

## Eastern District of California

**April 3, 2014 at 1:30 p.m.**

- This is a post-judgment order to appear filed by the judgment creditor/Chapter 7 Trustee, Thomas A. Aceituno, for the examination of the judgment debtor, Marco Cuevas. The court having signed the order to appear for examination, Marco Cuevas shall appear and furnish information to aid in the enforcement of the money judgment against him.

3. [10-43410](#)-E-13 MARIANN BINGHAM  
[14-2020](#) DBJ-1  
BINGHAM V. OCWEN LOAN  
SERVICING, LLC

MOTION FOR ENTRY OF DEFAULT  
JUDGMENT  
3-4-14 [[10](#)]

**Final Ruling:** The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's final ruling.** No appearance at the April 3, 2014 hearing is required.

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Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

**The hearing on the Motion for Entry of Default Judgment is continued to 1:30 p.m. on May 15, 2014.**

#### **Stipulation to Continue**

The Parties filed a Stipulation to continue the hearing on this Motion from the April 3, 2014 hearing date. Though the Stipulation does not state the reason for the continuance or a date for the continued hearing, given the nature of the Adversary Proceeding the court will infer that the parties are in active, responsible settlement discussions. The Complaint seeks a determination that the Defendant's deed of trust is void, the full amount of its secured claim having been paid through the Chapter 13 Plan. It is asserted that the discharge has been entered and the Defendant is now enjoined pursuant to 11 U.S.C. § 524 from attempting to enforce the unsecured portion of its claim against the Plaintiff or Plaintiff's assets. FN.1.

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FN.1. As discussed below the court has previously valued the secured claim of Ocwen Loan Servicing, LLC. No proof of claim was filed for Ocwen Loan Servicing, LLC. However, Ocwen Loan Servicing, LLC did file Proof of Claim No. 1 for HSBC Bank, USA, N.A., as Trustee. Official Registry of Claims in the Plaintiff's bankruptcy case. Bankr. E.D. Cal. 10-43410. The Proof of Claim Form states that Notices and Payments to and for HSBC Bank, USA, N.A, as Trustee, are to be mailed to Ocwen Loan Servicing, LLC.  
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## **REVIEW OF MOTION**

Plaintiff Mariann Bingham, seeks entry of a default judgment against Defendant Ocwen Loan Servicing, LLC ("Defendant"), in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceedings was commenced on January 17, 2014. Dckt. No. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on January 17, 2014. Dckt. No. 3. The complaint and summons were properly served on Defendant. Dckt. No. 7.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on February 25, 2014. Dckt. No. 9.

## **FACTS**

IT appears that Defendant Ocwen Loan Servicing, LLC is the servicer for HSBC Bank USA, N.A., as Trustee for the holders of Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2006-S3 ("HSBC"), the owner of the note and second deed of trust recorded against Plaintiff-Debtor's residence (6177 Oliver Road, Paradise, California). See Proof of claim No. 1.

On September 8, 2010, Plaintiff-Debtor filed a Motion to Value Collateral of Ocwen Loan Servicing, LLC, which the court granted on October 13, 2010. Dckt. Nos. 10 & 17 in Underlying Bankruptcy Case No. 10-43410. On November 1, 2010, Plaintiff confirmed a plan that purported to value the second note and deed of trust held by Defendant at \$0.00. Dckt. Nos. 5 & 19. Plaintiff obtained a discharge in their bankruptcy case on January 6, 2014. The Debtor has completed her Chapter 13 Plan. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extent of Defendant's lien.

## **APPLICABLE LAW**

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a

default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.