

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

March 8, 2016 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.	12-33104-D-13	WILLIAM/LIA MCVICKER	CONTINUED MOTION TO MODIFY PLAN
	BSH-7		12-18-15 [107]

Tentative ruling:

This is the debtors' motion to confirm a modified chapter 13 plan. The trustee filed opposition and the court issued a tentative ruling. The court then continued the hearing to permit the debtors to supplement the record, which they have done. In response to the debtors' supplemental evidence, the trustee filed a reply. He continues to oppose the motion on the ground the plan is not proposed in good faith. For the following reasons, the motion will be denied.

With this motion, the debtors attempt for the third time in this case to reduce the dividend to unsecured creditors. Prior to the initial hearing on this motion, the court issued a tentative ruling detailing the significant changes the debtors have made to their Schedules I and J in response to the trustee's objections to their various proposed plans. (The trustee has objected to five plans proposed by the debtors over the course of the case.) In short, each time there appeared to be something that would increase the debtors' ability to fund their plan, the debtors made changes to their Schedules I and J and proposed instead to lower their plan

payment, and thus, the dividend. The frequency and consistency of those changes caused the court to conclude the debtors had not been candid and had not met their burden of demonstrating that the proposed plan was filed in good faith.

The debtors have since filed a supplemental declaration of debtor William McVicker, who testifies that when he reviewed the amended Schedule J prepared by his attorney when this motion was filed, in December of 2015, he failed to address two categories - home maintenance and transportation - that had caused the court concern when the debtors attempted to reduce the dividend two and one-half years ago. Mr. McVicker testifies that as a result, he failed to make appropriate changes to those two categories. Instead of \$934 for home maintenance, as listed on the amended Schedule J filed in December, based on the debtors' actual expenses in 2014 and 2015, as well as anticipated repairs to their septic system, the debtors' expected home maintenance expenses total \$765 per month. And instead of \$1,534 for transportation, based on actual 2014 and 2015 expenses, the correct figure is \$800. Thus, when they filed this motion seeking to reduce their plan payment and the dividend to unsecured creditors, the debtors estimated their expenses at a total of \$903 per month higher than they actually are. The debtors have now filed a further amended Schedule J to include these new figures.

The trustee replies that the plan is not proposed in good faith and that the plan payment should be increased by the \$903 per month by which the debtors overstated their expenses. (This will still result in a \$2,500 decrease in the plan payment from what the debtors were paying through November of 2015.) The court agrees with the trustee, and as the debtors have not agreed to this increase, the court concludes they have failed to meet their burden of demonstrating that the plan has been proposed in good faith.

The court will hear the matter.

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| 2. | 15-29315-D-13
RDG-1 | ANGELINA TORDESILLAS | CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY RUSSELL
D. GREER
1-15-16 [14] |
| | | | |
| 3. | 14-26718-D-13
RDG-2 | HELEODORO ALVAREZ | OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
1-25-16 [100] |

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. On February 23, 2016, the debtor filed an amended Schedule C. As a result of the filing of the amended Schedule C, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

4. 15-25727-D-13 SUSAN WALKER MOTION TO CONFIRM PLAN
PGM-2 1-21-16 [47]

5. 15-29738-D-13 JOSEPH CLARK OBJECTION TO CONFIRMATION OF
RDG-3 PLAN BY RUSSELL D. GREER
2-12-16 [47]

Final ruling:

This case was dismissed on February 23, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

6. 15-27844-D-13 KHEVIN TRAN MOTION TO CONFIRM PLAN
DAT-1 1-21-16 [41]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because the moving party served the motion, notice of hearing, and supporting declarations, but not the plan itself, as required by LBR 3015-1(d)(1).

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

7. 15-27844-D-13 KHEVIN TRAN MOTION TO AVOID LIEN OF STATE
DAT-2 FARM MUTUAL AUTOMOBILE INS. CO.
2-9-16 [53]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by State Farm Mutual Automobile Insurance Company ("State Farm") against real property that is the debtor's residence. The motion was noticed pursuant to LBR 9014-1(f)(1) and no opposition has been filed. However, that does not by itself entitle the debtor to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the

'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Thus, the court will consider the merits of the motion. As discussed below, the moving papers do not contain enough information to permit State Farm to determine whether to oppose the motion or the court to determine whether to grant it. Further, the motion is not accompanied by evidence establishing its factual allegations and demonstrating that the moving party is entitled to the relief requested, as required by LBR 9014-1(d)(6). For these reasons, the motion will be denied.¹

For a judicial lien to be avoidable, it must impair an exemption to which the debtor would otherwise be entitled. § 522(f)(1) of the Bankruptcy Code; In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992). Here, the moving papers include only the debtor's alleged value of the property, \$160,000, and the amount secured by the deed of trust against it, \$115,480. There is no indication of the amount of the debtor's exemption claim. Thus, the moving papers are insufficient to enable State Farm to determine whether to oppose the motion or the court to determine whether to grant it. In terms of evidence, the debtor testifies that "[t]here is zero (\$0.00) equity in my residence over and above the amount of the property's first deed of trust and my homestead exemption." Debtor's Decl., filed Feb. 9, 2016, at 2:11-12. As that testimony is conclusory, it is insufficient to demonstrate that the moving party is entitled to avoid the lien.

In addition, the debtor has filed as an exhibit a purported "amended" Schedule A, which is problematic for two reasons. First, although that schedule has elements in common with both the original and amended Schedules A actually filed with the court, it has never been filed with the court. Second, the exhibit states that "Edizon co signed for debtor's grand father to purchase the property. Title has both names. Debtors [sic] has 50% interest." There is another individual who is also a debtor on the judgment underlying State Farm's judgment lien - Harrison Tran. To the extent, if any, Harrison Tran is a co-owner of the property, the debtor would not be entitled to avoid the lien as the lien affects the interest of Harrison Tran in the property. (Under § 522(f)(1) of the Bankruptcy Code, the debtor may avoid the fixing of a judicial lien on "an interest of the debtor" in property in certain circumstances.) The court cannot determine from the moving papers or the record in this case whether Harrison Tran has an interest in the property.

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

¹ The court notes also that the proof of service is incomplete. It states only that true copies of the documents were "enclosed in a sealed envelope addressed as follows:." It does not indicate that postage was prepaid or that the envelopes were thereafter deposited in the United States Mail.

8. 13-20946-D-13 BOLIVAR/ARACELI VALLE
TOG-3

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA), N.A.
1-29-16 [65]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by Capital One Bank (USA) N.A. The motion will be denied because it is not accompanied by evidence establishing its factual allegations and demonstrating that the moving parties are entitled to the relief requested, as required by LBR 9014-1(d) (6).

"There are four basic elements of an avoidable lien under § 522(f) (1) (A): 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 ... a judicial lien. 11 U.S.C. § 522(f) (1)." Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added) (internal quotation marks omitted). In this case, the debtors have not claimed as exempt any interest in the property as against which they seek to avoid the lien. (The motion states that the property has been exempted on an amended Schedule C; however, neither the original nor the amended Schedule C includes any claim of exemption in the property.) Thus, they debtors have not established that they are entitled to relief under § 522(f) (1) (A).

As a result of this evidentiary defect, the motion will be denied by minute order. No appearance is necessary.

9. 13-20946-D-13 BOLIVAR/ARACELI VALLE
TOG-4

MOTION TO AVOID LIEN OF CACH,
LLC
1-29-16 [71]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by CACH, LLC. The motion will be denied because it is not accompanied by evidence establishing its factual allegations and demonstrating that the moving parties are entitled to the relief requested, as required by LBR 9014-1(d) (6).

"There are four basic elements of an avoidable lien under § 522(f) (1) (A): 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 ... a judicial lien. 11 U.S.C. § 522(f) (1)." Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added) (internal quotation marks omitted). In this case, the debtors have not claimed as exempt any interest in the property as against which they seek to avoid the lien. (The motion states that the property has been exempted on an amended Schedule C; however, neither the original nor the amended Schedule C includes any claim of exemption in the property.) Thus, the debtors have not established that they are entitled to relief under § 522(f) (1) (A).

As a result of this evidentiary defect, the motion will be denied by minute order. No appearance is necessary.

10. 15-27067-D-13 MARLENE DOUGLAS
PGM-3

MOTION TO CONFIRM PLAN
1-21-16 [58]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

11. 15-20069-D-13 SILHADI ALAMI
MSM-1

MOTION TO VALUE COLLATERAL OF
OCWEN LOAN SERVICING, LLC
2-4-16 [35]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of OCWEN Loan Servicing, LLC at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of OCWEN Loan Servicing, LLC's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

12. 15-28869-D-13 JOSE/ARACELY RAMIREZ
TOG-1

MOTION TO CONFIRM PLAN
1-14-16 [25]

13. 15-28974-D-13 DONALD/JANELLE CHANDLER
GMW-2

MOTION TO CONFIRM PLAN
1-12-16 [26]

14. 15-29786-D-13 JERROLD CLEMENS AND
LRR-1 SHAYLA TRAYLOR

MOTION TO VALUE COLLATERAL OF
BANK OF THE WEST
1-28-16 [16]

Tentative ruling:

This is the debtors' motion to value collateral of Bank of the West (the "Bank"); namely, a second position deed of trust against the debtors' residence. The Bank has filed opposition and the debtors have filed a reply. For the following reasons, the court intends to deny the motion.

The debtors filed the motion supported only by their own declaration as to the value of the property. They testified that at the time of filing this case (December 23, 2015), the residence was worth \$180,000. They added that the property is in need of significant repairs, including a new roof, gutters and downspouts, and a new heating and air system. They have obtained bids for these repairs from a roofing and construction company and a heating and air conditioning company, respectively, at \$21,930 for the roof, gutters, and downspouts, and \$9,200 for the heating and air conditioning system, for a total of \$31,130. As a result, the debtors testify, "the value of the property is lowered to \$148,870.00." Debtors' Decl., at 5-6. The debtors have filed copies of the bids as exhibits.

The debtors' calculation deducts the full cost of the repairs, \$31,130, from the debtors' estimated value, \$180,000, to arrive at the \$148,870 figure. This method of calculation assumes that the cost of repairs diminishes the value of a piece of real property by a dollar-for-dollar amount; thus, it also assumes the converse - that when repairs are made to a real property, the value of the property increases on a dollar-for-dollar basis. The debtors have submitted no evidence or argument to support this proposition. The debtors could have submitted such evidence with their motion or they could have obtained an appraisal prior to commencing this case or during the five weeks after they filed the case and before they filed this motion. They chose instead to "reserve[] the right if this motion is opposed to obtain a certified appraisal." Debtors' Mot., at 2:12.

This court's local rule requires a moving party to support his or her motion with "evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested." LBR 9014-1(d)(7). (All subsequent rule references are to LBR 9014-1.) Although the rule permits a moving party to file a reply to any opposition filed to an (f)(1) motion, it does not provide for the moving party to file additional evidence with the reply or to "reserve the right" to file additional evidence if opposition is filed. See (f)(1)©.

Although the rule requires a party opposing an (f)(1) motion to support the opposition with "evidence establishing its factual allegations" ((f)(1)(B)), this court generally allows a party opposing a motion to value collateral additional time to obtain an appraisal. In doing so, the court recognizes that the moving party has unilateral control of the amount of time both parties will have to obtain their evidence because the moving party chooses how long to wait before filing his or her motion, whereas the opposing party may have as little as 14 days to gather its evidence. Further, the party opposing an (f)(1) motion may file opposition without evidence if he or she believes the moving party's evidence is not sufficient to carry the day.

Here, the Bank filed opposition indicating it believes the value of the debtors' property is \$235,000, based on a broker's price opinion dated December 16, 2015, one week before the debtors filed this case. The Bank requests additional time to conduct discovery and obtain an appraisal. The debtors have filed a reply stating they do not oppose allowing the Bank 60 to 90 days to obtain an appraisal.

The Bank's broker's price opinion is hearsay, and thus, the court will not consider it. However, considering only the evidence submitted by the debtors with their motion, the court concludes the debtors have failed to submit admissible evidence sufficient to satisfy their burden of demonstrating that the value of the property is less than the amount due on the first deed of trust, alleged by the debtors to be \$172,604. The repair bids submitted as exhibits are hearsay, and therefore, inadmissible; there is no evidence that the value of a piece of real property is reduced dollar-for-dollar by the cost of needed repairs from what the value would be if the repairs were not needed; and the debtors' starting point for their valuation, \$180,000, is based on nothing more than the debtors' own conclusion, with no supporting facts. Although a debtor's opinion of value as the owner of the property is admissible, it often carries little weight where, as here, the debtor has no expertise in the field of real estate. This is especially true where the motion is opposed.

And in fact, as noted by the Bank, the debtors' credibility on that point is undermined by their original Schedule A, filed with their petition on December 23, 2015, where they listed the "current value" of the property as \$180,000. Where permitted to add "other information [they] wish[ed] to add about this item," the debtors stated, "Residence is in need of new Heating & Air System and a new roof." They did not indicate that the cost of the necessary repairs was not already factored into the \$180,000 figure or that that figure would need to be reduced in any amount to account for the repairs.

Because the debtors have failed to satisfy their burden of proof on the issue of value, the court intends to deny the motion. Thus, the court need not reach the alternate ground raised by the Bank - that the debtors may not value the Bank's secured claim because there is a third party who owns an interest in the property. The court will hear the matter.

15. 14-29592-D-13 JAMES/KATHERINE JONES MOTION TO MODIFY PLAN
JCK-2 2-1-16 [30]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

16. 15-27695-D-13 BENNETT AFARI
SJS-1

MOTION TO CONFIRM PLAN
1-19-16 [27]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

17. 15-29902-D-13 PETER HERRERA
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY TRUSTEE RUSSELL D.
GREER
2-12-16 [24]

18. 15-29805-D-13 ENEDINA CHAVEZ-WILLIAMS
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
2-12-16 [19]

19. 15-26914-D-13 DANIELLA WALKER
RDG-2

CONTINUED MOTION TO DISMISS
CASE
2-8-16 [29]

20. 16-20823-D-13 JOHN/KELLY COSTAMAGNA
FMB-1
FARMERS AND MERCHANTS BANK
OF CENTRAL CALIFORNIA VS.
MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION TO
CONFIRM TERMINATION OR ABSENCE
OF STAY
2-23-16 [9]
21. 15-29824-D-13 DANILO/HYDIE CRUDA
RDG-1
OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
2-12-16 [13]
22. 15-29824-D-13 DANILO/HYDIE CRUDA
AP-1
OBJECTION TO CONFIRMATION OF
PLAN BY WELLS FARGO BANK, N.A.
2-17-16 [16]
23. 15-29738-D-13 JOSEPH CLARK
JAB-3
OBJECTION TO CONFIRMATION OF
PLAN BY PROVIDENT SAVINGS BANK
2-17-16 [53]

Final ruling:

This case was dismissed on February 23, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

24.	10-50367-D-13 RDG-2	RAFAEL ESPINDOLA AND MERY ESPINOZA	CONTINUED MOTION TO DISMISS CASE 12-8-15 [69]
25.	10-50367-D-13 TOG-5	RAFAEL ESPINDOLA AND MERY ESPINOZA	MOTION TO VALUE COLLATERAL OF DITECH FINANCIAL, LLC 2-19-16 [81]
26.	15-29775-D-13 RDG-1	CLIFTON/CONCEPCION GAYOTIN	OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE RUSSELL D. GREER 2-12-16 [33]
27.	15-28899-D-13 RDG-1	DANA BUCKINGHAM	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 1-11-16 [19]

Final ruling:

Objection withdrawn by moving party. Matter removed from calendar.