UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

February 25, 2014 at 9:32 A.M.

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1. 13-25503-B-7 SUNRISE VISTA MORTGAGE CORPORATION
13-2262 U.S. BANK N.A. V. SUNRISE VISTA MORTGAGE CORPORATION

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
11-15-13 [18]

Tentative Ruling: None.

2. 13-20645-B-7 ROBERT/TRISTINA KITAY
13-2126 GONZALEZ V. KITAY ET AL
DEG-1

AMENDED MOTION FOR ENTRY OF DEFAULT JUDGMENT
1-28-14 [89]

Tentative Ruling: The motion is continued to April 8, 2014, at 9:32 a.m., to be heard after the hearing on the defendants' motion to set aside entry of default and default judgment and for dismissal of the adversary proceeding.

The court is aware that on February 7, 2014, the plaintiff filed an amended notice of hearing (Dkt. 104) which purports to continue the motion to March 11, 2014. However, merely filing an amended notice of hearing is not sufficient to obtain a continuance; continuances must be approved by the court. See LBR 9014-1(j).

The court will issue a minute order.

3. 09-36633-B-13 ROBERT/PAMALA PAULSON
13-2353 PAULSON ET AL V. BANK OF AMERICA, N.A.
RWF-2

MOTION FOR ENTRY OF DEFAULT JUDGMENT
1-22-14 [13]

Tentative Ruling: The motion is denied without prejudice.

By this motion, the plaintiff debtors seek entry of default judgment against the defendant, "Bank of America, N.A., a.k.a. Bank of America Home Loans" that the lien of the second deed of trust on the debtors'

residence located at 1620 Mahaffey Court, Folsom, California (the "Property") is void and of no further force or effect. Additionally, the debtors seek an award of attorney's fees and costs and an award of a $500.00 penalty against the defendant for the defendant's alleged failure to comply with Cal. Civ. Code § 2941(d).

The debtors allege that the lien of the second deed of trust is void and of no further force or effect as to the Property because they obtained an order in their parent chapter 13 bankruptcy case which valued the Property pursuant to 11 U.S.C. § 506(a) and fixed the defendant's secured claim at $0.00, that they completed all payments under their chapter 13 plan and that they received a discharge. These are the required elements for "lien stripping" or "Lam stripping" as set forth in In re Lam, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

However, a review of the court's records in the debtors' parent chapter 13 case shows that the order valuing the Property which the debtors obtained is not effective as to the named defendant, Bank of America, N.A. The motion to value collateral, filed on September 10, 2009, in the debtors' bankruptcy case (Dkt. 13) asserted that second of trust in the Property was held by "Bank Of America Home Loans." The motion to value collateral was served on the following:

1.) GE Money Bank, c/o Recovery Management Systems Corp., at 25 SE 2nd Avenue #1120, Miami, Florida 33131-1605, via first class mail to the attention of Ramesh Singh.

2.) BAC Home Loans Servicing, LP c/o McCalla Raymer LLP, at 1544 old Alabama Road, Roswell, Georgia 30076, via first class mail to the attention of "Bankruptcy Department."

3.) Bank of America Home Loans, at PO Box 5170, Simi Valley, California, 93062-5170, via certified mail to the attention of a manager. This address corresponds to an address for BAC Home Loans Servicing, LP.

4.) Bank of America Home Loans, c/o "CT Corporation Agent for Service of Process, at 818 W. 7th Street, Los Angeles, California 90017, via certified mail. The court takes judicial notice that the address is the address for CT Corporation System.

The foregoing service shows that the debtors treated the entity "Bank of America Home Loans" as one and the same as BAC Home Loans Servicing LP in connection with the motion to value collateral. The court's order granting the motion to value collateral, entered on October 15, 2009, stated that $0.00 of "Bank of America Home Loans'" claim secured by the second deed of trust on the Property was a secured claim and the balance of its claim was an unsecured claim.

Now, in connection with the instant adversary proceeding and the motion for entry of default judgment, the debtors assert that "Bank Of America Home Loans" is an a.k.a. of Bank of America, N.A. However, there is no evidence in the court's records that Bank of America, N.A., as opposed to BAC Home Loans Servicing, LP was ever

properly served with the motion to value collateral. As a result, the order granting the motion to value collateral is void as to Bank of America, N.A. Therefore, the court cannot at this time enter default judgment against Bank of America, N.A. until such time as the debtors obtain an order valuing the Property and fixing the secured claim of Bank of America, N.A. at $0.00 in the parent bankruptcy case (assuming that Bank of America, N.A. is in fact the holder of the promissory note secured by the deed of trust on the Property).

The court will issue a minute order.

4. 13-33397-B-7 BERNADETTE
13-2361 LIABEUF-ROSENTHAL SNM-1
LIABEUF-ROSENTHAL V. KEYBANK NATIONAL ASSOCIATION

MOTION FOR ENTRY OF DEFAULT JUDGMENT
1-17-14 [14]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied without prejudice.

By this motion the debtor seeks a determination of dischargeability of a debt based on a student loan obligation owed to KeyBank, N.A. in the amount of approximately $32,867.68, pursuant to 11 U.S.C. § 523(a)(8).

To determine whether the debtor is entitled to entry of default judgment, the court looks to the averments in her complaint (Dkt. 1). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977). However, the motion must also demonstrate that the debtor is entitled to such a finding as a matter of law. Pursuant to LBR 9014-1(d)(5), each motion shall cite the legal authority relied upon by the filing party. "[E]ntry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." In re Meyer, 373 B.R. 84, 88 (B.A.P. 9th Cir. 2007).

In this case, the debtor has not shown that she is entitled to judgment as a matter of law. The motion does not address any legal authority setting forth the standard for a determination of dischargeability pursuant to § 523(a)(8). The motion merely sets forth the circumstances of service of the summons and complaint and the defendant's failure to respond thereto. Accordingly, the motion is denied without prejudice.

The court will issue a minute order.

5. 11-46760-B-7 BRIAN/RANDI THIEL
12-2073 BRR-4
TIBBETTS ET AL V. THIEL ET AL

MOTION TO DISMISS BRIAN THIEL
1-27-14 [84]

Tentative Ruling: The motion is granted in part. The adversary proceeding is dismissed as to defendant Brian Thiel pursuant to Fed. R. Civ. P. 12(b)(1), without prejudice to the plaintiffs' continued prosecution of the non-bankruptcy claims underlying their requests for nondischargeability alleged in the adversary complaint. Except as so ordered, the motion is denied.

The court dismisses the adversary claims for a determination of nondischargeability of alleged debts owed by Brian Thiel to the plaintiffs because those claims are moot. As set forth in the motion, a judgment denying Brian Thiel's discharge in his parent bankruptcy case was entered against him in adversary proceeding no. 12-2284-B on January 7, 2014. The plaintiffs' claims for nondischargeability against Brian Thiel are therefore moot. See In re Burrell, 415 F.3d 994 (9th Cir. 2005).

The court will issue a minute order.

6. 13-35303-B-7 SHARON/JASON SHERMAN
JRR-1

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
1-23-14 [15]

Tentative Ruling: The debtors' opposition is sustained in part and overruled in part. The motion to dismiss is granted in part and denied in part. The motion to dismiss is denied as to joint debtor Sharon Saffron Sherman ("Sharon"). The motion to dismiss is granted as to joint debtor Jason Toby Sherman ("Jason") and Jason's chapter 7 bankruptcy case is dismissed. Except as so ordered, the motion is denied.

Although the motion requests dismissal of the case as to both debtors, the court notes, as pointed out by the debtors in their opposition, that Sharon attended the first meeting of creditors under 11 U.S.C. § 341(a) on January 9, 2014, and that the meeting of creditors was successfully concluded as to her. Therefore, the motion is denied as to Sharon.

As to Jason, the debtors' opposition gives no satisfactory answer as to Jason's failure to attend either the initial meeting of creditors on January 9, 2014, were the continued meeting of creditors on January 23, 2014. The opposition states that Jason was unable to attend "for the reasons stated in his Declaration," but no such declaration accompanies the opposition or is otherwise filed on the docket of the case. Therefore, the motion is granted as to Jason and his case is dismissed.

The court will issue a minute order.

7. 13-32529-B-7 GARY/DEBRA CAMPBELL MOTION TO SELL
HSM-4 2-3-14 [67]

Tentative Ruling: The motion is granted in part. Pursuant to 11 U.S.C. § 363(b)(1), the chapter 7 trustee is authorized to sell the estate's interest in the assets (the "Property") described in the Purchase and Sale Agreement for Certain Store Assets filed as Exhibit "A" to the motion (the "Agreement"), pursuant to the Agreement, in an "as is" condition to the debtors for $13,400.00, without deduction of the debtors' exemption in the Property. The debtors may offset their claimed exemption of $3,400.00 in the Property against the purchase price. The net proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

Although both the Agreement and the motion represent that the purchase price for the Property is $10,000.00, the court construes the actual purchase price for the Property to be $13,400.00, based on the trustee's proposed credit for the debtors' claimed exemption in the event that overbidders appear at the hearing.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The court will issue a minute order.

8. 13-20440-B-7 JOHN/GAIL SIMS MOTION TO SELL
JRR-2 1-22-14 [39]

Tentative Ruling: The motion is dismissed without prejudice.

The trustee has not shown that the motion is ripe for adjudication. By this motion, the trustee seeks authorization to short-sell real property located at 40775 Leeward Road, The Sea Ranch, California (the "Property"). The trustee seeks to sell the Property for $485,000.00. The debtors' sworn Schedule D (Dkt. 1 at 29-30) shows that the Property is encumbered by a deed of trust in favor of Wells Fargo Home Mortgage with a balance of $730,000.00. In support of the motion, the trustee has submitted a short sale approval letter from Wells Fargo Home Mortgage (Dkt. 42 at 12), which describes short sale terms that are consistent with those set forth in the motion.

However, HSBC Bank USA, N.A. As Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-through Certificates, Series 2007-11 ("HSBC") has filed a statement of conditional non-opposition to the motion in which HSBC asserts that it is the holder of the

promissory note secured by the deed of trust on the Property. In support of its conditional non-opposition, HSBC has submitted a copy of the promissory note (Dkt. 45 at 3-6), which was originally made for the benefit of Wells Fargo Bank, N.A., but which is indorsed in blank. HSBC has also submitted a copy of the deed of trust (Dkt. 45 at 7-25) and a Corporate Assignment of Deed of Trust dated June 20, 2012, which shows that the beneficial interest under the deed of trust was transferred to HSBC prior to the date of the filing of the petition in this bankruptcy case. In light of the foregoing, and in light of HSBC's statement that its non-opposition is "contingent upon its secured claim being paid off in full or in accordance with any approval as authorized by [HSBC]," the court is not persuaded that a short sale approval letter from "Wells Fargo Home Mortgage" is sufficient evidence of a short sale transaction that is ripe for court approval.

The absence of an actual short sale transaction for the court to approve means that the court lacks jurisdiction over the matter because the motion lacks justiciability. The justiciability doctrine concerns "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Under Article III of the United States Constitution, federal courts only hold jurisdiction to decide cases and controversies. The party asserting the claim, in this case, the trustee, has the burden of producing evidence to establish that the issues are ripe. McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936); see also Signature Properties Intern. Ltd. Partnership v. City of Edmond, 310 F.3d 1258, 1265 (10th Cir. 2002). With no evidence that the holder of the obligation secured by the deed of trust on the property consents to the short sale, no case or controversy within the meaning of Article III exists.

The court will issue a minute order.

9. 13-20644-B-7 PERRY YUEN
ET-5

MOTION FOR COMPENSATION BY THE LAW OFFICE OF EASON & TAMBORNINI, ALC FOR MATTHEW R. EASON, DEBTOR'S ATTORNEY(S), FEES: $11,070.00, EXPENSES: $0.00
1-17-14 [389]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is removed from the calendar. The movant withdrew the motion on February 19, 2014 (Dkt. 399).

10. 13-36144-B-7 BLG-1 — MIGUEL/ELIZABETH IZURIETA — MOTION TO COMPEL ABANDONMENT 1-23-14 [11]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to March 25, 2014, at 9:32 a.m.

As the personal property for which the debtor seeks abandonment (the "Property") is of inconsequential value and benefit to the estate due in part to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

11. 13-34046-B-7 RAC-3 — JASON/SHANNON WONG — MOTION TO COMPEL ABANDONMENT 1-20-14 [47]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 554(b), the real property located at 8029 Halkeep Way, Sacramento, California (the "Property") is deemed abandoned by the estate. Except as so ordered, the motion is denied.

The debtors alleged without dispute that the Property had a value of $126,960.00 on the date of the filing of the petition, that the Property is encumbered by secured debt with an aggregate balance of $106,348.94 and that the debtors have claimed an exemption of $20,797.33 in the Property pursuant to Cal. Civ. Proc. Code § 703.140(b)(5). The Real Property is of inconsequential value and benefit to the estate. 11 U.S.C. § 554(b).

The court will issue a minute order.

12. 13-23353-B-7 JB-1 — ALLEN-SIMMONS HEATING & SHEET METAL CO. — MOTION TO EMPLOY GABRIELSON & COMPANY AS ACCOUNTANT(S) 2-11-14 [51]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

13. 12-40758-B-7 JUAN/CISELY HERNANDEZ — MOTION TO AVOID LIEN OF CACH, LLC
HLG-2 — 2-11-14 [34]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

14. 12-40758-B-7 JUAN/CISELY HERNANDEZ — MOTION TO AVOID LIEN OF CASABELLA HOMEOWNERS ASSOCIATION
HLG-3 — 2-11-14 [39]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is denied without prejudice.

The debtors seek an order avoiding a judicial lien purportedly held by Casabella Homeowners Association (the "Creditor") to the extent that it impairs a claim of exemption to which they would be entitled in their real property located at 36365 Cinzia Lane, Winchester, CA 92596 (the "Property"). To avoid a judicial lien pursuant to 11 U.S.C. § 522(f), the debtors must show the following:

> First, there must be an exemption to which the debtor "would have been entitled under subsection (b) of this section." 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be either a nonpossessory, nonpurchase-money security interest in categories of property specified by the statute, 11 U.S.C. § 522(f)(2), or be a judicial lien. 11 U.S.C. § 522(f)(1).

In re Mohring, 142 B.R. 389, 392-93 (Bankr. E.D. Cal. 1992), aff'd, 24 F.3d 247 (9th Cir. 1994).

Here, the debtors have failed to establish the existence of a judicial lien impairing their claim of exemption in the Property. Although the debtors claim to have attached as Exhibit "C" to their motion (Dkt. 42, p.7) a copy of the abstract of judgment in favor of the Creditor, what is actually attached is proof of recordation of an abstract of judgment in favor of Cach, LLC, which is related to a matter heard elsewhere on today's calendar. The debtors have provided no other evidence that the Creditor either holds an abstract of judgment against the debtors or that it was properly recorded. As such, the debtors have failed to establish the requirements set forth in 11 U.S.C. § 522(f) and In re Mohring, and the motion is denied without prejudice.

The court will issue a minute order.

15. 13-35560-B-7 ERACLIO ANGULO
SLC-1

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT 341 MEETING OF CREDITORS
1-8-14 [13]

Tentative Ruling: The debtor's opposition is sustained. The chapter 7 trustee's motion to dismiss is denied. The deadline for the trustee to object to the debtor's discharge pursuant to 11 U.S.C. § 727 or to file a motion under Federal Bankruptcy Rule 1017(e) to dismiss this case pursuant to 11 U.S.C. § 707(b) is extended to April 6, 2014.

The trustee filed this motion in response to the debtor failing to appear at the duly noticed first meeting of creditors held on January 8, 2014. The debtor states in his opposition that his failure to appear was due to him having to attend a funeral for a family member in Mexico. Since that time, both he and his counsel have appeared at the continued meeting of creditors held on February 5, 2014. The court construes the trustee's motion as a request to dismiss this case pursuant to 11 U.S.C. § 707(a)(1) for cause, including unreasonable delay by the debtor that is prejudicial to creditors. As the moving party, the trustee carries the burden of persuasion. In re Hickman, 384 B.R. 832, 841 (9th Cir. BAP 2008). Here, because the debtor has appeared at the continued meeting of creditors and the trustee has failed to explain what, if any, prejudice the creditors suffered from the debtor failing to appear at the first meeting, the court finds that the trustee has failed to satisfy her burden of proving the existence of cause to dismiss this case under 11 U.S.C. § 707(a). As such, the motion to dismiss is denied.

The trustee's request for an extension of the deadline to object to the debtor's discharge pursuant to 11 U.S.C. § 727 or to file a motion under Federal Bankruptcy Rule 1017(e) to dismiss this case pursuant to 11 U.S.C. § 707(b) is granted. When a request for an enlargement of these deadlines is made before the time has expired, as it was here, the court may enlarge time for cause shown. Fed. R. Bankr. P. 1017(e) and 4004(b). Here, the court finds that the debtor's failure to appear at the first duly noticed meeting of creditors constitutes sufficient cause for an extension of the aforementioned deadlines to April 6, 2014.

The court will issue a minute order.

16. 13-33683-B-7 CHARLES/DORIS WITTHAR
NBC-1

MOTION TO REDEEM PERSONAL PROPERTY
1-13-14 [20]

Tentative Ruling: The motion is denied without prejudice.

The motion is denied without prejudice because the debtors have failed to establish that the subject property can be redeemed as a matter of law. By this motion, the debtors seek to redeem a 2004 Ford Ranger (VIN 1FTYR44E34PB35072) (the "Vehicle") from a lien held by secured creditor Members First Credit Union. Pursuant to 11 U.S.C. § 722, "an individual debtor may...redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title..." 11 U.S.C. § 722. Here, the debtors have not claimed the Vehicle as exempt

under 11 U.S.C. § 522, and the Vehicle has not been abandoned under 11 U.S.C. § 554. The court acknowledges that the trustee filed a report of no distribution on November 20, 2013. However, the filing of a report of no distribution does not serve as an abandonment of property of the estate for the purposes of 11 U.S.C. § 554. The debtors have failed to file a motion to compel abandonment of the Vehicle under 11 U.S.C. § 554(b), and 11 U.S.C. § 554(c) is only creates an abandonment at the time of the closing of the case.

The court will issue a minute order.

17. 13-35490-B-7 SL-1 — QUTONI MILIKINI — MOTION TO COMPEL ABANDONMENT 2-11-14 [12]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is continued to March 25, 2014, at 9:32 a.m.

As the property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtor's claims of exemption pursuant to Federal Bankruptcy Rule 4003(b)(1) has expired.

The court will issue a minute order.

18. 13-34976-B-11 TMP-3 — CORINNE HUTTLINGER — MOTION TO VALUE COLLATERAL OF FANNIE MAE 2-10-14 [42]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter is set to be heard on March 25, 2014, at 9:32 a.m. and is therefore removed from today's calendar.

19. 12-37961-B-11 FXR-44 — ZF IN LIQUIDATION, LLC — MOTION FOR COMPENSATION BY THE LAW OFFICE OF LOWENSTEIN SANDLER, LLP FOR JEFFREY D. PROL, CREDITOR COMM. ATY(S), FEES: $22,655.40, EXPENSES: $0.00 1-28-14 [2452]

Tentative Ruling: The motion is granted to the extent set forth herein. The application is approved on an interim basis in the amount of

$113,277.00 in fees and $3,064.03 in costs, for a total of $116,341.03, for the period of August 1, 2013, through and including November 30, 2013, payable as a chapter 11 administrative expense. The debtor is authorized to pay any unpaid interim fees and costs from funds segregated for this purpose pursuant to the Order Establishing Interim Fee Application and Expense Reimbursement Procedure for Professionals Employed by the Estate under Section 327 entered on November 13, 2012 (Dkt. 288). Except as so ordered, the motion is denied.

On October 8, 2012, the debtor filed a chapter 11 petition. By order entered on November 9, 2012 (Dkt. 267), the court authorized employment of Lowenstein Sandler, LLP, as counsel for the Official Committee of Unsecured Creditors (the "Committee"). The applicant now seeks compensation for services for the period of August 1, 2013, through and including November 30, 2013. For purposes of this interim application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court notes that Article III, Section 3.3 of the debtor's chapter 11 plan (Dkt. 1971), confirmed by order entered December 12, 2013 (Dkt. 2403), now governs professional compensation. In relevant part, this provision provides that "each party seeking an award by the Bankruptcy Court of Professional Fees: (a) must file its final application for allowance of compensation for services rendered and reimbursement of expenses incurred through the Effective Date on or before the Administrative Claims Bar Date..." Art. III, § 3.3 (Dkt. 1971, p.21). The Administrative Claims Bar Date "shall mean for Administrative Claims other than 503(b)(9) Claims, the first Business Day that is thirty (30) days after the Effective Date pursuant to which Creditors must file a request for payment of any Administrative Claim that arose between October 8, 2012 and the Effective Date, for which notice shall be provided by Proponent in the Notice of Effective Date." Art. I, § 1.11 (Dkt. 1971, p.10). In this case, it appears that there is not yet an effective date as a notice of effective date has not been filed under the procedures set forth in Article VIII, Section 8.2 of the plan (Dkt. 1971, p.57) and the ninetieth (90th) day after the confirmation date [December 12, 2013 (Dkt. 2403) + 90 days = March 12, 2014] has not yet arrived.

The court will issue a minute order.

20.	11-42866-B-11	DAVID ZACHARY AND ANNMARIE SNORSKY	MOTION FOR COMPENSATION FOR SITKOFF/O'NEIL ACCOUNTANCY CORPORATION, ACCOUNTANT(S), FEES: $1,200.00, EXPENSES: $0.00 1-15-14 [330]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on an interim basis in the amount of $1,200.00 in fees and $0.00 in expenses, for a total of $1,200.00, for the period of October 5, 2012, through and including May 31, 2013 payable as a chapter 11 administrative expense. Except as so ordered, the motion is denied.

By order entered on October 3, 2012 (Dkt. 223), the court authorized the debtors-in-possession to retain the applicant as their accountant, with an effective date of employment of July 1, 2012. The applicant seeks compensation for services rendered and costs incurred during the period of October 5, 2012, through and including May 31, 2013. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

21. 09-46575-B-13 ROMAN BANAKH
13-2106 LDD-3
BANAKH V. BANK OF AMERICA, N.A.

AMENDED MOTION FOR ENTRY OF DEFAULT JUDGMENT
1-16-14 [44]

Tentative Ruling: The motion is granted in part. Judgment by default will be entered in favor of the plaintiff, Roman Banakh (the "Plaintiff"), declaring that the deed of trust (secondary lien) dated December 8, 2006, and executed by the Plaintiff in favor of Bank of America, N.A. (The "Defendant"), as beneficiary, recorded on June 19, 2007, in the official records of the Sacramento County Recorder's Office, Book No. 20070619 (the "Deed of Trust"), and encumbering the real property and improvements which has the address of and is commonly known as 864 Marsh Creek Drive, Sacramento, CA 95838 (the "Property") is void and of no further force or effect as a lien or encumbrance on the Property. The Plaintiff's request for leave to file a separate, properly noticed and served application for attorney's fees and costs is dismissed. Except as so ordered, the motion is denied.

The facts alleged in the complaint (Dkt. 1) (the "Adversary Complaint") include the following. On December 4, 2009, the Plaintiff filed a voluntary bankruptcy petition under chapter 13. The Plaintiff was the owner of the Property as of the petition date. On the petition date the Property had a value of $170,000.00 and was encumbered by two deeds of trust: (1) a first deed of trust held by Washington Mutual (as predecessor of JPMorgan Chase Bank, N.A.) in the amount of approximately $182,432.00; and (2) the Defendant's Deed of Trust with a value of approximately $198,420.00. Pursuant to this court's order entered February 12, 2010 (Dkt. 35), the value of the Property as of the petition date was $170,000.00, the Defendant's secured claim was $0.00, and the entirety of the Defendant's claim was an unsecured claim. The Plaintiff confirmed a chapter 13 plan providing for payment of the Defendant's secured claim of $0.00 and providing for the Defendant's unsecured claim. The Plaintiff completed that plan and obtained a chapter 13 discharge. The Plaintiff alleges that the Defendant has ignored his requests to reconvey or extinguish the Deed of Trust.

The court finds that the Plaintiff has in the Adversary Complaint sufficiently pled his claim for relief for the extinguishment of the Deed of Trust. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977).

The Plaintiff's request for leave to file a separate, properly noticed and served application for attorney's fees and costs is dismissed because such leave is not required. Requests for attorney's fees and costs are governed by the requirements of Fed. R. Bankr. P. 7054 (incorporating the requirements of Fed. R. Civ. P. 54), the Local Bankruptcy Rules and the Eastern District Local Rules. If the Plaintiff makes a motion for attorney's fees and costs, the Plaintiff is required to establish that this adversary proceeding is an action "on the contract," as that term is defined by the relevant controlling authorities, under California Civil Code § 1717.

The court will issue a minute order on the motion. Counsel for the Plaintiff shall submit a form of judgment that conforms to the ruling and complies with Fed. R. Bankr. P. 7054.

22. 12-33980-B-7 LARRY WALLER
GR-2

MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S), FEES: $9,067.50, EXPENSES: $128.60
2-4-14 [141]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

23. 13-25191-B-7 AJAY CHANDRA
13-2204 BKM-1
CENTRAL VALLEY CONCRETE, INC. V. CHANDRA

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT AND/OR MOTION FOR DETERMINATION OF NON-DISCHARGEABILITY OF DEBT AGAINST AJAY CHANDRA
1-6-14 [29]

Tentative Ruling: The motion is granted in part. Judgment by default will be entered in favor of plaintiff Central Valley Concrete, Inc. (the "Plaintiff"), against defendant Ajay Chandra (the "Defendant") in the amount of $646,783.51. Said amount shall be deemed non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2). The Plaintiff's claim under 11 U.S.C. § 523(a)(4) is dismissed pursuant to Fed. R. Civ. P. 12(b)(6) with leave given to the Plaintiff to amend. On or before March 18, 2014, the Plaintiff shall file and serve on the Defendant, consistent with the requirements of Fed. R. Bankr. P. 7004, a first amended complaint which amends its claim under § 523(a)(4). Nothing in this ruling grants leave to amend to add additional parties or additional claims. If the Plaintiff does not file and serve a compliant first amended complaint on or before March 18, 2014, the Defendant may submit a proposed order dismissing the 11 U.S.C. § 523(a)(4) claim without leave to amend. The Plaintiff's claim under 11 U.S.C. § 523(a)(7) is dismissed pursuant to Fed. R. Civ. P. 12(b)(6) without leave to amend. Except as so ordered, the motion is denied.

The facts alleged in the complaint (Dkt. 1) (the "Adversary Complaint") include the following. The Defendant was hired as the controller and later the chief financial officer for the Plaintiff in 2003 and was

continuously employed by the Plaintiff until June 2007. On June 5, 2007, the Plaintiff was contacted by the Bank of Stockton regarding certain deposits the Defendant allegedly made into his personal bank account. An internal investigation of these transactions led the Plaintiff to conclude that the Defendant had deposited into his personal bank account over $1.1 million in corporate funds between 2004 and 2007 without the Plaintiff's prior authorization. The Defendant allegedly admitted to a check writing and endorsement scheme whereby he made twenty (20) separate deposits into his personal bank account. After the internal investigation concluded, the Plaintiff filed a criminal complaint with the Merced County Sheriff's Department. A subsequent criminal trial, case no. MF-46340, in which the Defendant pled no contest, resulted in a conviction of embezzlement and a prison sentence of four years and four months. The criminal court issued an order of restitution in favor of the Plaintiff in the amount of $1,511,482.92. On June 6, 2007, the Plaintiff filed a civil complaint in the Merced County Superior Court, case no. 150369, alleging, among other things, conversion. The case was later transferred to the San Joaquin County Superior Court, case no. 39-2008-00187429-CU-FR-STK, and a summary judgment motion on the conversion cause of action was granted against the Defendant. The civil judgment against the Defendant totaled $1,424,102.60. The Plaintiff asserts that, to date, it has been able to recover $777,369.09 from the Defendant.

The court finds that the Plaintiff has in the Adversary Complaint sufficiently pled its claim for relief under 11 U.S.C. § 523(a)(2). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977).

Regarding the remaining claims, it is established in the Ninth Circuit that a default judgment is inappropriate where the claimant does not in his pleadings establish his claim or right to relief even if all of the allegations in the complaint are taken as true. In such a situation, the complaint should be dismissed for failure to state a claim. Moore v. United Kingdom, 384 F.3d 1079, 1090 (9th Cir. 2004).

The following sets forth the legal standard for evaluating whether a complaint states a claim upon which relief may be granted:

> The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984).

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal,129 S .Ct 1937, 1954

(2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007) ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do'"). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). Furthermore:

> A dismissal under Rule 12(b)(6) may be based on the lack of cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988)...the Court is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.' Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); accord W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Furthermore, courts will not assume that plaintiffs 'can prove facts which [they have] not alleged, or that the defendants have violated . . . laws in ways that have not been alleged.' Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D. Cal. 2007).

If a complaint is dismissed under Rule 12(b)(6), "[the] court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc), citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other words, the court is not required to grant leave to amend when an amendment would be futile. Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)).

Under the above standard, the court dismisses the Plaintiff's claim under 11 U.S.C. § 523(a)(4) with leave granted to amend the claim. 11 U.S.C. § 523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Here, the court finds that the Plaintiff has failed to establish in the Adversary Complaint facts sufficient to a finding that the Defendant acted as a "fiduciary" to the Plaintiff as that term is defined under 11 U.S.C. § 523(a)(4). "The term 'fiduciary' in the bankruptcy discharge context includes technical and express trusts." In re Starzer, 331 B.R. 444, 446 (Bankr. E.D.Cal. 2005). The Adversary Complaint's allegations that the Defendant was "entrusted by Plaintiff with financial management responsibilities," "Defendant manipulated Plaintiff's trust and confidence," and "Defendant owed fiduciary duties including a duty of loyalty, a duty of care, a duty of full disclosure, a duty to be truthful, and a duty not to commit fraud upon Plaintiff," without more, do not establish a fiduciary relationship between the parties under the authorities interpreting 11 U.S.C. § 523(a)(4).

The court acknowledges the Plaintiff's attempts in the instant motion to add an allegation of embezzlement to the Adversary Complaint by asking the court to give preclusive effect to the prior criminal and civil court judgments. However, as noted above the purpose of a motion for entry of default judgment pursuant to Fed. R. Civ. P. 12(b)(6) is to test the adequacy of the allegations set forth in the Adversary Complaint and determine whether those particular facts create plausible grounds for the relief sought in the Adversary Complaint. In that respect, the court is constrained to the factual allegations and claims for relief set forth in the Adversary Complaint. The evidence presented with the motion can only lend support to facts and claims for relief already alleged and cannot add allegations to the Adversary Complaint. Here, the second claim for relief in the Adversary Complaint does not seek a court determination of embezzlement. The court cannot make a finding for a claim for relief not set forth in the Adversary Complaint. As such, the Plaintiff's claim for relief under 11 U.S.C. § 523(a)(4) is dismissed with leave to amend.

The Plaintiff's claim under 11 U.S.C. § 523(a)(7) is dismissed pursuant to Fed. R. Civ. P. 12(b)(6) without leave to amend. 11 U.S.C. § 523(a)(7) excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit..." 11 U.S.C. § 523(a)(7). The court finds that allowing the Plaintiff to amend this claim would be futile as there is no evidence to suggest that the Plaintiff is, or ever was, a governmental unit. The allegation of additional facts will not change that fact.

Finally, the court's ruling deems $646,783.51 non-dischargeable pursuant to 11 U.S.C. § 523(a)(2). The court acknowledges that the instant motion requests that a much higher amount, $872,136.63, be deemed non-dischargeable. However, pursuant to Fed. R. Civ. P. 54(c), "a default judgment must not differ in kind from, *or exceed in amount*, what is demanded in the pleadings." Fed. R. Civ. P. 54(c) (emphasis added). The first claim for relief in the Adversary Complaint seeks a determination that $646,783.51 be deemed non-dischargeable and, by operation of Fed. R. Civ. P. 54(c), a higher amount cannot be sought in the instant motion.

The court will issue a minute order.

24. 11-36395-B-7 GURJIT JOHL
GJH-4

MOTION FOR COMPENSATION BY THE LAW OFFICE OF HUGHES LAW CORPORATION FOR GREGORY J. HUGHES, TRUSTEE'S ATTORNEY(S), FEES: $23,707.50, EXPENSES: $0.00
2-4-14 [104]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's general counsel, Hughes Law Corporation ("HLC"), in the amount of $23,060.50 in fees and expenses for services rendered during the period of July 17, 2011,

through and including February 4, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On June 30, 2011, the debtor commenced this bankruptcy case by filing a voluntary petition under chapter 7. By order entered on October 23, 2013 (Dkt. 67), the court authorized the trustee to retain HLC as general bankruptcy counsel in this case. HLC's employment was effective September 4, 2011. The fees and costs requested are approved in full, with the exception of $647.00 for services incurred prior to the effective date of employment. This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). Therefore, the total award is reduced to $23,060.50.

The court finds that, as set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.