UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

January 29, 2019 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	18-90805-D-13 DEF-3	JAMES DUNN, AND NORMA DUNN	MOTION TO CONFIRM PLAN 11-30-18 [28]
2.	17-90709-D-13 BSH-4	MOHAMMAD FAROOQI	MOTION TO MODIFY PLAN 12-5-18 [64]

3.	18-90309-D-13 RDG-2	RONNIE KEOMUANGCHANH AND OURAY SANACHAY	OBJECTION TO CLAIM OF WILSHIRE CONSUMER CREDIT, CLAIM NUMBER 15 12-19-18 [40]

4.	18-90411-D-13 DEF-4	ROGER/STORMIE SCHUMACHER	MOTION TO AVOID LIEN OF BALBOA CAPITAL CORPORATION 11-13-18 [54]

Tentative ruling:

This is the debtors' motion to avoid a judicial lien held by Balboa Capital Corporation ("Balboa") against the real property that is the debtors' residence. The lien secures a debt for $59,151. Balboa has filed opposition. For the following reasons, the motion will be denied.

The debtors' evidence consists of the declaration of the joint debtor, who testifies that in her opinion, the value of the residence was $367,235, apparently as of the date the debtors' petition was filed. Unavoidable liens against the property total $276,853 and the debtors have claimed an exemption of $100,000. Thus, if the debtors' valuation is accurate, application of the formula in § 522(f)(2)(A) yields the conclusion that the full amount of Balboa's lien impairs the debtors' exemption.[1] That is, there is no equity in the property to secure any part of Balboa's lien.

An owner of property may testify to his or her opinion of the value of that property, with limitations:

> **If testifying under [Fed. R. Evid.] 701, the owner may merely give his opinion based on his personal familiarity [with] the property, often based to a great extent on what he paid for the property. On the other hand, if he is truly an expert qualified under the terms of Rule 702 "by knowledge, skill, experience, training or education . . .," then he may also rely on and testify as to facts "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . ." pursuant to Rule 703. For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay should be limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties unless the debtor truly qualifies as an expert under Rule 702 such as being a real estate broker, etc.**

2 Russell, Bankruptcy Evidence Manual § 701:2, pp. 784-85 (West 2012-2013 ed.).

Absent other evidence, the court would likely give some weight to the joint debtor's testimony, although her reliability is undermined by the fact that in their original schedules, the debtors valued the property at $400,000 rather than

$367,234. (The debtors have not explained why they lowered the value in their amended schedules or how they arrived at the relatively precise figure of $367,234.) Application of the § 522(f)(2)(A) formula using the $400,000 value would result in Balboa's lien impairing the debtors' exemption only in part.

Balboa, however, has submitted the declaration of a licensed real estate appraiser, together with a copy of her appraisal, as evidence that the value of the property as of June 1, 2018, the date the debtors' petition was filed, was $485,000.[2] Leaving aside the question of the reliability of the joint debtor's testimony, the court gives greater weight to the opinion of a licensed real estate appraiser as to an issue of property valuation than to the opinion of a debtor with no apparent experience or expertise in the real estate industry. At a value of $485,000, there is ample equity to secure Balboa's judicial lien in full and the lien does not impair the debtors' exemption. Accordingly, the motion will be denied.

The court will hear the matter.

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1 59,151 + $276,853 + $100,000 = $436,004 - $367,234 = $68,770. Because the result of the formula, $68,770, exceeds the amount secured by the lien, $59,151, the lien impairs the exemption.

2 The declaration does not appear by name on the docket; instead, it was filed as Balboa's Exhibit 2. It is, nonetheless, signed by the appraiser under penalty of perjury. It authenticates a copy of her appraisal, which is attached, and she declares in the declaration that based on her professional opinion, she estimates the value of the property as of June 1, 2018 at $485,000.

5.	18-90411-D-13 DEF-5	ROGER/STORMIE SCHUMACHER	MOTION TO CONFIRM PLAN 12-14-18 [77]

6.	18-90738-D-13 DCJ-2	LARRY FOSTER	MOTION TO CONFIRM PLAN 12-11-18 [27]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because the plan provides for the secured claim of 2005 Residential Trust 3-2 at $0 based on the alleged value of the collateral securing the claim, whereas the debtor has failed to file a motion to value collateral, as required by LBR 3015-1(i).

For the reason stated, the motion will be denied by minute order. No appearance is necessary.

7. 15-90860-D-13 FRANCINE BOCKMON-ORTIZ MOTION TO MODIFY PLAN
MLA-1 12-17-18 [41]

8. 17-90869-D-13 KAY PARKER MOTION TO RECONSIDER
18-9016 1-1-19 [30]
DEOL V. PARKER

ADVERSARY PROCEEDING CLOSED:
12/19/2018

Tentative ruling:

This is the motion of the defendant in this unlawful detainer proceeding, Kay Parker ("Ms. Parker"), for reconsideration of this court's December 18, 2018 order (the "Order") remanding the action to the Stanislaus County Superior Court, from which Ms. Parker had earlier removed it. The plaintiff, Harminder Deol ("Deol"), has filed opposition and Ms. Parker has filed a reply. For the following reasons, the motion will be granted in part and the court will reconsider its ruling on the remand motion as follows.

Ms. Parker brings the motion pursuant to Fed. R. Civ. P. 59(e) and 60(b) "on the grounds that errors of fact and law were made in the Order and that manifest injustice would result if the Order were not amended or reversed." Defendant's Amended Memo., filed Jan. 1, 2019 ("Memo."), at 3:1-3. Ms. Parker's position is a bit ironic in that she has raised precisely the same issues in litigation in this court and the state court, and for the reasons stated below, her conduct in both venues suggests gamesmanship and forum shopping, albeit an unusual one in that Ms. Parker's litigation in the two courts has, since May 9, 2018, been simultaneous. On that date, she filed in this court an adversary complaint against Mid Valley Services, Inc. ("Mid Valley") and Deol, commencing AP No. 18-9005, to recover alleged estate property and money allegedly unlawfully taken from the chapter 13 estate, and for other relief. However, she failed to remove to this court Deol's unlawful detainer action then pending in the state court, although she alleged in defense of that action the same conduct by Mid Valley and Deol that she alleges here.

Ms. Parker removed the unlawful detainer action only after the state court had denied her motion to quash the summons and the day before the case was set for trial, on a trial date that had already been continued at Ms. Parker's request. And on December 21, 2018, three days after this court granted Deol's motion to remand the unlawful detainer action back to the state court, Ms. Parker filed a new complaint in the state court against Mid Valley and Deol to quiet title, to set aside an allegedly void trustee's deed, and for injunctive, declaratory, and other relief. Deol has now removed that action to this court, where it has been assigned AP No. 19-9004.

The court remains persuaded, as set forth in its ruling underlying the Order, that Ms. Parker filed her notice of removal of the unlawful detainer action nine months after the time it was due under Fed. R. Bankr. P. 9027(a)(3), and but for a single issue, the action should be remanded on that ground alone. Ms. Parker made a deliberate decision to attempt to quash the summons in the state court rather than removing the action to this court. She then allowed the case to languish in the state court for many months in an "On Hold" status, both before and after May 9, 2018, based apparently on the state court's uncertainty about the automatic stay issue. And after the state court finally denied Ms. Parker's motion to quash, seven months after it was filed, she waited another three months before filing her notice of removal. This conduct and Ms. Parker's alleged reasons for it do not constitute excusable neglect such as would be grounds for extending the time for filing the notice of removal. See Fed. R. Bankr. P. 9006(b)(1).

The court does not condone the delays Ms. Parker has caused in the case. However, Ms. Parker now having briefed the issues to a limited degree, it appears there is a threshold issue that must be determined by this court before the unlawful detainer action can be remanded. Although neither party has raised the issue, this court has exclusive jurisdiction to determine whether Mid Valley violated the automatic stay when it foreclosed on Ms. Parker's property, as she contends. See Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081-1083 (9th Cir. 2000). If it did, the foreclosure sale was void. Id. at 1082, citing Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). The consequences that would flow from such a determination will be addressed at a later time, if necessary.

The issue has been on the table for a year, yet none of the parties has brought it to the fore. Therefore, the court will construe this motion as a motion for a determination as to whether the foreclosure sale was conducted in violation of the stay. Mid Valley will be a necessary party to that determination; thus, the court will construe the motion as having been filed in Ms. Parker's adversary proceeding against Mid Valley and Deol, AP No. 18-9005, and the new adversary proceeding created by Deol's removal of Ms. Parker's complaint filed in December in the state court, AP No. 19-9004. The court will set a short briefing schedule. The court intends to allow two weeks for Ms. Parker to brief the issue – again, limited solely to the question of whether the automatic stay was violated, then two weeks for Deol and Mid Valley to file opposition, and one week for Ms. Parker to file a reply.

The record makes clear the issue is purely legal in nature. Further, in unlawful detainer proceedings, lengthy evaluations regarding issues of title are generally not permitted.[1] As the facts regarding the foreclosure sale do not appear to be in dispute, the court does not expect discovery will be necessary on this very discrete issue. The remaining issues raised in the unlawful detainer action are purely matters of state law. Accordingly, once the issue of the alleged stay violation has been determined, this court will determine whether to remand the remainder of the action to the state court.

The court will hear the matter.

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1 [C]laims regarding title to the property are not generally litigated in an unlawful detainer proceeding. One exception to the rule . . . is found in California Code of Civil Procedure § 1161a, governing the right of possession by a party initiating an unlawful detainer proceeding after obtaining title at a nonjudicial foreclosure sale. The exception allows for "a narrow and sharply

focused examination of title."

Eden Place, LLC v. Perl (In re Perl), 811 F.3d 1120, 1128-29 (9th Cir. 2016) (citations omitted).

9.	18-90671-D-13 DCJ-2	WILLIAM LEMMONS	MOTION TO CONFIRM PLAN 12-17-18 [56]

10.	18-90173-D-13 JAD-1	GREGORY/KAREN MARIANI	MOTION TO REFINANCE 1-3-19 [30]

11.	10-90384-D-13 18-9007 BUCHANAN ET AL V. GAAR-TODESCHINI	BRYAN/SHERRI BUCHANAN	MOTION FOR ENTRY OF DEFAULT JUDGMENT 12-28-18 [47]

Tentative ruling:

This is the plaintiffs' motion for entry of a default judgment. The defendant has not filed an opposition specific to this motion. However, within the time permitted for filing opposition, she filed a motion to set aside the default entered against her, which is also on this calendar. As the court intends to grant that motion, the plaintiffs' motion for entry of a default judgment will be denied. The court will hear the matter.

12.	18-90741-D-13 AP-1	DONNA DIXON	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 11-13-18 [16]

Final ruling:

This objection has been resolved by stipulated order entered January 23, 2019. As such, the objection is removed from calendar as moot. No appearance is necessary.

13.	18-90842-D-13 RDG-2	CHARLES SMITH	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 1-7-19 [24]
14.	18-90842-D-13 RAS-1	CHARLES SMITH	OBJECTION TO CONFIRMATION OF PLAN BY CARRINGTON MORTGAGE SERVICES, LLC 1-8-19 [30]
15.	18-90457-D-13 DCJ-2	MAHESH GANDHI	CONTINUED MOTION TO CONFIRM PLAN 9-11-18 [30]
16.	18-90862-D-13 RDG-1	JACOB KAISER	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 1-7-19 [16]

17. 18-90876-D-13 LEONARDO/MELISSA JOSEF — OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER
RDG-1 — 1-7-19 [24]

18. 10-90384-D-13 BRYAN/SHERRI BUCHANAN — MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT
18-9007
BUCHANAN ET AL V. GAAR-TODESCHINI — 1-14-19 [51]

Tentative ruling:

This is the defendant's motion to set aside the default that has been entered against her. The plaintiffs have filed opposition. For the following reasons, the motion will be granted.

A default may be set aside under Fed. R. Civ. P. 55(c), incorporated herein by Fed. R. Bankr. P. 7055, for good cause. The factors the court is to consider are: "(1) whether [the defendant] engaged in culpable conduct that led to the default; (2) whether [the defendant] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the plaintiff]." Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004). As indicated by the use of the word "or," these factors are in the disjunctive; a motion to set aside a default or default judgment may be denied if any one of them is present. Id. at 926.

However, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." United States v. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010). "Put another way, where there has been no merits decision, appropriate exercise of district court discretion under Rule 60(b) requires that the finality interest should give way fairly readily, to further the competing interest in reaching the merits of a dispute." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). Id.

By their complaint, the plaintiffs, who are also the debtors in the reopened chapter 13 case in which this adversary proceeding is pending, seek an order finding the defendant in contempt for violating Bankruptcy Code §§ 105, 362, and 524; finding her in contempt for violating 15 U.S.C. § 1692(f) (the Fair Debt Collection Practices Act ("FDCPA")); awarding damages, costs, and attorney's fees pursuant to Bankruptcy Code § 362(k) and for contempt of court; not allowing the defendant to place the debt with any credit reporting agencies; and requiring that the defendant "remove the plaintiff's name from the deed of trust." Plaintiffs' Complaint, filed May 29, 2018, at 3:8.

As to some of these claims for relief, it appears from the face of the complaint that the defendant has a meritorious defense and that setting aside the default would not prejudice the plaintiffs. There are no allegations the defendant

took any action in violation of the automatic stay or that she is or was a debt collector, within the meaning of the FDCPA. See Newfield v. City Nat'l Bank, NA, 2017 U.S. Dist. LEXIS 46027, *7 (C.D. Cal. 2017). Relief under Bankruptcy Code § 105 is not available because other substantive remedies are available under the Code for the defendant's alleged conduct. See Willms v. Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002); Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 14 (9th Cir. BAP 2002). The request that the court "not allow [the defendant] to place the debt under any credit report agencies" is a request for injunctive relief with no allegations to suggest the defendant has ever done so or threatened to do so. The court will not grant prospective injunctive relief on speculation. Finally, the request that the defendant be ordered to remove the plaintiffs' name from the deed of trust is unintelligible – there is no allegation regarding a deed of trust in the complaint.

The only apparently viable claim in the complaint is the allegation that the defendant violated the plaintiffs' discharge by not removing a lien that had been determined in their chapter 13 case to have a value of $0. The plaintiffs allege they discovered the lien was still of record through a title search on June 1, 2017, when they were trying to refinance their mortgage. The complaint states the plaintiffs' attorney wrote the defendant about the matter on July 28, 2017; a copy of the letter is filed as an exhibit to the complaint. The complaint does not allege whether or not the defendant took steps to remove the lien between that date and the date the plaintiffs filed their complaint, on May 29, 2018. It merely states the defendant's failure to remove the lien is a willful violation of the discharge injunction and that her continued attempts to collect the debt, which are not alleged in any further detail, also constitute willful violations. In fact, the plaintiffs do not request an order declaring the defendant's lien to be void.

The defendant's declaration supports a finding that she may have a meritorious defense. She states she had a judgment against the plaintiffs; that her attorney "apparently filed a lien based on the judgment in Calaveras County" (Defendant's Decl., filed Jan. 14, 2019, at 1:23-24); that the plaintiffs filed a motion to value her collateral, which was granted; and that "[she] did not know [she] had to do anything." Id. at 1:26. She adds, "I was unaware that the lien was causing a problem for Plaintiffs. I thought it was cleared by their bankruptcy." Id. at 1:26-27. The defendant goes on:

> I received a letter from Plaintiffs' attorney David Foyil early August 2017. I did not know what I had to do. I knew my lien was no good. I made numerous attempts over a period of several weeks to contact Mr. Foyil by telephoning his number (209) 223-5363. I received no reply. In early March I was contacted [by] Mr. Martin Adiwibowo of Timios Title Company. He told me the release should have been done in the bankruptcy. I did not know what Mr. Mitchell [the defendant's attorney, who had since died] had done. Timios Title Company prepared a Release of Lien for me to sign. I signed it with a notary acknowledgment on March 23, 2018. I mailed it back to Timios Title Company. I thought that would clear the lien. I relied on the title company. I then received this lawsuit from Mr. Foyil's office. I did not understand why Mr. Foyil or Mr. Mitchell did not take care of this in 2010.

Id. at 2:1-10.

The plaintiffs' opposition barely addresses this testimony. The plaintiffs' attorney testifies he mailed the July 28, 2017 letter to the defendant hoping to

settle the matter and that she failed to respond. The plaintiffs do not mention the defendant's testimony that she signed and returned a release of lien to a title company in the spring of 2018. They do not allege they took any other steps regarding the lien during the ten months between the time their attorney wrote to the defendant and the time he commenced this adversary proceeding. Thus, the record suggests the defendant may have a meritorious defense.

The record also suggests there would be little, if any, prejudice to the plaintiffs from setting aside the defendant's default. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered.'" TCI Group, 244 F.3d at 701 (citations omitted). Here, there was a ten-month delay from the writing of the letter to the filing of the complaint, a three and a half-month delay from the time the summons and complaint were served to the time the plaintiffs requested entry of the defendant's default in the proper format, and another three-month delay between the time the default was entered and the time the plaintiffs filed their motion for entry of default judgment (also on this calendar). In fact, the plaintiffs did not seek entry of a default judgment until a week after the defendant had filed her answer. (They acknowledged in their motion the answer had been served, but "past the statutory deadline." Plaintiffs' Motion for Default Judgment, filed Dec. 28, 2018, first ¶ 7.) These delays support the conclusion that the plaintiffs will not be prejudiced by setting aside the default and requiring them to proceed on the merits.

Finally, the court is not persuaded the defendant engaged in any culpable conduct that led to her default being entered. "[I]n this context . . . a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.' We have 'typically held that a defendant's conduct was culpable . . . where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.'" Mesle, 615 F.3d at 1092. "[I]t is clear that simple carelessness is not sufficient to treat a negligent failure to reply as inexcusable, at least without a demonstration that other equitable factors, such as prejudice, weigh heavily in favor of denial of the motion to set aside a default." Id. at 1092-93 (citations omitted).

The plaintiffs make much of the defendant's apparent disinclination to accept service of process – their attorney has taken the liberty of characterizing a process server's testimony to accuse the defendant of lying about her identify; the attorney's testimony is hearsay and conclusory. He also states he spoke with the defendant on August 3, 2018, and she "indicated to me that she did not have funds to pay for damages." Foyil Decl., filed Jan. 21, 2019, ¶ 4. He "sent a request for a financial statement [from] her." Id. This testimony does not support a conclusion the defendant's failure to file a timely answer resulted from an intention to take advantage of the plaintiffs, interfere with judicial decisionmaking, or otherwise manipulate the legal process. The court concludes that all three factors the court is to consider weigh in favor of setting aside the default. Accordingly, the motion will be granted.

The court will hear the matter.