55. At the April 10, 2012, continued hearing on that motion, the court found that the motion did not correctly identify the creditor, as a review of the deed of trust showed that Stockton Mortgage Inc. is only the trustee under the trust deed. The beneficiaries and presumably the creditors, *see* Cal. Civ. Code § 2936 are identified in the deed of trust as:

JOHN H. FREY AND TESIBEL E. FREY, TRUSTEES OF THE FREY FAMILY TRUST, DATED JUNE 12, 1981 as to an undivided 20.735% interest.

ELIZABETH KREUGER, TRUSTEE OF THE ELIZABETH KREUGER LIVING TRUST, DATED JULY 17, 1996 as to an undivided 37.839% interest.

LESLIE MERL FREY AND RUTH ELIZABETH FREY, TRUSTEES OF THE LESLIE MERL FREY AND RUTH ELIZABETH FREY REVOCABLE TRUST, DATED JANUARY 28, 1992 as to an undivided 41.426% interest.

Bankr. E.D. Cal. No. 11-44540, Dckt. 100 at 7.

Finding that the party in interest had not been served by Federal Rule of Bankruptcy Procedure 7004, the court issued an Order denying the motion. Order, Bankr. E.D. Cal. No. 11-44540, Dckt. 127.

On March 17, 2014, Plaintiff-Debtor filed a new motion to value collateral, naming John H. Frey, Tesibel E. Frey, Elizabeth Kreuger, Leslie Merl Frey and Ruth Elizabeth Frey as creditors. Bankr. E.D. Cal. No. 11-44540, Dckt. 152. The court issued an Order granting that motion on April 28, 2014. Bankr. E.D. Cal. No. 11-44540, Dckt. 164.

As reviewed by the court previously, the Defendant herein is not actually the beneficiary, but rather is merely the Trustee on the Second Deed of Trust. Plaintiff-Debtor not only has brought this Adversary Proceeding against the wrong party (California Civil Code § 2941(b)(1) imposing a statutory obligation on the *beneficiary* under the deed of trust ), but has also failed to serve the actual party in interest.

### **Failure of Trustee to Reconvey Void Deed of Trust**

In the Motion Plaintiff-Debtor makes reference to attorney's fees and a statutory penalty pursuant to California Civil Code § 2941(d). The provisions of California Civil Code § 2941 provides more, creating statutory duties that arising when a deed of trust is no longer enforceable. The California Legislature provides in § 2941(b) that within 30 days of an obligation secured by a deed of trust has been "satisfied," the "beneficiary" shall (not may):

1. Execute and deliver to the trustee under the deed of trust the original note, deed of trust, request for full reconveyance, and other documents as may be necessary to reconvey the deed of trust.

Then the trustee under the deed of trust shall (not may):

2. Execute and record, within 21 days, the reconveyance of the deed of trust;
3. Deliver a copy of the recorded reconveyance to the trustor or successor (here the Plaintiff-Debtor)

This court has previously discussed the effect of the valuation of a secured claim pursuant to 11 U.S.C. § 506(a), provision for such secured claim in a Chapter 13 Plan, the satisfaction of the secured claim as valued pursuant to 11 U.S.C. § 506(a) through the completion of the Chapter 13 Plan, and the deed of trust then being rendered void (and being a cloud on the debtor's title) as a matter of both state and federal law. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

When these issues first arose, there was an appearance that some creditors or their trustee's/servicing agents, believed that rather than reconveying the deed of trust as required by contract (the deed of trust itself) and California law, they could ignore the cloud on title and place the burden on the debtor to file a complaint and then "outsource" the reconveyance work and expense to the debtor and court to issue a judgement clearing the void cloud on the title to the post-Chapter 13 plan competition debtor. In the Martin decision above, the court addressed this point in Footnote 18, and such "outsourcing" has not been an issue since 2013, stating:

FN.18. The court is gravely concerned with Defendant's failure to respond to Plaintiff's requests to reconvey the Deed of Trust after completion of the Chapter 13 Plan. While of minimal cost and expense to Defendant to comply with its contractual and statutory obligations to reconvey the Deed of Trust and clear title for the consumer Plaintiff, it has failed to fulfill its contractual and statutory obligations. This places an unreasonable and unnecessary burden on the average consumer debtor. Most benignly, one could assume that such a creditor is merely trying to save a few pennies by making the consumer bear the cost of clearing title. [\*\*25] For those with a more sinister bent, one could think that such creditors are attempting to slander title to the consumer's property to try and leverage an unwarranted payment later to release the void lien as of record.



A consumer debtor and the court do not serve as a "for free title department" processing reconveyances for a creditor. Prevailing plaintiffs may seek recovery of their attorneys' fees and expenses, as this Plaintiff has, for the reasonable attorneys' fees and costs to clear a cloud on title following completion of a confirmed Chapter 13 Plan. Such litigation requires an experienced, sophisticated attorney who understands the interplay between state real property law and federal bankruptcy law to effectively prosecute an action to enforce the Plaintiff's rights obtained through completion of the Chapter 13 Plan. Such attorneys' fees are not inexpensive, as the Plaintiff must go through multiple steps in not only filing and properly serving the Complaint, and having the default entered, but prosecuting a motion providing the court with the sufficient legal and evidentiary basis for entry of a judgment in the litigation.

Martin, 491 B.R. at 132.

### **Relief Requested**

To the extent that the Complaint as drafted seeks to "quiet title" as between the Plaintiff-Debtor and the beneficiaries under the Second Deed of Trust, such beneficiaries appear to be missing. Stockton Mortgage, the "mere" trustee under the Second Deed of Trust is not a proxy for the beneficiaries.

In the First Cause of Action seeking to quiet title (which is incorrectly titled as a cause of action for "declaratory relief"), Plaintiff-Debtor seeks an adjudication of the Second Deed of Trust being void and a judgment clearing said void deed of trust from title. That is a dispute with the beneficiaries, not the trustee under the deed of trust.

The Second Cause of Action seeks the recovery of the \$500 statutory damages for the failure to reconvey the Second Deed of Trust. Such a claim does properly lie against the trustee under the deed of trust, Stockton Mortgage Incorporated, but also appears to lie against each of the unnamed beneficiaries, as does the claim for attorney's fees in the Third (titled Fifth) Claim for Relief.

The Complaint does not appear to request injunctive relief against Stockton Mortgage, mandating that it fulfill its contractual and statutory obligation to reconvey the Second Deed of Trust.

Thus, other than a possible \$500 statutory damages award, it does not appear the Complaint, as now drafted, affords Plaintiff-Debtor the opportunity to obtain the relief desired - quieting title as to the Second Deed of Trust with the beneficiaries under said deed of trust.

At the hearing the court addressed these issues with counsel for Plaintiff-Debtor, as well as whether Plaintiff-Debtor was intending to amend the complaint to add each of the beneficiaries, seek the recovery of statutory damages, actual damages (if any), and attorney's fees from each of the beneficiaries and the trustee, and what relief Plaintiff-Debtor believed could be granted in this Complaint which names only the trustee under the Second Deed of Trust.

The court also posited to Plaintiff-Debtor's counsel what response arose from Defendant Stockton Mortgage when counsel addressed with Defendant the court's prior rulings discussed above.

Counsel for the Plaintiff-Debtor addressed these points at the hearing, stating to the court  
XXXXXXXXXXXXXXXXXXXXX

Therefore, the Motion is XXXXXXXXXXXXXXXXXXXXXXXX.

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 Mercedes Perez ("Plaintiff-Debtor") 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  
XXXXXXXXXXXXXXXXXXXXX.

2. [11-44540-E-13](#) **MERCEDES PEREZ**  
[18-2042](#) **Peter Cianchetta**  
PLC-1

**MOTION TO VACATE DISMISSAL OF  
ADVERSARY PROCEEDING**  
12-11-18 [\[18\]](#)

**PEREZ V. CAMP**

**ADV. PROC. DISMISSED: 12/06/2018**

**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).**  
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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 Defendant and Office of the United States Trustee on December 11, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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, -----.

**The Motion to Vacate is granted, and the order dismissing Adversary Proceeding (Dckt. 11) is vacated.**

Mercedes Perez ("Plaintiff-Debtor") filed the instant Adversary Proceeding on April 5, 2018. Dckt. 1. Summons was issued the same day. Dckt. 3.

On November 19, 2018, the court issued the following conditional Order:

**IT IS FURTHER ORDERED** that if Plaintiff-Debtor has not filed and served a motion for entry of default judgment; which is supported by competent and properly authenticated evidence; including a Certificate of Service documenting service having been made by noon on November 28, 2018, the court shall dismiss the

Complaint without prejudice due to the lack of prosecution, without further notice or hearing.

Order, Dckt. 9. Plaintiff-Debtor failing to meet the requirements of the conditional order, the court issued an Order on December 6, 2018, dismissing the Complaint without prejudice due to the failure to prosecute this Adversary Proceeding. Order, Dckt. 11.

### **Motion to Vacate Dismissal**

On December 11, 2018, Debtor filed this instant Motion to Vacate, claiming the following:

1. It was impossible for the Plaintiff to file and serve a motion for entry of default judgment because Defendant is deceased, and an investigation was then ongoing as to the existence and location of an heir or probate/trust proceeding.
2. Plaintiff-Debtor's counsel failed to properly calendar the Status Conference and failed to appear at the December 4 Status Conference. If Plaintiff-Debtor's counsel had appeared, he would have informed the court informed the Court that the search was complete and no heirs were found.
3. Plaintiff-Debtor's counsel has now prepared and filed a motion seeking to publish the summons, leading to default and default judgement.
4. Plaintiff-Debtor's counsel " due to mistake and inadvertence, failed to file the new plan and motion to confirm the amended plan with the Court which resulted in the dismissal of this case."

Plaintiff-Debtor argues (1) she would be greatly prejudiced by not receiving a final determination on the merits; (2) that the impact on judicial proceedings by vacating the dismissal would be minimal; (3) there is no delay in prosecuting this Adversary Proceeding because Debtor's counsel was conducting a search and waiting on the results from his private investigator because the Defendant had passed in 2010; and (4) Plaintiff-Debtor acted in good faith as demonstrated by performing all necessary actions and conducting an exhaustive search for a probate proceeding.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

### **APPLICABLE LAW**

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

- (1) mistake, inadvertence, surprise, or excusable neglect;

- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is “a grand reservoir of equitable power to do justice in a particular case.” *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App’x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); see also *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: “(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default.” *Falk*, 739 F.2d at 463 (citations omitted).

## DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers “the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.” *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App’x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

The sole ground for the dismissal was Plaintiff-Debtors failure to prosecute the Adversary Proceeding, as indicated by failure to file and serve a motion for entry of default judgment supported by

competent and properly authenticated evidence and a certificate of service documenting service.

Plaintiff-Debtor has explained there was there was abnormal difficulty in serving Defendant in the case due to his being deceased. As a result, default was not entered and no motion for entry of default could be brought.

Plaintiff-Debtor's counsel argues there was mistake and inadvertence in this case<sup>FN.1</sup>, which the court interprets to be with respect to counsel's failure to properly calendar the Status Conference and appear at the December 4 Status Conference, or otherwise notify the court of the circumstances here.

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FN.1. As discussed, supra, the Motion states "due to mistake and inadvertence, [debtor] failed to file the new plan and motion to confirm the amended plan with the Court which resulted in the dismissal of this case." This is a clear scrivener's error, or more accurately a "cut and paste" error in borrowing from other pleadings.

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Mis-calendarng is a human error and not one which creates any great burden on the court or other parties.

Therefore, in light of the foregoing, the Motion is granted, and the order dismissing Adversary Proceeding (Dckt. 11) is vacated.

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 Vacate filed by Mercedes Perez ("Plaintiff-Debtor") 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 granted, and the order dismissing Adversary Proceeding (Dckt. 11) is vacated and the requirement for the filing of the motion for entry of default judgment discharged.

**IT IS FURTHER ORDERED** that a Status Conference in this Adversary Proceeding shall be conducted **at 2:00 p.m. on February 14, 2019.**

3. [11-44540-E-13](#)      **MERCEDES PEREZ**

[18-2042](#)      **Peter Cianchetta**  
**PLC-2**

**MOTION TO SERVE BY  
PUBLICATION  
12-11-18 [14]**

**PEREZ V. CAMP**

**DEBTOR DISMISSED: 12/06/2018**

**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).**  
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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 Defendant and Office of the United States Trustee on December 11, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Motion To Serve By Publication was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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, -----.

<p><b>The Motion To Serve By Publication is denied without prejudice.</b></p>
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On December 11, 2018, Mercedes Perez ("Plaintiff-Debtor") filed this Motion for an order to serve defendant William Camp ("Defendant") by publication pursuant to Federal Rule of Bankruptcy Procedure 7004(c). Plaintiff-Debtor argues the Motion should be granted because Plaintiff-Debtor has stated a cause of action against Defendant-a necessary party-and said Defendant cannot with reasonable diligence be found and served by any other manner specified in Federal Rule of Bankruptcy Procedure 7004(c).

In support of the Motion, Debtor filed the Declaration of Aaron Wagner. Dckt. 15. The Wagner

Declaration identifies Mr. Wagner as a private investigator. *Id.* at ¶ 2. The Declaration further states Wagner searched for William Camp, a resident of Rio Vista, California, and was informed he passed away February 15, 2010. *Id.* at ¶ 4. Mr. Wagner performed further searches looking for a Probate or Trust Proceeding and could locate none. *Id.* at ¶ 5.

## DISCUSSION

As a basic requirement for a person to have his or her rights determined in federal court, that person must meet the basic requirements for legal competency. FED. R. CIV. P. 17(b).

A party must have legal capacity to prosecute or defend a case. MOORE'S FEDERAL PRACTICE, CIVIL § 17.20. Capacity concerns a litigant's legal authority or power to sue or be sued. *Id.*

In the Motion, it is requested that the publication be made in a newspaper of "general circulation" called the Daily Recorder. Motion, p. 1:22-25. The Declaration in support of this Motion does not provide the court with any information as to the scope of the "general circulation" of the Daily Recorder. Dckt. 15.

The Points and Authorities provided in support of the Motion provide the court with the following basis for disposing of personal notice on a party in interest and providing notice by publication, merely quoting Federal Rule of Bankruptcy Procedure 7004(c), repeating:

(c) Service by Publication. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)–(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

No guidance from appellate court authority or treatises is provided for this somewhat extraordinary relief in the exercise of federal judicial power. The Points and Authorities further state that the named Defendant, William Camp cannot be found (his being deceased alleged in the Motion). Dckt. 15. This testimony by Aaron Wagner, the investigator, states that he routinely uses a "commercial data base to locate individuals for service of process - Tracers, Inc." When he sought information about Defendant William Camp, he was "informed" that Mr. Camp was deceased on February 15, 2010. Mr. Wagner testifies that he investigated further for possible probate or trust proceedings, but nothing further. (As to "trust proceedings," if the trust is properly set up, no such judicial proceedings are necessary.)

No information is provided as to the investigation of possible relatives, which could include a William H. Camp in Richmond, California; and a Debra Camp in Squaw Valley, California.

Additionally, the Deed of Trust that is attached to the complaint as an exhibit identifies the beneficiary as being "William H. Camp, Trustee of the William H. Camp Trust," not William H. Camp personally. Dckt. 1 at 12. The recording of the Deed of Trust was requested by Commonwealth Land Title Insurance Company. An internet search indicates that this Title Insurance Company exists. <http://cltic.com/>. No information is provided about counsel and the investigator contacting the Title Insurance Company to



obtain information about the trustee, trust documents, and whether there is an attorney who set up the trust.

No information is provided as to investigation concerning Mr. Camp's neighbors at his last known address, which on the certificate of service filed on February 12, 2012 for the Motion to Value, was stated to be 114 Second Street, Rio Vista, CA 94571, Attn: Officer/Managing Agent." 11-44540; Cert. of Serv., Dckt. 62.

A Google Map search indicated that there is not an 114 Second Street address in Rio Vista, California. However, there are 114 S 2nd Street and a 114 N 2nd Street addresses.<sup>FN.1</sup> One appears to be a residence, the other a church.

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FN.1.

<https://www.google.com/maps/search/114+Second+Street,+Rio+Vista,+CA+/@38.1566546,-121.6940263,17z/data=!3m1!4b1>  
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In reviewing the two deeds of trust attached to the Complaint, the deed of trust dated July 21 (no year) which has appears to have a recording date of 1997, lists Mr. Camp's address as 114 S. Second Street, Rio Vista, California. Dckt. 1 at 16 (emphasis added). The property records indicate that the owner of the South Second Street Property at the time was Timothy Harris, who has an Oakley, California address.

### **Service by Publication**

Federal Rule of Bankruptcy Procedure 9008 provides that the court shall determine the form and manner of service by publication. Little guidance has been provided by the appellate or trial courts in the form of decisions for such publication under the Federal Rules of Bankruptcy Procedure.

Under California law, service by publication is provided in Cal. C.C.P. § 415.50, which states:

(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that either:

(1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action.

(2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property.

(b) The court shall order the summons to be published in a named newspaper, published in this state, **that is most likely to give actual notice to the party to be**

**served.** If the party to be served resides or is located out of this state, the court may also order the summons to be published in a named newspaper outside this state that is most likely to give actual notice to that party. The order shall direct that a copy of the summons, the complaint, and the order for publication be forthwith mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication shall be made as provided by Section 6064 of the Government Code unless the court, in its discretion, orders publication for a longer period.

Here, the Plaintiff-Debtor, counsel, and court know that the named Defendant is dead and thus, mere publication will not be likely to give actual notice to a dead person of the litigation of rights and interests the dead person formally had.

Federal Rule of Civil Procedure 17, incorporated into Federal Rule of Bankruptcy Procedure 7017 requires that a party who is sued has to have the capacity to be sued. That capacity is based on the applicable state law of where the defendant is domiciled. Rule 17(b)(1). In California Code of Civil Procedure § 377.40, with respect to a deceased target defendant, California law provides:

**Cal. C.C.P. § 377.40. Persons subject to suit**

Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.

The problem here is that it appears Plaintiff-Debtor has not yet identified, and may not be able to identify after diligent review, the necessary successor in interest with whom to litigate.

California law does provide for an action to establish the rights and interests of persons in real or personal property - a quiet title action. Cal. C.C.P. §§ 760.010 et seq. Such an action may be prosecuted against unknown persons or claims. Cal. C.C.P. § 762.020. For unknown or deceased defendants in a quiet title action, California law provides:

**§ 762.020. Unknown persons or claims**

(a) If the name of a person required to be named as a defendant is not known to the plaintiff, the plaintiff shall so state in the complaint and shall name as parties all persons unknown in the manner provided in Section 762.060.

(b) If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff shall so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff shall also state in the complaint, so far as

is known to the plaintiff, the name, age, and legal disability (if any) of the person in being who would be entitled to the claim had the contingency upon which the claim depends occurred prior to the commencement of the action.

**Cal. C.C.P. § 762.030. Decedents**

(a) If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff shall join the personal representative as a defendant.

(b) If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative:

(1) The plaintiff shall state these facts in an affidavit filed with the complaint.

(2) Where it is stated in the affidavit that such person is dead, the plaintiff may join as defendants “the testate and intestate successors of (naming the deceased person), deceased, and all persons claiming by, through, or under such decedent,” naming them in that manner.

(3) Where it is stated in the affidavit that such person is believed to be dead, the plaintiff may join the person as a defendant, and may also join “the testate and intestate successors of (naming the person) believed to be deceased, and all persons claiming by, through, or under such person,” naming them in that manner.

Then, for service by publication for a quiet title action, California law further provides:

**§ 763.010. Manner of service; Order for publication**

(a) The form, content, and manner of the service of summons shall be the same as in civil actions generally.

(b) If upon affidavit it appears to the satisfaction of the court that the plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants and persons joined as testate or intestate successors of a person known or believed to be dead, the court shall order service by publication pursuant to Section 415.50 and the provisions of this article. The court may, in its discretion, appoint a referee to investigate whether the plaintiff has used reasonable diligence to ascertain the identity and residence of persons sought to be served by publication, and the court may rely on the report of the referee instead of the affidavit of the plaintiff in making the order for service by publication.

(c) Nothing in this section authorizes service by publication upon any person named

as an unknown defendant who is in open and actual possession of the property.

### **§ 763.020. Conditions of order for publication**

Whenever the court orders service by publication, the order is subject to the following conditions:

(a) The plaintiff shall post, not later than 10 days after the date the order is made, a copy of the summons and complaint in a conspicuous place on the real property that is the subject of the action.

(b) The plaintiff shall record, if not already recorded, a notice of the pendency of the action.

(c) The publication shall describe the property that is the subject of the action. In addition to particularly describing the property, the publication shall describe the property by giving its street address, if any, or other common designation, if any; but, if a legal description of the property is given, the validity of the publication shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

### **Cal. C.C.P. § 763.030. Contents for Publication, Conclusiveness of Judgment**

(a) Whenever the court orders service by publication, the publication may:

(1) Name only the defendants to be served thereby.

(2) Describe only the property in which the defendants to be served thereby claim interests.

(b) Judgment against a defendant who fails to appear and answer following service under this section shall be conclusive against the defendant named in respect only to property described in the publication.

With respect to the Complaint itself, to assert state law rights to quiet title, the Complaint must include the following:

### **§ 762.060. Designations in complaint**

(a) In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants “all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff’s title, or any cloud upon plaintiff’s title thereto,” naming them

in that manner.

(b) In an action under this section, the plaintiff shall name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property.

(c) If the plaintiff admits the validity of any adverse claim, the complaint shall so state.

### **Relief Requested in Complaint**

The Complaint alleges that the Debtor “secured orders valuing the secured collateral of Defendant [William Camp] at zero pursuant to 11 U.S.C. § 506(a) on 10/13/2011.” Complaint ¶ 9, Dckt. 1. (The court notes that the bankruptcy case was filed by Plaintiff Debtor on October 14, 2011, so the date reference is in error. The court’s orders on the Motions to Value were issued in April 2012.) As stated by the investigator, the Defendant William Camp passed away in 2010 - thus any orders in 2011 or later against Mr. Camp are orders issued against a person who no longer existed in this life.

The Complaint does not appear to be in accord with California law to quiet title as to the Property for known and unknown parties. It appears that Plaintiff-Debtor and counsel have some amendments to make to the Complaint.

At the hearing, Counsel for Plaintiff-Debtor stated to the court **XXXXXXXXXXXXXXXXXXXX**

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 Serve By Publication filed by Mercedes Perez (“Plaintiff-Debtor”) 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 without prejudice.