

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: MARCH 30, 2016
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [15-14218](#)-A-7 SARA AKBARPOUR STATUS CONFERENCE RE: COMPLAINT
[16-1014](#) CHASE INC. V. AKBARPOUR 2-1-16 [[1](#)]
NICHOLAS ANIOTZBEHERE/Atty. for pl.

Final Ruling

This matter is continued to May 17, 2016, at 10:00 a.m. to allow the plaintiff to seek entry of default and to prove up the default judgment. If a judgment or dismissal is not in the file, not later than May 3, 2016, the plaintiff shall file a status report.

2. [13-17444](#)-A-7 A & A TRANSPORT, CO., CONTINUED STATUS CONFERENCE RE:
[15-1072](#) INC. COMPLAINT
MANFREDO V. ADAMS 6-2-15 [[1](#)]
DAVID JENKINS/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

3. [15-14147](#)-A-7 MELINDA PILLSBURY-FOSTER STATUS CONFERENCE RE: AMENDED
[16-1011](#) COMPLAINT
PILLSBURY-FOSTER V. NATIONSTAR 2-1-16 [[7](#)]
MORTGAGE, LLC ET AL
MELINDA PILLSBURY-FOSTER/Atty. for pl.
ORDER CONTINUING TO 5/31/16,
ECF NO. 28

Final Ruling

The status conference is continued to June 1, 2016, at 10:00 a.m. A separate order will issue from chambers.

4. [15-14147](#)-A-7 MELINDA PILLSBURY-FOSTER MOTION TO DISMISS ADVERSARY
[16-1011](#) GED-1 PROCEEDING/NOTICE OF REMOVAL
PILLSBURY-FOSTER V. NATIONSTAR AND/OR MOTION FOR MORE DEFINITE
MORTGAGE, LLC ET AL STATEMENT
2-24-16 [[10](#)]
GARY DEVLIN/Atty. for mv.
ORDER CONTINUING TO 6/14/16
ECF NO. 28

Final Ruling

The motion to dismiss is continued to June 14, 2016, at 10:00 a.m. A separate order will issue from chambers.

5. [11-17165](#)-A-7 OAKHURST LODGE, INC., A MOTION TO ALLOW PLAINTIFF TO
[15-1017](#) CALIFORNIA CORPORATION DMS-12 FILE THEIR FIRST AMENDED
OAKHURST LODGE, INC. V. COMPLAINT
FIRST-CITIZENS BANK & TRUST 2-26-16 [[123](#)]
DONNA STANDARD/Atty. for mv.
RESPONSIVE PLEADING

No tentative ruling.

6. [16-10165](#)-A-7 ANGELA RENFROE STATUS CONFERENCE RE: COMPLAINT
[16-1012](#) 1-27-16 [[1](#)]
U.S. TRUSTEE V. RENFROE
ROBIN TUBESING/Atty. for pl.

Final Ruling

The status conference is continued to April 13, 2016, at 10:00 a.m. to be heard in conjunction with the motion for default judgment.

7. [15-14865](#)-A-7 DANIEL PUENTES STATUS CONFERENCE RE: COMPLAINT
[16-1017](#) 2-3-16 [[1](#)]
PUENTES V. DISCOVER BANK
TIMOTHY SPRINGER/Atty. for pl.
DISMISSED 3/19/16

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

8. [15-10966](#)-A-7 RODNEY HARON MOTION TO DISMISS ADVERSARY
[15-1122](#) GTG-1 PROCEEDING/NOTICE OF REMOVAL
HAWKINS V. NEVADA PROPERTY 1 2-24-16 [[26](#)]
LLC
WILLIAM NOALL/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Complaint under Rule 12(b)(6)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Denied

Order: Civil minute order

While this case was pending as a chapter 11 case, the present adversary complaint was filed by the debtor in possession. Since then, the case was converted, and Robert Hawkins has been substituted as the plaintiff in this action.

The defendant now moves to dismiss the complaint under Civil Rule 12(b)(6) for failure to state a claim. The motion is opposed by the trustee.

STANDARDS UNDER RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "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." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

ANALYSIS

The elements of an avoidable preference are well known and set forth in § 547(b):

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made-- (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if--(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C.A. § 547 (West); see also *In re Ahaza Sys., Inc.*, 482 F.3d 1118, 1123 n.3 (9th Cir. 2007) (quoting 11 U.S.C. § 547(b)).

The complaint alleges almost all elements of a preferential transfer under this statutory subsection. It alleges that "[o]n various dates within [90] days of the Petition date, the debtor paid substantial sums to the defendant." It further claims that these payments are estimated to amount to approximately \$40,000 in the aggregate.

The trustee also alleges that the payment transfers were made while the debtor was insolvent. Even though this allegation is somewhat conclusory, the statute itself requires the court to presume insolvency of the debtor on and during the 90 days immediately preceding the date of the petition. 11 U.S.C. § 547(f). Because insolvency is statutorily presumed, the insolvency of the debtor need not be alleged in greater and more plausible factual detail.

In addition, the complaint alleges that the payments were "transfers of an interest of the debtor in property" and were "for, or on account of an antecedent debt owed by the debtor before the payment was made." It claims that the payment transfers enabled the defendant to receive more than it would have received if the case were a case under chapter 7 and the payment had not been made. These particular factual allegations, the court notes, do track substantially the language of the statute while inserting the relevant party (the debtor) into such language. But this statutory language is quite specific, so recasting such language would not cause it to rise to a more acceptable level of plausibility. And accepting as true that the debtor owed a debt to the defendant, the court reasonably infers that the transfers were to or for the benefit of a creditor.

The complaint contains the aggregate amount of such transfers. The defendant has admitted the existence of transfers in its reply (the court takes judicial notice of the reply and its contents under F.R.E. 201) when it stated that it "*did* receive certain transfers from the Debtor during the 90-day period preceding the petition date." Reply Supp. Mot. Dismiss Compl., at 3, ECF No. 39. Instead of lacking sufficient notice from the complaint of which transfers are the basis for its alleged liability, the defendant attempts to litigate and argue defenses to these transfers under the guise of lacking enough factual detail to determine whether certain statutory defenses apply. Reply Supp. Mot. Dismiss Compl. at 3. Defendant states that it has no way of knowing which payments are alleged to be preferential "particularly as *each transfer* during the 90-day period is clearly supported by a contemporaneous [exchange] or subsequent extension of credit." *Id.* (emphasis added).

In short, the defendant admits knowledge of the transfers made to it by debtor during the 90-day preference period. But it argues that it lacks sufficient knowledge of which transfers are at issue because *each transfer* falls within a statutory defense, *see, e.g.,* § 547(c)(1) and (4). By this argument, the defendant has impliedly relied on a pleading standard much higher than required, *i.e.,* a standard that would require a complaint to contain facts that would enable a defendant to know with certainty whether its defense would prevail as to each separate factual basis for liability.

The proper standard, rather, is that the complaint plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Accepting the complaint's factual allegations as true and construing them in the light most favorable to the trustee as the non-movant, the court concludes that the factual detail provided, while sparse, meets the minimal requirements necessary to state a claim upon which relief can be granted. The defendant has fair notice of which transfers are the basis for the complaint, and whether each transfer will fall within a statutory defense can be addressed in the normal course of litigation.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Defendant Nevada Property 1 LLC's motion to dismiss under Rule 12(b)(6) has been presented to the court. Having reviewed the papers and evidence filed in support and opposition to the motion and having heard the arguments of counsel, if any, and good cause appearing,

IT IS ORDERED that the motion is denied. The defendant shall answer the complaint within the time prescribed by Rule 7012(a) of the Federal Rules of Bankruptcy Procedure.

9. [15-10966](#)-A-7 RODNEY HARON
[16-1015](#)
HARVEYS TAHOE MANAGEMENT
COMPANY, INC. ET AL V. HARON
MARGARET FOLEY/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: COMPLAINT
2-1-16 [[1](#)]

No tentative ruling.

10. [15-13996](#)-A-7 NATHANIAL LEGGS STATUS CONFERENCE RE: COMPLAINT
 [16-1013](#) 1-31-16 [[1](#)]
 LEGGS V. LOBEL FINANCIAL
 DAVID JENKINS/Atty. for pl.

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

11. [15-10966](#)-A-7 RODNEY HARON CONTINUED STATUS CONFERENCE RE:
[15-1122](#) COMPLAINT
HAWKINS V. NEVADA PROPERTY 1 10-18-15 [[1](#)]
LLC

No tentative ruling.