



**UNITED STATES BANKRUPTCY COURT
Eastern District of California**

Chief Judge Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: JANUARY 30, 2024
CALENDAR: 10:30 A.M. ADVERSARY PROCEEDINGS

Unless otherwise ordered, all matters before Chief Judge Fredrick E. Clement shall be heard simultaneously: (1) **IN PERSON** in Courtroom 28, (2) via **ZOOMGOV VIDEO**, (3) via **ZOOMGOV TELEPHONE**, and (4) via **COURTCALL**.

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1. Review the [Pre-Hearing Dispositions](#) prior to appearing at the hearing.
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PRE-HEARING DISPOSITION INSTRUCTIONS

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. However, non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [23-23523](#)-A-7 **IN RE: THE RETREAT AT ROYAL GREEN, LLC.**
[23-2098](#) [CAE-1](#)

STATUS CONFERENCE RE: NOTICE OF REMOVAL
11-27-2023 [[1](#)]

FABROS ET AL V. THE RETREAT AT
ROYAL GREEN LLC ET AL
UNKNOWN TIME OF FILING/ATTY. FOR PL.

Final Ruling

At the suggestion of Chapter 7 trustee Nikki Farris, the status conference is continued to March 26, 2024, at 10:30 a.m. Not later than March 14, 2024, through counsel, trustee Farris shall file a status report. A civil minute order shall issue.

2. [23-23124](#)-A-7 **IN RE: KEVIN BASSHAM**
[23-2103](#) [FEC-1](#)

ORDER TO SHOW CAUSE
12-20-2023 [[7](#)]

STRATEGIC FUNDING SOURCE, INC.
V. BASSHAM
RESPONSIVE PLEADING

Final Ruling

The Order to Show Cause is discharged without sanctions imposed. The Corporate Disclosure Statement has been filed. ECF no. 9. A civil minute order shall issue.

3. [20-23457](#)-A-7 **IN RE: ERNESTO/MARILYN PATACSIL**
[20-2167](#) [FEC-5](#)

STATUS CONFERENCE RE: COMPLAINT
11-2-2020 [[1](#)]

CABARDO ET AL V. PATACSIL ET
AL
HECTOR MARTINEZ/ATTY. FOR PL.

Final Ruling

The status conference is continued to May 7, 2024, at 10:30 a.m. Not later than 14 days prior to the continued status conference, the parties shall file a joint status report. A civil minute order shall issue.

4. [23-22657](#)-A-13 **IN RE: ARIANA MORENO**
[23-2073](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
11-21-2023 [\[13\]](#)

MORENO V. AMERICAN EXPRESS
NATIONAL BANK
ELLIOT GALE/ATTY. FOR PL.

If both sides accept the tentative rulings on items no. 4 and no. 5, by agreement of counsel in advance of the hearing, neither party need appear, and the court will adopt each tentative ruling.

Tentative Ruling

The status conference will be continued to March 12, 2024, at 10:30 a.m.

5. [23-22657](#)-A-13 **IN RE: ARIANA MORENO**
[23-2073](#) [DW-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
12-22-2023 [\[20\]](#)

MORENO V. AMERICAN EXPRESS
NATIONAL BANK
DENNIS WINTERS/ATTY. FOR MV.
RESPONSIVE PLEADING

If both sides accept the tentative rulings on items no. 4 and no. 5, by agreement of counsel in advance of the hearing, neither party need appear, and the court will adopt each tentative ruling.

Tentative Ruling

Motion: Dismiss, Rule 12(b)(6)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Denied

Order: Civil minute order

This is defendant American Express National Bank's motion to dismiss an adversary proceeding for violation of the stay. Fed. R. Civ. P. 12(b)(6), incorporated by Fed. R. Bankr. P. 7012. The plaintiff debtor opposes the motion.

FACTS

As plead the facts are not complicated. Prior to bankruptcy Ariana Moreno ("Moreno") had a revolving line of credit with American Express National Bank ("AMEX Bank"). Am. Compl. ¶ 13, ECF No. 13.

On August 8, 2023, Moreno filed a Chapter 13 bankruptcy. *Id.* at ¶ 14. Unaware that Moreno had filed bankruptcy AMEX Bank withdrew \$636.00 from Moreno's bank account. *Id.* at ¶¶ 17, 20. Starting on August 21, 2023, Moreno, acting through counsel, informed AMEX Bank that she had filed bankruptcy and demanded the return of the withdrawn funds. *Id.* at ¶ 18. Realizing its situation, AME Bank attempted to negotiate a settle of its predicament, e.g., post-petition withdrawal of funds. On several occasions, defendant AME Bank, acting through counsel asked the plaintiff to withhold litigation and asked for additional time to respond to the demand to return funds. It then attempted to condition return of the funds on settlement of any stay violation action.

On September 6, 2023, Defendant's paralegal alleged that the funds were taken prior to AMEX receiving notice of the bankruptcy but *AMEX had 'authorized' the return of the funds 'in resolution of this matter' and asked if such an agreement was acceptable.*

The same day, September 6, 2023[,] Plaintiff's counsel responded and noted his confusion over the term 'authorized' given that AMEX had an affirmative duty to return the funds promptly and *it appeared AMEX was leveraging the return of the funds as a settlement tactic.* Counsel for Plaintiff then requested to follow up once the funds had been returned.

Counsel for [AMEX Bank] (rather than a paralegal) responded and walked back the prior statement and stated that they were waiting on the check to be issued.

Counsel for Plaintiff responded the same day September 6, 2023[,] and noted the discrepancy between the two emails regarding the return of funds and requested an update as soon as the funds had been returned.

Id. at ¶¶ 32-35 (emphasis added).

The funds were returned to Moreno on September 14, 2023. *Id.* at ¶ 46.

PROCEDURE

This adversary proceeding followed. Plaintiff's complaint pleads a violation of the stay. 11 U.S.C. § 362(a)(3), (a)(6), (k). Am. Compl., ECF No. 13. The complaint seeks actual damages (including emotional distress), punitive damages, and attorneys' fees. *Id.* at 7:18-20. The defendant has moved to dismiss for failure to state a cause of action. Mot. to Dismiss, ECF No. 20.

JURISDICTION

This court has jurisdiction. 28 U.S.C. §§ 1334(a)-(b), 157(b); see also General Order No. 182 of the Eastern District of California. Jurisdiction is core. 28 U.S.C. § 157(b)(2)(A), (O). Plaintiff has consent to the entry of final orders and judgments. Am. Compl. ¶ 12, ECF No. 13; defendant has not yet signaled their consent, or

lack thereof, to final orders and judgments. Fed. R. Bankr. P. 7012(b) (requiring consent or lack of consent in responsive pleadings). 28 U.S.C. § 157(b)(3); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1945-46 (2015).

LAW

THE STAY

The law of the stay is well-settled. Section 362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

...

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title...

11 U.S.C. § 362(a)(3), (a)(6).

Section 362(k) provides one of the enforcement mechanisms for these protections. "Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k).

The key to a § 362(k) action is the "willful" nature of the defendant's actions. As one commentator stated it:

8:876 Willful" violation required: Section 362(k) damages are awardable only for a "willful" violation of the stay. [11 USC § 362(k)]

(1) Establishing "willfulness"

(a) [8:877] Specific intent to violate stay not required: A violation of the automatic stay is "willful" if the defendant knew of the automatic stay and defendant's acts were intentional. It need not be shown that defendant knew its acts constituted a violation of the stay. *In re Pace* (9th Cir. 1995) 67 F3d 187, 191; *In re Bloom* (9th Cir. 1989) 875 F2d 224, 227; see also ¶ 8:882]

"Once a creditor knows that the automatic stay exists, the creditor bears the risk of all intentional acts that violate

the automatic stay regardless of whether the creditor means to violate the automatic stay." [In re *Campion* (9th Cir. BAP 2003) 294 BR 313, 318]

1) [8:878] Compare—actual knowledge of stay required: On the other hand, absent actual knowledge or notice of the stay, a violation of the stay is not willful and hence 11 USC § 362(k) damages are not awardable. [In re *Abrams* (9th Cir. BAP 1991) 127 BR 239, 244—creditor's repossession of vehicle without knowledge debtor filed bankruptcy not "willful" (but refusal to release vehicle after receiving notice of stay constituted willfulness; ¶ 8:877)]

a) [8:879] Knowledge inferred from circumstances: Knowledge of the stay may be inferred from knowledge of the petition. Thus, where a creditor knew the debtor had filed for bankruptcy, the creditor's violation of the stay is properly characterized as "willful" despite absence of affirmative knowledge of the stay. [In re *Reed* (BC D UT 1981) 11 BR 258, 275]

...

Such "informal" notice, as well as other types of actual notice (such as reading about the bankruptcy in the press or learning of it from a third party), can constitute notice sufficient for a finding of willfulness. [See *In re Abrams* (9th Cir. BAP 1991) 127 BR 239, 240-244—creditor who repossessed debtor's vehicle postpetition (without knowledge of bankruptcy filing) willfully violated stay by refusing to return vehicle after being notified of debtor's bankruptcy by fax from debtor's attorney]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Liability for Violating the Stay* § 8:876-88 (Rutter Group December 2023).

Good faith is not a defense. The same source noted:

"Good faith" no defense: Whether the defendant believed in good faith that it had a right to the property or a right to take the action is irrelevant to the issue of willfulness. [See *In re Aleckna* (3rd Cir. 2021) 13 F4th 337, 343—"a creditor's 'good faith' belief that he is not violating the automatic stay provision is not determinative of willfulness" (internal quotes omitted); *In re Ozenne* (9th Cir. BAP 2006) 337 BR 214, 221; *In re Pace* (9th Cir. 1995) 67 F3d 187, 191; *In re Goodman* (9th Cir. 1993) 991 F2d 613, 618]

Id. at § 8:882.

After 2021, passive retention of a debtor's property does not violate the stay described in § 362(a)(3), (a)(6). *City of Chicago, Illinois v. Fulton*, 592 U.S. 154, 141 S. Ct. 585, 208 L. Ed. 2d 384 (2021) (11 U.S.C. § 362(a)(3); *In re Stuart*, 632 B.R. 531, 538-41, 544 (9th Cir. BAP 2021). Post *Fulton*, an affirmative act by the

creditor is required. *Id.* Acts that merely maintain the status quo are insufficient; rather, the creditor must perform an act "to enhance its position." *Stuart*, 632 B.R. at 544, citing *Margavitch v. Southlake Holdings, LLC (In re Margavitch)*, 2021 WL 4597760 * 7 (Bankr. M.D. Pa. 2021).

RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory"); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering the sufficiency of the complaint, the court may consider the factual allegations in the complaint itself and some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). *See generally, Wagstaff Practice Guide: Federal Civil Procedure Before Trial, Attacking the Pleadings, Motions to Dismiss* § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

Plausibility means that the plaintiff's entitlement to relief is more than possible. *Twombly*, 550 U.S. at 570 (the facts plead "must

cross the line from conceivable to plausible"); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11 Cir. 2017). Allegations that are "merely consistent" with liability are insufficient. *Iqbal*, 556 U.S. at 662; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, Wagstaff, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility, and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

DISCUSSION

Considered as a whole, AMEX Bank's actions constitute an act, within the meaning of 11 U.S.C. § 362(a)(3), (a)(6) and *Fulton*, and give rise to an inference of willfulness. The "act," as described by *Fulton*, is comprised of: (1) AMEX Bank's withdrawal of funds, Am. Compl. ¶ 17, ECF No. 13; and (2) AMEX Bank's refusal to return those funds only if Moreno agreed that that she would take no further action against the bank for the post-petition withdrawal. Am. Compl. ¶ 32 ("AMEX had 'authorized' the return of the funds 'in resolution of the matter' and asked if such an agreement was acceptable"). AMEX Bank's situation is not like *Fulton* or *Stuart*, where the creditor was merely the passive beneficiary of its pre-petition actions. Rather, at least as plead, AMEX Bank affirmatively acted, i.e., withdrew funds, Am. Compl. ¶ 17, ECF No., 13, and did so post-petition. Moreover, the inference of refusal to return funds unless Moreno agreed not pursue her rights, enhanced their position vis-à-vis the underlying revolving account debt.

Moreover, AMEX Bank acted willfully. While the initial withdrawal was made without knowledge of the stay, not later than August 21, 2023, AMEX Bank was informed of the applicability of the stay. Am. Compl. ¶ 18, ECF No. 13. It acted intentionally when it: (1) withdrew the funds; and (2) attempted to settle the possible stay violation in exchange for return of the funds taken. For each of these reasons, Moreno has stated a plausible cause of action under 11 U.S.C. § 362(k).

CONCLUSION

The motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

American Express National Bank's motion has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that not later than February 20, 2024, defendants American Express National Bank shall file an answer to the First Amended Complaint, ECF No. 13; and

IT IS FURTHER ORDERED that no enlargements of time shall be granted without leave of court and, if the defendant fails to file a timely answer, the plaintiff shall forthwith and without delay shall seek the entry of defendant's default.

6. [21-22976](#)-A-7 **IN RE: THE DESIGN BUILD COMPANY, LLC**
[23-2061](#) [FEC-1](#)

ORDER TO SHOW CAUSE
12-20-2023 [\[41\]](#)

HOPPER V. CURRIER ET AL

Final Ruling

The respondents have not filed opposition to the Order to Show Cause. The default of the respondent is entered. The sua sponte motion to strike the answer, ECF No. 39 is granted as to Pepper Shack LLC only. The plaintiff shall seek entry of default against defendant Pepper Shack LLC. A civil minute order shall issue.