

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

June 7, 2017 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

- 2. The court will not continue any short cause evidentiary hearings scheduled below.**
- 3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**
- 4. If no disposition is set forth below, the matter will be heard as scheduled.**

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|------|-------------------------------|--------------------|--------------------------------|
| 1. | 16-23101-D-7 | JOHNNY/BETH AGUIAR | MOTION BY FREDERICK H. SCHILL |
| | 16-2169 | FHS-1 | TO WITHDRAW AS ATTORNEY |
| | JEFF'S TRUCK SERVICE & POWER, | | 5-11-17 [40] |
| | INC. V. AGUIAR | | |
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| 2. | 15-29031-D-7 | OKSANA KOPCHUK | MOTION FOR COMPENSATION BY THE |
| | DNL-5 | | LAW OFFICE OF DESMOND, NOLAN, |
| | | | LIVAICH & CUNNINGHAM FOR J. |
| | | | RUSSELL CUNNINGHAM, TRUSTEE'S |
| | | | ATTORNEY |
| | | | 5-4-17 [87] |

Tentative ruling:

This is the motion of the trustee's counsel, Desmond, Nolan, Livaich &

Cunningham ("DNLC") for a first and final allowance of compensation in the amount of \$19,515.12. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion.

The court would add, however, that it appears DNLC misconstrues its entitlement to fees on a purely hourly basis rather than on the hybrid fee basis DNLC negotiated with the trustee and the court approved. DNLC's employment application stated it would receive a contingency fee for services rendered in the "investigation, prosecution, and collection [of] all transfer avoidance claims (including any related compromise motion)" and "an hourly fee per lode star" for general counsel services. The order granting the employment application stated that compensation would be pursuant to the hybrid fee agreement and added that "[f]or the work to be performed for a contingent fee, the recovery for purposes of determining the contingent fee shall be limited to that property that is recovered by Trustee as a result of counsel's efforts." Order, DN 51, ¶ 4. It appears that the hourly compensation DNLC seeks, \$18,249, exceeds the amount of the fees that would be allowed if the court strictly interpreted the employment application and order. Thus, it appears the language in the motion to the effect that DNLC has "agreed to limit its compensation" (DN 87, at 2:28) to its hourly fees and in an earlier motion to the effect that "[a]s an accommodation, DNLC has agreed to limit its compensation to an hourly fee per lode star" (DN 77, at 3:24-25; in both cases, emphasis added) is inaccurate.

As a result of counsel's efforts, the trustee received from the defendant in the trustee's fraudulent transfer action against the debtor's husband a sum sufficient to pay all claims in full, plus the trustee's attorney's fees. This compromise was in lieu of the trustee litigating and possibly recovering from the defendant two pieces of real property allegedly fraudulently transferred by the debtor to her husband. In analyzing the alternative to the compromise; namely, litigation and ultimately sale of the two properties, the trustee stated: "After commissions, costs, and senior lien payoffs, the Trustee estimates sale proceeds of the [two properties] would exceed \$425,000.00, less \$140,250.00 in attorney fees based on the 33% contingency, leaving a net of \$284,750.00 to the estate." Trustee's Compromise Motion, DN 77, at 3:13-16. For this reason, apparently, DNLC views its decision to accept fees on a purely hourly basis as "limiting" its compensation as an accommodation to the trustee. Id. at 3:24.

The sale of the two properties and recovery by the estate of far more money than was needed to pay all claims is, however, not what happened. What happened is that filed claims came in at a total of \$12,027, even including late claims. Thus, the trustee has presumably collected from the defendant only an amount sufficient to pay those claims, her trustee's fees, and DNLC's compensation. DNLC's task billing breakdown (DN 87, p. 4) lists services the court would view as within the contingency fee portion of the hybrid arrangement as totaling \$14,176.50 on an hourly basis ¹ and the portion comprising general counsel services as \$4,072.50.² The court does not know how much the trustee collected from the defendant by way of the compromise. However, it appears a payment of \$30,000 would have been sufficient to cover the trustee's fees, \$3,750, the filed claims, \$12,027, and DNLC's general counsel fees, \$4,072, and to leave \$10,151, which would have been enough to pay DNLC a 33% contingency fee on the \$30,000 collected, or \$10,000. Thus, under the strict terms of the employment application and order, DNLC would be entitled to a total of \$14,072 in fees plus costs, whereas instead, DNLC seeks \$18,249 in fees plus costs.

As indicated, given the amounts involved, the court intends to grant the motion. However, it appears greater precision in the analysis would have been appropriate as a matter of notice to parties-in-interest. The court will hear the matter.

- 1 Investigation and administration of estate's assets, \$2,449; adversary proceeding for fraudulent transfer, \$5,242.50; settlement of adversary proceeding, \$6,485. The debtor's schedules do not suggest any other assets were available and DNLC does not suggest any asset other than the fraudulent transfer claims was ever considered for administration.
- 2 Motions for extension of the deadline to object to discharge, \$3,035; fee and employment applications, \$1,037.50.

3. 17-20731-D-11 CS360 TOWERS, LLC CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
2-3-17 [1]

This matter will not be called before 10:30 a.m.

4. 17-20731-D-11 CS360 TOWERS, LLC FURTHER HEARING RE: MOTION TO
TBG-2 USE CASH COLLATERAL
2-15-17 [12]

This matter will not be called before 10:30 a.m.

5. 16-23638-D-7 MICHAEL NICHOLS MOTION FOR COMPENSATION FOR
DMW-6 JEFFREY D. WILSON, ACCOUNTANT
4-27-17 [48]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

6. 14-25148-D-11 HENRY TOSTA
UST-2

MOTION TO CONVERT CASE AND/OR
MOTION TO DISMISS CASE
4-4-17 [696]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

7. 15-26465-D-7 SCOTT POMEROY
16-2250 LBG-201
ROBERTS V. SWEETLAND

CONTINUED MOTION TO RECONSIDER
ORDER
4-6-17 [22]

Tentative ruling:

This is the defendant's motion to set aside the default entered against her on February 3, 2017 (DN 9). The plaintiff, who is also the trustee in the underlying chapter 7 case (the "trustee"), has filed opposition and the defendant has filed a reply.¹ For the following reasons, the motion will be denied without prejudice.

The standard for setting aside a default is "good cause." Fed. R. Civ. P. 55(c), incorporated herein by Fed. R. Bankr. P. 7055. The factors the court is to consider are these: "(1) whether [the defendant] engaged in culpable conduct that led to the default; (2) whether [the defendant] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the plaintiff]." Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004). As indicated by the use of the word "or," these factors are in the disjunctive; a motion to set aside a default or default judgment may be denied if any one of them is present. Id. at 926. The burden of proof is on the moving party, and simply put, the moving party has failed to submit any evidence whatsoever. Id.² However, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." United States v. Signed Personal Check No. 730, 615 F.3d 1085, 1091 (9th Cir. 2010) (citations omitted).

In this adversary proceeding, the trustee seeks to avoid the debtor's alleged transfers of a car and two motorcycles to the defendant, who was and/or is the debtor's girlfriend, about 15 months before the debtor filed his petition commencing the underlying case. The trustee attempted to serve the summons and complaint by mailing them to the defendant at an address in Rocklin - the same address the debtor listed as his address on his petition commencing the case. The essence of the defendant's argument - the portion that is relevant to the above factors - is this: that the summons and complaint were served on the defendant at the debtor's address whereas the defendant was in the process of moving out and did not receive them until "the court[']s mailing that went to both the present address of the Debtor and the former address of the Debtor" (Defendant's Motion, DN 22 ("Mot."), at 2:14-15); that the debtor did not read them carefully and thought they related to him rather than the defendant; and that the debtor assumed he would be hearing from his counsel about the documents so he did not pass them on to the defendant.

Supported by admissible evidence and not countered by other evidence, these allegations might have gone some way toward meeting the applicable standard, which is, after all, not especially onerous.³ However, there is no admissible evidence

from anyone - no declaration of the debtor and, critically, no declaration of the defendant. Thus, the court has no evidence on which to determine whether the defendant engaged in culpable conduct that led to the default. In addition, the statement that the defendant did not receive the summons and complaint at the debtor's present address because the defendant was in the process of moving out, whereas she did receive the entry of default when it was sent to the debtor's present and former addresses, raises questions that will need to be answered if the defendant files a subsequent motion. The trustee phrases it well:

[T]he motion does not categorically deny that Defendant was residing at the Debtor's address in December, 2016 [when the summons and complaint were mailed] or getting mail at his address. Instead, the motion states that "She [Defendant] has in fact been in the process of relocating since November." [Citation.] Since the motion was filed in April, 2017, the necessary inference is that Defendant has been in the process of relocating for five months. Where has she been living during that time? Where was she living in December, 2016? Where was she getting her mail in December, 2016? While it might be inferred that Defendant was not residing with the Debtor in December, 2016, why is there not an explicit statement to that effect?

Trustee's Opposition, DN 32, at 4:1-9. Thus, even if the defendant were to sign a declaration testifying only to the facts as set forth in the motion, the court would be unable to assess whether she was properly served or whether she engaged in culpable conduct in failing to file a timely response.

The defendant blames the trustee for her failure to timely respond. She attacks him for attempting service just before the holiday season (on December 12, 2016), such that, if she had received the documents, she would have had trouble finding counsel, "shar[ing] evidence and documents" (Mot. at 3:16), and filing a response on time. The defendant adds that it was unreasonable for the trustee to sue only her and not the debtor as well because the debtor was a party, along with the defendant, to the challenged transfers. The defendant contends the trustee deliberately omitted the debtor as a defendant so as to encourage confusion in the debtor's mind and so the debtor's attorney would not have to be served, both of which would delay receipt of the documents by the defendant. Both arguments are specious. There is no law or rule preventing a plaintiff from serving a summons and complaint shortly in advance of a holiday (or even two holidays), and it is not necessary that the plaintiff in a fraudulent transfer action sue both parties to the transfer. In fact, it is uncommon. In short, as to the first factor - the defendant's culpability - the defendant has made virtually no showing. In fact, she might be viewed as having skirted the issue.

Turning to the second factor the court is to consider - whether the defendant has a meritorious defense, as with the first factor, the defendant has submitted no evidence. However, the motion alleges that the defendant paid the debtor for the vehicles on a repayment plan and that all but about \$8,500 had been paid by the time the petition was filed. That, at least, represents some relatively specific factual allegations suggesting the defendant has a meritorious defense, at least with respect to a portion of the value of the challenged transfers.

A defendant seeking to vacate a default judgment must present specific facts that would constitute a defense. But the burden on a party seeking to vacate a default judgment is not extraordinarily heavy. All that is necessary to satisfy the "meritorious defense" requirement is to allege

sufficient facts that, if true, would constitute a defense: the question whether the factual allegation is true is not to be determined by the court when it decides the motion to set aside the default. Rather, that question would be the subject of the later litigation.

Signed Personal Check No. 730, 615 F.3d at 1094 (citations omitted). The trustee appears to concede and the court finds that the defendant has satisfied her burden of alleging the existence of a meritorious defense.

The third factor the court is to consider is whether setting aside the default would prejudice the plaintiff. The trustee contends the defendant's delay in seeking to set aside the default has prejudiced him because he has unnecessarily incurred attorney's fees in preparing the present motion - the motion for entry of a default judgment. He claims he several times offered to agree to set aside the default upon a showing the defendant was not properly served. This is not the type of prejudice a court should consider as justifying a refusal to set aside a default. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case. Rather, the standard is whether [plaintiff's] ability to pursue his claim will be hindered," such as by "loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 701 (9th Cir. 2001) (citations omitted). Nor is the plaintiff's incurring of costs in litigating the default the type of prejudice the court is to consider. Id. "While [the counter-claimant] was, of course, entitled to litigate her claim any way she chose to, the fact that she chose to oppose vacating the default and was unsuccessful in doing so cannot establish prejudice." Id.

To conclude, the court finds that the second and third factors - the existence of a meritorious defense and the absence of prejudice to the trustee - weigh in favor of the defendant. However, as discussed above, if any of the three factors is present, the court may deny the motion. Here, the defendant's allegations about when she received the summons and complaint and why she did not receive them earlier, and therefore, respond to the complaint in a timely manner are presented in such a vague and confusing manner that the court is entirely unable to make any assessment as to whether her conduct was culpable.

In fact, it is not even clear counsel has conferred with the defendant herself or only with the debtor. For example, the motion states that because of the holidays, "it would have been a near impossibility to find counsel, interview counsel to determine if they were competent for the job, hire them, pay them, transmit details to them, and then get an answer on file" (Mot. at 4:3-6), but then adds, "And this is all assuming she was available during those periods to seek counsel and not away on holidays herself." Id. at 4:8-9. This language suggests the attorney who filed the defendant's opposition has not obtained the defendant's version of events. Under these circumstances, the court is simply unable to conclude that the defendant's conduct in failing to respond to the complaint on time was not culpable.

For the reasons stated, the court intends to deny the motion without prejudice. The court will hear the matter.

1 The court has also reviewed the trustee's Notice of Intent to Move for Leave to File Late Opposition, in which the trustee responds to the defendant's argument that the opposition was filed late (by two days) and she "suffered" from the

delay. The trustee's counsel offers to agree to a continuance to allow the defendant to file a revised reply. There is no need for a continuance, and as the motion will be denied without prejudice, the defendant will not suffer from the late filing.

- 2 The defendant's reply reflects a serious misunderstanding of the burden of proof, as well as the court's local rule regarding motion practice, LBR 9014-1(d)(7). The defendant states:

The trustee is correct that no declaration was present[ed], however, the trustee could request a evidentiary hearing and did not do so. All that the trustee requested was a time to provide a response and did so late. Further, the defendant can easily supply evidence at an evidentiary hearing but this is not what the trustee requested. We would be glad to have an evidentiary hearing in this case . . . but the trustee has not requested this only tried to point [to] the fact that we have the same degree of evidence as they have produced.

Defendants' Reply, DN 35, at 3:20-4:2.

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A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer. . . . [I]n this context the term "intentionally" means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.'"

Signed Personal Check No. 730, 615 F.3d at 1092 (citations omitted).

8. 17-21465-D-11 BELINDA SMITH CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
3-7-17 [1]

Final ruling:

This status conference is continued to July 19, 2017 at 10:00 a.m. No appearance is necessary on June 7, 2017.

9. 17-21465-D-11 BELINDA SMITH CONTINUED MOTION TO DISMISS
UST-1 CASE AND/OR MOTION TO IMPOSE A
ONE-YEAR BAR AGAINST THE FILING
OF A NEW CASE
4-11-17 [27]

Final ruling:

The hearing on this motion was continued by stipulated order to July 19, 2017 at 10:00 a.m. No appearance is necessary on June 7, 2017.

10. 16-27672-D-11 DAVID LIND

STATUS CONFERENCE CONTINUED RE:
CHAPTER 12 VOLUNTARY PETITION
11-18-16 [1]

Tentative ruling:

This is a continued status conference in this chapter 11 case. The hearing was continued from the most recent date at the request of the debtor, who indicated he was in the process of retaining counsel. On May 24, 2017, attorney Peter Fear filed opposition on behalf of the debtor to the trustee's motion to employ a real estate broker and has since signed a stipulation on behalf of the debtor with the trustee's counsel for the dismissal without prejudice of that motion.

The court's concern is that Mr. Fear has not made an appearance as an attorney of record for the debtor in any of the ways authorized by the court's local rule, LBR 2017-1(b)(2). If Mr. Fear intends to proceed as attorney of record for the debtor, he will need to take one of those steps. The court will hear the matter.

11. 16-27672-D-11 DAVID LIND
DNL-3

MOTION TO EMPLOY COLDANI
REALTY, INC. AS BROKER
5-10-17 [123]

Final ruling:

Pursuant to the stipulation of the moving party and the opposing party, the motion will be dismissed without prejudice. The motion will be dismissed by minute order. No appearance is necessary.

12. 17-20984-D-7 DAVID/JENNIFER VON SAVOYE
EGS-1
BAYVIEW LOANSERVICING, LLC
VS.

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
4-12-17 [24]

Final ruling:

The hearing on this motion was continued to July 5, 2017 at 10:00 a.m. No appearance is necessary on June 7, 2017.

13. 16-25590-D-7 JOSE ANGULO
TGM-2

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH JOSE GUADALUPE
ANGULO
5-11-17 [52]

14. 17-22391-D-7 HAROLD BARBER
EAT-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
5-1-17 [13]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtor's Statement of Intentions indicates he will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

15. 14-25816-D-7 DEEPAL WANNAKUWATTE
HLC-1

MOTION TO WITHDRAW CLAIM NUMBER
53
5-16-17 [1199]

16. 14-25820-D-11 INTERNATIONAL
HLC-1 MANUFACTURING GROUP, INC.

MOTION TO WITHDRAW CLAIM NUMBER
42
5-16-17 [1328]

17. 09-46625-D-7 VASCO/MICHELE DEMELLO
DNL-8

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF DESMOND, NOLAN,
LIVAICH AND CUNNINGHAM FOR J.
LUKE HENDRIX, TRUSTEE'S
ATTORNEY(S)
5-17-17 [159]

18. 09-46625-D-7 VASCO/MICHELE DEMELLO MOTION TO EMPLOY BACHECKI, CROM
DNL-7 AND CO., LLP AS ACCOUNTANT(S)
5-17-17 [154]
19. 17-21127-D-7 HAZEL 71, INC. AMENDED MOTION TO SELL FREE AND
NOS-4 CLEAR OF LIENS, AMENDED MOTION
TO APPROVE OVERBIDDING
PROCEDURES AND AMENDED MOTION
FOR ADMINISTRATIVE EXPENSES
5-17-17 [49]
20. 17-20731-D-11 CS360 TOWERS, LLC MOTION FOR ORDER ESTABLISHING
DB-3 SALE AND BID PROCEDURES AND/OR
MOTION TO SELL FREE AND CLEAR
OF LIENS
5-24-17 [121]

This matter will not be called before 10:30 a.m.

21. 17-20731-D-11 CS360 TOWERS, LLC MOTION TO EMPLOY CAL NORTHERN
DB-2 REALTY GROUP AS BROKER(S)
AND/OR MOTION TO EMPLOY
COLDWELL BANKER RESIDENTIAL
BROKERAGE AS BROKER(S) , MOTION
TO EMPLOY JONES LANG LASALLE
BROKERAGE, INC. AS BROKER(S)
5-24-17 [124]

This matter will not be called before 10:30 a.m.

22.	14-27645-D-7 HLC-1	BETSY WANNAKUWATTE	MOTION TO WITHDRAW CLAIM NUMBER 34 5-16-17 [186]
23.	15-29890-D-7 DNL-20	GRAIL SEMICONDUCTOR	MOTION FOR APPREHENSION AND REMOVAL OF DONALD STERN TO COMPEL ATTENDANCE FOR EXAMINATION 5-24-17 [711]