UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 21, 2016 at 10:00 a.m.

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1. 15-26904-A-7 MIKKY TALLMAN — MOTION TO
16-2011 FWP-1 — DISMISS ADVERSARY PROCEEDING
TALLMAN V. VERIZON WIRELESS — 2-18-16 [10]

Tentative Ruling: The motion will be granted in part.

The defendant, Cellco Partnership, d/b/a Verizon Wireless, moves for dismissal with prejudice of the amended complaint in the subject adversary proceeding.

The plaintiff filed the underlying chapter 7 bankruptcy case on August 31, 2015. The trustee filed a report of no distribution on November 20, 2015. The plaintiff received his discharge on December 10, 2015.

The plaintiff filed this adversary proceeding on January 19, 2016. The plaintiff also filed an amended complaint on January 26, 2016.

The plaintiff complains that the defendant has been violating the automatic stay by seeking to collect on a debt from the plaintiff and by disconnecting the plaintiff's wireless services. The complaint is titled "Complaint To Deny Dischargeability Of Debt" and it seeks $20 million in damages. Docket 5.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement*

to relief."'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"*First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

Initially, despite its title, the complaint is not asserting claims under sections 523 and/or 727. In the narrative of the complaint, the plaintiff seeks redress for automatic stay violations. The plaintiff complains of the defendant seeking to collect debt from the plaintiff.

11 U.S.C. § 362(k)(1) provides that an individual injured by willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

The "[movants] ha[ve] the burden of proof under § 362(k), which requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay." Harris v. Johnson (In re Harris), Case No. 10-00880-GBN, WL 3300716, at *4 (B.A.P. 9th Cir. Apr. 7, 2011) (citing to Fernandez v.

G.E. Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 180 (B.A.P. 9th Cir. 1998)).

The complaint fails to identify the specific stay violations perpetrated by the defendant. This is important as the plaintiff received his chapter 7 discharge on December 10, 2015. At that time, the automatic stay expired as to the plaintiff. See 11 U.S.C. § 362(c)(2)(C).

In other words, only collection efforts undertaken before December 10, 2015 can be stay violations. Collection efforts undertaken after December 10 cannot be stay violations because the stay expired as to the plaintiff-debtor on that date.

Further, the complaint does not identify the debt the defendant is seeking to collect. This is of paramount importance as only the plaintiff's pre-petition debt is subject to the bankruptcy proceeding. The defendant is free to collect on the plaintiff's post-petition debt. Such collections are not subject to and do not violate the automatic stay.

Finally, while the plaintiff is seeking $20 million in damages, the complaint is mostly devoid of information about the plaintiff's actual damages.

For example, the complaint asserts that the plaintiff has been unable to have access to domestic violence, child abuse, therapy and other resources.

But, the complaint fails to explain how or why denial to the above-listed resources has harmed the plaintiff. People who are denied such resources are generally not automatically entitled to $20 million in damages.

The complaint mentions that the plaintiff sustained emotional harm, but it does not say how or why he sustained the harm. The complaint states that some of the emotional harm was due to the way the plaintiff was treated. Yet, the complaint does not say how the plaintiff was treated and who was responsible for the way he was treated.

Given the above deficiencies, the stay violation claim does not rise to the level of plausibility, as prescribed by Ashcroft. The complaint will be dismissed with leave for the plaintiff to amend the complaint. He shall have 14 days after the hearing on this motion to amend the complaint. The motion will be granted in part.

2. 15-26904-A-7 MIKKY TALLMAN — STATUS CONFERENCE
16-2011 — 1-26-16 [5]
TALLMAN V. VERIZON WIRELESS

Tentative Ruling: None.

3. 16-20912-A-11 SEAN SUH'S CARE HOMES, INC. — STATUS CONFERENCE
2-18-16 [1]

Tentative Ruling: None.

4. 13-23517-A-7 TRACY GATEWAY, LLC — MOTION TO SET ASIDE
15-2055 HCS-6 — 9-22-15 [41]
FUKUSHIMA V. SUTTER CENTRAL VALLEY HOSPITALS ET AL

Final Ruling: This motion has been voluntarily dismissed pursuant to a stipulation between the parties. Docket 83.

5. 15-29541-A-12 TIMOTHY WILSON — MOTION TO CONFIRM CHAPTER 12 PLAN
WW-1 — 1-22-16 [20]

Tentative Ruling: The motion will be denied without prejudice.

The hearing on this motion was continued from February 22, 2016 in order for the debtor to supplement the record and address deficiencies with other motions pertinent to plan confirmation. The debtor has filed some additional papers in support of one lien avoidance motion. An amended ruling from February 22 follows below.

The debtor is seeking approval of his chapter 12 plan filed on January 22, 2016.

The motion will be denied. While the court is granting in part one of the debtor's lien avoidance motions, the court is denying avoidance of the Ellen Star and Susquehanna Commercial Finance liens. The plan cannot be confirmed because it contemplates avoidance of those liens.

Further, as pointed out by the trustee, the plan pays unsecured creditors less than what they would receive in a chapter 7 proceeding. Under the plan they will receive only $114.80, whereas the debtor's schedules disclose $17,027.70 in non-exempt assets.

Finally, neither the court, nor the trustee can determine whether the debtor will be able to make all proposed plan payments. 11 U.S.C. § 1225(a)(6). Although the trustee has requested the debtor's 2015 profit and loss statement, it has not been provided to him. The motion will be denied.

6. 15-29541-A-12 TIMOTHY WILSON — MOTION TO AVOID JUDICIAL LIEN
WW-10 — 2-8-16 [51]
VS. COMMERCIAL EQUIPMENT LEASE CORP. ET AL.

Tentative Ruling: The motion will be granted in part and denied in part.

The hearing on this motion was continued from February 22, 2016 in order for the debtor to supplement the record. The debtor has filed additional papers, consisting of abstracts of judgment for some of the lienholders.

The debtor is asking the court to avoid the judicial liens of (1) Commercial Equipment Lease Corporation, (2) Pape Machinery, Inc., (3) Steve Stoelk, (4) Holt of California, (5) Wells Fargo Bank, (6) Mariecella Fiscus dba KMB Enterprises, and (7) Ellen Star, on the debtor's two real properties in Pioneer, California, a 160-acre and an 80-acre parcel. Both parcels are located at 16030 Schaefer Ranch Road in Pioneer, California.

A judgment was entered against the debtor in favor of **Commercial Equipment**

Lease Corporation for the sum of $75,053.54 on November 19, 2010. The abstract of judgment was recorded with Amador County on February 16, 2010. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

A judgment was entered against the debtor in favor of **Pape Machinery, Inc.** for the sum of $20,827.08 on September 21, 2009. The abstract of judgment was recorded with Amador County on October 26, 2009. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

A judgment was entered against the debtor in favor of **Steve Stoelk** for the sum of $45,889.88 on September 10, 2009. The abstract of judgment was recorded with Amador County on October 20, 2009. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

A judgment was entered against the debtor in favor of **Holt of California, a California corporation** for the sum of $44,481.03 on June 8, 2009. The abstract of judgment was recorded with Amador County on June 29, 2009. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

A judgment was entered against the debtor in favor of **Wells Fargo Bank** for the sum of $33,085.13 on December 19, 2008. The abstract of judgment was recorded with Amador County on February 9, 2009. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

A judgment was entered against the debtor in favor of **Mariecella A. Fiscus** for the sum of $4,922.28 on April 5, 2002. The abstract of judgment was recorded with Amador County on February 1, 2008. That lien attached to the debtor's real property, consisting of two different parcels, located at 16030 Schaefer Ranch Road, Pioneer, California.

The motion will be granted as to the above-outlined creditors pursuant to 11 U.S.C. § 522(f)(1)(A). The first parcel of real property - the debtor's residence - has an approximate value of $1,000,000 as of the petition date. The unavoidable liens on the first parcel totaled $1,394,000 on that same date, consisting of a first priority deed of trust in favor of Umpqua Bank for $1,300,000 and a second priority deed of trust in favor of Shirley Sittner for $94,000. The debtor claimed the first parcel exempt under Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $100.00 in Schedule C.

The second parcel of real property has an approximate value of $220,000 as of the petition date. The unavoidable liens on the second parcel totaled $349,272.22 on that same date, consisting of:

- a first mortgage in favor of Randy and Janet Wright and Jack Faradon for $215,824.22,

- a second mortgage in favor of George and Sylvia Niu for $44,073, and

- a third mortgage in favor of Shirley Sittner for $89,375.

Docket 85.

The debtor claimed the second parcel exempt under Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1.00 in Schedule C.

The above-referenced lien holders each hold a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

Finally, the motion will be denied without prejudice as to the judgment lien of **Ellen Star**. The abstract of judgment substantiating her lien is not among the exhibits where the abstracts of judgment for the other lien holders are found. See Docket 99.

7.	15-29541-A-12 TIMOTHY WILSON WW-11 VS. SUSQUEHANNA COMMERCIAL FINANCE	MOTION TO AVOID JUDICIAL LIEN 2-8-16 [62]

Tentative Ruling: The motion will be denied without prejudice.

The hearing on this motion was continued from February 22, 2016 in order for the debtor to supplement the record. The debtor has not filed additional papers pertaining to this motion. Accordingly, the court will deny the motion in accordance with the ruling it posted for the February 22 hearing.

Although the motion directs the court to the attached exhibits for the amount of the subject judgment lien, the attached exhibits do not contain amounts for any of the encumbrances. Docket 65. Hence, the reference to the amount of the judgment lien in the motion is inadmissible hearsay. Fed. R. Evid. 802.

8.	14-29148-A-13 PAVEL/NATALYA FOKSHA 15-2171 RLG-1 FOKSHA ET AL V. MARLER	MOTION FOR SUMMARY JUDGMENT 2-18-16 [23]

Tentative Ruling: The motion will be granted in part.

The plaintiffs, Natalya and Pavel Foksha, the debtors in the underlying chapter 13 case, seek summary judgment on their claims pertaining to the dischargeability of their disputed debt to the defendant, Patricia Marler. The motion specifically requests:

- judgment determining that the debt owed to the defendant is dischargeable and

- judgment enjoining the defendant from further collection efforts on her claim against the plaintiffs.

Docket 23 at 9.

The plaintiffs filed the underlying chapter 13 case on September 11, 2014. As of the petition date, there was a pending state court action by the defendant against plaintiff Ms. Natalya Foksha for money damages. Docket 27, Exs. 1 & 2.

On September 12, 2014, one day after the plaintiffs filed their bankruptcy case, the defendant's counsel in the state court action sent a letter to the plaintiffs' bankruptcy counsel, stating that the defendant is "willing to

stipulate that we will not seek any damages beyond her insurance policy limits." Docket 27, Ex. 1.

In Schedule F, the plaintiffs identified Mr. Swartz, the defendant's attorney, as a general unsecured creditor with a claim in the amount of $0.00. Case No. 14-29148, Docket 15. The schedules do not list the defendant as a creditor.

On October 4, 2014, the court sent the notice of chapter 13 bankruptcy case to the plaintiffs' creditors, including the defendant's counsel. Case No. 14-29148, Docket 21. The notice identifies the nongovernmental claims bar date as January 21, 2015. Case No. 14-29148, Docket 19. The notice also identifies December 22, 2014 as the deadline for filing complaints to determine the dischargeability of debts. Id.

On November 18, 2014, the defendant's counsel in the state court action sent a letter to an attorney for the plaintiffs, offering a $30,000 settlement for dismissal of that action against Mrs. Foksha, including relinquishment of a prior judgment obtained by the plaintiffs against the defendant. Docket 27, Ex. 2. This November 18 letter starts with the defendant's counsel acknowledging that the plaintiffs have filed for bankruptcy and unequivocally states "I have spoken with my clients about this matter at some length . . . ." Id.

The defendant did not file a timely – *i.e.*, by December 22, 2014 - nondischargeability action against the plaintiffs.

The defendant also did not file a timely proof of claim in this case. There are no proofs of claim on the plaintiffs' bankruptcy case claims docket from the defendant or the defendant's counsel, by the January 21, 2015 claims bar date.

On March 25, 2015, the court entered an order confirming the plaintiffs' chapter 13 third amended plan, filed on February 4, 2015. Case No. 14-29148, Dockets 63 & 74. The confirmed plan pays a 100% dividend to general unsecured creditors. Case No. 14-29148, Docket 63 at 4. The plan confirmation revested all estate property in the plaintiffs. Case No. 14-29148, Docket 63 at 5.

On June 18, 2015, the defendant's counsel filed two proofs of claim, for $100,000 each, based on an assertion of elder abuse. The proofs of claim are only in the name of the defendant's counsel. They do not even mention the defendant. POCs 14 & 15.

On August 26, 2015, the plaintiffs filed their complaint in the instant adversary proceeding, requesting:

1) a declaration that the defendant is a noticed creditor of the plaintiffs,

2) a declaration that the debts owed to the defendant are dischargeable,

3) an injunction against the defendant's further collection efforts, and

4) a request for actual damages, including attorney's fees and costs.

Docket 1.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

The motion will be granted in part. First, the defendant has violated Local Bankruptcy Rule 7056-1(b), which provides that:

"*Any party opposing a motion for summary judgment or partial judgment shall reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in support of that denial. . . . The opposing party shall be responsible for the filing with the Court of all evidentiary documents cited in the opposing papers. If a need for discovery is asserted as a basis for denial of the motion, the party opposing the motion shall provide a specification of the particular facts on which discovery is to be had or the issues on which discovery is necessary.*"

The opposition does not contain a reproduction of the plaintiffs' statement of undisputed facts or a response to each of the factual assertions in the plaintiffs' statement. Summary judgment motions are decided based on evidence. Yet, the defendant's opposition is devoid of any evidence. The opposition has no supporting declarations or exhibits. See Docket 31. As such, the opposition is unhelpful and inadequate in responding to the motion.

Second, the court rejects the defendant's contention that she is not a creditor of the plaintiffs in the bankruptcy case because her claim is unliquidated and/or disputed. No legal authority exists limiting the definition of creditors in bankruptcy cases only to creditors holding liquidated and/or undisputed claims.

On the contrary, the Bankruptcy Code sets forth the broadest possible definition of "claim."

11 U.S.C. § 101(10) prescribes that "[t]he term 'creditor' means--

"(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

"(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

"(C) entity that has a community claim."

Section 101(10)(A) obviously does not limit "a claim" to claims that are liquidated and/or undisputed.

More, 11 U.S.C. § 101(5) defines "claim" as:

"(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

"(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

The Ninth Circuit has identified the above definition as the "broadest possible definition" of claim. "This 'broadest possible definition' of 'claim' is designed to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'" California Dept. of Health Servs. v. Jensen (In re Jensen), 995 F.2d 925, 929-30 (9th Cir. 1993) (citing to H.R.Rep. No. 595, 95th Cong., 2d Sess. 1, 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266; S.Rep. No. 598, 95th Cong., 2d Sess. 1, 22, reprinted in 1978 U.S.C.C.A.N. 5787, 5808).

Given that the defendant had claims for money damages pending in state court against Mrs. Foksha on the date the plaintiffs filed their bankruptcy case, there is no genuine issue over whether the defendant is a creditor of Mrs. Foksha.

Third, the court also rejects the defendant's argument that the plaintiffs' bankruptcy filing is a fraudulent conveyance to avoid litigation of the defendant's claims. There is no legal authority that labels the filing of a bankruptcy case a fraudulent conveyance. The defendant cites no authority to support her contention.

California's fraudulent conveyance law is subject to federal law, including bankruptcy law, under the supremacy clause of the United States Constitution. And, there is a federal statutory right to bankruptcy relief. See 11 U.S.C. §§ 109 and 301. The filing of a bankruptcy case is not a fraudulent conveyance.

Fourth, as the defendant contests the dischargeability of her claim against the plaintiffs, the controlling Bankruptcy Code provision is 11 U.S.C. § 523(a)(3), which provides that:

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

. . .

"(3) neither listed nor scheduled under section 521 (a)(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—

"(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

"(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."

The defendant did not file a timely (or untimely) nondischargeability action against the plaintiffs, nor did she file a timely proof of claim in the plaintiffs' chapter 13 case.

The December 22, 2014 deadline for filing nondischargeability actions has long passed. The January 21, 2015 claims bar date has also passed and the court has confirmed the plaintiffs' chapter 13 plan relying on the defendant's nonfiling of a proof of claim.

"The provisions of a confirmed [chapter 13] plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."

11 U.S.C. § 1327(a).

Although the defendant was not herself noticed with the bankruptcy filing, her counsel was notified and he acknowledged it in a letter to the plaintiffs' bankruptcy counsel dated September 12, 2014, one day after the petition filing.

Additionally, the defendant's counsel unequivocally admitted in his November 18, 2014 letter that he had informed the defendant of the plaintiffs' bankruptcy filing. The letter's title is "*Marler v. Foksha, et al.*" Docket 27, Ex. 2. The letter starts with acknowledging the plaintiffs' bankruptcy filing and then admits that the defendant's counsel "ha[s] spoken with [the defendant] about this matter at some length." Id.

In other words, while the defendant may not have been properly notified with the plaintiffs' bankruptcy filing, her counsel was notified and she acquired actual knowledge of the plaintiffs' bankruptcy filing from him. She had actual knowledge of the plaintiffs' bankruptcy filing at least as of November 18, 2014, meaning that she knew of the bankruptcy case in time both to file a timely nondischargeability action and to file a timely proof of claim.

There is no genuine issue of material fact as to the defendant's timely actual knowledge of the plaintiffs' bankruptcy case. The September 12, 2014 and November 18, 2014 letters of her counsel establish this. The defendant has proffered no evidence to refute this.

As the defendant had timely knowledge of the bankruptcy case, she cannot invoke section 523(a)(3) to redress her failures.

As such, her claim against the plaintiffs' subject bankruptcy estate is dischargeable. The court will enter a summary judgment so declaring.

Finally, the court will deny the request for injunctive relief because the court's order confirming the plaintiffs' chapter 13 plan is already an injunction, given the prescription of 11 U.S.C. § 1327(a) and (c), which provides that:

"(a) The provisions of a confirmed [chapter 13] plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

. . .

"(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan."

9.	12-35955-A-13 12-2700 COUNTY OF YUBA V. DENTON	MARY DENTON RK-2	MOTION TO APPROVE COMPENSATION FOR DEFENDANT'S ATTORNEY 12-23-15 [33]

Tentative Ruling: The motion will be denied.

The defendant, Mary Denton, the debtor in the underlying chapter 13 bankruptcy case, seeks attorney's fees against the plaintiff, the County of Yuba, pursuant to 11 U.S.C. § 523(d), which provides that:

"*If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.*"

The plaintiff, in its capacity as legal representative and public guardian of Justin Denton, the defendant's former spouse, opposes the motion.

The defendant filed the underlying chapter 13 case on August 31, 2012. The plaintiff filed the instant adversary proceeding on December 3, 2012. The complaint filed on December 3, 2012 contained a single claim under section 523(a)(15). On February 27, 2014, the plaintiff filed an amended complaint, without leave of court, adding a claim under section 523(a)(2)(A).

On April 22, 2014, the defendant filed a motion to dismiss. Docket 17. On June 2, 2014, the court entered an order dismissing the plaintiff's 11 U.S.C. § 523(a)(15) claim and denying the plaintiff's request for relation back of its 11 U.S.C. § 523(a)(2)(A) claim. Dockets 13, 28, 30. With this, the plaintiff's case was over.

This motion for attorney's fees was filed on December 23, 2015.

Local Bankruptcy Rule 1001-1(c) provides that:

"*The Federal Rule of Bankruptcy Procedure and these Local Rules govern procedure in all bankruptcy cases and bankruptcy proceedings in the Eastern District of California. The following Local Rules of Practice of the United States District Court for the Eastern District of California apply in all bankruptcy cases and proceedings: Rules 173 (Photographing, Recording or Broadcasting of Judicial Proceedings), 180 (Attorneys), 181 (Certified Students), 183 (Persons Appearing In Propria Persona), 184 (Disciplinary Proceedings Against Attorneys), 292 (Costs), and 293 (Awards of Attorneys' Fees). Except for these enumerated rules, no other Local Rules of Practice of the United States District Court for the Eastern District of California apply.*"

District Rule 293(a) provides that "[m]otions for awards of attorneys' fees to prevailing parties pursuant to statute shall be filed not later than twenty-eight (28) days after entry of final judgment."

The instant motion is untimely. It was filed nearly one and one-half years after the court dismissed the action, in violation of District Rule 293(a), as incorporated by Local Bankruptcy Rule 1001-1(c). Accordingly, the motion will be denied.

10. 15-26281-A-7 STEPHEN TRUMAN — MOTION TO
16-2004 JMB-1 — DISMISS ADVERSARY PROCEEDING
PARTNERS FEDERAL CREDIT UNION — 2-11-16 [7]
V. TRUMAN

Tentative Ruling: The motion will be granted in part.

The defendant, Stephen Truman, the debtor in the underlying chapter 7 case, seeks dismissal under Rule 12(b)(6) of the claims under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6), arguing that the complaint fails to state a claim upon which relief can be granted.

As spelled out by the complaint, the facts leading to the subject dispute are as follows. The defendant applied for membership with the plaintiff. To qualify the defendant for membership, the plaintiff required that the defendant be an employee, retiree, or immediate family member or roommate of an employee or retiree of the Walt Disney Company or one of its subsidiaries. To gain access to a membership with the plaintiff, the defendant used his relationship with his already deceased grandmother, by submitting to the plaintiff her 2013 IRS Form 1099-R. The defendant did not disclose to the plaintiff that his grandmother had passed away. Without knowing that the defendant's grandmother had passed away, the plaintiff granted the defendant membership.

Once the defendant had been admitted as a member, the plaintiff opened a checking account and later a home equity line of credit for the defendant.

On July 17, 2014, the defendant entered into a branch of the plaintiff in Las Vegas, Nevada, seeking to deposit $229,500 into his HELOC account. After the deposit was processed, the plaintiff requested that the transaction be reversed and that the $229,500 be deposited into his checking account. The plaintiff deposited the funds into his checking account. Due to the processing delay of reversing the HELOC transaction, however, the defendant had $229,500 available into his checking account and another $229,500 available into his HELOC account for six days.

The defendant discovered the availability of $229,500 in each of his accounts with the plaintiff. It is then that the defendant began making withdrawals from both the checking and HELOC accounts.

On July 18, 2014, the defendant transferred $70,500 from his HELOC account to his checking account and withdrew $300,000 from his checking account by purchasing two cashier checks payable to himself or MGM Grand, one for $200,000 and the other for $100,000. The defendant also withdrew $100 cash from his checking account.

On July 19, 2014, the defendant transferred $2,500 from his HELOC account to his checking account.

On July 20, 2014, the defendant transferred $37,500 from his HELOC account to his checking account and withdrew $429.75 from his checking account via a debit card transaction at the MGM Grand Hotel in Las Vegas.

On July 21, 2014, the defendant transferred $170,000 from his HELOC account to his checking account and withdrew $126,605 cash from his checking account in two transactions, one for $5,000 and another for $121,605.

On July 21 and 22, 2014, the defendant also initiated three payments from his checking account to other creditors. These transactions were reversed by the defendant, however.

From July 18 through July 22, the defendant transferred a total of $280,500 from his HELOC account to his checking account. During that time, the defendant also withdrew, in one form or another, $427,134.75 from his checking account.

The defendant filed the underlying chapter 7 bankruptcy case on August 6, 2015. The plaintiff filed the instant adversary proceeding on January 12, 2016, asserting three claims, a claim under section 523(a)(2)(A), a claim under section 523(a)(4) for larceny, and a claim under section 523(a)(6). The complaint asserts that the plaintiff suffered damages in the amount of $150,234 due to the above-identified transactions.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'*"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"*First, the tenet that a court must accept as true all of the allegations*

contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

Turning to the asserted causes of action, 11 U.S.C. § 523(a)(2) provides that an individual is not discharged "from any debt for money . . . , 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."

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff justifiably relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")). These elements are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999).

11 U.S.C. § 523(a)(4) provides that an individual is not discharged "from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Larceny does not require the existence of a fiduciary relationship. Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991); see also First Delaware Life Ins. Co. v. Wada (In re Wada), 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997). In the motion, the plaintiff argues that the defendant's actions amount to larceny under section 523(a)(4).

Larceny is a "'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.'" In re Brown, 331 B.R. 243, 249 (Bankr. W.D. Va. 2005) (citing Johnson v. Davis (In re Davis), 262 B.R. 663, 672 (Bankr. E.D. Va. 2001)). Larceny requires an intent to steal. In re Lynch, 315 B.R. 173, 179-80 (Bankr. D. Col. 2004) (discussing the requisite intent for larceny).

11 U.S.C. § 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."

To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id.

Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The debtor must have had the subjective intent to harm or the subjective belief / knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6).

A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The motion will be granted in part. First, although the complaint complains that the plaintiff lost $150,234 due to the above transactions, the complaint lacks key information about the defendant's HELOC account.

While the defendant withdrew $427,134.75 from his checking account, he also transferred a total of $280,500 from his HELOC account to his checking account. If the defendant had $280,500 of unused credit in his HELOC account – apart from the reversed deposit of $229,500 in that account, the defendant transferred the $280,500 from his HELOC account to his checking account within the terms of his HELOC agreement. The $280,500 from the defendant's HELOC account plus the $229,500 deposited into his checking account equals $510,000, which is obviously more than the $427,134.75 the defendant spent from the

checking account.

However, the complaint is devoid of information about whether the defendant had $280,500 of unused credit in his HELOC account – apart from the reversed deposit of $229,500 in that account, when he began transferring funds from his HELOC to the checking account.

More, if the defendant had $280,500 of unused credit in his HELOC account, apart from the reversed deposit of $229,500 in that account, this action is based merely on an intentional breach of contract, *i.e.*, that the defendant did not repay the funds he rightfully took from his HELOC.

Intentional breaches of contract are not actionable under section 523(a)(2)(A), the fraud and larceny aspects of section 523(a)(4) or section 523(a)(6). Lockerby v. Sierra, 535 F.3d 1038, 1042-43 (9th Cir. 2008) (holding that intentional breach of contract does not support a section 523(a)(6) claim just because it was substantially certain that the breach would cause injury); Whited v. Galindo (In re Galindo), 467 B.R. 201, 213 (Bankr. S.D. Cal. 2012) (holding that "[a]n intentional breach of a contract alone will not trigger the 'willful and malicious injury' dischargeability exception"); Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001) and Donaldson v. Ortenzo Hayes (In re Ortenzo Hayes), 315 B.R. 579, 590 (Bankr. C.D. Cal. 2004) (holding that intentional breaches of contract require tortious conduct in order for the debt arising from the breach to be excepted from discharge); see also Rice, Heitman & Davis, S.C. v. Sasse (In re Sasse), 438 B.R. 631, 648 (Bankr. W.D. Wis. 2010) (holding that "intentional breach of contract is not fraud under § 523(a)(2), and a promise about future acts, without more, likewise does not constitute a misrepresentation").

The complaint then does not have factual allegations that rise to the level of tortious conduct and the plaintiff's three tort-derived claims do not meet the plausibility standard of Ashcroft. While there may be possibility or some probability under the current complaint that the defendant acted unlawfully, this is not Ashcroft's standard. The court will dismiss each of the claims with leave for the plaintiff to amend the complaint.

Second, even if the complaint is amended to include factual assertions that rise to the level of tortious conduct, the defendant's alleged misrepresentations about his qualifications for membership with the plaintiff do not rise to actionable misrepresentations under section 523(a)(2)(A).

The misrepresentations about the defendant's qualifications for membership with the plaintiff induced the plaintiff to grant him a membership with the plaintiff.

But, the misrepresentations were not a proximate cause or cause in fact of the plaintiff losing $150,234 from the defendant's HELOC transfers. The complaint does not say that these membership qualification misrepresentations induced the plaintiff to grant the defendant the HELOC account. The plaintiff does not grant HELOC accounts to every member. The defendant was required to specially qualify for the HELOC account, separately and independently from the defendant's qualifications for membership with the plaintiff.

The complaint is clear that the plaintiff granted the HELOC to the defendant sometime after the defendant became a member of the plaintiff and opened the checking account. Docket 1 ¶ 8.

Further, the complaint does not allege when the plaintiff discovered the membership qualification misrepresentation. Thus, even if this was a cause in fact for the plaintiff losing $150,234 from the defendant's HELOC transfers, there are no facts in the complaint regarding a plausible justifiable reliance on these misrepresentations to grant the defendant access to the HELOC.

For instance, the plaintiff may have discovered the defendant's membership qualification misrepresentation at any time prior to July 17, 2014. If the plaintiff discovered the misrepresentation prior to granting the defendant the HELOC, the plaintiff may have decided to go forward with the HELOC notwithstanding. If the plaintiff discovered the misrepresentations after granting the defendant the HELOC but before July 17, 2014, the plaintiff may have decided that rescission of the HELOC – a likely consequence of membership revocation – would not be in its best business interests.

Finally, there are no other representations, much less section 523(a)(2)(A) actionable misrepresentations in the complaint.

The complaint states that the defendant did not discover the "system processing error" giving him access to the extra funds until "later . . . on July 17, 2014." Docket 1 ¶ 12. This means that – according to the complaint – the defendant did not make any misrepresentations calculated to induce the plaintiff to make the extra funds available to the defendant. The defendant realized the availability of the extra funds only after he sought reversal of the HELOC deposit and redeposit of the funds into the checking account. This is not fraud. Fraud requires misconduct prior to the sustained harm – namely, an intentional misrepresentation that will eventually lead to harm.

This is a further basis for dismissal of the section 523(a)(2)(A) claim. Accordingly, the motion will be granted in part. The plaintiff shall have 14 days from the hearing on this motion to file an amended complaint.

11. 15-26281-A-7 STEPHEN TRUMAN — STATUS CONFERENCE
16-2004 — 1-12-16 [1]
PARTNERS FEDERAL CREDIT UNION
V. TRUMAN

Tentative Ruling: None.

12. 16-20749-A-7 SUSAN HINTON — MOTION TO
DJR-1 — VACATE DISMISSAL O.S.T.
3-10-16 [15]

Tentative Ruling: The motion will be denied.

The debtor is asking the court to vacate its February 29, 2016 order dismissing this case. The debtor filed this case on February 10, 2016, but she did not file her bankruptcy schedules, statements and attorney's disclosure statement. As a result, the court issued a notice of incomplete filing on the petition date, telling the debtor to file the missing documents by February 24, 2016. Docket 3.

The debtor contends that she tried filing the missing documents at about 6:00 p.m. on February 23, 2016, only to find out later that the documents were never filed with the court. The debtor asserts that there was a problem with the server of her counsel's computer, making "it impossible for Debtor's counsel to go to the Court's eFile page or to log on to PACER to determine if the missing

documents were timely filed . . . [and] also ceas[ing] emails to the droy@roylawaplc.com email address which the Clerk of the Court had as the email address for noticing of events in this case." Docket 15 at 2.

The motion will be denied for several reasons.

Initially, the debtor makes no effort to cite or brief the legal authority for the setting aside of the dismissal.

Further, even if the court were to apply Fed. R. Civ. P. 60, the motion will be denied. Fed. R. Civ. P. 60(a), as made applicable here by Fed. R. Bankr. P. 9020, prescribes that:

"The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."

Rule 60(a) does not apply here as the debtor admits that there is no clerical mistake or a mistake arising from oversight or omission found in a judgment, order, or other part of the record. It was a computer server malfunction in the office of the debtor's counsel that led to the failure to file the documents.

Next, Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to set aside or reconsider an order or a judgment for:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances."

Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).

The motion has been filed timely. It was filed on March 10, 2016, only 10 days after dismissal of the case.

The debtor admits that there was a neglect on her part in filing the missing documents. She contends that the neglect should be excused, however, as she attempted to file the documents on February 23 and in fact believed they had been filed.

However, the court does not have sufficient evidence to conclude that excusable

neglect exists. The debtor's story does not quite add up.

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the [opposing party]; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

The court does not have sufficient information to ascertain the reason for the debtor's neglect in not filing the documents timely or to confirm the debtor's good faith.

First, even if the debtor attempted to file the missing documents on February 23 and believed she had successfully filed them, the debtor also admits that there was a server malfunction with the computer of the debtor's counsel.

The discovery of the server problem begs the question of why the debtor's counsel was not immediately suspicious about the success of filing the documents? This is not answered by the motion.

Second, as the debtor's counsel lost access to his email account to receive event notices from the court, including a receipt for the supposedly filed documents, he should have immediately become aware of the need to discover whether the e-filing was successful. He obviously did not do this.

The problem with his office computer is no excuse for his failure to make certain that the filing was successful. The debtor's counsel could have simply called the court and spoken with the assigned case manager to determine whether the filing went through. The motion does not say why the debtor's counsel did not do this.

Third, the motion says nothing about why the debtor's counsel did not utilize another computer to check the status of the debtor's case and the filing of the documents.

Fourth, the motion does not unequivocally state when the debtor's counsel first learned of the failed February 23 filing and when he first discovered the computer problem. This information is important as the court did not dismiss the case until February 29, six days after the February 23 filing.

In other words, the debtor had six days after February 23 to make certain that the documents were properly filed with the court and that the case is not dismissed. The motion does not say what the debtor did during those six days.

Given the foregoing, the court cannot ascertain the reason for the debtor's neglect in not filing the documents timely or confirm her good faith.

Finally, there is no other basis for granting the motion under Rule 60(b). In light of the above-outlined deficiencies in the debtor's story, the motion makes no case for mistake, inadvertence, surprise or other reason for relief either. The motion does not establish that the debtor did not know and had no reason to know of the problem with the February 23 filing in time to avert dismissal of the case.