

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 1, 2022 at 2:00 p.m.

1.	<u>20-90115-E-7</u> ALI MUTHANA <u>KRO-2</u>	CONTINUED MOTION TO REVOKE DISCHARGE OF DEBTOR(S) 6-10-21 [47]
----	--	---

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. No Certificate of Service was filed with the court. At the hearing all parties in interest appeared, documenting that service had been made.

The Motion to Revoke Discharge of Debtor 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 Revoke Discharge is XXXXXXXXXXXXXXXXXX
--

KROLOFF, BELCHER, SMART, PERRY & CHRISTOPHERSON, a Professional Law Corporation, creditor with an unsecured claim in the amount of \$81,393.27 ("Objector"), filed the instant Motion to Revoke Debtor's Discharge on June 11, 2021.

The instant case was filed under Chapter 7 on February 11, 2020. Debtor received a discharge on June 11, 2020. Dckt. 15. Objector argues that Ali Saeed Muthana ("Debtor") is not

entitled to a discharge in the instant bankruptcy case for the following reasons:

1. the discharge was obtained through the fraud of the debtor and Kroloff did not know of such fraud until after the granting of such discharge, pursuant to U.S.C. § 727(d)(1); and
2. Debtor acquired property that is property of the estate or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition or entitlement to such property, or to deliver or surrender such property to the trustee, pursuant to 11 U.S.C. § 727(d)(2).

DISCUSSION

The revocation of a discharge is governed by 11 U.S.C. § 727(d), which Bankruptcy Code section provides in part,

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

11 U.S.C. § 727(d). The standard for a determination of fraud that would allow for revocation of a discharge is a heightened standard. As explained in Collier on Bankruptcy,

Section 727(d)(1) provides that, if the other requisites are present, the court may revoke the discharge if it “was obtained through the fraud of the debtor.” This language requires, at a minimum, that the discharge would not have been granted but for the fraud alleged. The fraud required to be shown is fraud in fact, such as the intentional omission of assets from the debtor’s schedules. The fraud required to be shown must involve intentional wrong, and does not include implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.⁶

⁶ Collier on Bankruptcy P 727.17 (16th 2021).

Here, partners at a law firm that represented the Debtor pre-petition, testify that they read, meaning “heard someone else say,” that Debtor had won the lottery, that he won \$5 million, and thus the money exists and must have gone somewhere. The witnesses do not testify that they have personal

knowledge of such winnings, but only that they heard someone else say in newspaper articles, and then it being reference in a pleading filed in a state court action. ^{FN.1.}

FN. 1. Federal Rules of Evidence 601 et seq., requiring that a witness have personal knowledge of the fact as to which that person testifies under penalty of perjury, and not merely knows that someone else states that they know.

Creditor argues that Debtor engaged in fraud because not only did Debtor did not disclose the lottery winning of \$5 million four year prior to the filing but also Debtor must own additional liquid assets or other property purchased with those lottery winnings that were not disclosed in the bankruptcy petition.

First, what the Objector presents as evidence is hearsay. The information provided by creditors are details obtained from newspaper articles. With one exception, no evidence is presented by this sophisticated party, a law firm, that is anything other than the reference to newspapers where Objector had at its disposal the tools of Discovery.

The one exception is Exhibit E, a Motion *in Limine* filed by an attorney for Debtor in a state court action, in which the attorney for Debtor states:

This has particular relevance to this action in that one cross-defendant ALI MUTHANA was fortunate enough to be the recipient of a portion of California Lottery winnings during the pendency of this action.

Exhibit E, Motion *in Limine*, p.2:8-9; Dckt. 49. This Motion has a filed date in the upper right hand corner of September 30, 2016. That is four years before Debtor commenced this Chapter 7 bankruptcy case.

Objector presents no evidence from the California Lottery as to what Debtor won or how much he received. Objector does not mention subpoenas for bank records of the Debtor, given that the check or checks would have to be deposited and the funds therefrom traceable. Objector themselves represent that in doing research as to whether other assets were held, Objector appears to have only come across the lottery prize. Objector does not allude to any other assets and it may be that there aren't any than those listed on Debtor's Schedules.

Debtor's Response

The court then has Debtor testifying that he had won "only \$1,160,001.99" and not the \$5 million as argued by the Objector. Debtor has presented the court with evidence that a net payment amount of \$1,160,001.99 was paid to Debtor, Debtor made an additional tax payment of \$100,000.00, and that the amount paid to Debtor was deposited at a Wells Fargo account. Declaration, Dckt. 54, see also Exhibits 1 and 2, Dckt. 53.

In essence, the basis of the Objection is that Debtor won some money five years before the bankruptcy case was filed, there obviously must be assets somewhere relating thereto that could be used to pay Debtor's creditors, and therefore the Debtor's discharge should be revoked on this supposition.

The court cannot revoke and then deny a debtor his discharge where what is presented is speculative based on newspapers with a simple reason that since Debtor won the lottery the money must be or must have gone somewhere. Actual evidence is required.

Creditor is sophisticated in the law. There are many tools available to conduct discovery, whether within the contested matter through the Federal Rules of Civil Procedure (Fed. R. Civ. P. 28-37, Fed. R. Bankr. P. 7028-7037, 9014(c)) or through Federal Rule of Bankruptcy Procedure 2004. Creditor has had these tools, obviously (as attorneys) are aware of these tools, and presumably used them to the extent possible to present evidence to carry Creditor's burden of proof.

In his Declaration, attorney Kerry Krueger, a shareholder of Creditor, testifies that he personally started representing the Debtor in 2016. Then, in 2019 represented Debtor in another matter. Mr. Krueger then testifies that when Debtor obtained his discharge (which was June 11, 2020), "I did not know that Debtor had recently won \$5 million in the California Lottery" Declaration, ¶ 4; Dckt. 50. The winning is alleged to have occurred five years earlier, which may be "recent" in some respects, and five long, financially crushing years in others.

While admitting in the Declaration that he was aware, apparently in 2019, that Debtor had some lottery winnings, he assumed that they were only a couple thousand dollars. It was after subsequently learning that it was higher, he had a paralegal engage in on-line research to find articles about the winnings.

In the Motion, Creditor repeatedly makes reference to the news articles making reference to the Debtor splitting a \$10,000,000 lottery winning, so therefore Debtor received \$5,000,000. The copy of the Lottery payment to Debtor provided as Exhibit 1, Dckt. 53, includes the following information:

- a. "LOTTERY TOTAL PRIZE AMOUNT.....\$1,546,666.66"
- b. "INITIAL GROSS PAYMENT AMOUNT....\$1,546,666.66"
- c. "INITIAL FEDERAL TAX WITHHELD.....\$1,160,001.99"

(emphasis in original). Thus, the amount paid to Debtor, based on evidence presented, was \$1,160,000.99. The court takes judicial notice, it commonly being known in the jurisdiction, that the large lottery prizes are stated in the dollar amount of the total payments made over a 30 year period. The winner has the option to elect to take a present value discounted lump sum cash payment in place of the 30 year "annuity."

The California Lottery maintains its official State website at <https://www.calottery.com/>. At that webpage examples of the 30 year payout and the discounted cash value are provided, with examples including:

PowerBall \$274,000,000 prize, with estimated cash value of \$197,700,000 (28% discount)

SuperLotto Plus \$9,000,000 prize, with estimated cash value of \$6,400,000 (28.8% discount)

Mega Millions \$265,000,000 prize, with estimated cash value of \$185,600 (30% discount)

It would not be surprising to see a Lottery winner take the lump sum cash payment.

While theorizing that assets must exist and while contending that something else must be disclosed, at the end of the day, creditor merely presents the court with conjecture, speculation, hearsay, and circumstantial, “it has to be,” evidence. Creditor has not provided the court with creditor, personal knowledge evidence of the winnings, has not presented the court with bank records, has not presented with Lottery records, and not presented the court with evidence of there being Lottery winnings hidden away by the Debtor five years after the Debtor won the money.

On Schedule I, Debtor lists his employment as that of a cashier, and having been that for the six years preceding the bankruptcy filing, and as of the February 11, 2020 filing of the bankruptcy case, having gross monthly earnings of \$3,000. Dckt. 1 at 29-30. After taxes and withholdings, Debtor states his take home pay is \$2,870.25. *Id.* On Schedule J, Debtor lists a spouse (for whom no income is shown) and two children, who were minors during the five years preceding the filing of the bankruptcy case. *Id.* at 31-32. The expenses listed on Schedule J, for which Debtor states his expenses exceed income by (\$1,329.75) a month are meager for a family of two adults and two teenage sons.

On the Statement of Financial Affairs Debtor states having wages of \$18,000 in 2019 and \$16,500 in 2018. *Id.* at 38.

If Debtor had \$1,000,000 in 2015 and “lived like a millionaire” while making cashier wages as shown on the Statement of Financial Affairs., for 2015, 2016, 2017, 2018, and 2019, the \$1,000,000 would represent “only” \$200,000 a year. Monthly, that breaks down to \$16,666.66 a month. Large when compared to \$3,000 or less a month as a cashier, but not never-ending deep money.

Looking at Schedules D and E/F, Debtor doesn’t have much in claims, other than Creditor for the legal fees and (\$625,000) for being on the wrong end of a judgment. *Id.* at 19-24. That judgment creditor, identified as Maiyesa Basidiq, who is identified as the defendant in a San Joaquin County Superior Court Action, a 2014 case. Creditor’s attorneys were brought into that case in 2019 to represent Debtor when his prior counsel passed away for the trial and post-trial motions.

August 19, 2021 Hearing

At the hearing, counsel for the Trustee reported that the Trustee is actively investigating the lottery winning proceeds and the transfer of such monies by the Debtor. Counsel for Objecting Creditor discussed with the court the need to proceed with discovery and the diligent prosecution of this Motion.

In light of the ongoing investigation by the Chapter 7 Trustee and the issues raised, the court continues the hearing to allow for the diligent prosecution of this Motion. ^{FN.2.}

FN. 2. Though not currently shown by Creditor, if Debtor has hidden lottery winnings, the Chapter 7 Trustee and others using the discovery tools available should be able to ferret out where such monies are. And if so, revocation of the Debtor’s discharge would be the least of Debtor’s worries, and he would then likely need to engage the service of defense counsel as this matter would be elevated to the United States District Court and the United States Attorney.

October 13, 2021 Trustee Status Report

The Trustee filed a Discovery Update Status Report on October 13, 2021, Dckt. 59. The report states the Trustee obtained an order under Rule 2004 authorizing a subpoena for documents to California Lottery. California Lottery responded and provided documents confirming Debtor won an award in September 2015 of \$1,160,000.00 and was paid on November 17, 2015.

The Trustee obtained an order under Rule 2004 authorizing the examination of Ali Muthana and production of documents. Mr. Muthana produced bank statements and other documents. The bank statements showed Mr. Muthana deposited the winnings into a Wells Fargo Bank account, a portion was used to buy real property located at 2022 Whitefall Court, Ceres California. The remainder was withdrawn in installments during the following 2-3 months, the Trustee is unable to trace the funds following withdrawal.

The Debtor testified he obtained a loan against the Whitefall Court property in May 2019 for approximately \$237,000.00. The Trustee cannot trace the funds beyond these withdrawals. Further, Debtor transferred the Whitefall Court property during the Chapter 7 bankruptcy case for no consideration to his stepson, Bader A. Suwaid. The Debtor purportedly refinanced the existing loan on the property with a new loan form GNN Real Estate & Mortgage, Inc.

Additionally, Trustee has obtained orders authorizing the examination of Basma Muthana and three entities purportedly owned by Ms. Muthana. Trustee has been unable to serve Ms. Muthana because she has been reportedly out of the country per Debtor's testimony.

Lastly, Trustee commenced Adversary Proceeding No. 21-9008 against Mr. Suwaid and GNN Real Estate and Mortgage, Inc. on July 26, 2021, seeking to avoid the post-petition transfer of the Whitefall property. The court continued the status conference to December 2, 2021 to enable one of the Defendant's counsel to recover from COVID-19. No discovery has been conducted.

October 14, 2021 Creditor Status Report

Creditor Kroloff, Blecher, Smart, Perry & Christopherson, a Professional Law Corporation, filed a Discovery Update Status Report on October 14, 2021, Dckt. 62. The Creditor states the prize awarded to the Debtor was less than previously thought by the Creditor, but still a significant sum. This was evidence through the 2004 documents California Lottery turned over.

Creditor has examined the Bank Statements the Debtor has turned over and are interested in the November and December 2015 bank statements. The Creditor indicates that large amount withdrawals were made by the Debtor in the month of December. Creditor indicates that the Debtor's bank account balance went from \$1,160,000.00 on December 1, 2015 to \$7,469.00 by December 28, 2015. When asked about this Debtor cannot remember what the money went to. He testified it went to purchasing a home and gambling.

Creditor and counsel for the Trustee have communicated regarding the Trustee attempting to obtain documents relating to the Debtor's daughter, Basma Muthana and the three entities purported to be owned by her. Creditor has learned Trustee is in the process of obtaining records from the bank for the Debtor's large withdrawals to determine if they were made via wire transfer, cash, or cashier's check. Trustee will also seek to obtain financial records from Ms. Muthana regarding her businesses and

whether the withdrawals by Debtor have any relation to an ownership stake in said businesses.

The information the Creditor needs to prove their argument for the Motion to Revoke Discharge is the same information the Trustee is attempting to obtain. Creditor indicates it would be a waste of time and resources to subject the Debtor and Ms. Muthana to the same examinations under a separate Rule 2004 order. Further, Creditor would have the same challenges in serving Ms. Muthana as the Trustee.

Bank Statement Exhibits

The Trustee has provided a copy of a June 27, 2019 Wells Fargo Bank statement for Debtor's account. Dckt. 60. The transactions for that one month include:

Electronic Deposit, 5/29/2019.....	\$236,895
Withdrawal Made in A Branch/Store, 5/31/2019.....	(\$20,000)
Withdrawal Made in A Branch/Store, 5/31/2019.....	(\$20,030)
Withdrawal Made in A Branch/Store, 5/31/2019.....	(\$50,000)
Withdrawal Made in A Branch/Store, 5/31/2019.....	(\$56,000)
Withdrawal Made in A Branch/Store, 5/31/2019.....	(\$90,090)

The Trustee's Status Report does not indicate the status of obtaining the documentation from Wells Fargo Bank of how the withdrawals were documented (cashier's check, money order, electronic transfer) and tracing of those funds. While stating that the Trustee is "unable to trace the funds," it does not indicate this withdrawal documentation and where checks or electronically transferred funds were negotiated. There is no indication in the Status Report that Wells Fargo Bank handed Debtor suitcases of cash for the \$236,000 withdrawals made in one day.

Creditor has provided a copy of a December 28, 2015 Wells Fargo Bank Statement for Debtor and Bader A Kassim Suwaid. Dckt. 63. The beginning balance on December 1, 2015, is \$1,160,763. For the month of December 2015, the withdrawals and deposits include:

12/9/2015	Edeposit.....	\$ 49,000
12/9/2015	Purchase Bank Check or Draft.....	(\$ 44,173.87)
12/11/2015	Withdrawal Made in Branch/Store.....	(\$ 8,000)
12/11/2015	Purchase Bank Check or Draft.....	(\$104,506.29)
12/11/2015	Purchase Bank Check or Draft.....	(\$747,824.04)
12/15/2015	Withdrawal Made in Branch/Store.....	(\$ 10,000)
12/16/2015	Withdrawal Made in Branch/Store.....	(\$ 17,500)
12/18/2015	Edeposit.....	\$ 4,000
12/21/2015	Purchase Bank Check or Draft.....	(\$265,000)

The Creditor's Status Report does not indicate the status of obtaining the documentation from Wells Fargo Bank of how the withdrawals were documented (cashier's check, money order, electronic transfer) and tracing of those funds.

October 21, 2021 Hearing

At the hearing, the Movant and the Chapter 7 Trustee addressed with the court ongoing discovery relating to this Contested Matter, an Adversary Proceeding the Chapter 7 Trustee is prosecuting, and general discovery relating to the now identified withdrawals of more than \$1,300,000 by Debtor, many of which have been identified as having been by bank check or draft.

The court continues the hearing allowing the parties to conduct discovery in this Contested Matter. Fed. R. Bankr. P. 9014(c), incorporation of discovery rules from the Federal Rule of Civil Procedure into contested matter practice.

January 27, 2022 Hearing

The court's review of the Docket discussed that nothing new has been filed by the Parties to this Contested Matter.

In the Trustee's Adversary Proceeding against Suwaid and GNN Real Estate and Mortgage, Inc. (21-9008) the court has issued a Scheduling Order, with the pre-trial conference set for November 10, 2022.

At the Hearing, counsel for the Trustee reported that there is ongoing discovery concerning the issues, and there is an adversary proceeding commenced against the person who received the transfer of Debtor's property.

Counsel for Creditor states that the underlying facts and discovery overlap significantly between this Contested Matter and the Trustee's Adversary Proceeding.

Debtor's counsel reported that his client is not a party to the Adversary Proceeding.

The court continues the hearing to allow the Parties to complete discovery, and at the continued hearing conduct a scheduling conference (depending on whether the Parties request an evidentiary hearing or will proceed on the written documents and declarations).

Creditor's May 25, 2022 Status Report

Creditor filed a status report on May 25, 2022 (Dckt. 75) stating Trustee's Counsel provided Creditor copies of all of Debtor's bank statements, tax returns, California Lottery statements, and other documents obtained through subpoena, as well as deposition transcripts of Debtor, Debtor's daughter, and Basma Muthana. This is all the discovery Creditor would have requested through court order.

Creditor states they have reviewed the above discovery and now submits on the pleadings, declarations, and documentary evidence previously submitted to the court.

Trustee's May 25, 2022 Status Report

Trustee filed a status report on May 25, 2022 (Dckt. 77) stating they will attend the hearing but do not intend to introduce evidence. Additionally, Trustee reserves the right to seek revocation if any of the grounds under 11 U.S.C. § 727(d)(2) or (3) arise prior to the closing of the case.

June 1, 2022 Hearing

At the hearing, **XXXXXXXXXX**

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 Revoke Discharge filed by Kroloff, Belcher, Smart, Perry & Christopherson, a Professional Law Corporation, 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 Revoke Discharge is **XXXXXXX**

FINAL RULINGS

2. [20-24123-E-11](#) RUSSELL LESTER STATUS CONFERENCE
 [22-2016](#) CAE-1 3-21-22 [\[1\]](#)
 LESTER V. FIRST AMERICAN TITLE
 COMPANY ET AL

Final Ruling: No appearance at the June 1, 2022 Status Conference is required.

Plaintiff's Atty: Thomas A. Willoughby; Nicholas L. Kohlmeyer; Richard A. Lapping

Defendant's Atty:

 Zi C. Lin [First American Title Company]

 Anthony Asebedo [Russ Lester, LLC]

Adv. Filed: 3/21/22

Answer: none

Nature of Action:

Injunctive relief - other

Notes:

[FWP-1] Motion for Temporary Restraining Order Pending Hearing and Preliminary Injunction filed 3/22/22 [Dckt 7]; Temporary/Interim Preliminary Injunction and Order Setting Final Hearing on Motion for Preliminary Injunction filed 4/11/22 [Dckt 24]

[FWP-2] Stipulation to Extend Deadline to Respond to Complaint [re defendant Russ Lester] filed 4/6/22 [Dckt 20]

[MHK-1] Stipulation for Second Extension of Time to Respond to Complaint [re defendant Russ Lester] filed 5/18/22 [Dckt 33]

[MHK-2] Application for Order Continuing Status Conference Pursuant to Stipulation filed 5/18/22 [Dckt 36]; Order continuing status conference to 8/24/22 at 2:00 p.m. filed 5/23/22 [Dckt 39]

<p>The Status Conference has been continued to 2:00 p.m. on August 24, 2022, pursuant to prior order of the court (Dckt. 39).</p>
--

3. [20-20715-E-13](#) FOUAD MIZYED
[20-2016](#) CAE-1
MIZYED V. FAY SERVICING, LLC
ET AL

CONTINUED STATUS
AMENDED COMPLAINT
9-14-20 [\[49\]](#)

ADVERSARY PROCEEDING
DISMISSED: 5/9/2022

Final Ruling: No appearance at the June 1, 2022 Status Conference is required.

Plaintiff's Atty: Arasto Farsad; Nancy W. Weng
Defendant's Atty: Jana Logan

Adv. Filed: 2/14/20
Answer: none
First Amd. Cmplt Filed: 6/8/20
Answer: none
Second Amd. Cmplt Filed: 9/14/20
Answer: none

Notes:

Continued from 3/17/22, the Parties requesting a further continuance for a focused final round of settlement discussions.

Stipulation of Dismissal Pursuant to FRCP 41(a) filed 4/30/22 [Dckt 109]

[AF-6] Order Granting Stipulation of Dismissal filed 5/9/22 [Dckt 110]

<p>The Adversary Proceeding having been dismissed, Status Conference is concluded and removed from the Calendar.</p>
