

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

Pursuant to District Court General Order 618, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, until further order of the Chief Judge of the District Court. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

May 21, 2022 at 11:00 a.m.

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| 1. | <u>09-25085-E-7</u>
<u>09-2339</u>

LARNED V. ROTTEVEEL | HUBERT ROTTEVEEL

ORDER TO APPEAR FOR
EXAMINATION
(HUBERT ROTTEVEEL)
4-4-20 [67] |
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The Examination of Hubert Rotteveel, the Judgment Debtor, is continued to 11:00 a.m. on May 21, 2020, at this court.

On April 4, 2020, Plaintiff Doug Larned filed an Application and Order for Appearance for Examination of Judgment Debtor, Hubert Rotteveel. Dckt. 67. Plaintiff seeks to examine Debtor for purposes of obtaining information to aid in enforcement of a money judgment against Debtor. *Id.* The court granted this application and Debtor has been ordered to appear for examination on May 21, 2020 at 11:00 a.m.

On May 18, 2020, Plaintiff filed an *Ex Parte* Motion to continue the Examination. Dckt. 70. Two grounds were stated. *Id.* The first is that an examination cannot be held at the Courthouse because it is closed to the public. The second is that there are ongoing settlement discussions.

That the Courthouse is closed to these parties renders an examination at the Courthouse impossible.

The Judgment Debtor has filed an Objection and Request that the court strike the examination as improper. Dckt. 60. Judgment Debtor directs the court to the fact that the judgment to

May 21, 2020 at 11:00 a.m.

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be enforced is one issued by the Superior Court for the County of Solano in light of California Code of Civil Procedure § 491.150(b) which provides that a debtor's examination is to be conducted in a court in the county in which the person, whose examination is being taken, resides or has a place of business unless the place in which the examination is to be taken is less than 150 miles from the judgment debtor's residence.

A review of California Code of Civil Procedure § 491.150 identifies the examination to one when a "writ of attachment" has been issued. This is for the examination of a third party who may be holding an asset that is subject to the writ of attachment.

The present examination is a judgment debtor exam, pursuant to California Code of Civil Procedure § 708.110, which provides in pertinent part:

§ 708.110. Examination of judgment debtor

(a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment.

The proper court for conducting an examination of a judgment debtor is specified in California Code of Civil Procedure § 708.160, which provides in pertinent part:

§ 708.160. Proper court for examination; Examination outside county where judgment entered

(a) Except as otherwise provided in this section, the **proper court for examination** of a person under this article is **the court in which the money judgment is entered**.

(b) A person sought to be examined **may not be required to attend an examination before a court located outside the county in which the person** resides or has a place of business unless the distance from the person's place of residence or place of business to the place of examination is less than 150 miles.

(c) If a person sought to be examined does not reside or have a place of business in the county where the judgment is entered, the superior court in the county where the person resides or has a place of business is a proper court for examination of the person.

(d) If the judgment creditor seeks an examination of a person before a court other than the court in which the judgment is entered, the judgment creditor shall file an application that shall include all of the following:

(1) An abstract of judgment in the form prescribed by Section 674.

(2) An affidavit in support of the application stating the place of residence or place of business of the person sought to be examined.

(3) Any necessary affidavit or showing for the examination as required by Section 708.110 or 708.120.

(4) The filing fee for a motion as provided in subdivision (a) of Section 70617 of the Government Code.

The judgment for which the examination is to be taken is identified as the judgment in this Adversary Proceeding. Application and Order, Dckt. 67.

The judgment in this Adversary Proceeding was entered on July 6, 2010. Dckt. 59. The Judgment consists of the following:

This court having required the parties to complete an arbitration proceeding, and having confirmed that arbitration award, now determines and declares that the First Amended Arbitration Award filed April 13, 2010 in this court, is not dischargeable in bankruptcy pursuant to 11 U.S.C. §§ 523(a)(2) and (a)(6). A copy of that Award is appended hereto.

No other relief was granted.

Defendant Debtor makes reference to a Solano Superior Court Action *Oregon Museum Science & Indus. v. Douglas Larned*, in which Mr. Larned obtained a judgment on a cross-complaint against the Judgment Debtor.

Attached to the judgment determining that the Arbitration Award is nondischargeable has a copy of that Award attached to it. Dckt. 59. The Arbitration Award makes reference to a cross complaint by the Plaintiff against the Judgment Debtor in a Solano County Action. The Arbitration Award states that it was being entered after leave for it to be completed had been ordered by the Bankruptcy Court.

The Judgment Debtor states that there is a judgment that has been obtained by Plaintiff in the Solano Court. It appears that obligation as determined in the arbitration has been determined nondischargeable by the Bankruptcy Court.

The court continues the Judgment Debtor Examination to 10:30 a.m. on July 23, 2020, in this court.

The court orders Plaintiff to file a status report identifying what judgment obligation is the subject of this Order of Examination and if there is a state court judgment as stated by the Debtor.

The court shall issue a minute 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 Order for Judgment Debtor Examination issued by the court having been presented to the court, the Courthouse being closed to the public due to the COVID-19 pandemic making it impossible to conduct the examination on May 21, ,2020,and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Examination of Hubert P. Rotteveel, the judgment debtor in this Adversary Proceeding, is continued to 11:00 a.m. on July 23, 2020, to be conducted in this court.

IT IS FURTHER ORDERED that Hubert P. Rotteveel, shall appear in this court at the continued Examination.

IT IS FURTHER ORDERED that Doug Larned, the Judgment Creditor, shall file a status report on or before July 9, 2020, that identifies the judgment obligations that are the subject of the examination in this court, whether there is a state court judgment based on the arbitration award, and the judgment in the Solano County Superior Court which the Judgment Debtor states that Plaintiff has obtained against Judgment Debtor.

GOLDEN ET AL V. WELLS FARGO
BANK, N.A.

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on April 21, 2020. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted.

Nicole Golden and Stephen Alter ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on April 21, 2020. Dckt. 11. Plaintiff seeks a default judgment against Wells Fargo Bank, N.A. ("Defendant") in the instant Adversary Proceeding No. 2020-0219.

The instant Adversary Proceeding was commenced on February 20, 2020. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on February 20, 2020. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on December 6, 2019. Dckt. 8.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint to obtain a judgment voiding the lien of Wells Fargo pursuant to 11 U.S.C. §506(d) and Rule 7001(2). The Complaint contains the following general allegations as summarized by the court:

- A. On July 1, 2014, Plaintiffs filed a Motion to Value Defendant's Lien at \$0.00.
- B. On August 5, 2014, the court granted the motion and the second deed of trust had a secured value of \$0.00, and the balance of the claim was determined to be an unsecured claim to be paid through the confirmed Chapter 13 Plan.
- C. Defendant filed a Proof of Claim on August 15, 2014, based on the lien in the amount of \$129,116.00.
- D. Plaintiff-Debtor's Plan was confirmed on December 29, 2014. On February 18, 2020, Plaintiff-Debtor received their discharge.
- E. Pursuant to 11 U.S.C. §506(d) and Rule 7001(2), Debtors are entitled to a judgment voiding the lien.
- F. Plaintiff-Debtor is entitled to an award of attorney's fees and costs.

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

- A. A Judgment Voiding the Lien;
- B. Attorney's Fees and Costs; and
- C. For such other and further relief as the court deems appropriate.

RELIEF SOUGHT IN MOTION FOR DEFAULT JUDGMENT

Plaintiffs filed the Motion for Default Judgment, accompanied by the Declaration of Nicole Golden, Dckt. 14, and Exhibits A and B, Dckt. 13.

In the Motion, Plaintiff requests the following relief:

- A. A Judgment Voiding the Lien; and
- B. For such other and further relief as the court deems appropriate.

REVIEW OF THE MOTION FOR ENTRY OF DEFAULT JUDGMENT

On April 21, 2020, Plaintiffs filed the instant Motion for Entry of Default Judgment pursuant to Fed. R. Bankr. P. 7055. Dckt. 11.

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

- A. Plaintiffs bring motion pursuant to FRCP 55, as incorporated by FRBP 7055.
- B. Plaintiff- Debtor filed their bankruptcy case under Chapter 13 on April 30, 2014.
- C. Plaintiff-Debtor own title to real property commonly known as 5407 Caledonia Circle, Carnelian Bay, California.
- D. There is a second deed of trust recorded June 4, 2007 securing a loan of \$129,940.03 held by Defendant.
- E. On July 1, 2014, Plaintiffs filed a Motion to Value Defendant's Lien at \$0.00.
- F. On August 6, 2014, the court granted the motion and the second deed of trust was determined to have a secured value of \$0.00, with the balance of the claim was determined to be an unsecured claim to be paid through the confirmed Chapter 13 Plan. The Property was valued at \$450,000
- F. Defendant filed a Proof of Claim on August 15, 2014, based on the lien in the amount of \$129,116.00.
- G. Plaintiff-Debtor's Plan was confirmed on December 29, 2014. Plaintiff-Debtor has made all payments required under the Plan, and on February 18, 2020, Plaintiff-Debtor received their discharge.
- I. Plaintiff-Debtor filed this Adversary Proceeding on February 20, 2020.
- J. The Default was entered on April 13, 2020.
- K. Pursuant to 11 U.S.C. §506(d) and Rule 7001(2), Debtors are entitled to a judgment voiding the lien.

Motion, Dckt. 11.

ADDITIONAL DOCUMENTS FILED WITH THE MOTION

The Declaration of Nicole Golden, one of the Plaintiffs in this adversary proceeding was

filed. Dckt. 14. Ms. Golden testifies that she owns the Property and that Wells Fargo has a first and a second deed of trust on the Property. *Id.* at ¶ 3-4. She testifies that on August 5, 2014, Plaintiff-Debtor obtained an order securing the value of the second deed of trust as \$0.00. *Id.* at ¶ 5. Lastly, Ms. Golden testifies that Plaintiff-Debtor have completed the required Plan payments and have obtained their discharge. *Id.* at ¶ 6.

The properly authenticated exhibits filed in support of the Motion are: Exhibit A: June 4, 2007 Deed of Trust and Exhibit B: August 6, 2014 Order. Dckt. 13.

APPLICABLE LAW

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

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

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

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

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

Valuing Collateral and Secured Claims

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

(a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value 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.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

Section 506(d) prescribes a number of special rules governing the avoidance of liens that secure disallowed claims. 11 U.S.C. § 506(d) provides as follows:

(d)To the extent that **a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void**, unless—

(1)such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2)such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d) (emphasis added).

DISCUSSION

Judgment Voiding the Lien under 11 U.S.C. 506(d)

Plaintiff request that the court issue a judgment voiding the lien on the basis that the court entered an order granting the motion to value the collateral of Defendant at \$0.00 on August 5, 2014. By granting the Motion, the Lien had a secured value of \$0.00, with the balance of the claim determined to be an unsecured claim under the confirmed Chapter 13 Plan.

The court having already determined Defendant's Secured Claim to have a value of \$0.00, that prior order and the findings of fact thereunder are not subject to attack or dispute. The findings and that final order stand, are enforceable, and binding on the parties.

Plaintiff have completed their Chapter 13 Plan. As documented by the Trustee's Final Report

and Account in the Plaintiff's bankruptcy case, Plaintiff's Chapter 13 Plan was confirmed on December 29, 2014, and completed on June 26, 2019. Bankruptcy Case No. 14-24616. The Plaintiff received their discharge on February 18, 2020. *Id.* Dckt. 101.

Plaintiff has properly stated a claim for, and presented evidence in support of the Motion for Entry of Default Judgment. Plaintiff is entitled to the full reconveyance of the Second Deed of Trust and to have title free and clear of such encumbrance. This court has previously addressed in detail the basis under California state law, standard note and deed of trust contractual law, and bankruptcy law for a deed of trust being void upon the completion of a Chapter 13 Plan which provides for payment of the 11 U.S.C. § 506(a) determined secured claim value. Upon completion of such a plan, the creditor is required (contractually and statutorily) to reconvey the deed of trust to clear record title of the void deed of trust. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Plaintiff, Defendant, and other creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *See* WITKIN SUMMARY OF CALIFORNIA LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511. *See Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013), for discussion of 11 U.S.C. § 506(d) application in this situation.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on Defendant, as the beneficiary under the Second Deed of Trust, to reconvey that deed of trust when the secured obligation has been satisfied. The Chapter 13 Plan having been completed and Defendant having been paid the full amount of the secured claim as determined pursuant to 11 U.S.C. § 506(a), the Defendant's Secured Claim has been satisfied and there remains no obligation secured by the Second Deed of Trust.

The Plaintiff is entitled to a determination that the Second Deed of Trust is void and of no force and effect. The court shall issue a judgment that the Second Deed of Trust is null and void, and of no force and effect, with respect to the following property:

5407 Caledonia Circle, Carnelian Bay, California.

CONCLUSION

The court grants Judgment for Plaintiff and against Defendant determining that the Second Deed of Trust is void and of no force and effect.

The court shall issue a minute 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 for Entry of Default Judgment filed by Nicole Golden and Stephen Alter ("Plaintiff-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 For Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien, or encumbrance pursuant thereto, held by Wells Fargo N.A. against the real property commonly known as 5407 Caledonia Circle, Carnelian Bay, California, recorded on June 4, 2007, with the County Recorder for Placer, Document No. 2007- 0001028-00, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Wells Fargo N.A. has no interest in the real property pursuant to the deed of trust.

Plaintiff may seek the allowance of costs and award of attorney's fees as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.