

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

April 25, 2018 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	15-26503-D-7	NOLANDO/LYNNE BANEZ	MOTION TO AVOID LIEN OF CAPITOL
	RCB-3		ONE BANK (USA), N.A.
			3-13-18 [42]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

2. 15-26503-D-7 NOLANDO/LYNNE BANEZ MOTION TO AVOID LIEN OF
RCB-4 DISCOVER BANK
3-13-18 [37]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

3. 10-47422-D-7 DENNIS/SHERYL LANCASTER MOTION TO RESERVE ASSETS UPON
HSM-9 CLOSING OF THE CASE
3-20-18 [133]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to reserve assets upon closing of the case is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

4. 18-21340-D-7 LAWRENCE/JOYCE LEE BOEH MOTION FOR RELIEF FROM
JHW-1 AUTOMATIC STAY
1ST MIDAMERICA CREDIT UNION 3-14-18 [10]
VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

5. 17-24444-D-11 RAMON LOPEZ CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
7-5-17 [1]

6. 17-24444-D-11 RAMON LOPEZ
MF-1

CONTINUED MOTION TO APPOINT
TRUSTEE
9-1-17 [54]

7. 11-44346-D-7 MELVIN JARVIS AND BELINDA
SDB-2 MORRIS-JARVIS

MOTION TO AVOID LIEN OF
PORTFOLIO RECOVERY ASSOCIATES,
LLC
3-27-18 [35]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

8. 12-31648-D-12 RONALD/TINA BOX
SAC-6

MOTION FOR ENTRY OF DISCHARGE
3-2-18 [106]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for entry of Chapter 12 discharge pursuant to 11 U.S.C. § 122(a) is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

9. 17-21149-D-7 LESLEY REEVE
17-2095 PA-1
ST. CROIX FINANCIAL CENTER,
INC. V. REEVE

MOTION FOR SUMMARY JUDGMENT
3-14-18 [17]

Final ruling:

The hearing on this motion has been continued to June 20, 2018 at 10:00 a.m. by stipulation of the parties, approved by order filed April 12, 2018. No appearance is necessary on April 25, 2018.

10.	17-21149-D-7	LESLEY REEVE	CONTINUED MOTION APPROVE SALE
	DNL-3		AGREEMENT
			1-31-18 [44]

Final ruling:

Pursuant to the order entered on April 16, 2018 the hearing on this motion is continued to June 20, 2018 at 10:00 a.m. No appearance is necessary on April 25, 2018.

11.	17-28363-D-7	CHESTER JIMERSON AND	CONTINUED MOTION TO EXTEND
	DNL-3	SUNITA RANI	DEADLINE TO FILE A COMPLAINT
			OBJECTING TO DISCHARGE OF THE
			DEBTOR
			3-14-18 [34]

Tentative ruling:

This is the trustee's motion to extend the deadline to object to the debtors' discharge, filed as a countermotion to the debtors' motion to convert the case to a chapter 13 case. The debtors have filed opposition. By separate ruling on this calendar, the court has indicated it will grant the debtors' motion, which will render the trustee's countermotion moot. The court therefore intends to deny the motion as moot. The court will hear the matter.

12.	17-28363-D-7	CHESTER JIMERSON AND	CONTINUED MOTION TO CONVERT
	SNM-1	SUNITA RANI	CASE TO CHAPTER 13
			3-6-18 [29]

Tentative ruling:

This is the debtors' motion to convert this case from chapter 7 to chapter 13. The trustee has filed opposition and the debtors have filed two declarations of their attorney in reply.¹ For the following reasons, the motion will be granted.

The trustee originally asked that a briefing schedule be set for this motion so he could conduct discovery. He has since withdrawn that request, both in writing and orally at the initial hearing. In opposition to the motion, the trustee relies on what he believes was materially incorrect information on the debtors' original schedules and statement of financial affairs. He also contends statements were made at the meeting of creditors "that could support a finding of egregious behavior by the Debtors" Trustee's Opp., DN 48, at 2:18-19. The court has reviewed (1) the debtors' original and amended schedules and statements of financial affairs, (2) what they filed as exhibits in support of this motion as "Chapter 13 Schedules I and J," and (3) the transcripts of the initial and continued sessions of the meeting of creditors, supplied by the trustee.

In Marrama v. Citizens Bank, 549 U.S. 365, 371 (2007), the Supreme Court held that a debtor does not have an absolute right to convert a chapter 7 case to chapter 13. The Court expressly did not "articulate with precision what conduct qualifies as 'bad faith'" sufficient to permit a judge to deny a motion to convert (549 U.S. at 375 n.11), but the Court did conclude that "the courts in this case correctly held that Marrama forfeited his right to proceed under Chapter 13." Id. at 371.

The court finds the debtors' conduct in the present case to be much less egregious than was the debtor's in Marrama. Here, the debtors disclosed the originally-omitted asset at the outset of the first session of the meeting of creditors and, relatively promptly, amended their schedules. True, the trustee had become aware of the omitted asset before the initial session of the meeting took place. But it appears from the email exchanges submitted by the trustee that he discovered the asset through a property profile and mortgage statement provided him by the debtors in response to his apparently generic request for property valuations and mortgage statements. In other words, it was the debtors who initiated the disclosure, not the trustee.

Since the filing of this case, the debtor has received a promotion at his job, which entails a significant increase in his income. The debtors have submitted as exhibits to this motion what they call "Chapter 13 Schedules I and J," in which they have disclosed the increased income.² They have not increased their own living expenses but have added \$600 per month which they contend they contribute to the debtor's parents to assist with their expenses. Despite this newly-listed \$600 expense, the debtors propose to devote the significant majority of their increased income to a chapter 13 plan payment and they propose to pay their unsecured creditors in full. They have also indicated they will pay compensation to the chapter 7 trustee and his counsel through the plan, in amounts approved by the court.

In these circumstances, the court concludes the debtors have proposed the conversion in good faith and the motion will be granted. The court will hear the matter.

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- 1 Much of the attorney's "testimony" is not based on personal knowledge, and the court reaches this decision without considering those portions.
 - 2 The debtors will need to file the schedules as a stand-alone document with an amendment cover sheet in order to comply with Fed. R. Bankr. P. 1008.

13.	17-28363-D-7	CHESTER JIMERSON AND	MOTION TO DISMISS ADVERSARY
	18-2020	SUNITA RANI SNM-2	PROCEEDING
	HOPPER V. JIMERSON ET AL		3-20-18 [20]

Tentative ruling:

This is the defendants' motion to dismiss this adversary proceeding pursuant to Fed. R. Civ. P. 12(b)(1) and (6), incorporated herein by Fed. R. Bankr. P. 7012(b), and pursuant to § 704 of the Bankruptcy Code (which governs the trustee's duties). The plaintiff, who is also the trustee in the underlying case (the "trustee"), has filed opposition. For the following reasons, the motion will be denied.

In deciding a Rule 12(b)(6) motion, the court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The defendants' motion does not mention these standards and it appears they were not considered. The motion is entirely fact-based. Thus, the defendants contend the complaint does not state a claim to sell co-owned property pursuant to § 363(h) of the Code because (1) the debtors are listed as joint tenants with the defendants on title solely as the result of a refinance in 2015; (2) the debtors received loan proceeds from the refinance and did not contribute to the acquisition or improvement of the property; (3) under California law, the debtors have no equity interest in the property; and therefore, (4) the bankruptcy estate has no equity interest. These issues might be appropriately raised in a motion for summary judgment, as the trustee suggests. They are not appropriately raised in a Rule 12(b)(6) motion. Accepting the facts alleged by the trustee as true, and drawing all reasonable inferences in the trustee's favor, the court finds that the complaint states a claim to relief under § 363(h) that is plausible on its face.

The defendants' Rule 12(b)(1) and § 704 argument is two-fold; first: "The chapter 7 trustee filed this action after the announcement that the Debtor could pay his creditors in full in a chapter 13. The chapter 7 trustee is acting outside the scope of 11 U.S.C. §704. Therefore, the chapter 7 trustee lacks standing, and the case should be dismissed under FRCP 12(b)(1)." Defendants' Motion, DN 20, at 4:21-24. And second: "The chapter 7 trustee is not authorized to take action against the interests of the parties in interest, and the creditors will receive far less if the subject property is sold than if the Debtors continue to pay the loan. The case should be dismissed for lack of standing. 11 U.S.C. §704. FRCP 12(b)(1)." Id. at 5:2-5.

As to the first of these, the trustee was under no obligation to administer the case based solely on the debtors' "announcement" that they could pay their creditors in full, an "announcement" not remotely credible based on the debtors' original schedules. Second, the only creditor the defendants claim would receive less if the property is sold is their mortgage lender, who would lose out on future finance charges that will be paid if the loan is repaid over its entire term. The defendants offer no indication that outcome is not permissible under applicable law and no indication the argument has anything to do with the trustee's standing.

For the reasons stated, the motion will be denied. The court will hear from the parties as to whether it would be appropriate to dismiss this adversary proceeding without prejudice, in light of the court's decision to convert the debtors' underlying chapter 7 case to a case under chapter 13.

14. 18-20967-D-7 CHRISTINE RUSSAK
AP-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-14-18 [10]

15. 13-23371-D-11 JUAN/MARGARITA RAMIREZ MOTION TO CLOSE CHAPTER 11 CASE
TCS-10 3-20-18 [315]
16. 13-23371-D-11 JUAN/MARGARITA RAMIREZ MOTION TO CONVERT CASE TO
UST-1 CHAPTER 7 AND/OR MOTION TO
DISMISS CASE
3-14-18 [312]
17. 17-28274-D-7 ANN DRISCOLL MOTION TO SELL
DMW-1 3-19-18 [15]
18. 18-21081-D-7 NANCY TOLANG MOTION TO AVOID LIEN OF
JCK-1 INCENTIVE FINANCIAL SERVICES,
LLC
3-19-18 [9]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

19. 18-21081-D-7 NANCY TOLANG
JCK-2

MOTION TO AVOID LIEN OF
PERSOLVE, LLC
3-19-18 [13]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

20. 18-21081-D-7 NANCY TOLANG
JCK-3

MOTION TO AVOID LIEN OF CACH,
LLC
3-19-18 [17]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

21. 17-20689-D-11 MONUMENT SECURITY, INC.

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
2-1-17 [1]

22. 18-20192-D-7 MICHAEL/LAURA MACY
JHW-1
FORD MOTOR CREDIT COMPANY,
LLC VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-12-18 [19]

Final ruling:

This matter is resolved without oral argument. This is Ford Motor Credit Company, LLC's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

23. 17-27397-D-7 GEVORG/ARMINE POLADYAN
18-2014 PLC-1
TRIVEDI V. POLADYAN ET AL

MOTION TO STRIKE AND/OR MOTION
TO DISMISS ADVERSARY PROCEEDING
3-15-18 [8]

Tentative ruling:

This is the motion of the defendants in this case, who are also the debtors in the chapter 7 case in which this adversary proceeding is pending (the "debtors"), to strike certain allegations from the plaintiff's complaint, pursuant to Fed. R. Civ. P. 12(f), incorporated herein by Fed. R. Bankr. P. 7012(b), and to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), incorporated by the same bankruptcy rule. The plaintiff has filed opposition. For the following reasons, the motion to strike will be denied and the motion to dismiss will be granted with leave to amend.¹

Under Rule 12(f), the court may strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The defendants do not contend the allegations they seek to strike are redundant, immaterial, or scandalous; they claim the allegations are "patently false and therefore impertinent to the Adversary Proceeding." Defendants' Motion, DN 8, at 2:3-4. However, for purposes of Rule 12(f), "[i]mpertinent" matter consists of statements that do not pertain, and are not necessary, to the issues in question." Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010). "Impertinent" matter does not include false or allegedly false matter.

In fact, case law is directly contrary to the defendants' position. "[C]ourts may not resolve disputed and substantial factual or legal issues in deciding . . . a motion to strike." Whittlestone, 618 F.3d at 973. Thus, "Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law." Id. at 974-75.² And a motion to strike is not "an appropriate avenue to challenge the truth of an allegation." Novva Ausrustung Grp., Inc. v. Kajioka, 2017 U.S. Dist. LEXIS 108614, *3-4, 2017 WL 2990850 (D. Nev. 2017). In short, where the issues raised would be more appropriately addressed by way of a motion to dismiss portions of a complaint, under Fed. R. Civ. P. 12(b)(6), or a motion for summary judgment, a motion to strike is not appropriate. Whittlestone, 618 F.3d at 974.

As to the Rule 12(b)(6) portion of the motion, the court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The plaintiff's complaint seeks a determination of nondischargeability based on § 523(a)(2), (4), and (6) of the Bankruptcy Code. The defendants contend the allegations are not specific enough to meet the heightened pleading requirement of Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. Here, the defendants are correct. As to the § 523(a)(2) claim, the complaint does not touch on all the elements of fraud; instead, the plaintiff alleges the defendants' promise was false in that the defendants intended to breach the promise, in turn, because they breached it.³ The plaintiff does not sufficiently allege fraud in inducing the

plaintiff's decedent to act as she did. The allegations are also devoid of statements as to who made the particular representations, to whom, when, and where, or how the representations would suggest fraud.

As to the § 523(a)(4) claim, the complaint does not allege there was a fiduciary relationship between the defendants and the plaintiff's decedent, does not include allegations tending to support the existence of such a relationship, does not sufficiently allege fraud or defalcation by the defendants while acting in a fiduciary capacity, and does not allege facts tending to support each of the elements of embezzlement or larceny. As to the § 523(a)(6) claim, the complaint does not sufficiently allege willful and malicious injury to the person or property of another. In this regard, the plaintiff would be well advised to review the case law on the elements of those two separate factors - willful and malicious.

In sum, the complaint reads much like a complaint for breach of contract. It does not allege with sufficient specificity facts tending to demonstrate the elements of claims under § 523(a)(2), (4), or (6). Thus, the court will, by order from chambers, conditionally grant the motion to dismiss and give the plaintiff 20 days from the date of the order on this motion to amend the complaint. The court will hear the matter.

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- 1 Although filed as a single motion, the motion to strike and the motion to dismiss are really separate motions - the allegations the defendants challenge in the one are different from the allegations they challenge in the other.
 - 2 The defendants argue that certain allegations in the complaint are wrong based on the application of Cal. Rev. & Tax. Code 11911 to the facts. The argument calls for the court to draw a legal conclusion, and is therefore not an appropriate subject of a motion to strike.
 - 3 For example, the plaintiff alleges the defendants promised "[they] would repay the \$180,000 loaned[;] that was materially false as no payments were [e]ver made." Plaintiff's Complaint, DN 1, at 7:10-11.

24. 12-32263-D-7 ZOUA HER
SLE-1

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK
4-2-18 [20]

25. 17-20981-D-7 ALEX/PATRICIA FRANCOIS MOTION TO ABANDON
TGM-2 4-2-18 [25]
26. 18-21289-D-7 JESSICA TOLES MOTION FOR RELIEF FROM
VVF-1 AUTOMATIC STAY
MECHANICS BANK, INC. VS. 4-9-18 [10]
27. 18-20896-D-7 YURA VASILASCU CONTINUED MOTION FOR RELIEF
TRF-1 FROM AUTOMATIC STAY
DEUTSCH BANK NATIONAL TRUST 2-27-18 [16]
COMPANY VS.
- Final ruling:**
- Motion withdrawn by moving party. Matter removed from calendar.**
28. 14-25098-D-7 ANTHONY/JESSICA FERNANDEZ MOTION TO AVOID LIEN OF CAPITAL
SLE-1 ONE BANK
4-2-18 [24]

29. 18-21699-D-7 RICHARD HARRIS

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
4-6-18 [15]