

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY

DATE: FEBRUARY 13, 2019

CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

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

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [18-11240](#)-A-7 **IN RE: DIANA XAVIER**
[18-1083](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-19-2018 [[1](#)]

MANFREDO V. RIVER-X ET AL
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.
ORDER, ECF NO. 16

No Ruling

2. [17-14774](#)-A-7 **IN RE: BILLY MCCARTY**
[18-1064](#) [UST-1](#)

MOTION FOR SUMMARY JUDGMENT
12-20-2018 [[12](#)]

U.S. TRUSTEE V. MCCARTY
ROBIN TUBESING/ATTY. FOR MV.

Final Ruling

Motion: Summary Judgment on Claim for Denial of Discharge

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

Disposition: Granted

Order: Prepared by moving party

The U.S. Trustee moves for summary judgment on a claim for denial of debtor Billy McCarty's chapter 7 discharge. No opposition has been filed. For the reasons discussed, the court will grant the motion.

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co.*, 732 F. Supp. 2d 1107, 1110 (D. Haw. 2010).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and

supporting materials—including facts considered undisputed—show the movant is entitled to it.” Fed. R. Civ. P. 56(e)(3).

The U.S. Trustee has moved the court for summary judgment on a claim for denial of Billy McCarty’s discharge under § 727(a)(6)(A). The U.S. Trustee has attested to facts showing that Billy McCarty failed to obey a lawful order of the court, entered on March 2, 2018 in the underlying chapter 7 case, requiring Mr. McCarty to turn over to the chapter 7 trustee 100% of the 2017 state and federal tax refunds. See Case No. 17-14774-A-7, ECF No. 34. The U.S. Trustee has produced undisputed and unrefuted evidence that Mr. McCarty has not complied with the March 2 order, in spite of him knowing about the order. The turnover order was entered pursuant to a stipulated motion by the trustee and the debtor. Case No. 17-14774, ECF No. 32. And, the trustee has made further attempts to enforce the turnover order, including sending a demand letter to Mr. McCarty in June 2018. ECF No. 15. Such efforts by the trustee have been to no avail. The trustee has not received the refunds from Mr. McCarty. *Id.*

Mr. McCarty has also failed to file a response to this motion. Because Mr. McCarty has failed to properly address the facts asserted by the U.S. Trustee, such facts are deemed undisputed by the court. See Fed. R. Civ. P. 56(e)(2). The trustee’s complaint to deny discharge, moreover, was filed within the deadline for filing objections to discharge, as required by Fed. R. Bankr. P. 4004(a) and an order extending that deadline until September 25, 2018. Case No. 17-14774, ECF No. 46. The instant complaint was filed on September 25, 2018. ECF No. 1.

Under § 727(a)(6)(A), grounds for denial of discharge exist if “the debtor has refused . . . to obey any lawful order of the court, other than an order to respond to a material question or to testify.”

Here, the undisputed facts show that Billy McCarty knew of the March 2, 2018 turnover order and that despite further specific requests by the trustee for turnover of the refunds, Mr. McCarty has not produced the refunds and complied with the March 2 order. Accordingly, the U.S. Trustee is entitled to the relief requested under 11 U.S.C. § 727(a)(6)(A).

3. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#) [SSN-5](#)

AMENDED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF
REMOVAL
1-16-2019 [[242](#)]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
STEVEN NEWBURGH/ATTY. FOR MV.

Tentative Ruling

Motion: Dismiss Adversary Proceeding

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

Disposition: granted without prejudice

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

DISCUSSION

Piggybacking on Sallyport Commercial Finance, LLC ("Sallyport") and Idemitsu Apollo Corporation's ("Idemitsu") motions to dismiss, Happy Rock Merchant Solutions, LLC ("Happy Rock") moves to dismiss all causes of action against it contained in the Second Amended Complaint, September 5, 2018, ECF # 131. Finding that the reasons for dismissing Sallyport and Idemitsu apply with equal force to Happy Rock, the motion will be granted. Civil Minute, October 31, 2018, ECF # 182, 183.

For the sake of consistency, the motion will be granted without prejudice. *Id.* But since the plaintiffs elected not to file an amended complaint, and instead rested on the remaining allegations of the Second Amended Complaint, the court will not set a deadline for filing an amended complaint. Rather, should the plaintiffs wish to file a Third Amended Complaint they will need to seek leave under Rule 15. Fed. R. Civ. P. 15, *incorporated by* Fed. R. Bankr. P. 7015.

CIVIL MINUTE ORDER

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

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Happy Rock Merchant Solutions, LLC's motion has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion to dismiss is granted without prejudice as to all counts of the Second Amended Complaint, September 5, 2018, ECF # 131; and

IT IS FURTHER ORDERED that plaintiffs may not file a Third Amended Complaint absent consent of all opposing parties or leave of court.