

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, March 31, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

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. [20-10608](#)-A-13 **IN RE: TRISHALL WASHINGTON**
[TCS-4](#)

CONTINUED MOTION TO MODIFY PLAN
1-3-2022 [\[58\]](#)

TRISHALL WASHINGTON/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The chapter 13 trustee timely opposed this motion, and the court continued the hearing to March 31, 2022 at 9:30 a.m. Order, Doc. #70. On March 3, 2022, the chapter 13 trustee and counsel for the debtor submitted a joint stipulation to resolve the chapter 13 trustee's opposition to confirmation of the chapter 13 plan with a proposed order confirming the debtor's second modified plan. Doc. ##74, 75.

The failure of creditors, 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 amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The confirmation order shall be consistent with the proposed order marked Exhibit A, Doc. #75.

2. [19-10438](#)-A-13 **IN RE: JOSE/JENNIFER RODRIGUEZ**
[NES-4](#)

CONTINUED MOTION TO MODIFY PLAN
1-14-2022 [\[104\]](#)

JENNIFER RODRIGUEZ/MV
NEIL SCHWARTZ/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtors Jose Luis Rodriguez and Jennifer Kay Rodriguez (collectively, "Debtors") filed and served this motion to confirm the first modified chapter 13 plan pursuant to Local Rule of Practice ("LBR") 3015-1(d)(2) and set for hearing on February 24, 2022. Doc. ##104-07. The chapter 13 trustee ("Trustee") filed an opposition to Debtors' motion. Doc. #108. The court continued this matter to March 31, 2022 and ordered Debtors to file and serve a written response to Trustee's objection by March 10, 2022; or if Debtors elected to withdraw this plan, then Debtors had to file, serve, and set for hearing a confirmable modified plan by March 17, 2022. Doc. #111.

Having reviewed the docket in this case, the court finds Debtors have not voluntarily converted this case to Chapter 7 or dismissed this case, and Trustee's objection has not been withdrawn. Further, Debtors have not filed and served any written response to Trustee's objection. Debtors have not filed, served, and set for hearing a confirmable modified plan by the time set by the court.

Accordingly, Debtors' motion to confirm their first modified Chapter 13 plan is DENIED on the grounds set forth in Trustee's opposition.

3. [21-10840](#)-A-13 **IN RE: HECTOR/DESIREE FLORES**
[MHM-1](#)

MOTION TO DISMISS CASE
2-18-2022 [\[39\]](#)

MICHAEL MEYER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to April 21, 2022, at 9:30 a.m.

ORDER: The court will issue an order.

The trustee's motion to dismiss will be continued to April 21, 2022, at 9:30 a.m., to be heard with the debtors' motion to confirm the second modified chapter 13 plan (TCS-2, Doc. ##43-49).

4. [22-10144](#)-A-13 **IN RE: VANESSA GONZALES**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
3-9-2022 [[17](#)]

MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the filing fees now due have been paid. The case shall remain pending.

5. [21-12456](#)-A-13 **IN RE: PEDRO GALLEGOS**
[MHM-1](#)

MOTION TO DISMISS CASE
2-18-2022 [[34](#)]

MICHAEL MEYER/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue the order.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, 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 amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Here, the chapter 13 trustee asks the court to dismiss this case for unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) and because debtor has failed to make all payments due under the plan (11 U.S.C. § 1307(c)(4)). Doc. #34. Pedro Moreno Gallegos ("Debtor") is delinquent in the amount of \$2,600.00. Doc. #34. Before this hearing, additional payments in the amount of \$1,300.00 for February 25, 2022 and March 25, 2022 also will come due. Id. No written opposition was filed.

On January 18, 2022, counsel for Debtor filed a Notice of Death of a Debtor. See Doc. #29. Debtor passed away on November 26, 2021. If Debtor's estate pays the delinquency of \$2,600.00, in addition to all monthly payments that come due while this motion is pending, Trustee will withdraw this motion to dismiss. Doc. #34.

Federal Rule of Bankruptcy Procedure 1016 provides that in the event of the death of a chapter 13 debtor the case may be dismissed or, if further administration is possible and in the best interest of the parties, the case may be concluded in the same manner as though the death had not occurred. "The term 'further administration' implies that the case would be carried to its normal conclusion with payments to the creditors as provided in the confirmed plan, rather than conversion of the case to Chapter 7." In re Spiser, 232 B.R. 669, 673 (Bankr. N.D. Tex. 1999). No motion for further administration of this chapter 13 bankruptcy case has been filed.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay by Debtor that is prejudicial to creditors and 11 U.S.C. § 1307(c)(4) for failing to timely make payments due under the plan. However, this case cannot be converted to chapter 7 because Debtor is deceased and cannot be a debtor upon date of conversion of the case. In re Goldston, 627 B.R. 841, 866-67 (Bankr. D.S.C. 2021).

Accordingly, this motion will be GRANTED. The case will be dismissed.

6. [22-10158](#)-A-13 **IN RE: GUILLERMO/VERONICA PRADO**
[CJK-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY LOANCARE LLC
3-15-2022 [\[37\]](#)

LOANCARE, LLC/MV
JASON VOGELPOHL/ATTY. FOR DBT.
CHRISTINA KHIL/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. The debtors filed a modified plan on March 28, 2022 (Doc. #43). The court notes that the debtors have not yet filed and set for hearing a motion to confirm the modified plan as required by Local Rule of Practice 3015-1(d)(1).

7. [22-10158](#)-A-13 **IN RE: GUILLERMO/VERONICA PRADO**
[JHK-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TD BANK, N.A.
2-17-2022 [\[17\]](#)

TD BANK, N.A./MV
JASON VOGELPOHL/ATTY. FOR DBT.
JOHN KIM/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. The debtors filed a modified plan on March 28, 2022 (Doc. #43). The court notes that the debtors have not yet filed and set for hearing a motion to confirm the modified plan as required by Local Rule of Practice 3015-1(d)(1).

8. [22-10158](#)-A-13 **IN RE: GUILLERMO/VERONICA PRADO**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
3-10-2022 [\[29\]](#)

JASON VOGELPOHL/ATTY. FOR DBT.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. The debtors filed a modified plan on March 28, 2022 (Doc. #43). The court notes that the debtors have not yet filed and set for hearing a motion to confirm the modified plan as required by Local Rule of Practice 3015-1(d)(1).

9. [20-12667](#)-A-13 **IN RE: KIMBERLY/KIM LOPEZ**
[MHM-1](#)

MOTION TO DISMISS CASE
2-18-2022 [\[45\]](#)

MICHAEL MEYER/MV
ERIC ESCAMILLA/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion to dismiss case on March 25, 2022. Doc. #49.

10. [21-11182](#)-A-13 **IN RE: KIAH SANDERS**
[WLG-2](#)

CONTINUED MOTION TO MODIFY PLAN
12-14-2021 [\[29\]](#)

KIAH SANDERS/MV
NICHOLAS WAJDA/ATTY. FOR DBT.
RESPONSIVE PLEADING
CASE DISMISSED 3/28/22

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was entered on March 28, 2022. Doc. #62. The motion will be DENIED AS MOOT.

11. [21-11182](#)-A-13 **IN RE: KIAH SANDERS**
[WLG-3](#)

MOTION TO INCUR DEBT
3-1-2022 [\[49\]](#)

KIAH SANDERS/MV
NICHOLAS WAJDA/ATTY. FOR DBT.
RESPONSIVE PLEADING
CASE DISMISSED 3/28/22

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was entered on March 28, 2022. Doc. #62. The motion will be DENIED AS MOOT.

12. [20-10488](#)-A-13 **IN RE: EDWIN/MARIZEN PROTACIO**
[FW-2](#)

MOTION TO MODIFY PLAN
2-11-2022 [[42](#)]

MARIZEN PROTACIO/MV
GABRIEL WADDELL/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.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of creditors, 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 amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is 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.

13. [22-10091](#)-A-13 **IN RE: MARSHA MENDOZA**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
3-1-2022 [[19](#)]

\$10.00 INSTALLMENT PAYMENT ON 3/2/22

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid.

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.

14. [21-12495](#)-A-13 **IN RE: JARED/CHRISTINA HARP**
[DMG-3](#)

MOTION TO CONFIRM PLAN
2-18-2022 [\[48\]](#)

CHRISTINA HARP/MV
D. GARDNER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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 after the
hearing.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). On March 11, 2022, the chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to confirm the chapter 13 plan. Doc. #59. Creditor Guild Mortgage Company LLC ("Creditor") filed an objection to plan confirmation on March 15, 2022. Doc. #61. On March 23, 2022, the debtors filed a written reply. Doc. #64. The failure of other creditors, 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. This matter will proceed as scheduled.

The debtors Jared Christopher Harp and Christina Govan Harp (together, "Debtors") filed their second amended chapter 13 plan ("Plan") on February 18, 2022. Doc. #51. Trustee objects to confirmation of the Plan because Debtors are delinquent in Plan Payments. Doc. #59. Trustee moved to dismiss Debtors' bankruptcy case for the same reason but withdrew the motion to dismiss on March 25, 2022. Creditor objects to confirmation of the Plan on the grounds that the Plan: (1) does not provide for Creditor's secured claim; and (2) does not cure a \$68.16 pre-petition default. Doc. #61.

Federal Rule of Bankruptcy Procedure 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." 11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof of claim filed under § 501, is deemed allowed unless a party in interest objects. Creditor filed its proof of claim on December 6, 2021. Claim 12.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #51. Creditor contends that the Plan must provide for Creditor's claim in Class 4. Doc. #64. Class 4 includes secured claims that mature after the completion of the plan, are not in default, and will be paid directly by the debtors. Doc. #51. However, Creditor's proof of claim contends that there is a default, so it is unclear whether Class 4 is appropriate.

On March 23, 2022, Debtors stated that they will include Creditor in Class 4 by way of a modification contained in the order confirming the plan, and that Debtors will increase their next payment to Creditor by the amount of the default on a one-time basis. Doc. #64. Creditor has not acknowledged the purported agreement and has not withdrawn the objection to confirmation.

Although a chapter 13 need not "provide for" a secured claim, Creditor asserts a \$68.16 pre-petition delinquency evidenced by a proof of claim. It is unclear to the court whether the resolution of Creditor's objection proposed by Debtors, including the addition of Creditor's claim to Class 4 of the Plan in the order confirming the plan, is appropriate.

Regarding Trustee's objection, Debtors claim to be current in Plan payments. Doc. #64. Trustee's objection cites to 11 U.S.C. § 1325(a)(6), which predicates plan confirmation on the debtors' ability to make all payments under the plan and to comply with the plan. Whether Trustee objects to Debtors' ability to make Plan payments in the future is unclear, but a review of Debtors' Schedules I and J does raise feasibility issues. Debtors schedule a monthly net income of \$617.23 while proposing a monthly Plan payment of \$750. Schedule J, Doc. #28; Plan, Doc. #51. Further, while Trustee withdrew a separate motion to dismiss, Trustee has not withdrawn the objection to plan confirmation.

The court is inclined to deny plan confirmation. This matter will proceed as scheduled so the court can hear from Creditor, Trustee, and Debtors as to whether a new plan will need to be filed or whether, in light of Debtors' representations on the record, the Plan can be confirmed.

15. [21-12495](#)-A-13 **IN RE: JARED/CHRISTINA HARP**
[MHM-2](#)

MOTION TO DISMISS CASE
3-2-2022 [\[53\]](#)

MICHAEL MEYER/MV
D. GARDNER/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion to dismiss on March 25, 2022. Doc. #66.

MOTION TO REFINANCE
3-17-2022 [\[37\]](#)

DANA HERRERA/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

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 Moving Party shall submit a proposed
order after the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("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.

Kenneth Paul Herrera and Dana Renae Herrera (together, "Debtors"), the chapter 13 debtors in this case, move the court for an order authorizing Debtors to refinance their mortgage for their real property commonly known as 12417 Locksley Drive, Bakersfield, CA (the "Property"). Doc. #37. Debtors wish to refinance their mortgage because the refinancing will allow Debtors to pay off the balance of their chapter 13 bankruptcy. Decl. of Dana Herrera, Doc. #39.

LBR 3015-1(h)(1)(E) provides that "if the debtor wishes to incur new debt . . . on terms and conditions not authorized by [LBR 3015-1(h)(1)(A) through (D)], the debtor shall file the appropriate motion, serve it on the trustee, those creditors who are entitled to notice, and all persons requesting notice, and set the hearing on the Court's calendar with the notice required by Fed. R. Bankr. P. 2002 and LBR 9014-1."

The court is inclined to GRANT this motion. This motion was properly served and noticed, and opposition may be presented at the hearing. There is no indication that Debtors are not current on their chapter 13 plan payments or that the chapter 13 plan is in default. The new debt is a single loan incurred only to refinance the existing debt encumbering the Property. Doc. #39. The only security for the new debt will be the Property.

Accordingly, subject to opposition raised at the hearing, this motion is GRANTED. Debtors are authorized, but not required, to enter into a refinance agreement in a manner consistent with the motion.

1. [21-12205](#)-A-7 **IN RE: EDUARDO/JESSICA MACIAS**
[22-1005](#) [CAE-1](#)

STATUS CONFERENCE RE: COMPLAINT
1-19-2022 [[1](#)]

MACIAS V. UNITED STATES DEPARTMENT OF EDUCATION ET AL
PETER BUNTING/ATTY. FOR PL.
DISMISSED; CLOSED

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This adversary proceeding was dismissed on February 8, 2022. Doc. #7.

2. [21-10425](#)-A-7 **IN RE: WAMIDH AL KAJAJI**
[21-1028](#)

TELEPHONIC HEARING RE: AMENDED COMPLAINT
8-31-2021 [[11](#)]

SMAHA LAW GROUP, APC V. KAJAJI ET AL
KRISTEN FRITZ/ATTY. FOR PL.

NO RULING.

3. [21-12729](#)-A-7 **IN RE: JOSE MESTRES**
[22-1006](#) [CAE-1](#)

STATUS CONFERENCE RE: COMPLAINT
1-20-2022 [[1](#)]

SCHOOLSFIRST FEDERAL CREDIT UNION V. MESTRES
PAUL REZA/ATTY. FOR PL.

NO RULING.

4. [21-10842](#)-A-7 **IN RE: JESUS FLORES AND LETICIA HERNANDEZ**
[21-1029](#) [SLL-1](#)

CONTINUED MOTION FOR SUMMARY JUDGMENT
1-21-2022 [\[15\]](#)

VOKSHORI LAW GROUP V. FLORES
STEPHEN LABIAK/ATTY. FOR MV.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion for summary judgment on March 15, 2022. Doc. #36.

5. [21-12348](#)-A-11 **IN RE: JUAREZ BROTHERS INVESTMENTS, LLC**
[22-1004](#) [SR-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
2-11-2022 [\[9\]](#)

JUAREZ BROTHERS INVESTMENTS, LLC V. GRIMMWAY ENTERPRISES,
THOMAS WOODS/ATTY. FOR MV.
RESPONSIVE PLEADING

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 after the
hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The plaintiff timely filed written opposition on March 17, 2022. Doc. #13. This matter will proceed as scheduled.

As a procedural matter, the Notice of Hearing filed in connection with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice include the names and addresses of persons who must be served with any opposition. The Notice of Hearing also does not comply with LBR 9014-1(d)(3)(B)(iii), which requires the notice to advise respondents that they can determine whether the matter has been resolved without oral argument or whether the court has issued a tentative ruling by viewing the court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing, and that parties appearing telephonically must view the pre-hearing dispositions prior to the hearing. Additionally, the Notice of Hearing and Motion were filed as the same document, which does not comply with LBR 9004-2(c)(1). The court encourages counsel for the moving party to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the local rules.

On January 11, 2022, the chapter 11 debtor and debtor-in-possession Juarez Brothers Investments LLC ("Plaintiff") commenced this adversary proceeding and filed a verified complaint (the "Complaint"). Doc. #1.

Grimmway Enterprises Inc. ("Defendant") moves to dismiss all claims against it pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) for failure to state a claim upon which relief can be granted. Doc. #9. Rule 12(b)(6) is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. As stated in Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss ("MPA"), Defendant "moves to dismiss for: (1) judicial estoppel for the changing of [Plaintiff]'s representatives' 'stories' in open court, (2) the application of laches and statutes of limitation, and (3) Mr. Cesar Juarez's well-documented statutory and apparent authority to bind [Plaintiff] to commercial agreements including the ones involved in this case - found in judicially noticeable records." MPA 5:5-9, Doc. #10.

The court is inclined to DENY Defendant's motion because the motion does not raise any issue with respect to the sufficiency of the allegations against Defendant as set forth in the Complaint.

Defendant asks the court to take judicial notice of various documents. Doc. #11. Although Federal Rule of Evidence 201(c)(2) requires the court "take judicial notice if a party requests it and the court is supplied with the necessary information," the court will instead exclude the evidence submitted by Defendant. Defendant's motion is made under Rule 12(b)(6). Rule 12(d) states that matters outside the pleadings presented to a court on a motion under Rule 12(b)(6) will render the motion a motion for summary judgment unless the outside matters are excluded by the court. Therefore, the court will exclude the outside matters, and Defendant's request for judicial notice is denied.

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "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, 570 (2007)); Rule 8(a). "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." Iqbal, 556 U.S. at 679. In ruling on a Rule 12(b)(6) motion, the material considered is generally limited to the face of the complaint and material incorporated into the complaint by reference. Stoyas v. Toshiba Corp., 896 F.3d 933, 938-39 (9th Cir. 2018).

"Ordinarily affirmative defenses may not be raised by motion to dismiss[,] but this is not true when . . . the defense raises no disputed issues of fact." Scott v. Kuhlmann, 746 F.2d 1377 (9th Cir. 1984) (per curiam) (citation omitted). The defendant raising an affirmative defense bears the burden of proving the defense. Garcia v. Salvation Army, 918 F.3d 997, 1008 (9th Cir. 2019).

Here, Defendant states as grounds for dismissal estoppel, laches, and statute of limitations, each of which are all specifically identified as affirmative defenses under Rule 8(c). Defendant's argument that Plaintiff is bound, as a matter of law, by the execution of a deed of trust by Cesar Juarez, a member of Plaintiff, is not an affirmative defense explicitly stated under Rule 8(c). Nevertheless, "[a]gency is a fact, the burden of proving which rests upon the party affirming its existence" and it is therefore procedurally similar to one of the enumerated affirmative defenses. Burbank v. National Cas. Co., 43 Cal. App. 2d 773, 781 (1941).

None of Defendant's arguments challenge the sufficiency of the allegations in the Complaint, which is the sole operation of a Rule 12(b)(6) motion. Regarding estoppel, Defendant asserts that three elements must be met to satisfy estoppel and then seeks to present evidence and argument proving the three elements. MPA 10:5-12:10, Doc. #10. Defendant does not attack the Complaint. The same is true for Defendant's argument relating to laches, where Defendant not only relies exclusively on state law but also suggests that two elements must be met and proceeds to cite outside evidence in an attempt to establish the two elements. MPA 12:12-14.

With respect to Defendant's statute of limitations argument, a motion to dismiss may be proper when the allegations of the complaint are clearly barred by the relevant statute of limitations. Kuhlmann, 746 F.2d 1377. In the MPA, Defendant asks the court to consider what the "gravamen" of the Complaint might be, then suggests that the Complaint is an action to cancel an instrument and therefore subject to a four-year statute of limitations. MPA 13:17-25 (citing Robertson v. Superior Court, 90 Cal. App. 4th 1319, 1325-1328 (2001)); Cal. Civ. Code § 3412; Cal. Civ. Proc. Code § 343. Underlying this argument is Defendant's contention that an action to cancel an instrument, in this case a deed of trust, pursuant to California Civil Code § 3412 is a "non-quiet title" claim. MPA 13:15.

However, an action to cancel a deed of trust under California Civil Code § 3412 is simply one theory a party may advance in attempting to quiet title to real property. Muktarian v. Barmby, 63 Cal. 2d 558, 560 (1965) (explaining that "there is no statute of limitations governing quiet title actions [so] it is ordinarily necessary to refer to the underlying theory of relief to determine which statute applies," and collecting cases and various theories applicable to quiet title actions); cf. Robertson, 90 Cal. App. 4th at 1326 (explaining that California Civil Code § 3412 contains no statute of limitation itself and is a "maxim[] of law generally applicable to civil and commercial transactions and relationships."). While it is generally true that an action brought pursuant to California Civil Code § 3412 is subject to a statute of limitations, in the context of this Complaint, the California Civil Code § 3412 claim is part of Plaintiff's request to quiet title. Importantly, the Complaint seeks to quiet title to property currently in the possession of Plaintiff.

"It long has been the law that whether a statute of limitations bars an action to quiet title may turn on whether the plaintiff is in undisturbed possession of the land." Mayer v. L&B Real Estate, 43 Cal. 4th 1231, 1237 (2008). Generally, the statute of limitations is tolled for a plaintiff seeking to quiet title while in possession of the property and only begins to run when the plaintiff is no longer in "undisturbed possession" of the land. Kumar v. Ramsey, 71 Cal. App. 5th 1110, 1122-23 (2021). Determining whether a disturbance has arisen requires the court to consider a number of factual questions. Id. Here, because Plaintiff is in possession of the property at issue, it is not clear on the face of the Complaint that the claims for relief asserted in the Complaint are barred by a statute of limitations.

Finally, with respect to Defendant's argument that Plaintiff's member, Cesar Juarez, bound Plaintiff to a deed of trust as a matter of law, the court has already stated that "[a]gency is a fact, the burden of proving which rests upon the party affirming its existence." Burbank, 43 Cal. App. 2d at 781; see also C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc., 213 F.3d 474, 479-80 (9th Cir. 2000) (stating that unless only one conclusion about an agent's authority may be drawn, "existence of an agency and the extent of an agent's authority is a question of fact and should not be decided on summary judgment."). Defendant's final argument, like the others before it, fails to

support a Rule 12(b)(6) motion and does not attack the allegations of the Complaint.

Defendant does not contest the plausibility of the Complaint. Instead, Defendant's motion asks the court to consider outside evidence and rule on affirmative defenses for which Defendant bears the burden of proof, defenses that could negate Defendant's liability despite the well plead allegations of the Complaint.

Accordingly, the court is inclined to DENY the motion to dismiss and give Defendant until April 14, 2022 to file an answer.

In addition, the status conference currently scheduled for April 7, 2022 at 11:00 a.m. will be continued to June 9, 2022 at 11:00 a.m. The parties shall comply with the various requirements set forth in the Order to Confer on Initial Disclosures and Setting Deadlines (Doc. #5) using the June 9, 2022 status conference date.

6. [17-13859](#)-A-7 **IN RE: KYLE PENNINGTON**
[17-1091](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
12-16-2017 [\[1\]](#)

MARTINEZ V. PENNINGTON
KEVIN LITTLE/ATTY. FOR PL.

NO RULING.

The parties should be prepared to explain to the court at the hearing why joint or unilateral status report(s) were not filed no later than March 24, 2022, as required by the order continuing the status conference. Doc. #86.