UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

May 12, 2014 at 10:00 a.m.

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1. 14-24122-A-11 NGANE PHOMMACHANH — MOTION TO EXTEND AUTOMATIC STAY
AVN-2 — 4-28-14 [16]

Tentative Ruling: The motion will be denied.

The debtor is asking the court to extend the automatic stay, stating that he filed one prior bankruptcy case which was dismissed.

The court will not extend the automatic stay because the debtor has not rebutted the presumption that this case was filed not in good faith.

11 U.S.C. § 362(c)(3)(A) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 (11, 12 or 13) after dismissal under section 707(b), the automatic stay with respect to a debt, property securing such debt, or any lease terminates on the 30th day after the filing of the new case.

11 U.S.C. § 362(c)(3)(B) and (C) further provide that:

"(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall

not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; **or**

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor."

On March 10, 2014, the debtor filed a chapter 13 case (Case No. 14-22423). But, the court dismissed that case on April 18, 2014 due to the debtor's failure to timely file petition documents, including the chapter 13 plan, the means test form, schedules A through J, the statement of financial affairs, the statistical summary and the summary of schedules.

The debtor did not file the these documents on the petition date, resulting in a notice of incomplete filing. That notice informed the debtor that those documents must be filed no later than March 24. Case No. 14-22423, Docket 3. On March 24, 2014, the debtor filed a motion for extension of the deadline to file the documents. Case No. 14-22423, Docket 9. The court entered an order on March 25 extending the deadline for filing the documents to April 7. Case No. 14-22423, Docket 12. The debtor did not file the missing documents - except the chapter 13 plan - until April 16. The case was dismissed on April 18.

Importantly, before the dismissal of the prior case, the debtor's landlord and principal creditor, Market West, L.L.C., filed a motion for relief from the automatic stay on April 18, 2014. Case No. 14-22423, Docket 17.

This case was filed on April 22, 2014. The presumption that the instant case has not been filed in good faith as to all creditors arises from:

- the fact that the prior case was dismissed on April 18, 2014, within the one-year period prior to the filing of this case on April 22, 2014, after the debtor failed to timely file petition documents as required by 11 U.S.C. § 521 (11 U.S.C. § 362(c)(3)(C)(i)(II)(aa));

- the fact that there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the prior chapter 13 case (11 U.S.C. § 362(c)(3)(C)(i)(III)(bb)); and

- the fact that the court is not convinced that the debtor will be able to confirm or perform a chapter 11 plan in this case (11 U.S.C. §

362(c)(3)(C)(i)(III)(bb)).

There is also a presumption that the instant case has been filed not in good faith as to Market West, given that Market West had filed a motion for relief from the automatic stay in the prior case and that motion was still pending as of April 18 when the prior case was dismissed. Case No. 14-22423, Dockets 24 & 28; see 11 U.S.C. § 362(c)(3)(C)(ii).

The excuse offered by the debtor for not filing the petition documents and plan in the prior chapter 13 case is "due to a payment dispute with his business bookkeeper who had much of the information needed to complete such schedules." Docket 16 at 2. "Once this payment dispute with such individual was resolved, Debtor filed his schedules on April 16, 2014." Id. "A Chapter 13 plan was not filed at that time, since such a plan could not have been filed in good faith in view of Debtor's ineligibility for Chapter 13 relief as well as the fact that Debtor's attorney intended to move for conversion of the case to Chapter 11." Id.

In other words, the debtor not only failed to file the necessary documents, but also filed a chapter 13 petition without being eligible for chapter 13 relief. "Upon reviewing Debtor's liabilities in detail, Debtor's attorney became aware that Debtor's unsecured debts exceed the debt limit set forth in 11 U.S.C. § 109(e) for Chapter 13 debtors." Docket 16 at 2.

The debtor has not offered clear and convincing evidence of a substantial excuse for failing to file the documents in the prior case, thus rebutting the presumption under 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa). The only explanation offered for not filing the documents on time in the prior case is that the debtor had a payment dispute with his bookkeeper who had the information necessary for completing the petition documents. The bookkeeper apparently withheld the information preventing the debtor from completing the petition documents.

However, the debtor gives no details whatsoever about his dispute with the bookkeeper. For instance, there is no evidence about when the dispute started, when the dispute was resolved, how it was resolved, when the bookkeeper turned the necessary information over to the debtor, how long it took for the debtor to prepare and file the petition documents after receiving the necessary information from the bookkeeper, etc.

The debtor also does not state when he discovered that he is not eligible for chapter 13 relief. Although it is implied by the motion that he discovered the ineligibility after filing the prior case, it is not clear whether he discovered it before or after the April 7 deadline for filing the documents and whether it was before or after the bookkeeper turned over the information needed for completion of the schedules.

The presumption under 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa) has not been rebutted.

Further, by admitting that he discovered his ineligibility for chapter 13 relief after filing the prior chapter 13 case, the debtor is admitting to have filed the prior chapter 13 case without first making certain that he is eligible for chapter 13 relief. This alone is basis for concluding that the prior case was filed in bad faith, thus bolstering the presumption that this case was not filed in good faith.

Bad faith is determined by examining the totality of the circumstances. In re Rolland, 317 B.R. 402, 414-15 (Bankr. C.D. Cal. 2004).

"The bankruptcy court should consider the following factors: (1) whether the debtor 'misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;' (2) 'the debtor's history of filings and dismissals;' (3) whether 'the debtor only intended to defeat state court litigation;' and (4) whether egregious behavior is present." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

A finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

Another point that further substantiates the bad faith filing of the prior case and bolsters the absence of good faith in filing this case is the fact that the timing of both cases is directly linked to defeating a state court unlawful detainer action. The debtor states that both the prior case and this case were filed in an attempt to stop the attempts of the debtor's landlord to obtain possession of the debtor's business property where he operates a restaurant business.

While the debtor may want bankruptcy relief in order to deal with taxes and other unsecured liabilities, the urgency of both filings is directly affected by the state court litigation. The motion makes it clear that the urgency of the filings was due solely to the debtor's landlord evicting the debtor from his place of business.

Next, the debtor's excuse for not filing the documents timely is not a substantial excuse for purposes of 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa) because the debtor does not explain why he did not request another extension of the time to file the petition documents and chapter 13 plan in the prior case. The court does not have explanation or evidence on this point from the debtor.

The order granting the first extension of time did not forbid the debtor from seeking another extension. Case No. 14-22423, Docket 12.

On the contrary, the order states that "[n]o further extensions will be granted absent a notice, motion, and a hearing served on all creditors and the trustee," clearly implying that the debtor could have filed request for further extension of the time to file the documents. Case No. 14-22423, Docket 12 at 2. However, the debtor never filed a request for a second extension and has not explained why he did not file such a request.

Furthermore, as an alternative basis for denying the motion, the debtor has not established that there has been a substantial change in the financial or personal affairs of the debtor since the dismissal of the prior case. 11 U.S.C. § 362(c)(3)(C)(i)(III)(bb). The debtor says that the substantial change is evidenced by the resolution of his financial conflict with his bookkeeper.

But, the debtor offers no details about that conflict (*e.g.*, timing, amount, etc.) nor does he say how it was resolved. In fact, the motion states that the conflict was resolved before the prior case was dismissed because the debtor was able to file his schedules on April 16, two days before the case was dismissed on April 18. Case No. 14-22423, Dockets 27 & 28.

On the other hand, the substantial change contemplated by 11 U.S.C. § 362(c)(3)(C)(i)(III) is "since the dismissal of the next most previous case." Hence, using the resolution of the conflict with the bookkeeper to rebut the presumption of 11 U.S.C. § 362(c)(3)(C)(i)(III) makes no sense.

More, the debtor says that he needs the continuance of the stay "in order to have time to effect [*sic*] a cure of a default under his business lease with Market West . . . since he fell behind on his rental payments during a period of financial mismanagement which he has since rectified." Docket 16 at 3.

Yet, the debtor admits that his landlord has obtained a writ of possession already. Docket 16 at 3. This means that a judgment for possession has been entered already against the debtor in state court and the debtor no longer has a right to possess the property.

"[W]e do not distinguish between 'inferior' and 'superior' courts for purposes of determining whether to apply collateral estoppel. To the contrary, a federal court *must give* 'full faith and credit' to state court judgments." Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 829 (9th Cir. 2002) (citing Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).

The court then is perplexed as to how the debtor intends to cure his default under the lease and fund a plan of reorganization in this case. The state court judgment against the debtor, which will inevitably lead to the loss of his business space, compels the court to conclude that the debtor cannot confirm and perform under a chapter 11 plan in this case. See 11 U.S.C. § 362(c)(3)(C)(i)(III)(bb).

Finally, as a further alternative basis for denying this motion, the presumption as to Market West under 11 U.S.C. § 362(c)(3)(C)(ii) has not been rebutted. Market West had a pending stay relief motion under 11 U.S.C. § 362(d) as of the date the prior case was dismissed. The debtor has not even addressed this part of the statute.

The debtor has not rebutted any of the presumptions under 11 U.S.C. § 362(c)(3)(C) that this case was filed not in good faith. Hence, the court will not continue the automatic stay. The motion will be denied.

2.	12-39338-A-7 13-2034 BASTAN V. GOSWAMI	JAGDISH GOSWAMI MBC-1	MOTION FOR SANCTIONS 4-7-14 [37]

Tentative Ruling: The motion will be granted in part and denied in part.

The plaintiff, Hooshang Bastan, moves for sanctions against the defendant Jagdish Goswami, for his failure to respond to document production requests and interrogatories.

The plaintiff's reply filed in connection with this motion on April 28, 2014 will be stricken because there is no opposition to the motion.

As the court's Local Bankruptcy Rule 9014-1(f)(1)(C) provides, "[t]he moving party may, at least seven (7) days prior to the date of the hearing, serve and file with the Court a written reply to any written opposition filed by a responding party." In other words, the movant is authorized to file a reply only to a written opposition to the movant's motion. As no response was filed to this motion, the reply filed on April 28, 2014 will be stricken. Docket 44.

The reply will be stricken also because it appears to be seeking relief not sought in the motion. For instance, the reply refers to seeking "issue preclusion sanctions," which are not even mentioned in the motion.

Turning to the merits of the instant motion, Fed. R. Civ. P. 37(d), as made applicable here by Fed. R. Bankr. P. 7037, provides that:

"(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

The sanctions in Rule 37(b)(2)(A)(i)-(vi) available under Rule 37(d) include:

"(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party."

Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi).

"[F]ailure to object to discovery requests within the time required constitutes

a waiver of any objection." Richmark Corp. V. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992).

Preliminarily, the plaintiff has certified that he has attempted to obtain the outstanding discovery responses without intervention by the court. Docket 39 at 4. The plaintiff's counsel sent an e-mail to the defendant's counsel on March 12, 2014, asking him for the last time about the discovery responses. As of April 4, 2014, when Ian Sangster's supporting declaration was executed, no responses had been received. Docket 39.

The discovery requests were originally served on the defendant on September 17, 2013 and September 30, 2013, respectively. The plaintiff never received responses to those discovery requests. In or about November 2013, the parties entered into negotiations pertaining to the dismissal of the defendant's wife from the action, the amendment of the complaint to assert an additional cause of action, and the extension of the discovery cut-off deadline. After the filing, service and answer of the amended complaint, the plaintiff reserved on January 22, 2014 the identical discovery originally served on the defendant in September 2013. As of April 4, 2014, no responses had been received. Docket 39 at 4.

The plaintiff is asking the court:

- to deem the facts alleged in paragraphs 19 through 33, 39 and 40 of the amended complaint as established at trial, and

- to determine that those facts satisfy the "plaintiff's prima facie showing" as to all the claims in the amended complaint, subject to rebuttal by the defendant.

The claims asserted in the amended complaint filed on January 29, 2014 include 11 U.S.C. § 523(a)(2), (a)(4), (a)(6), and 11 U.S.C. § 727(a)(3) and (a)(4) claims. Docket 30.

As the plaintiff originally served the discovery requests on the defendant in September 2013, re-served the requests on January 22, 2014, and then the parties agreed to an extension of the discovery cut-off deadline to March 21, 2014 - memorialized in a stipulated order entered on January 30, 2014 (Docket 33) - an order compelling the discovery responses will not be helpful. The defendant has had nearly six months now to respond to the discovery requests.

The lack of discovery responses from the defendant has prevented the plaintiff from determining whether the facts alleged in the complaint can be proven at trial.

For instance, the 11 U.S.C. § 727(a)(3) claim pertains to the defendant's concealment, destruction, mutilation, falsification or failure to keep or preserve recorded information. Yet, while the defendant has denied all allegations pertaining to the § 727(a)(3) claim in his answer, the defendant has produced no records to substantiate his denial of the § 727(a)(3) allegations. The plaintiff was entitled to the defendant's discovery responses.

The defendant's failure to respond to the discovery requests has prejudiced and unduly delayed and hampered the plaintiff's prosecution of this case.

Given the foregoing, the court will sanction the defendant by deeming all facts

in paragraphs 19 through 33, 39 and 40 of the amended complaint (Docket 30) as established at trial, subject to the defendant rebutting such facts at trial. See Li v. A Perfect Day Franchise, Inc., 281 F.R.D. 373, 393 (N.D. Cal. 2012) (awarding identical sanctions for discovery violations).

But, the court will not determine that the facts satisfy the "plaintiff's prima facie showing" as to the claims in the amended complaint. The plaintiff is not required to make a mere prima facie showing of the asserted claims. The plaintiff has the ultimate burden of persuasion on each of the claims. This part of the motion will be denied.

Finally, the court will award costs to the plaintiff for bringing this motion. The plaintiff is seeking an award of $3,000 in attorney's fees for 10 hours of work, at $300 an hour, performed in preparing the motion papers. See Fed. R. Civ. P. 37(d)(3).

However, the motion contains inadequate evidence that 10 hours of services were reasonable and necessary to prepare the motion. The only evidence from the plaintiff of the expenses is a single sentence in the supporting declaration of Ian Sangster, stating that "[p]laintiff seeks his reasonable attorney's fees necessitated by the filing of this motion of $3,000.00., which represents ten hours of my time billed at $300.00 per hour, which is reasonable rate for attorneys of my experience in this area." Docket 39 at 4.

There is no evidence of how the 10 hours spent by Mr. Sangster were allocated. The court then cannot tell whether spending 10 hours on the motion was reasonable.

More, the court is unconvinced that 10 hours of time was necessary. While it is true that the memorandum in support of the motion is 21 pages in length, only approximately 11 pages contain motion narrative. The remaining 10 pages are either devoid of narrative - such as the first and last pages of the motion - or contain lengthy quotes from the amended complaint or the discovery requests. Similarly, although the supporting declaration is five pages long, the narrative of the declaration is only three pages long.

Given this and given that the court is not granting the motion in its entirety, the court will award the plaintiff only $1,800 in attorney's fees for bringing the motion, representing six hours of work. The fees shall be payable solely by the defendant. The defendant shall pay the fees to the plaintiff no later than seven days after entry of the order on this motion. The plaintiff shall lodge the order on this motion no later than 48 hours after the conclusion of the hearing on the motion.

No other sanctions will be awarded. The motion will be granted in part and denied in part.

3.	13-34541-A-11	6056 SYCAMORE TERRACE	MOTION TO
	CAH-11	L.L.C.	VALUE COLLATERAL
	VS. INDYMAC MORTGAGE SERVICES		4-4-14 [113]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent creditor and any other party 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 as consent 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.

The motion will be granted.

The debtor moves for an order valuing the rental real property 6056 Sycamore Terrace Pleasanton, California at $1,920,000 in an effort to strip off Indymac Mortgage Services' second approximately $250,000 mortgage on the property and treat it as a wholly unsecured claim. The property is not the debtor's residence.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is secured only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

The debtor contends that the property has a value of $1,920,000. The debtor's opinion of value is memorialized in a stipulation with the senior lien holder, approved by the court on April 1, 2014. Dockets 111 & 112.

The property is subject to:

- a first mortgage in favor of JPMorgan Chase Bank for approximately $2,231,587 ($2,250,700.10 per proof of claim),

- a second mortgage in favor of IndyMac Mortgage Services for approximately $250,000, and

- a third mortgage in favor of Jahan and Faran Honardoost for approximately $200,000.

The property is not the debtor's residence. The anti-modification provision of 11 U.S.C. § 1123(b)(5) then does not apply. Indymac's second priority claim against the property is wholly unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after the deduction of JPMorgan Chase Bank's first mortgage. Hence, Indymac's second mortgage will be stripped off, making it an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It

is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

4. 13-34541-A-11 6056 SYCAMORE TERRACE MOTION TO
CAH-12 L.L.C. VALUE COLLATERAL
VS. JAHAN AND FARAN HONARDOOST 4-4-14 [118]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent creditors and any other party 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 as consent 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.

The motion will be granted.

The debtor moves for an order valuing the rental real property 6056 Sycamore Terrace Pleasanton, California at $1,920,000 in an effort to strip off Jahan and Faran Honardoost's third approximately $200,000 mortgage on the property and treat it as a wholly unsecured claim. The property is not the debtor's residence.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is secured only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

The debtor contends that the property has a value of $1,920,000. The debtor's opinion of value is memorialized in a stipulation with the senior lien holder, approved by the court on April 1, 2014. Dockets 111 & 112.

The property is subject to:

- a first mortgage in favor of JPMorgan Chase Bank for approximately $2,231,587 ($2,250,700.10 per proof of claim),

- a second mortgage in favor of IndyMac Mortgage Services for approximately $250,000, and

- a third mortgage in favor of Jahan and Faran Honardoost for approximately $200,000.

The property is not the debtor's residence. The anti-modification provision of 11 U.S.C. § 1123(b)(5) then does not apply. Jahan and Faran Honardoost's third priority claim against the property is wholly unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after the deduction of JPMorgan Chase Bank's first mortgage and Indymac's second mortgage. Hence, Jahan and Faran Honardoost's third mortgage will be stripped off, making it an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

5. 13-33668-A-7 RONALD/DIANA NICHOLS — MOTION FOR JUDGMENT ON THE PLEADINGS
14-2018 — 3-18-14 [21]
NICHOLS ET AL V. NCO FINANCIAL SYSTEMS INC., ET AL.,

Tentative Ruling: The motion will be dismissed as moot.

One of the defendants in this proceeding, Northland Group, Inc., asks that the claims against it be dismissed because it is not the real party in interest. Northland does not own an interest in the student loans the plaintiffs are seeking the court to declare dischargeable. "Northland was merely retained to assist in the pre-petition collection of a delinquent student loan debt owed to a third party."

On April 2, 2014, the plaintiffs filed an amended complaint, dropping Northland as a defendant in the action. Docket 34. The plaintiffs then have dismissed Northland from this proceeding. Accordingly, this motion will be dismissed as moot.

6. 07-26077-A-12 JOSIASSEN FARMS INC. — MOTION FOR ENTRY OF DISCHARGE
WW-27 — 4-14-14 [286]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the chapter 12 trustee, the U.S. Trustee, and any other party 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 as consent 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.

The motion for entry of a chapter 12 discharge will be granted.

11 U.S.C. § 1228(a) provides that:

"Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of the kind specified in section 523(a) of this title."

This case was filed on August 2, 2007. The court confirmed the debtor's chapter 12 plan on March 31, 2008. The debtor does not have any domestic support obligations.

First, the trustee has filed a final report and the time to file objections to it has expired. The report was filed on March 25, 2014 and the last day to file an objection to the report was on April 28, 2014. Docket 283. Although an objection to the report was filed on April 25, that objection has been voluntarily dismissed. Dockets 291 & 294. The trustee's report demonstrates that the debtor has made the payments required by the plan and that the trustee has made the payments to creditors required by the plan. The requirement imposed by 11 U.S.C. § 1228(a) that the debtor receive a discharge only after completion of all payments under the plan has been satisfied.

Second, the debtor has filed a certificate in connection with this motion that the debtor is not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. See 11 U.S.C. § 1228(a); Docket 288 at 2. No objection has been filed to that certificate and the time to file an objection has expired.

Finally, by service of this motion, the debtor has given all creditors notice that 11 U.S.C. § 522(q)(1) is not applicable, and that there is no pending proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind specified in section 522(q)(1)(B). No creditor has objected to this notice. This satisfies the requirements of 11 U.S.C. § 1228(f).

Therefore, no earlier than 10 days after the hearing on this motion, the clerk shall enter the debtor's discharge. See 11 U.S.C. § 1228(f).

7. 14-20583-A-11 LARRY JENT — MOTION TO DISMISS CASE 4-21-14 [72]
JGD-2

Tentative Ruling: The motion will be granted in part. Rather than dismiss the case, it will be converted to chapter 7 because conversion rather than dismissal is in the best interests of creditors.

The debtor is asking the court to dismiss the case as the court awarded relief from stay to the debtor's principal creditor, Northern Trust Company, secured by the debtor's real property in Truckee, California.

Northern Trust has filed a response, urging the court to convert the case to chapter 7, as that would be in its best interest. Northern Trust is afraid that the debtor may be planning to file another bankruptcy case, if this case is dismissed.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter . . . ." 11 U.S.C. § 1112(b)(4)(A), (F). The above instances of cause are not exhaustive.

Although the debtor filed this case on January 23, 2014, he has filed no monthly operating reports.

Further, as pointed out by the debtor, his principal secured creditor Northern Trust has obtained relief from stay as to the real property the debtor was attempting to protect from foreclosure in filing this case.

The above is cause under § 1112(b)(1) for dismissal or conversion to chapter 7.

Conversion to chapter 7 is in the best interest of the creditors and the estate as the debtor has assets that a chapter 7 trustee may be able to liquidate for the benefit of creditors. The debtor holds interest in a trust that owns 100% interest in Blackhorse Ranch 1, L.L.C. The debtor's interest in the trust is valued at $4.5 million. Docket 46. Although Amended Schedule B states that the L.L.C. owns "surface mineral rights at" the property as to which Northern Trust obtained relief from stay, the L.L.C. may own other assets, including, without limitation, a property management business seemingly operating in Portland, Oregon, disclosed in item 18 of the statement of financial affairs.

In addition, the debtor has disclosed at item 4 of the statement of financial affairs a pending claim in El Dorado County against Jonathan Neil & Associates.

The court will then convert the case to chapter 7 to allow a trustee to

investigate and possibly liquidate the above assets for the benefit of creditors.

The request for in rem relief by Northern Trust will be denied. The court does not award relief on a response to a motion. If Northern Trust seeks relief from the court, it should file its own motion.

8. 14-20583-A-11 LARRY JENT — STATUS CONFERENCE 1-23-14 [1]

Tentative Ruling: None.

9. 10-39585-A-7 SATNAM TATLA — MOTION FOR SUMMARY JUDGMENT
10-2689 MHK-1 — 4-4-14 [28]
SACRAMENTO SIKH SOCIETY BRADSHAW TEMPLE V. TATLA

Tentative Ruling: The motion will be denied.

The plaintiff, the Sacramento Sikh Society Bradshaw Temple, seeks summary judgment on its 11 U.S.C. § 523(a)(6) claim against the defendant, Satnam Tatla, the debtor in the underlying bankruptcy case.

The motion is based on a state court judgment the plaintiff obtained against the defendant. The facts giving rise to the state court litigation and eventual judgment - as established by the state court - are as follows.

In April 2004, the defendant executed two grant deeds as president for the plaintiff for the transfer of two real properties of the plaintiff, even though the defendant was not a president, any other officer or director of the plaintiff. The plaintiff had not authorized the defendant to transfer assets of the plaintiff. The two real properties constituted all or substantially all of the plaintiff's assets. After the plaintiff learned of the transfers, it instituted a state court action against the defendant and other parties. Docket 31, Ex. A at 3-5, 7-8.

On January 11 and 13, 2010, after a jury trial on the plaintiff's slander of title claim against the defendant and others, the jury returned special verdicts against the defendant, awarding the plaintiff $359,021.22 in compensatory damages and $167,500 in punitive damages. While punitive damages were awarded against each defendant separately, the compensatory damages were awarded jointly and severally against eight of the defendants in the state court action, including the defendant here. Docket 31, Ex. C.

The appeal of the judgment was rejected and the judgment is now final.

The defendant filed the underlying chapter 7 bankruptcy case on July 24, 2010 and received his discharge on January 11, 2011. The instant adversary proceeding was filed against the defendant on October 29, 2010.

For summary judgment to be granted, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) incorporated by Fed. R. Bankr. P. 7056. The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for

summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252. The court must evaluate whether there is a genuine issue of material fact with regard to each element of the plaintiff's claim.

Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." In re Younie, 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997) (quoting Migra v. Warren City School Dist. Bd. Of Educ., 465 U.S. 75, 81 (1984)); Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). Collateral estoppel applies in dischargeability proceedings. Harmon at 1245.

Under California law, collateral estoppel requires that: (1) the issue sought to be precluded from litigation must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Harmon at 1245 (citing Lucido v. Superior Court, 51 Cal. 3d 335 (1990)).

11 U.S.C. § 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."

To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61; Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id.

Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The debtor must have had the subjective intent to harm or the subjective belief/knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6).

A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The defendant was a defendant in the state court action. The state court entered a now final judgment on the merits against the defendant. However, the court is unconvinced that issue preclusion applies here. "Slander of title is the false and unprivileged disparagement of title to real property resulting in pecuniary damage. The recording of a deed which casts doubt upon the title is basis for an action in slander of title." Cavin Memorial Corp. v. Requa, 5 Cal. App. 3d 345, 361 (1970) (citations omitted). The elements of a slander of title claim include:

(1) a publication,
(2) without privilege or justification,
(3) falsity, and
(4) direct pecuniary loss.

Summer Hill Homeowners' Ass'n, Inc. v. Rio Mesa Holdings, L.L.C., 205 Cal. App. 4th 999, 1030 (2012).

A slander of title claim also requires either express or implied malice. Gudger v. Manton, 21 Cal. 2d 537, 544 (1943), *disapproved on other grounds by* Albertson v. Raboff, 46 Cal. 2d 375, 381 (1956).

The special verdict returned by the jury against the defendant declared that the defendant:

(1) published a false deed or deeds that cast doubt on the plaintiff's title to a real property on Bradshaw Road,

(2) "engage[d] in an ongoing conspiracy to commit one or more unlawful acts (slander of title by one or both deeds) causing harm to the [plaintiff],"

(3) the false deeds were reasonably understood by one or more of the persons to whom they were published to be a statement of fact,

(4) the defendant should have foreseen that the deeds would cause the plaintiff to incur attorney's fees and costs in order to restore its title to the property and/or be unable to construct improvements on the property,

(5) the defendant knew or should have known that the deeds were false or he published the deeds in reckless disregard of whether the deeds were true or false,

(6) the plaintiff proved by clear and convincing evidence that the defendant acted with malice or fraud,

(7) the plaintiff's damages for attorney's fees and costs are $321,021.22 and its damages for non-refundable Sacramento County Building Permit fees are $38,000 (totaling $359,021.22), and

(8) because it was determined that the defendant had engaged in the conduct with malice or fraud, the plaintiff was awarded $167,500 in punitive damages.

Docket 31, Ex. C.

The defendant's subjective intent to harm or subjective knowledge or belief that harm is substantially certain is not an element of slander of title. Even though slander of title requires malice, the plaintiff has not established that California's tort definition of malice is limited to the subjective intent to or knowledge of harm required by the willful injury standard of 11 U.S.C. § 523(a)(6). The court has seen no legal authority limiting malice under California law solely to the defendant's subjective intent.

On the contrary, even the motion admits that malice includes "the defendant lack[ing] reasonable grounds for belief in the truth of the publication and therefore act[ing] in reckless disregard." Docket 28 at 6. Such language is consistent with the defendant's objective and not subjective intent. Su at 1145-46 (pointing out that "the objective standard disregards the particular debtor's state of mind and considers whether an objective, reasonable person would have known that the actions in question were substantially certain to injure the creditor. [T]his standard looks very much like the 'reckless disregard' standard used in negligence"). The defendant's objective intent is irrelevant however in this case.

Further, even if the elements of slander of title are somehow limited to the defendant's subjective intent as to the resulting harm, the court has no evidence that the defendant's subjective intent as to the harm was actually litigated and necessarily decided in the former proceeding.

None of the special verdict findings speak to the defendant's subjective intent to harm or his subjective knowledge or belief that harm is substantially certain. Finding 2, for instance, speaks to the defendant being part of an ongoing conspiracy to do what caused the harm to the plaintiff, *i.e.*, to publish a falsity, but it says nothing about whether the defendant knew anything of the harm that is to follow.

Although finding 4 refers to the consequences from defendant's publication (*i.e.*, attorney's fees and costs and inability to construct improvements), the finding speaks to what the defendant "should have foreseen" and not what he subjectively knew or believed. "Should have foreseen" language is consistent only with the defendant's objective intent, *i.e.*, what a reasonable person would have foreseen, which is irrelevant here. Su at 1145-46. That language casts no light on the defendant's subjective intent.

While finding 5 speaks of the defendant's knowledge, it pertains to his knowledge about whether the published deeds were false and not about the harm to follow. And, once again, the "knew or should have known" and "reckless disregard" language is consistent with the defendant's objective and not subjective intent.

Furthermore, the court rejects the plaintiff's contention that the punitive damages award necessarily satisfies nondischargeability under § 523(a)(6). The Krishnamurthy v. Nimmagadda (In re Krishnamurthy), 209 B.R. 714 (B.A.P. 9th Cir. 1997) case quoted by the plaintiff predates the 2002 Ninth Circuit Su decision, which clarified that the willful injury aspect of § 523(a)(6) is limited to the debtor's subjective intent and excludes an objective intent assessment. In other words, while punitive damages may be awarded against a debtor in connection with an objective intent inquiry, such as a reckless disregard, the willful injury standard of § 523(a)(6) would not be satisfied. See, e.g., McAlister v. Slosberg (In re Slosberg), 225 B.R. 9, 16-17, 22-24 (Bankr. D. Me. 1998) (noting similar discrepancies between the requirements of

§ 523(a)(6) and the issues litigated in the former proceeding).

Punitive damages may be awarded also because the debtor intended the wrongful conduct but clearly did not have the subjective intent to inflict the resulting harm. For example, a debtor may have intended the conduct that caused a battery of the creditor but may not have had the subjective intent to cause the resulting harm. If the debtor for example intentionally throws a basketball at the head of the creditor, hitting him in the forehead and causing him to lose his balance and fall on the ground, but the creditor then twists and breaks his ankle as he tries to get up, still disoriented, the debtor may be subject to punitive damages. Yet, the debtor probably did not have the subjective intent to break the creditor's ankle, thus precluding § 523(a)(6) nondischargeability for the debt that arose from the broken foot.

Finally, the court cannot infer the defendant's subjective intent to harm or subjective belief that harm is substantially certain, from the circumstances established by the state court action. Courts are hesitant to grant summary judgment on issues involving motive or intent as such issues are provable only by circumstantial evidence. See, e.g., Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); see also Maffei v. N. Ins. Co. of New York, 12 F.3d 892, 898 (9th Cir. 1993); Morgan Creek Prods., Inc. v. Franchise Pictures L.L.C. (In re Franchise Pictures L.L.C.), 389 B.R. 131, 144-45 (Bankr. C.D. Cal. 2008).

Assessing circumstantial evidence includes assessing the veracity of witness testimony, which necessitates an opportunity to observe, listen to and analyze the demeanor, appearance, mannerism, and speaking intonation of the witnesses while in live testimony. The motion will be denied.

10. 10-39585-A-7 SATNAM TATLA — STATUS CONFERENCE
10-2689 — 10-29-10 [1]
SACRAMENTO SIKH SOCIETY
BRADSHAW TEMPLE V. TATLA

Tentative Ruling: None.

11. 13-30804-A-11 ELWYN/JEANNINE DUBEY — STATUS CONFERENCE
8-16-13 [1]

Tentative Ruling: None.