

**UNITED STATES BANKRUPTCY COURT
Eastern District of California**

Honorable Christopher D. Jaime
1200 I Street, Suite 200
Modesto, California

PRE-HEARING DISPOSITIONS COVER SHEET

DAY: TUESDAY

DATE: May 18, 2021

CALENDAR: 1:00 P.M. CHAPTER 13

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule, or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters and no appearance is necessary. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within seven (7) days of the final hearing on the matter.

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Modesto, California

May 18, 2021 at 1:00 p.m.

1. [19-90817](#)-B-13 GARY COOKSEY MOTION TO VACATE DISMISSAL OF
[BSH](#)-9 Brian S. Haddix CASE
4-29-21 [[153](#)]
DISMISSED: 04/26/2021

Final Ruling

The motion has been set for hearing on less than 28-days notice. Local Bankruptcy Rule 9014-1(f)(2). The motion will be decided on the papers. See General Order No. 618 at p.3, ¶ 3 (E.D. Cal. May 13, 2020) (ordering courthouse closure "until further notice" due to the COVID-19 pandemic and further ordering that all civil matters are to be decided on the papers unless the presiding judge determines a hearing is necessary). Oral argument will not assist in the decision-making process or resolution of the motion. See Local Bankr. R. 9014-1(h), 1001-1(f).

The court is aware that the motion is filed, set, and served under Local Bankr. R. 9014-1(f)(2) which means no written opposition prior to the hearing is required. The court also notes that relief under Fed. R. Civ. P. 59(e) may be granted on an *ex parte* basis. See *Perez-Reyes v. National Distribution Centers, LLC*, 2018 WL 7077183 (C.D. Cal. 2018) (granting *ex parte* application under Rule 59(e)). The court will therefore exercise its discretion to do so here.

The court's decision is to grant the motion to vacate dismissal.

Background

Before the court is the April 29, 2021, motion by debtor Gary Cooksey ("Debtor") to vacate the April 26, 2021, order dismissing this Chapter 13 case. The court has reviewed motion and its related declaration. The court has also reviewed and takes judicial notice of the docket. See Fed. R. Evid. 201(c)(1).

This Chapter 13 case was filed on September 6, 2019. A first amended plan filed on May 19, 2020, was confirmed on August 17, 2020. The case was dismissed on April 26, 2021, after the Debtor failed to timely respond to the Chapter 13 Trustee's ("Trustee") March 9, 2021, Notice of Default ("NOD"). According to the NOD, as of March 8, 2021, payments under the Debtor's confirmed amended plan were delinquent in the amount of \$6,399.00 and an additional payment of \$3,080.00 was due on March 25, 2021.

The Debtor states that he has been preoccupied with maintaining his business during the pandemic and, as a result, he mistakenly interpreted the NOD and correspondence from his attorney concerning the NOD as pertaining to his mortgage and not plan payments. The court notes that the Debtor's mortgage is a Class 4 claim under the confirmed amended plan which means it is paid directly by the Debtor.

The Debtor also states that on April 27, 2021, the day after the dismissal order was filed and entered, he tendered \$7,679.00 to the Trustee and with that payment he is now current. And the Debtor further states that he is now able and prepared to resume payments required by his confirmed amended plan.

May 18, 2021 at 1:00 p.m.

Discussion

Filed within fourteen days of entry of the order dismissing this Chapter 13 case, the Debtor's motion is governed by Fed. R. Civ. P. 59(e) applicable by Fed. R. Bankr. P. 9023. *First Ave. West Building, LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 561-62 (9th Cir. 2006); *In re Zinnel*, 2012 WL 8022513 at *1-2 (Bankr. E.D. Cal. Feb. 22, 2012). Relief under Rule 59(e) is an extraordinary remedy which is used sparingly and typically granted in only one of four instances: (1) if necessary to correct manifest errors of law or fact; (2) if necessary to present newly discovered or previously unavailable evidence; (3) if necessary to prevent manifest injustice; or (4) if an amendment is justified by an intervening change in controlling law. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

The Debtor identifies no manifest error of law or fact. More precisely, the Debtor does not dispute that a Chapter 13 case may be dismissed based on a default in plan payments. And by the Debtor's own admission as reflect by his post-dismissal payment, the Debtor was not current and therefore was in default under his confirmed amended plan when his Chapter 13 case was dismissed. The Debtor also identifies no change in controlling law between the time his Chapter 13 case was dismissed and the present. So that leaves only the second and third prongs available as a basis for relief.

The Debtor arguably presents evidence that was not previously available, *i.e.*, that he is now current with plan payments. Prior to dismissal that evidence did not exist because at the time of dismissal the Debtor was not current. And if the Debtor is in fact now current, albeit becoming current only after dismissal, that together with the Debtor's assertion in his declaration that he is willing and able to make all required plan payments going forward makes dismissal manifestly unjust. In other words, the Debtor should be provided with an opportunity to validate his sworn statement in order to avoid the need to refile a new Chapter 13 case and start over.

Based on the foregoing, the court finds a minimally sufficient basis under either the second or third prongs of the Rule 59(e) analysis to vacate the dismissal order. Therefore, the order dismissing this case entered on April 26, 2021, dkt. 150, is **ORDERED VACATED** and this Chapter 13 case is **ORDERED REINSTATED** subject to the following terms and conditions: **(1)** the Debtor shall be current with all plan payments by May 25, 2021; **(2)** the Debtor shall timely make all plan payments for a period of six (6) months beginning with the plan payment due for May 2021.¹ If the Debtor fails to comply with either condition this Chapter 13 case may again be dismissed on the Trustee's *ex parte* application.

The motion is ORDERED GRANTED for the reasons stated in the minutes.

The court will prepare an order.

¹In this context, "timely" means that the plan payment must be received by the Trustee on or before its due date.

Final Ruling

The motion has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). No opposition was filed. The matter will be resolved without oral argument. No appearance at the hearing is required.

The court's decision is to permit the requested modification and confirm the modified plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The motion is ORDERED GRANTED for reasons stated in the minutes. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

The court will issue an order.

3. [21-90183](#)-B-13 SECO BROWN AND LINDA MOTION TO EXTEND AUTOMATIC STAY
[FAT](#)-1 WILLIAMS-BROWN 4-26-21 [[13](#)]
Flor De Maria A. Tataje

Final Ruling

The motion has been set for hearing on less than 28-days notice. Local Bankruptcy Rule 9014-1(f)(2). The court has determined that this matter may be decided on the papers. See General Order No. 618 at p.3, ¶ 3 (E.D. Cal. May 13, 2020) (ordering courthouse closure "until further notice" due to the COVID-19 pandemic and further ordering that all civil matters are to be decided on the papers unless the presiding judge determines a hearing is necessary). The court has also determined that oral argument will not assist in the decision-making process or resolution of the motion. See Local Bankr. R. 9014-1(h), 1001-1(f).

The court's decision is to grant the motion to extend automatic stay.

Debtors seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c)(3) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past 12 months. The Debtors' prior bankruptcy case was dismissed on April 16, 2021, due to for failure to make plan payments (case no. 19-90641, dkt. 35). Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end in their entirety 30 days after filing of the petition. See e.g., *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (9th Cir. BAP 2011) (stay terminates in its entirety); accord *Smith v. State of Maine Bureau of Revenue Services (In re Smith)*, 910 F.3d 576 (1st Cir. 2018).

Discussion

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond 30 days if the filing of the subsequent petition was in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if 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. *Id.* at § 362(c)(3)(C)(i)(III). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008).

The Debtors assert that they were unable to make plan payments in the previous case after Joint Debtor Linda Williams-Brown, who provides the primary source of income for the household, shut down her business as a legal document preparer during the COVID-19 pandemic. Additionally, Debtors' prior counsel passed away and the Debtors were not aware that their case was in jeopardy to be dismissed.

The circumstances have changed in that Joint Debtor now receives weekly unemployment compensation and \$300 per week through September 6, 2021, per the American Rescue Plan Act. Joint Debtor also plans to reopen her business full-time now that pandemic-related restrictions have loosened. Joint Debtor is hopeful that her business will return to normal but nonetheless her current unemployment compensation is sufficient to cover plan payments. Separately, Debtors have hired new counsel to ensure that their payments are in full and timely paid.

The Debtors have sufficiently rebutted, by clear and convincing evidence, the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

The motion is ORDERED GRANTED for reasons stated in the minutes.

The court will issue an order.