UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, March 16, 2022
Place: Department B – Courtroom #13
Fresno, California

The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click here.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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, **and all parties will need to appear at the hearing unless otherwise ordered.** 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.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 AM

1. 17-14112-B-13 **IN RE: ARMANDO NATERA**
WEW-4

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-16-2022 [171]

RICHARD BARNES/MV
GABRIEL WADDELL/ATTY. FOR DBT.
WILLIAM WINFIELD/ATTY. FOR MV.
DEBTOR DISMISSED: 01/03/2018

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Richard Barnes as Trustee of the Richard Allen Barnes Trust Dated September 1, 2011 ("Movant") seeks to retroactively annul the automatic stay as of October 25, 2017 at 2:00 p.m. under 11 U.S.C. § 362(d)(1) and (d)(2) with respect to real property located at 2430 E. Orrland Avenue, Pixley, California ("Property"). Doc. #171.

Armando Natera ("Debtor") opposes annulment. Doc. #181.

Movant replied. Doc. #186.

This matter will be called and proceed as scheduled. The court is inclined to DENY the motion.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice 9014-1(f)(1) and will proceed as scheduled.

The parties request the court take judicial notice of certain documents from this bankruptcy proceeding, Case No. 17-14112 ("Bankr."), and the parties' related adversary proceeding, Adv. Proc. No. 20-01035 ("A.P."), as well as official records from Tulare County, and an appraisal report from Hopper Company retrospectively valuing Property at $110,000 as of October 25, 2017. Docs. #178; #182. The court may take judicial notice of all documents and other pleadings filed in this case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Gmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, but not the truth or falsity of such documents as related to findings of fact and

conclusions of law. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

BACKGROUND

On January 12, 2016, Rachel N. Milby, Trustee of the Milby Trust Dated September 6, 2000, conveyed Property to Debtor via a quitclaim deed. Doc. #177, *Ex. A*. Shortly thereafter, Raul Natera conveyed Property to Debtor via grant deed. *Id.*, *Ex. B*.

On March 23, 2016, Debtor obtained a loan from Movant, which was secured by a deed of trust recorded April 8, 2016. *Id.*, *Ex. C*. A week later, on March 29, Debtor conveyed Property to himself via a grant deed. *Id.*, *Ex. D*.

At some time thereafter, Debtor allegedly defaulted on the deed of trust in favor of Movant after only making a total of two payments. Doc. #175, ¶ 63. As result, Parker Foreclosure Services, LLC ("Parker Foreclosure") executed a *Notice of Default and Election to Sell under Deed of Trust* due to missed loan payments. This notice was rescinded on January 30, 2017, but a second notice was executed on May 23, 2017 and recorded May 25, 2017. Doc. #177, *Ex. E*. Then, on June 16, 2017, Movant executed a *Substitution of Trustee* naming Parker Foreclosure as the new trustee on the deed of trust. *Id.*, *Ex. F*. Parker Foreclosure then executed a *Notice of Trustee's Sale* August 25, 2017, recorded August 29, 2017, which scheduled a foreclosure sale for September 27, 2017. *Id.*, *Ex. G*. The sale was temporarily postponed and eventually held on October 25, 2017 at 2:00 p.m.

On October 25, 2017 at 2:00 p.m., Parker Foreclosure sold Property to Movant via public auction. Doc. #175, ¶ 6. The approximate balance owed to Movant at the time of the sale was $112,116.48. *Id.*, ¶ 5.

Meanwhile, on the same date as the foreclosure sale, Debtor filed chapter 13 bankruptcy at 1:59:28 p.m., shortly before the 2:00 p.m. foreclosure sale. Doc. #1. Debtor contends that his then-representative, Sylvia Gutierrez of the Law Office of Scott Lyons, spoke by telephone with Donald Parker, owner of Parker Foreclosure. Doc. #181. Ms. Gutierrez allegedly informed Mr. Parker of the bankruptcy filing and offered to provide the case number, but he supposedly refused to take the number and insisted that it should have been provided before 8:00 a.m. Doc. #184, *Ex. B*. She also offered to email the case information, but he supposedly refused to provide an email address and hung up. *Id.* The sale proceeded, and Movant was the winning bidder.

Parker Foreclosure subsequently executed a *Trustee's Deed Upon Sale* in favor of Movant on October 26, 2017, which was recorded on October 30, 2017. Doc. #177, *Ex. H*.

On November 7, 2017, Ms. Gutierrez contacted Kevin Blain, Movant's realtor, and allegedly advised him of the bankruptcy. Doc. #184, *Ex.*

B. Ms. Gutierrez's contacts with Mr. Parker and Mr. Blain contain hearsay as to those parties' acknowledging the bankruptcy and the existence of the automatic stay. However, on or about November 28, 2017, Parker Foreclosure definitively informed Movant of the bankruptcy through facsimile, stated that Movant will need to get relief from the automatic stay, and "STRONGLY" advised Movant to employ bankruptcy counsel to navigate the process. *Id.*, *Ex. D*, at 39, ¶¶ 14-25; 40, ¶¶ 1-6; *see also Ex. I* to *Ex. D*, at 48.

Thereafter, Movant retained counsel to file an unlawful detainer complaint in state court. Doc. #175, ¶ 9. He maintains that he did not learn of the bankruptcy filing until Parker Foreclosure informed him after the sale concluded. ¶¶ 7, 11. Upon learning of the bankruptcy, Movant instructed his counsel to pause prosecution of the unlawful detainer action. *Id.*, ¶ 9. Movant claims he was not informed by Debtor nor anyone else of the bankruptcy until Debtor served the adversary proceeding complaint on him in June 2020. *Id.*, ¶¶ 7, 11-13.

However, after receiving notice of the chapter 13 trustee's motion to dismiss, Movant requested the state court to enter a default judgment on December 29, 2017, which it did. *Id.*, ¶ 10. Debtor's bankruptcy case was dismissed on January 3, 2018. Doc. #36.

Debtor was subsequently evicted from Property on or about February 23, 2018. Doc. #175, ¶ 17. Post-eviction, Movant cleaned up Property and hauled away trash that was left behind. He was informed by realtors that Property could not be sold in its present condition because it did not have a well. *Id.*, ¶¶ 18-19.

On March 27, 2018, Property was sold to Michael and Mitzi Lincicum. Doc. #177, *Ex. I*. Sometime between the sale date and June 14, 2018, the Lincicums drilled a water well and installed equipment necessary to pump ground water for residential use. Doc. #175, ¶ 22. Debtor did not occupy Property at the time the Lincicums made the purchase. *Id.*, ¶ 20.

On June 14, 2018, the Lincicums sold Property to Roger and Sandra Ward. Doc. #177, *Ex. J*.

Nearly two years later, Debtor filed Adv. Proc. No. 20-01035 against Movant, Parker Foreclosure, the Lincicums, and the Wards, seeking declaratory relief and damages for violation of the automatic stay on June 6, 2020, as well as a determination that the sale of Property was voided by the automatic stay upon filing the chapter 13 petition. A.P. Doc. #1. This adversary proceeding and a related motion for retroactive relief from the automatic stay filed by the Wards are still pending.

Movant now seeks to retroactively annul the automatic stay as of the date and time of the foreclosure sale. Debtor opposes.

DISCUSSION

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

Though "cause" may exist to lift the stay, Movant seeks retroactive annulment of the automatic stay effective as of the petition date, October 25, 2017 at 2:00 p.m. Whether Debtor had an equity interest in Property on the petition date is disputed. Docs. #177, *Ex. P*; #184, *Ex. F*.

The Ninth Circuit Court of Appeals has warned that retroactive relief should only be "applied in extreme circumstances." *In re Aheong*, 276 B.R. 233, 250 (B.A.P. 9th Cir. 2002) (citations omitted). When deciding a motion to annul the automatic stay, the court may consider the "*Fjeldsted*" factors:

1. Number of filings;
2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;
3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;
4. The Debtor's overall good faith (totality of circumstances test;
5. Whether creditors knew of the stay but nonetheless took action, thus compounding the problem;
6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;
7. The relative ease of restoring parties to the *status quo ante*;
8. The costs of annulment to debtors and creditors;
9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative contract;
10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;
11. Whether annulment of the stay will cause irreparable injury to the debtor;
12. Whether stay relief will promote judicial economy or other efficiencies.

In re Fjeldsted v. Lien (In re Fjelsted), 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003). One factor alone may be dispositive. *Id.*

The court finds that the *Fjeldsted* factors weigh against annulling the stay as follows:

1. *Number of filings*: There has only been one chapter 13 filing, which ended in dismissal after two months due to failure to pay filing fees.

2. *Whether, in a repeat filing case, the circumstances indicate an intent to delay and hinder creditors*: Movant contends that the chapter 13 bankruptcy was filed with the intent to hinder creditors. Doc. #173. As evidence, Movant points to the fact that (a) Debtor did not own any equity in Property; (b) the case was dismissed for failing to pay required fees; (c) Debtor did not prosecute the chapter 13 case, causing it to be dismissed shortly after filing; and (d) notice was not given to Movant about the bankruptcy and he was only notified when Don Parker of Parker Foreclosure informed him of the bankruptcy.

In response, Debtor contends that Parker Foreclosure was an agent of Movant under Cal. Civ. Code § 2295. Doc. #181. The existence of an agency relationship can be demonstrated by circumstancial evidence, including the acts of the parties and their written and oral communications. *Whittaker v. Otto*, 188 Cal. App. 2d 619, 622-23 (Ct. App. 1961). Debtor argues that Parker Foreclosure is Movant's agent based on their communications.

Since Parker Foreclosure was timely informed of the bankruptcy on the date it was filed, Debtor insists that this knowledge is imputed to Movant as the principal of Parker Foreclosure. *Id.*, citing *Triple A. Mgmt. Co. v. Frisone*, 69 Cal. App. 4th 520, 534-35 (1999). Further, since Parker Foreclosure communicated that knowledge of the bankruptcy to Movant, along with the need to secure the services of a bankruptcy attorney to obtain stay relief, Movant was aware of the automatic stay and its effects but proceeded to violate it anyway.

However, this is Debtor’s only bankruptcy filing. There is nothing in the record indicating a scheme to delay or hinder creditors. The first two factors are not implicated, weighing against neither Movant nor Debtor.

3. *A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser*: Movant maintains that he is a *bona fide* purchaser under California law. Debtor disagrees.

A *bona fide purchaser* purchases property (1) for value, (2) in good faith, and (3) without actual or constructive knowledge of another’s rights. *Oakdale Village Group v. Fong*, 43 Cal. App. 4th 539, 547 (1996).

Since Movant was never informed of the bankruptcy and no notice of the bankruptcy petition was recorded in Tulare County, Movant insists that he satisfies all of the requirements to be deemed a *bona fide*

purchaser. Had such notice been given, Movant claims he would not have proceeded with the foreclosure sale and instead sought stay relief.

In response, Debtor claims that Movant is not a *bona fide* purchaser because he had imputed knowledge from his agent, Parker Foreclosure. Thus, any prejudice to creditors is the result of Movant's deliberate actions taken with full knowledge of the existence of the stay.

While the Lincicums and Wards may potentially be *bona fide* purchasers for value depending upon yet to be developed facts, the same does not appear to be true with respect to Movant and Parker Foreclosure on this record. The record indicates that both Parker Foreclosure and Movant had actual knowledge of the bankruptcy. Parker Foreclosure's refusal to acknowledge the bankruptcy filing does not change the fact the bankruptcy was filed. This factor weighs against annulment.

4. *The Debtor's overall good faith (totality of circumstances test*: Good faith includes whether (1) the debtor has misrepresented the facts or manipulated the Bankruptcy Code in an inequitable manner; (2) Debtor's history of bankruptcy filings; (3) Debtor intended to frustrate collection of a state court judgment; and (4) "egregious behavior." *In re Welsh*, 711 F.3d 1120, 1132 (9th Cir. 2013), citing *In re Leavitt*, 171 F.3d 1219, 1224 (9th Cir. 1999). "In sum, the inquiry focuses on the debtor's motivation and forthrightness with the court in seeking relief." *Welsh*, 711 F.3d at 1132.

Movant focuses on the fact that Debtor's petition was dismissed because (a) he never paid the filing fee; (b) he did not complete mandatory credit counseling pre-petition; and (c) he never made any plan payments nor filed a plan. Doc. #173. As such, he was never eligible to file bankruptcy, and never eligible to confirm a plan. Further, Movant emphasizes that because Debtor did not own any equity interest in Property, there was no estate to reorganize, Property was not Debtor's residence on the petition date, and therefore Property was not necessary for an effective reorganization.

Debtor disagrees, instead contending that the chapter 13 petition was filed with intent to make his plan payments and cure the arrearage owed on Movant's claim. Doc. #181. Debtor had the ability and intention to refinance the loan owed to Movant, but due to Movant's illegal filing of the *Trustee's Deed Upon Sale*, any refinance was rendered impossible. Debtor avers good faith and blames joint collusion of Movant and Parker Foreclosure in hindering his ability to proceed in the instant bankruptcy.

While Debtor did fail to prosecute his bankruptcy, which would have been dismissed for failure to file a credit counseling certificate, there is no evidence that Debtor (i) misrepresented facts or manipulated the Bankruptcy Code, (ii) intended to frustrate the collection of a state court, or (iii) engaged in egregious behavior. This factor appears to be neutral.

5. *Whether creditors knew of the stay but nonetheless took action, thus compounding the problem*: Movant insists that Debtor made no effort to notify him or other purchasers about the bankruptcy petition and automatic stay. However, since Debtor immediately notified Parker Foreclosure of the bankruptcy, Movant had imputed knowledge of the bankruptcy filing. In spite of that imputed knowledge, Parker Foreclosure and Movant proceeded with the sale, and then prepared and recorded the *Trustee's Deed Upon Sale*. Then, Movant tried to evict Debtor and tied up Debtor's interest in Property, thus preventing its refinance. Property was subsequently sold to the Lincicums, who Debtor claims also had knowledge of the issues prior to purchasing. The Lincicums sold Property to the Wards, who also purportedly had knowledge of the bankruptcy. Rather than taking corrective action in a lawful and timely fashion, the parties aggressively moved forward with foreclosure and eventually litigation. This further compounded the initial automatic stay violation. This factor appears to weigh heavily against annulment.

6. *Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules*: Movant contends that Debtor failed to comply with the Bankruptcy Code, as evidenced by the dismissal of his case for failure to pay the filing fee, failing to provide all pages of his state and federal tax returns to the chapter 13 trustee, failing to complete credit counseling in the six months preceding the petition date, and failing to make all of the payments required by his chapter 13 plan.

Debtor, meanwhile, argues that his lack of compliance was due to Movant's actions in clouding title to Property with his void *Trustee's Deed Upon Sale*. Had this not been recorded in violation of the automatic stay, Debtor could have attempted to refinance Property to pay his chapter 13 plan. However, blaming lack of compliance with the credit counseling pre-requisite due to a post-petition foreclosure makes no sense. This factor is neutral or partially favors annulment.

7. *The relative ease of restoring parties to the status quo ante*: Movant says that it would be virtually impossible to restore the parties to the *status quo ante*. Movant sold Property to the Lincicums, who made improvements and then sold Property to the Wards. Doc. #173. The parties have paid registration costs, maintenance fees, purchases, improvement expenses, sales costs, and taxes over the 42-43 months since Debtor held title to Property. For example, the Lincicums spent $30,555.00 drilling a water well and installing and repairing pumping equipment. Doc. #175, ¶ 21. The Wards, meanwhile, set the mobile home on a permanent foundation, fenced and laser leveled Property, installed plumbing and landscaping, and performed other maintenance and improvements. It would be impossible to remove those improvements or restore the value added back to the Lincicums and Wards. Further, since October 25, 2017, the real estate market has changed drastically.

In contrast, Debtor claims that restoring parties to the *status quo ante* is relatively simple. Doc. #181. Debtor is still the owner of Property, and the extent to which other parties have incurred expenses as result of buying Property from a seller with no right to dispose of it, they may litigate their claims against Movant or their respective title insurance companies. The fact that subsequent purchasers incurred expenses through their own fault in illegally forcing Debtor off of his property does not mean it is impossible to restore the parties to the *status quo ante*. This factor weighs in favor of annulment.

8. *The costs of annulment to debtors and creditors*: Movant says that there is no cost of annulling the stay because annulment would maintain the status quo. Had Movant sought stay relief while the bankruptcy case was initially pending, it likely would have been granted because Debtor did not have an equity interest in Property, and it was not necessary for an effective reorganization.

Debtor argues that the cost to him from granting annulment would be "astronomical" because he would be denied his right to pursue corrective action against the creditors who willfully violated the automatic stay repeatedly. The court is not convinced Debtor's costs are "astronomical." Debtor has damage claims against Movant and other parties. And Debtor's apparent compliance problems when the bankruptcy was filed is problematic.

While there would be slight costs to Movant, Parker Foreclosure, the Lincicums, and the Wards if the stay is not annulled, each of those parties would retain the legal right to seek recovery to the extent they are entitled. Discovery has demonstrated that Movant, through Parker Foreclosure, had his own title insurance protection, and that the Lincicums and Wards have had the costs of their defense underwritten by title insurance against which they could assert claims for any out-of-pocket expenses. This factor is neutral or slightly favors annulment.

9. *How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative contract*: Movant focuses on the fact that Debtor waited 2.5 years before reopening the case and filing the adversary proceeding, all the while never notifying Movant or Parker Foreclosure of the bankruptcy. Doc. #173. The facts do not support this contention.

In contrast, Debtor notes that the Wards moved for annulment over a year ago, but Movant is only now pursuing the same relief despite being the first of the defendants to know of the stay. Doc. #181. Further, Movant delayed seeking annulment of the stay until long after Debtor brought the adversary proceeding rather than taking corrective action at the outset.

Debtor explains that he was facing financial issues, including the loss of Property, and health issues, which prevented him from filing the adversary proceeding sooner. This factor weighs against annulment.

10. *Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief*: As noted above, Movant focuses on Debtor's delay in reopening the bankruptcy case and filing the adversary proceeding.

However, nothing prevented Movant from seeking to annul the stay sooner. Rather than taking corrective action to seek annulment at or around the time the case was filed and dismissed, Movant continued to take additional action. The *Trustee's Deed Upon Sale* was recorded, Debtor was evicted, Property was sold, the Lincicums improved Property, and then it was sold again to the Wards. At any step along the way, Movant could have reopened the case and filed this motion. At no point did that occur. This factor weighs heavily against annulment.

11. *Whether annulment of the stay will cause irreparable injury to the debtor*: Movant argues that Debtor will not suffer irreparable harm because he had no equity in Property on the petition date and it was not necessary for a reorganization. Doc. #173. Instead, Movant argues that the rights of subsequent purchasers will be prejudiced if the stay is not annulled.

On the other hand, if the stay is annulled, Debtor argues that he will lose his property, his right to deal with the debt owed on Property, and his ability to seek damages against parties that willfully violated the stay. The court does not agree the debtor has no damage claim if the stay is annulled. The extent of those damages is unclear. The court has insufficient evidence supporting that the Debtor suffered irreparable harm. This factor slightly favors annulment.

12. *Whether stay relief will promote judicial economy or other efficiencies*: Movant insists annulling the stay will promote judicial economy and other efficiencies by resolving the adversary proceeding. The subsequent sales of property will remain intact, and title will be quieted to the Wards. Conversely, if the stay is not annulled and the foreclosure sale is determined to be void, litigation will continue, including (a) claims by the Wards against the Lincicums for failing to deliver clear title of the Property; (b) claims by the Lincicums against Movant for failing to deliver clear title; (c) claims for unjust enrichment against the Debtor; and (d) claims of the Debtor that are currently pending. All of these proceedings will consume judicial resources and the court will need to evaluate how to make Movant and subsequent purchasers whole while depriving them the benefit of their bargain.

Debtor admits that judicial economy favors annulment. However, that annulment comes at a cost in the form of Debtor's loss of rights to pursue claims against parties that took illegal action against him.

Debtor contends that annulling the stay would unjustly harm the bankruptcy process by undermining the promotion of equity. As result, Debtor does not believe that this factor should weigh heavily into the court's decision. Though this factor weighs heavily in favor of annulment, the court agrees that it is not dispositive.

CONCLUSION

In sum, Movant argues that the court should focus on two factors specifically: (1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor. Doc. #173, citing *Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir. 1992).

Debtor's response argues that Movant and Parker Foreclosure were aware of the bankruptcy but simply chose to ignore and obscure it.

In reply, Movant objected to Debtor's exhibits on grounds of hearsay, improper expert testimony, lack of foundation, opinion on an ultimate issue, and lack of expert qualifications. Doc. #187. The court has ruled on those objections below. Movant also argues that Debtor was not entitled to bankruptcy relief due to his failure to obtain credit counseling services in the six months prior to the petition date. Doc. #186. Since he was not eligible to be a debtor, the plan confirmation would not have been successful, and the case would have been dismissed anyways. This is indicative of bad faith, says Movant.

Notwithstanding Debtor's ineligibility to be a debtor under 11 U.S.C. § 109(h), the automatic stay arose upon filing the petition and was still in full force and effect on October 25, 2017. Movant, through Parker Foreclosure, was promptly notified of the bankruptcy on the petition date. The sale proceeded anyway. While plausible deniability existed with respect to the sale on the petition date, the same is not true as to the issuance of the *Trustee's Deed Upon Sale* on October 26, 2017, its subsequent recording on October 30, 2017, Movant's eviction of Debtor post-dismissal, and the sales that followed, first to the Lincicums, and then to the Wards. By then, Movant and Parker Foreclosure had actual knowledge of the bankruptcy and the automatic stay. This actual knowledge, combined with Movant's considerably lengthy delay in taking corrective action, causes the *Fjeldsted* factors weigh against annulling the automatic stay.

This matter will be called and proceed as scheduled. The court is inclined to DENY the motion based on Movant's actual knowledge of the bankruptcy, repeated violations of the automatic stay, and lengthy delay in seeking annulment. Damages for what Debtor contends is a willful stay violation will be determined in the parties' related adversary proceeding.

RULINGS ON EVIDENTIARY OBJECTIONS

Page:Line	Testimony	Objection	Ruling
18:1-5	"I spoke to a representative named Teresa Beavidez [*sic*], who gave me her e-mail address. I promptly sent and e-mail attaching a copy of the voluntary petition. Ms. Benavidez e-mailed me back, confirming receipt and informing me that she had sent the bankruptcy information to the trustee. A true and correct copy of this series of e-mails is filed herewith as Exhibit "B."	Hearsay FRE 802	Sustained insofar as the testimony purports to prove the truth of Ms. Benavidez's statements. Overruled as to Ms. Gutierrez's testimony that she spoke to and emailed Ms. Benavidez information about the bankruptcy.
18:6-9	"9. Subsequently, I was contacted by a realtor named Kevin Blain. On November 7, 2017, I spoke to Mr. Blain who informed me that he represented Richard Barnes, who wanted to lease Mr. Natera's property back to him. I informed Mr. Blain of the bankruptcy filing, and heard nothing further from him.	Hearsay FRE 802	Sustained as to proving the truth of Mr. Blain's statements. Overruled as to Ms. Gutierrez's testimony that she spoke to Mr. Blain and informed him of the bankruptcy.
70	Exhibit "G" to Declaration of Peter Sauer. Email dated October 1, 2021, from Bill Enns of Pearson Realty to Mr. Sauer	• Hearsay FRE 802 • Improper expert testimony FRE 702 • Lack of foundation. Cites appraisal which is not in evidence. FRE 703 • Opinion of an ultimate issue FRE 704 • Not qualified as expert FRE 702	Sustained as to hearsay, improper expert testimony, lack of foundation, and not qualified as an expert. Overruled as to opinion of an ultimate issue. Mr. Enns will need to qualify as an expert witness and either submit a declaration under penalty of perjury or prepare and/or file an appraisal report.

2. 21-12723-B-13 **IN RE: MARK SCHAFER**
GEG-1

MOTION TO CONFIRM PLAN
1-31-2022 [13]

MARK SCHAFER/MV
GLEN GATES/ATTY. FOR DBT.
WITHDRAWN

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Withdrawn; the motion is dismissed.

NO ORDER REQUIRED.

Debtor Mark Louie Schafer withdrew the First Amended Chapter 13 Plan on March 2, 2022. Doc. #29. Accordingly, the motion to confirm plan is dismissed and will be dropped from calendar.

3. 19-12843-B-13 **IN RE: DONNIE EASON**
DRJ-3

MOTION FOR COMPENSATION FOR DAVID R. JENKINS, DEBTORS ATTORNEY(S)
2-14-2022 [30]

DAVID JENKINS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted as modified.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

David R. Jenkins ("Applicant"), attorney for Donnie L. Eason ("Debtor"), seeks final compensation in the sum of $3,000.00 under 11 U.S.C. § 330, reduced from $8,709.20. Doc. #30. Applicant provided services worth $8,575.00 in fees and incurred $134.20 in expenses from June 25, 2019 through February 7, 2022, but Debtors paid $2,000.00 pre-petition, and Applicant provided a courtesy discount of $3,650.00. Applicant requests $3,000.00 of the remaining $3,059.20 in this application. *Id.*

Debtor signed a statement of consent on February 11, 2022 indicating that Debtor has received and read the fee application and approves the same. Doc. #32, *Ex. D.*

No party in interest timely filed written opposition, but there is a minor discrepancy with the requested expenses and courtesy discount. This matter will be called as scheduled. The court intends to GRANT the motion as modified below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the debtor, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

The original Chapter 13 Plan dated July 1, 2019 is the operative plan in this case. Docs. #3; #22. Section 3.05 indicates that Applicant was paid $2,000.00 prior to filing the case and, subject to court approval, additional fees of $3,000.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. § 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #3. The *Disclosure of Compensation of Attorney for Debtor(s)* indicates that Applicant was paid $2,000.00 by Debtor pre-petition. Doc. #1, Form 2030.

Other than the pre-petition fees, Applicant declares that he has not accepted or demanded from Debtor or any other person any payment for services or costs without first seeking a court order permitting payment of those fees and costs. Doc. #32, *Ex. A*.

This is Applicant's first and final request for compensation. Doc. #30. The source of funds for payment of the fees will be $3,000.00 from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. *Id.*

Applicant provided 24.5 billable hours of legal services at a rate of $350.00 per hour, totaling $8,575.00 in fees. Doc. 32, *Ex. B*. Applicant also incurred $59.20 in service expenses, and anticipates an additional $75.00 in service expenses for this application, for a total of $134.20. *Id.*, *Exs. B*, *C*. The combined fees and expenses total $8,709.20. Debtors paid $2,000.00 pre-petition and Applicant provided a courtesy discount of $3,650.00. Of the remaining balance of $3,059.20, Applicant's request for fees is limited to **$3,000.00**.

From the time records submitted as *Exhibit B*, it appears that $59.20 in fees was omitted from the total "Costs" calculation. The court will inquire at the hearing whether Applicant intended to provide a courtesy discount of $3,709.20 to make the remaining balance equal to $3,000.00 as requested in the application.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, considering all relevant factors, including those enumerated in subsections (a)(3)(A) through (E). § 330(a)(3).

Applicant's services included, without limitation: (1) consulting with Debtor about his options after dismissal of his previous case; (2) obtaining documents and information, and preparing the petition, schedules, and chapter 13 plan; (3) preparing and prosecuting a motion to extend the automatic stay to protect Debtor's residence; (4) preparing and sending the § 341 meeting of creditors documents to Trustee; (5) attending and completing the meeting of creditors; (6) confirming the chapter 13 plan; and (7) preparing and filing this fee application (DRJ-2). Doc. #32, *Ex. A*. As noted above, Debtor consented to payment of the requested fees. *Id.*, *Ex. D*. The court finds the services and expenses actual, reasonable, and necessary.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Applicant will be awarded $8,575.00 in fees and $134.20 in expenses on a final basis pursuant to § 330. After application of the $2,000.00 pre-petition retainer and the $3,709.20 courtesy discount, provided that Applicant consents to waiving the additional $59.20 in expenses, the chapter 13 trustee will be authorized, in his discretion, to pay Applicant $3,000.00 in accordance with the chapter 13 plan for services rendered and expenses incurred from June 25, 2019 through February 7, 2022.

4. 19-15053-B-13 **IN RE: YASMIN APRESA**
RSW-7

MOTION TO MODIFY PLAN
2-11-2022 [92]

YASMIN APRESA/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Yasmin Araceli Apresa ("Debtor") seeks confirmation of the Fifth Modified Chapter 13 Plan. Doc. #82. Debtor wishes to retain the 84-month duration of her previous plan under 11 U.S.C. § 1329(d) and the

COVID-19 Bankruptcy Relief Extension Act of 2021. 117 P.L. 5, 135 Stat. 249.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely filed written opposition. Doc. #102. Trustee objects because (1) Debtor provided inadequate notice of the hearing under Local Rule of Practice ("LBR") 3015-1(d)(2); and (2) Debtor will not be able to make all payments under the plan and comply with the plan as required by 11 U.S.C. § 1325(a)(6).

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule") and LBR.

Rule 3015(h) requires at least 21 days' notice to the debtor, trustee, and all creditors of the time fixed to file objections to any proposed modification of a plan after confirmation. LBR 9014-1(f)(1) requires 28 days' notice of the hearing and notice that opposition must be filed 14 days prior to the hearing. To comply with both Rule 3015(h) and LBR 9014-1(f)(1), LBR 3015-1(d)(2) requires any modified plan proposed after confirmation to be set for hearing on at least 35 days' notice.

Debtor filed this motion on February 11, 2022 and originally set it for hearing on April 6, 2022. Doc. #93. On February 25, 2022, Debtor filed an *Amended Notice of Hearing* changing the hearing date to March 16, 2022. Doc. #98. March 16, 2022 is 19 days after February 25, 2022, and thus did not provide 35 days' notice as required by LBR 3015-1(d)(2). Further, even if the filing of the motion on February 11, 2022 controlled, which it does not, Debtor would have only provided 33 days' notice. Debtor has failed to provide adequate notice of the hearing and the opportunity to respond.

No order shortening time has been requested or granted.

Also, the Trustee correctly points out that the arrearage payment has not been properly provided for in the modified plan. So, the Trustee cannot pay the arrearage.

If another motion to modify is filed, the court will require a sufficient evidentiary record of Debtor's good faith in filing and modifying so many plans over such a short period of time. Though Debtor here claims a substantial home repair and care for an ill child impacted income enough to require yet another modified plan, the previous modifications suggest this is a debtor who has difficulty maintaining regular income to fund any plan.

The motion is DENIED WITHOUT PREJUDICE.

5. 22-10070-B-13 **IN RE: KARA RENFROE**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
2-23-2022 [14]

JOEL WINTER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The minutes of the hearing will be the court's findings and conclusions.

ORDER: The court will issue an order.

This matter will proceed as scheduled. If the fees due at the time of the hearing have not been paid prior to the hearing, the case will be dismissed on the grounds stated in the OSC.

If the installment fees due at the time of hearing are paid before the hearing, the order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

6. 21-12591-B-13 **IN RE: MICHELLE FRANCO**
PLG-1

MOTION TO CONFIRM PLAN
1-27-2022 [16]

MICHELLE FRANCO/MV
RABIN POURNAZARIAN/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Michelle Lynn Franco ("Debtor") seeks confirmation of the First Amended Chapter 13 Plan. Doc. #16.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver

of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

7. 19-10376-B-13 **IN RE: CHRISTINA MARTINEZ**
RSW-3

CONTINUED RE: MOTION TO MODIFY PLAN
1-10-2022 [66]

CHRISTINA MARTINEZ/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Withdrawn; the motion is dismissed.

NO ORDER REQUIRED.

Debtor Christina Martinez withdrew the *Motion to Confirm Debtor's Third Modified Chapter 13 Plan* on March 6, 2022. Doc. #81. Accordingly, the motion to confirm plan is dismissed and will be dropped from calendar.

11:00 AM

1. 19-15103-B-7 **IN RE: NATHAN/AMY PERRY**
20-1017

ORDER TO SHOW CAUSE REGARDING DISMISSAL OF ADVERSARY PROCEEDING FOR FAILURE TO PROSECUTE
2-9-2022 [51]

RICHNER ET AL V. PERRY

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Vacated.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

On February 9, 2022, the court issued an *Order to Show Cause Regarding Dismissal of Adversary Proceeding for Failure to Prosecute* ("OSC") after neither party appeared for the status conference held on February 9, 2022 nor filed status conference statements by February 2, 2022. Doc. #51. Plaintiffs were ordered to file and serve a written response to the OSC not later than March 2, 2022.

Though not timely, Richard W. Freeman, Jr., counsel for the plaintiffs, filed a response to the OSC on March 7, 2022. Doc. #53. Mr. Freeman states that he was unable to appear at the status conference on February 9, 2022, because he was in a trial that same day in Sonoma County Superior Court. *Id.* As a sole practitioner with no support staff, the status conference had not been properly calendared. Further, the continuation of the trial prevented Mr. Freeman from seeing the OSC until March 1, 2022, by which time it was too late to file a timely response. With apologies, Freeman also concurrently filed an updated status conference statement to advise the court of debtor Amy Perry's ("Defendant") pending criminal case in Sonoma County (SCR-739708), with a preliminary hearing estimated for April 22, 2022, and a Readiness Conference on March 11, 2022 before Judge Troye Shaffer.

Though Defendant is not represented in this adversary proceeding, her criminal defense attorney, N. Allen Sawyer, has advised that he will object to any discovery in this adversary proceeding until the criminal case is resolved. The scope of discovery also includes Defendant's parents, Salvador and Pamela Chiaramonte (Bankr. Case No. 20-11393). As soon as the stay on discovery is lifted, and assuming that the Chiaramontes do not intend to claim Fifth Amendment Privileges, Plaintiffs will be prepared to make Initial Disclosures by

May 1, 2022, and to set depositions for the Defendants, Witnesses, and RMA in March, as well as issue Third Party subpoenas.

The hearing on this OSC will be called and proceed as scheduled. The court intends to vacate the OSC and discuss upcoming scheduling dates and deadlines.

The court also notes that Plaintiffs attached certificates of service to the *Response to Order to Show Cause* and the *Status Conference Statement* in violation of the Local Rules of Practice ("LBR"). Docs. ##53-54. Doc. #37. LBR 9004-2(e)(1), (e)(2), and LBR 9014-1(e)(3) require proofs of service to be filed as separate documents and not attached to copies of the pleadings and documents served. Counsel is advised to review the local rules on the court's website and ensure procedural compliance in subsequent matters.[1]

[1] *See* LBR (eff. Apr. 12, 2021), http://www.caeb.uscourts.gov/LocalRules.aspx.

2. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
20-1049 CAE-1

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
10-28-2020 [25]

GUILLERMO V. LOCKE ET AL
GILBERT ZAVALA/ATTY. FOR PL.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Concluded.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

The court intends to GRANT the plaintiff's motion to dismiss in matter #3 below. GZZ-1. Accordingly, the court intends to order this status conference concluded at the hearing.

3. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
20-1049 GZZ-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
3-2-2022 [54]

GUILLERMO V. LOCKE ET AL
GILBERT ZAVALA/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Creditor Gloria Guillermo ("Plaintiff") requests an order dismissing the *First Amended Adversary Complaint to Determine Dischargeability and in Objection to Discharge* pursuant to Civ. Rule 41, *incorporated by* Rule 7041.[2]

First, this motion was filed on less than 28 days' notice using the procedure specified in LBR 9014-1(f)(2), but this alternative procedure does not apply for a motion filed in connection with an adversary proceeding. Doc. #55; *see* LBR 9014-1(f)(2)(A). The motion should have been filed with at least 28 days of notice under the procedure specified in LBR 9014-1(f)(1), which would then require Plaintiff to include any applicable disclosures specified in LBR 9014-1(d)(3)(B) and (f)(1)(B).

Typically, this error would result in the motion being denied without prejudice. LBR 1001-1(f) allows the court *sua sponte* to suspend provisions of the LBR not inconsistent with the Federal Rules of Bankruptcy Procedure to accommodate the needs of a particular case or proceeding.

Good cause exists to suspend LBR 9014-1(f)(2)(A) for this motion and shorten the amount of notice required to dismiss this adversary proceeding. Defendants will be prejudiced if this motion is denied without prejudice for procedural defects because the entry of discharge in their chapter 7 bankruptcy case will be further delayed. Additionally, chapter 7 trustee Irma C. Edmonds ("Trustee") and the Office of the United States Trustee ("UST") were served the motion. Also, no other party has initiated or sought an extension of time to file litigation against these debtors contesting the dischargeability of a debt or the discharge in general. In the interests of a just and speedy adjudication, the court will overlook this procedural deficiency under LBR 1001-1(f) in this instance. Future violations of the local rules may result in a motion being denied without prejudice.

Accordingly, this hearing was filed, served, and set for hearing on less than 14 days' notice pursuant LBR 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Rule 7041 provides that Civ. Rule 41 applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, U.S. Trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions deemed proper. The 1983 Advisory Committee on Rules explain that dismissal of a complaint objecting to discharge raises special concerns because the plaintiff may have been induced to dismiss the adversary proceeding in exchange for an advantage given or promised by the debtor.

The majority approach to settlement of claims under § 727, which has been used in other Ninth Circuit bankruptcy courts, is limited to circumstances where the terms of the settlement are fair and equitable and in the best interests of the estate. *Bankr. Receivables Mgmt. v. De Armond (In re De Armond)*, 240 B.R. 51, 56 (Bankr. C.D. Cal. 1999) citing *In re Bates*, 211 B.R. 338, 347 (Bankr. D. Minn. 1997) ("[D]ismissal of a § 727 complaint in return for the provision of a private benefit to the plaintiff would violate the plaintiff's fiduciary duty to the bankruptcy estate.")

Here, Plaintiff became a fiduciary to other creditors when the § 727 complaint was filed and cannot be dismissed if the settlement benefits only Plaintiff. *De Armond*, 240 B.R. at 58.

Plaintiff declares that she wants to dismiss the case because of health issues involving Plaintiff and her immediate family members, causing her to no longer wish to prosecute this adversary proceeding. Doc. #56. No consideration has been paid to Plaintiff based on the current record. Since there does not appear to be a settlement conferring any private benefits to Plaintiff, creditors do not appear to be prejudiced by dismissal of this adversary proceeding. Further, it does not appear that any other parties have taken any interest in this proceeding.

Additionally, although Trustee filed a *Notice of Assets* on April 29, 2021, it is unclear from the schedules whether Defendants have any non-exempt, unencumbered property to be administered for the benefit of unsecured claims. Docs. #39; #70. The court will inquire at the hearing as to whether Trustee intends to liquidate any property.

This matter will be called and proceed as scheduled. The court is inclined to GRANT the motion.

[2] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rule" will be to the Federal Rules of Bankruptcy Procedure; "Civ. Rule" will be to the Federal Rules of Civil Procedure; and all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.