

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

February 27, 2014 at 1:30 p.m.

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1.	<u>11-47181</u> -E-7	ARTHURO AGUILAR	MOTION TO DISMISS ADVERSARY
	<u>13-2391</u>	SAC-1	PROCEEDING
	SCOTT V. AGUILAR, JR.		1-10-14 [6]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Plaintiff, Chapter 7 Trustee, and Office of the United States Trustee on January 10, 2014. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

**The court's tentative decision is to grant the Motion to Dismiss Adversary Proceeding.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant Arturo Aguilar, Jr. ("Defendant"), moves the court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) as incorporated by Federal Rule of Bankruptcy Procedure 7012(b). Defendant argues that the complaint fails to state a claim upon which relief can be granted because the bar date for filing the complaint was April 22, 2013 and Plaintiff had actual knowledge of the bankruptcy filing but did not file this action until December 20, 2013.

Defendant states he disputes the allegations set forth in the Complaint. On May 20, 2008, Defendant filed a chapter 13 bankruptcy which was dismissed on July 7, 2009, Case no. 08-26661 (hereinafter "Case One"). Bankr. E.D. Cal. Case No. 08-26661 Dckts. 1, 57. On August 3, 2009, Defendant filed a chapter 13 bankruptcy which was dismissed on October 14, 2011, Case no. 09-36333 (hereinafter "Case Two"). Bankr. E.D. Cal. Case No. 09-36333 Dckts. 1, 62. On November 18, 2011, Defendant filed a chapter 13 bankruptcy which was converted to Chapter 7 on January 11, 2013 and

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discharged on April 30, 2013, Case no. 11-47181 (hereinafter "Case Three"). Bankr. E.D. Cal. Case No. 11-47181 Dckts. 1 and 80.

Defendant states that pursuant to Federal Rule of Bankruptcy Procedure 4007(c), the bar date for filing the complaint was set for April 22, 2013. Bankr. E.D. Case No. 11-47181 Dckt. 65.

On March 28, 2012, David Scott, Plaintiff ("Plaintiff") filed suit against Defendant in Sacramento County Superior Court regarding the same matter in this Adversary Proceeding. Defendant states that on September 7, 2012, Counsel for Plaintiff filed a Case Management Statement confirming that Defendant is in bankruptcy and that a Motion for Relief would be filed establishing that he had notice of Case Three. Defendant states that the proof of service indicates that the attorneys representing Plaintiff were served.

On December 20, 2013, Plaintiff filed this adversary proceeding against Defendant, despite the fact that the alleged claim was automatically discharged pursuant to 11 U.S.C. § 523(c)(1).

#### **PLAINTIFF'S OPPOSITION**

Plaintiff opposes dismissal of this adversary complaint. Plaintiff states that he did not have time to file an adversarial complaint in the Chapter 13 case and did not have notice of Debtor's *Ex Parte* Conversion of the case to a Chapter 7.

Plaintiff states he appears on each notice from each bankruptcy at the address of 1971 Fisher Lane, Woodland, California, ("Fisher Address") but he has not lived at this address since late 2006. Plaintiff states he lives at 1523 Paradise Valley Drive, Woodland, California ("Paradise Address"). Plaintiff argues that he filed a notice regarding his new address in Case No. 08-26661, Case One. Plaintiff states Debtor did not serve him at the correct address in the most recent bankruptcy case.

Plaintiff states that the notice of conversion was also served at his prior address, not his current address.

Plaintiff states that when the Notice of Bankruptcy Filing was filed in the Sacramento Superior Court on August 8, 2012, he did not have notice. Plaintiff argues by August 2012 the first claims bar date had passed by almost 6 months.

#### **REPLY BRIEF**

Defendant argues that it is undisputed that Counsel for Plaintiff had actual notice of Case Three no later than September 7, 2012, 227 days before the bar date, because that is the day he filed the Management Statement confirming that Defendant was in bankruptcy. Defendant also states that it is undisputed that this adversary proceeding was filed on December 20, 2013, 242 days after the bar date.

Defendant states that if Plaintiff truly first learned of this case on September 7, 2012, he could have filed this adversary proceeding at that time. However, he filed it 469 days later.

Defendant argues that the "Notice" Plaintiff references regarding his changed address was in fact a handwritten certificate of service that references the Paradise Address and makes not other reference to an incorrect address. Defendant states this is not sufficient to put the parties on notice of a changed address.

Defendant further states that while Plaintiff claims he did not receive the notice of Case Three because the notice was sent to the Fisher Address and he had moved to the Paradise Address in 2006, he filed a Proof of Claim on June 19, 2008, two years later, stating that he was using both the Fisher Address and the Paradise Address. Defendant states that Plaintiff owned the Fisher property until September 13, 2010 when it was sold at a Trustee's sale.

#### **STANDARD**

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 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").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's 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. See *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.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the

form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

## DISCUSSION

Subject to certain exceptions, the filing of a Chapter 7 petition in bankruptcy permits a debtor to be discharged from all debts that have arisen before the date of the order for relief. See 11 U.S.C. § 727(b). 11 U.S.C. § 523 provides,

(a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt --

. . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Section 523(c) provides the mechanism for invoking these exemptions and states,

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge. .

. .

11 U.S.C. § 523 (a)(3)(B), provides debts are not discharged that are,

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

. . .

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, *unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.*

(emphasis added). The creditor must institute an action to have the debt declared exempt from the bankruptcy proceedings, provided that he has notice or actual knowledge that the debtor is in bankruptcy. *In re Price*, 871 F.2d 97, 98 (9th Cir. Cal. 1989).

Federal Rule of Bankruptcy Procedure 4007 sets forth the procedure for determination of the dischargeability of a debt, and requires the filing

of a complaint by the creditor. Subsection (c) provides the following time limitations,

(c) A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Here, Plaintiff admits to actual knowledge of Case Three no later than September 7, 2012, 227 days before the bar date, when he filed the Case Management Statement confirming that Defendant was in bankruptcy. Exhibit C, Dckt. 10. It is undisputed that this adversary proceeding was filed on December 20, 2013, 242 days after the bar date. Dckt. 1.

The court also finds it suspect that if Plaintiff "first" learned of this case on September 7, 2012, he waited over one year to file this adversary proceeding. The court agrees with Defendant that the "Notice" Plaintiff references regarding his changed address was in fact a handwritten certificate of service that references the Paradise Address and makes no other reference to an incorrect address. Exhibit 4, Dckt. 16. The court also finds suspect that Plaintiff claims he did not receive the notice of Case Three because the notice was sent to the Fisher Address and he had moved to the Paradise Address in 2006, but that he filed a Proof of Claim on June 19, 2008, two years later, stating that he was using both the Fisher Address (under "Name and address where notices should be sent") and the Paradise Address (under "Name and address where payment should be sent"). Bankr. E.D. Cal. Case No. 08-26661, Proof of Claim No. 3.

Based on the evidence presented, the court finds that Plaintiff had actual knowledge of Case Three, on or before September 7, 2012. Pursuant to Federal Rule of Bankruptcy Procedure 4007(c), the bar date for filing complaints was set for April 22, 2013. Bankr. E.D. Case No. 11-47181 Dckt. 65. Therefore, Plaintiff had sufficient notice to file this adversary proceeding and failed to do so by the deadline. Plaintiff's due process argument is without merit. When he and his attorney were notified of the bankruptcy he had sufficient opportunity to present his objections and failed to do so. Therefore, the Motion to Dismiss the Adversary is granted.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Adversary Proceeding filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and the

Adversary Proceeding Case No. 13-2391 is dismissed.

2. [11-47181-E-7](#) ARTHURO AGUILAR  
[13-2391](#)  
SCOTT V. AGUILAR, JR.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
12-20-13 [[1](#)]

Plaintiff's Atty: Gregory Wayland  
Defendant's Atty: Scott A. CoBen

Adv. Filed: 12/20/13  
Answer: none

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - fraud as fiduciary, embezzlement, larceny

Notes:

Continued from 2/19/14 to be heard in conjunction with motion to dismiss  
adversary proceeding.