

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher M. Klein
Bankruptcy Judge
Sacramento, California

January 28, 2020 at 1:30 p.m.

1.	<u>19-25218-C-13</u> <u>MDB-2</u>	MARCUS BUCKNER Peter Macaluso	CONTINUED MOTION TO CONFIRM PLAN 12-13-19 [39]
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Final Ruling: No appearance at the January 28, 2020, hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors on December 13, 2019. By the court’s calculation, 32 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Plan is denied as moot.

The debtor, Marcus Da Mone Buckner (“Debtor”) seeks confirmation of the Chapter 13 Plan. The Plan provides for payments of \$1,060 for 60 months, and a 0 percent dividend to unsecured claims. Plan, Dckt. 23. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on December 27, 2019. Dckt. 43. Trustee opposes confirmation on the following grounds:

1. Debtor filed all the pleadings as one single document.

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2. It is unclear whether the Debtor served parties using the PACER creditor matrix.
3. There is a pending Order To Show Cause based on failure to pay filing fees.
4. Debtor is \$1,790 delinquent in plan payments.
5. Elite Acceptance has not filed a proof of claim, meaning that claim cannot be paid as provided by the plan.

Trustee notes that other than the stated objections, the plan meets the Bankruptcy Code requirements for confirmation.

MOTION TO DISMISS

Trustee filed a Motion To Dismiss the case on December 6, 2019. Dckt. 35. At the hearing, the Trustee noted there were some payments made and amount still delinquent, and that Debtor had not provided all documentation required. However, the Trustee agreed to a continuance, with the court ordering the Debtor to appear at a January 28, 2020, status conference to insure that Debtor appreciates his obligations in prosecuting this case.

JANUARY 14, 2020 HEARING

At the January 14, 2020, hearing the court continued the hearing to allow supplemental documents to be filed. Dckt. 61.

DISCUSSION

Subsequent to the filing of this Motion Debtor filed a Second Amended Plan and corresponding Motion to Confirm on January 22, 2020. Dckts. 54, 58. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Filing a new plan is a *de facto* withdrawal of the pending plan.

The court also notes Debtor has now retained counsel.

The Motion to Confirm the Amended Plan is denied as moot, and the plan is not confirmed.

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 Confirm the Amended Chapter 13 Plan filed by the debtor, Marcus Da Mone Buckner (“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 as moot, and the proposed Chapter 13 Plan is not confirmed.

Final Ruling: No appearance at the January 28, 2020, hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (pro se) and Office of the United States Trustee on December 6, 2019. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice, and the Status Conference is concluded.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. the debtor, Marcus Da Mone Buckner ("Debtor"), is \$1,790 delinquent in plan payments.
2. Debtor has not filed a motion to confirm his recently filed amended plan.
3. Debtor has not filed his 2017 tax return, not provided to trustee his complete 2018 tax return, and has not provided all required pay advices.

JANUARY 8, 2020 HEARING

At the January 8, 2020, hearing, the Trustee agreed to a continuance so long as a status conference was held to ensure Debtor is prosecuting the case. Dckt. 48.

DISCUSSION

Subsequent to the filing of this Motion Debtor filed a Second Amended Plan and corresponding Motion to Confirm on January 22, 2020. Dckts. 54, 58. The court also notes Debtor has now retained counsel.

In light of Debtor's efforts in actively prosecuting this case, the court shall deny the Motion without prejudice.

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 Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick (“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 Status Conference is concluded, and the Motion to Dismiss is denied without prejudice.

WELLS FARGO BANK, N.A. VS.

**Appearance Required For Movant's
Counsel, Dane W. Exnowski, esq.**

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, Chapter 13 Trustee, and Office of the United States Trustee on December 19, 2020. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay 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 for Relief from the Automatic Stay is denied without prejudice.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 600 Ferguson Ct, Dixon California ("Property").

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure

9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the “state with particularity” requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Grounds Stated in Motion

The Motion states the following:

Wells Fargo Bank, N.A. ("Movant") hereby moves this Court for an Order granting relief from the automatic stay under 11 U.S.C. § 362 as to the Debtor and Debtor's bankruptcy estate and the Co-Debtor Stay of 11 U.S.C. § 1301 in the above-captioned matter so that Movant may enforce its remedies against the property in accordance with applicable non-bankruptcy law on the real property commonly known as 600 Ferguson Ct, Dixon, CA 95620-4545 (the "Property"). Movant hereby moves this Court for an Order granting relief from the automatic stay on the following grounds:

1. Pursuant to 11 U.S.C. § 362(d)(1): The evidence establishes that Movant has not received all post-petition payments due to it to date, with the Loan due for the August 1, 2019 post-petition payment, for a total of 4 payments at \$2,213.67 each, through and including the November 1, 2019 payment [for a total of \$8,854.68]. Therefore, cause exists to terminate the stay.

2. Movant requests relief from the co-debtor stay of 11 U.S.C. § 1301: On the same basis articulated in § 1, above, Movant requests terminated of the co-debtor stay as it applies to the co-borrower Matthew Creed.

Movant submits the attached Declaration and Memorandum of Point & Authorities, as well as other evidence filed in support of its Motion.

On the same basis, Movant seeks relief from the co-debtor stay of 11 U.S.C. § 1301.

Motion, Dckt. 11.

In the above, several basic allegations are missing. There is no statement that the Debtor owes Movant any obligation, that there is some note, or that there is a deed of trust as to the Property. It is left for the court to guess, because this motion is filed and because debtor is delinquent in payments,

that Movant holds a claim secured by the Property.

The motion states the Property is owned by the debtor Leslie Ann Creed, in Case No. 18-27634. However, this Motion was filed in the case of **Anjana Kumar, No. 19-27634. The debtor in this case does not claim an interest in the Property. It appears the Motion was simply filed in the wrong case.**

Notwithstanding this error, the Motion still fails the pleading standards set forth in the Federal Rule of Bankruptcy Procedure. The Motion is denied without prejudice.

The court shall issue an 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 Relief from the Automatic Stay filed by Wells Fargo Bank, N.A. (“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 is denied without prejudice.

No other or additional relief is granted.