

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Modesto, California

April 25, 2024 at 10:30 a.m.

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1. [24-90018-E-7](#) **YOLANDA PINEDA-FONSECA** **TRUSTEE'S MOTION TO DISMISS FOR**
Pro Se **FAILURE TO APPEAR AT SEC.**
341(A) MEETING OF CREDITORS
2-29-24 [18]

Tentative Ruling: 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.

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The original Notice of Trustee's Motion states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on February 29, 2024. The Motion was originally going to be heard by this court on April 4, 2024. By the court's calculation, 35 days' notice was provided. 28 days' notice is required. However, an Amended Notice of Trustee's Motion was later served on Debtor (*pro se*) and Office of the United States Trustee on April 1, 2024, in preparation of this Hearing held on April 25, 2024. By the court's calculation, 24 days' notice was provided. 28 days' notice is required. Thus, sufficient notice was not provided for the Amended Notice of Trustee's Motion.

In light of the Chapter 7 Trustee's April 16, 2024 Docket Entry Report stating that Debtor appeared at the continued Meeting of Creditors on April 16, 2024, and the Meeting of Creditors having been concluded; and the Trustee having filed a Notice of Final Report of No Distribution and that there are no assets to be administered in this case (Dckt. 27), the court shortens the time to that given.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice as moot, Debtor having appeared at the Meeting of Creditors held on April 16, 2024, and the Meeting having been concluded.

The Chapter 7 Trustee, Geoffrey Richards (“Trustee”), seeks dismissal of the case on the grounds that Yolanda Pineda-Fonseca (“Debtor”) did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on March 26, 2024. Opposition, Docket. 21. Debtor then filed another Opposition to the Amended Trustee’s Motion on April 8, 2024. Opposition, Docket 24. Debtor states in their Opposition that they believed that the Meeting of Creditors was being held on March 29, 2024, and requests that the court not dismiss the case. *Id.*

DISCUSSION

Debtor did not appear at the Meeting of Creditor’s held on February 29, 2024. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

However, a continued Meeting of Creditors was held on April 16, 2024, and Debtor did appear at this meeting. Trustee’s Report, Docket 28. The Trustee has filed a Report of No Distribution and the last day to file an objection is May 17, 2024. Filing Report, Docket 27.

Based on the foregoing, Debtor has appeared at the Meeting of Creditors and unless there are any objections, Debtor will receive a discharge. Therefore, Trustee’s Motion is moot, and the Motion is denied without prejudice as moot, Debtor having appeared at the continued Meeting of Creditors on April 16, 2024.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 7 case filed by The Chapter 7 Trustee, Geoffrey Richards (“Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied without prejudice as moot, Debtor having appeared at the continued Meeting of Creditors on April 16, 2024.

Items 2 thru 3

Tentative Ruling: 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 tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

NO OFFICIAL CERTIFICATE OF SERVICE SHEET USED

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c). The court is unable to determine if the appropriate parties have been served.

On April 22, 2024, a First Amended Certificate of Service was filed using the required Eastern District of California form. Attached to it is the Clerk’s List of Parties in this Case.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 12 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **XXXXXXX**

The Motion to Dismiss is granted.

The Debtor in Possession, John Brasil (“Debtor in Possession”), seeks dismissal of their own case on the grounds that Debtor in Possession does not meet the definition of “family farmer” as defined in 11 U.S.C. § 101(8). Motion, Docket 37, ¶ 3. Debtor is no longer engaged in farming operations because he no longer desires to operate a dairy. Declaration, Docket 39, ¶ 3. 11 U.S.C. § 1208(b) states:

On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Therefore, pursuant to 11 U.S.C. § 1208(b), the court shall grant Debtor's Motion to Dismiss.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 12 case filed by the debtor, John Brasil ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted, and the case is dismissed.

3. [24-90079-E-12](#) **JOHN BRASIL** **CONTINUED STATUS CONFERENCE RE:**
[CAE-1](#) **VOLUNTARY PETITION**
2-21-24 [1]

Debtor's Atty: Brian S. Haddix

Notes:

Continued from 4/11/24 to be conducted in conjunction with the Debtor in Possession's Motion to Dismiss this Chapter 12 case.

The Status Conference is XXXXXXXX

APRIL 25, 2024 HEARING

The Debtor in Possession reports that he anticipates no opposition to his Motion to Dismiss this Case which is to be heard in conjunction with this Status Conference.

The Status Conference is **XXXXXXXX**

APRIL 11, 2024 INITIAL CHAPTER 12 STATUS CONFERENCE

On April 5, 2024, the Debtor in Possession filed a Motion to Dismiss this Chapter 12 Case based on the grounds that the Debtor in Possession has now determined that the Debtor does not qualify for relief under Chapter 12. Mtn. and Related Pleadings; Dckts. 37-41. The Debtor in Possession has filed a Status Report in which he provides detailed information of how the determination has been made that the Debtor does not qualify for Chapter 12 relief.

4. [21-90584-E-7](#) **MARIA CUEVAS LEMUS** **MOTION TO DISMISS ADVERSARY**
[22-9004](#) **ALG-1** **PROCEEDING/NOTICE OF REMOVAL**
CUEVAS LEMUS V. MARTINEZ, **3-26-24 [27]**

Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor and Plaintiff-Debtor’s Attorney on March 26, 2024. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

The Motion to Dismiss the Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss the Adversary Proceeding is granted, and the Adversary Proceeding is dismissed with prejudice.

Defendant Arturo Martinez (“Defendant”) moves this court for an order dismissing Maria Dolores Cuevas Lemus’ (“Plaintiff-Debtor”) Adversary Proceeding. Plaintiff-Debtor initiated this Adversary Proceeding by filing a Complaint on October 6, 2022, alleging three causes of action all bases on the grounds that Defendant violated the automatic stay when he foreclosed on Plaintiff-Debtor’s real property commonly known as 600 West Main Street, Crows Landing, California 95313 (“Property”). Plaintiff-Debtor filed her bankruptcy case on December 17, 2021, and Defendant caused to be recorded a Trustee’s Deed Upon Sale on February 14, 2022.

However, this court issued an Order annulling the automatic stay as to the Property on January 30, 2023. *See* Oder, Case no. 21-90584, Docket 36. That decision was appealed to the Bankruptcy Appellate Panel of the Ninth Circuit on February 10, 2023. *Id.* at Docket 38. After hearing argument, the Bankruptcy Appellate Panel ultimately affirmed this court's Order on November 15, 2023. *Id.* at Docket 56. Therefore, the automatic stay was annulled as to the Property.

Defendant's Motion to Dismiss is based on Fed. R. Civ. Pro. 8(a) and 12(b)(6), as incorporated in to Bankruptcy by Fed. R. Bankr. Pro. 7008 and 7012, arguing that Plaintiff-Debtor's Complaint now fails because there was no violation of the automatic stay, the stay having been annulled.

Plaintiff-Debtor filed a Response on April 11, 2024, agreeing that the Complaint should be dismissed based on there being no automatic stay in place when the Trustee's Deed Upon Sale was recorded against the Property, and stating that Plaintiff-Debtor's Complaint was entirely founded on there having been such a violation. Docket 31 p. 2:1-4. However, Plaintiff-Debtor requests that dismissal be made "without prejudice" so that Plaintiff-Debtor may bring certain claims in state court. *Id.* Plaintiff-Debtor has not informed the court of any such state causes of action or how this dismissal would prejudice a state court cause of action.

Review of Complaint

The Complaint (Dckt. 1) filed in this Adversary Proceeding states three causes of action, which the court summarizes as follows:

- A. First Cause of Action - Wrongful Foreclosure
 - 1. Debtor asserts having a community property or tenant in common interest in the Property. Complaint; ¶ 21.
 - 2. Debtor filed her Bankruptcy Case on December 17, 2021 at the same time as the non-judicial foreclosure was set to be conducted on the Property. *Id.* ¶ 22.
 - 3. The foreclosure sale was conducted in violation of the automatic stay. *Id.*, ¶ 24.
 - 4. The foreclosure sale was void. *Id.*, ¶ 26
 - 5. The Trustee's deed was not recorded within 15 days of the foreclosure sale. *Id.*, ¶ 27.
- B. Second Cause of Action - Declaratory Relief
 - 1. Plaintiff-Debtor requests that the court make a determination as to the effect of the foreclosure sale and determine the respective rights and interests of the Parties.
- C. Third Cause of Action - Injunctive Relief
 - 1. Defendant is in the process of transferring title of the Property to a third-party. *Id.*, ¶ 35.

2. Such transfer will cause great and irreparable injury to the Plaintiff-Debtor given that real property is deemed unique. *Id.*, ¶ 36.
3. Injunctive relief is proper to prevent the great and irreparable injury to Plaintiff-Debtor.

D. Prayer for Relief

1. The court issue a temporary restraining order or preliminary injunction prohibiting the transfer of the Property.
2. The court issue a judgment determining the respective rights and interests of the Parties in the Property.
3. Plaintiff-Debtor be awarded general damages.
4. Plaintiff-Debtor be awarded compensatory damages.
5. Plaintiff-Debtor recover her attorney's fees and costs.

The relief requested in the Complaint is based solely on the alleged violation of the automatic stay, for the court to determine the rights and interests of the Parties based on the violation of the automatic stay, and the court to award damages resulting from the violation of the automatic stay.

**Federal Rules of Civil Procedure For
Dismissal of Adversary Proceeding**

Fed. R. Civ. Pro. 12(b)(6) states:

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

...

(6) failure to state a claim upon which relief can be granted.

The Supreme Court held in *Bell Atlantic Corp. V. Twombly* that a complaint must assert such allegations to show harm and recovery is at least plausible on the face of the complaint. *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 556 (2007). In elaborating on the plausibility standard in the pleading stage of litigation, the Supreme Court held “[t]o 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).

Here, Plaintiff-Debtor's Complaint must be dismissed for failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6) as incorporated into bankruptcy under Fed. R. Bankr. Pro. 7012. As Plaintiff-Debtor has admitted, with there having been no stay in effect at the time Defendant caused the Trustee's Deed Upon

Sale to be recorded, Plaintiff-Debtor's allegations fail this plausibility standard as a matter of law. Therefore, the Motion to Dismiss is granted, and the Adversary Proceeding is dismissed.

Request of Plaintiff-Debtor That the Dismissal be Without Prejudice

The request for the dismissal to be without prejudice, and the laws, Federal Rules of Civil and Bankruptcy Procedure, and case law stated in Plaintiff-Debtor's Response is stated as follows:

Due to the annulment of the automatic stay, plaintiff can no longer state a claim based on section 362 of the bankruptcy code, which was the only cause of action raised in this adversary proceeding. However, it is possible that plaintiff may have state law claims related to the validity of the foreclosure. See California Civil Code section 2924m.

Therefore, if the Court grants the motion to dismiss, plaintiff requests that it be granted without prejudice to plaintiff raising any valid applicable state law claims in state court

Response, p. 2:1-6.

Federal Rule of Civil Procedure 41, which is incorporated into Federal Rule of Bankruptcy Procedure 7041 provides with respect to an Involuntary Dismissal [emphasis added]:

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

This “adjudication on the merits” is often referred to as “with prejudice,” meaning that the plaintiff cannot attempt to litigate those claims and issues in another forum or proceeding.

Plaintiff-Debtor has stated that she does not oppose the dismissal. While not opposing it, Debtor has not met the standards for a voluntary dismissal as provided in Federal Rule of Civil Procedure 41(a), which states [emphasis added]:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, **the plaintiff may dismiss an action without a court order by filing:**

(i) a **notice of dismissal** before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a **stipulation of dismissal signed by all parties** who have appeared.

(B) Effect. **Unless the notice or stipulation states otherwise, the dismissal is without prejudice.** But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an **action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.** If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. **Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.**

Plaintiff-Debtor has not sought the voluntary dismissal, either unilaterally or by stipulation, or by a motion filed with the court. Rather it has taken the Defendant to seek dismissal of this Adversary Proceeding as provided in Federal Rule of Civil Procedure 41(b).

In looking at the files for this Adversary Proceeding and the related Bankruptcy Case (21-90584), the time line for these issues pencils out as follows:

1. Bankruptcy Case Filed on December 18, 2021.
2. Bankruptcy Case dismissed on January 4, 2022.
3. Adversary Proceeding Filed at 1:49 p.m. on October 6, 2022. Complaint Dckt. 1.
4. Bankruptcy Case reopened at 3:39 p.m. on October 6, 2022, because the Adversary Proceeding had been filed. 21-90584; Order, Dckt. 18.
5. Motion for Relief From the Automatic Stay (annulment of the Stay) filed December 14, 2022. *Id.*; Dckt. 21.
6. Order Annulling the Automatic Stay entered January 30, 2023. *Id.*; Dckt. 21.
7. Appeal of Order Annulling the Automatic Stay filed on February 10, 2023 by the Plaintiff-Debtor in *pro se*.
8. Ninth Circuit Bankruptcy Appellate Panel Decision affirming the Order Annulling the Automatic stay docketed November 15, 2023. *Id.*; Dckt. 56.

9. Motion to Dismiss Adversary Proceeding filed by Defendant on March 26, 2024, one hundred and thirty-two days after Order Annulling the Automatic Stay was entered by the Bankruptcy Appellate Panel.

Clearly, it is not the Debtor who is seeking the voluntary dismissal of this Adversary Proceeding, but has left it place and forcing Defendant to expend the time, effort, and money in dismissing this Adversary Proceeding which was rendered clearly without merit given the Order Annulling the Automatic stay becoming final after it being affirmed by the Bankruptcy Appellate Panel.

Though Plaintiff-Debtor provides no information in the Reply (and Plaintiff-Debtor never having filed in her Bankruptcy Case listing Schedules listing assets) about what claims or issues, the court can structure the Order hereon to make it clear as to claims or issues have been dismissed with prejudice.

The Motion is granted and this Adversary Proceeding is dismissed with prejudice for any and all claims of Maria Dolores Cuevas Lemus (“Plaintiff-Debtor”) relating to the real property commonly known as 600 West Main Street, Crows Landing, California (the “Property”), the foreclosure of the Property, title to and interests in the Property, possession of the Property, and other claims, rights, damages, or interests asserted by Plaintiff-Debtor and any agents, representative, successors in interests, or other person seeking to assert rights, interests, and claims, of or from Plaintiff-Debtor based on or relating to:

- A. Alleged Violation of the Automatic Stay (11 U.S.C. §362) in Plaintiff-Debtor’s Chapter 7 Bankruptcy Case in the Eastern District of California, Case No. 21-90584; and
- B. The Foreclosure Trustee’s Deed not having been recorded within fifteen (15) days of the foreclosure sale.

Further, this court retains its Original and Exclusive Jurisdiction, 28 U.S.C. § 1334(a) over bankruptcy cases, including the orders entered therein and the related adversary proceedings, and core matter proceedings, 28 U.S.C. § 157, to determine whether claims, rights, interest, or other requests for relief asserted by Plaintiff-Debtor in other forums or proceeding have been dismissed with prejudice and asserting such are in violation of this Order and a dismissal with prejudice as provided in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

The court shall issue an order substantially in the following form:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Adversary Proceeding filed by Defendant Arturo Martinez (“Defendant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss the Adversary Proceeding is granted, and the Adversary Proceeding is dismissed with prejudice for any and all claims of Maria Dolores Cuevas Lemus (“Plaintiff-Debtor”) relating to the real property commonly known as 600 West Main Street, Crows Landing, California (the

“Property”), the foreclosure of the Property, title to and interests in the Property, possession of the Property, and other claims, rights, damages, or interests asserted by Plaintiff-Debtor and any agents, representative, successors in interests, or other person seeking to assert rights, interests, and claims, of or from Plaintiff-Debtor based on or relating to:

- A. Alleged Violation of the Automatic Stay (11 U.S.C. §362) in Plaintiff-Debtor’s Chapter 7 Bankruptcy Case in the Eastern District of California, Case No. 21-90584; and
- B. The Foreclosure Trustee’s Deed not having been recorded within fifteen (15) days of the foreclosure sale.

Further, this court retains its Original and Exclusive Jurisdiction, 28 U.S.C. § 1334(a) over bankruptcy cases, including the orders entered therein and the related adversary proceedings, and core matter proceedings, 28 U.S.C. § 157, to determine whether claims, rights, interest, or other requests for relief asserted by Plaintiff-Debtor in other forums or proceeding have been dismissed with prejudice and asserting such are in violation of this Order and a dismissal with prejudice as provided in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.