

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

June 13, 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.

1.	17-90209-D-13	LUCIANO SILVEIRA	OBJECTION TO CONFIRMATION OF
	CCR-1		PLAN BY JKP VENTURES, LP
			5-17-17 [33]

2.	17-90220-D-13	BRIAN HAYES	CONTINUED MOTION FOR RELIEF
	SSA-1		FROM AUTOMATIC STAY
	IRMA EDMONDS VS.		4-6-17 [18]

3. 17-90220-D-13 BRIAN HAYES OBJECTION TO DEBTOR'S CLAIM OF
SSA-2 EXEMPTIONS
5-11-17 [33]

4. 12-91525-D-13 DAVE BEYETTE CONTINUED MOTION TO AVOID LIEN
CJY-4 OF CA UNINSURED EMPLOYERS
BENEFITS TRUST FUND
5-1-17 [71]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

5. 17-90230-D-13 ELIZABETH ROORDA OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
5-12-17 [15]

6. 12-91233-D-13 DANIEL PARTINGTON MOTION TO VALUE COLLATERAL OF
CJY-3 JP MORTGAGE CHASE
5-4-17 [60]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of JP Mortgage Chase at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of JP Mortgage Chase's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

7. 17-90234-D-13 ALVARINO/SHIRLEY LEONARDO OBJECTION TO CONFIRMATION OF
APN-1 PLAN BY WELLS FARGO BANK, N.A.
5-16-17 [23]
8. 16-90758-D-13 SUZAN CHILDERS OBJECTION TO CLAIM OF BECHAROFF
SSA-3 CAPITAL CORP., CLAIM NUMBER 6
5-5-17 [48]

Tentative ruling:

This is the debtor's objection to the claim of Becharoff Capital Corp. ("Becharoff"), Claim No. 6 on the court's claims register. The objection was noticed pursuant to LBR 3007-1(b)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

First, although the moving party served Becharoff at the address on its proof of claim and attempted to serve it at the different address listed on the debtor's schedules, as required by LBR 3007-1(c), but the latter was ineffective because the moving party used a different suite number.

Second, the objection does not cite legal authority for the proposition on which it is based and the moving party's declaration does not demonstrate she is entitled to the relief requested, as required by LBR 9014-1(d)(6) and (7). The objection states that the adjudication of the claim was stayed when the debtor filed this case. (The debtor's statement of affairs lists a state court action by Becharoff as "pending" when this case was filed.) The debtor testifies: "This claim arises from a business loan with Bank of America in which my former husband and myself personally guaranteed." Debtor's Decl., DN 50, at 1:23-24. She adds: "While I do not dispute the principal or interest calculation of the claim, I do dispute the entry of \$16,250. There has been no adjudication by the State Court of any award of attorney's fees." *Id.* at 1:25-27. Thus, the debtor contends, the amount of the claim should be reduced from \$131,741.92 to \$115,491.92.

The grounds for disallowance of a claim are set forth in § 502(b); the fact that a claim or part of a claim has not been adjudicated by the time of a bankruptcy filing is not among them. In fact, the subsection states that a claim is to be disallowed if it is unenforceable for a reason other than because it is contingent or unmatured. § 502(b)(1). Further, the documentation attached to Becharoff's proof of claim suggests an attorney's fee award against the debtor may be appropriate. The Premium CreditLine for Business Authorization and Personal Guaranty that appears to be signed by the debtor as a guarantor states, "Guarantor agrees to pay the costs and expenses (including attorneys' fees) of Bank in enforcing this Personal Guaranty." Debtor's Ex. 1, p. 7. (Becharoff acquired the claim from Bank of America by way of assignment from an intervening assignee of the Bank.) On request of either party to the state court action, this court would likely grant relief from stay to permit the parties to return to state court to litigate the attorney's fee portion of Becharoff's claim.

The court will hear the matter.

9. 16-90869-D-13 MANUEL/NANCY RIVERA
CJY-1

MOTION TO MODIFY PLAN
4-24-17 [22]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

10. 17-90069-D-13 PAMELA MCCOLLOCH
WJS-1
THE CRABTREE 1999 REVOCABLE
TRUST VS.

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
3-20-17 [20]

11. 17-90069-D-13 PAMELA MCCOLLOCH
WJS-2

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY JOAN M.
AROE
3-28-17 [28]

12. 10-93070-D-13 SANDRA PRICE
GW-2

MOTION TO AVOID LIEN OF TRADE
ASSOCIATION, INC.
5-16-17 [93]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by Creditors Trade Association, Inc. ("Creditors Trade"). Creditors Trade has filed opposition in which it requests a continuance so it can obtain a valuation of the property. The court will grant that request. First, the court will generally continue a hearing, even on a motion like this one brought pursuant to LBR 9014-1(f)(1), because the debtor controls the timing of the filing of the motion, and thus, has time to assemble his or her evidence, whereas the creditor has a much more limited time to assemble its evidence. Second, the moving party failed to serve Creditors Trade in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr.

P. 9014(b). The moving party served Creditors Trade only through the attorney who, according to the motion, notified the moving party in February of this year that Creditors Trade was renewing its judgment, whereas there is no evidence the attorney is authorized to receive service of process on behalf of Creditors Trade in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004).¹

For these reasons, the court intends to continue the hearing. The court will hear the matter.

1 The moving party's attorney testifies he called the attorney in question in February of this year and advised him he was going to reopen this bankruptcy case and file a motion to avoid the judgment. The declaration adds nothing: it is not evidence the attorney was or is authorized to receive service of process for Creditors Trade in bankruptcy contested matters.

13. 10-93070-D-13 SANDRA PRICE
GW-3

MOTION TO AVOID LIEN OF
CARPENTERS 46 NORTHERN
CALIFORNIA COUNTIES CONFERENCE
BOARD
5-16-17 [99]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by Carpenters 46 Northern California Counties Conference Board ("Carpenters 46"). The motion will be denied because the moving party failed to serve Carpenters 46 in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving party served Carpenters 46 only through the attorneys who obtained its abstract of judgment, whereas there is no evidence the attorneys are authorized to receive service of process on behalf of Carpenters 46 in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004).

The moving party's attorney testifies he called the attorneys in question on May 11, 2017 and spoke with Zeke Carder, "who confirmed that they still represent Carpenters 46 Northern California Counties Conference Board regarding the judgment and abstract of judgment that is the subject of this motion." G. White Decl., DN 101, at 1:23-26. The debtor's attorney adds, "I advised him that I had reopened the case and would serve them as the attorney for Carpenters 46 Northern California Counties Conference Board with respect to this motion to avoid their judgment lien." Id. at 1:26-2:1. The declaration does not trump service requirements under the FRBP: it is not evidence the attorneys were or are authorized to receive service of process for Carpenters 46 in bankruptcy contested matters. Moreover, the moving party's attorney does not testify Mr. Carder stated he or the firm was authorized to receive such service.¹

As a result of this service defect, the court intends to deny the motion. Alternately, the court will continue the hearing to allow the moving party to address this service defect. The court will hear the matter.

1 The court notes that the same law firm filed a request for special notice on

behalf of Carpenters 46 in this case; however, a request for special notice is not necessarily evidence that the firm was or is authorized to accept service of process on behalf of the creditor in bankruptcy contested matters. In this instance, the request for special notice was filed six and a half years ago in a case that was closed over two and a half years ago and reopened by the moving party in May of this year. Further, the request "includes the type of notice referred to" in several bankruptcy rules, notably not including Rule 7004.

14. 16-90371-D-13 MATTHEW METTLER MOTION TO MODIFY PLAN
JM-3 4-24-17 [48]

15. 17-90376-D-13 HUMBERTO LARA MOTION FOR RELIEF FROM
SC-1 AUTOMATIC STAY
BRECKENRIDGE PROPERTY FUND 5-15-17 [9]
2016, LLC VS.

DEBTOR DISMISSED: 05/15/2017

16. 12-92283-D-13 CHERYL HICKS MOTION TO SELL
JWS-1 5-9-17 [46]

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 to sell real property is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order, which is to be signed off by the trustee prior to submission. No appearance is necessary.

17. 17-90412-D-13 KAL KIRKLE CONTINUED MOTION TO IMPOSE
DCJ-1 AUTOMATIC STAY
5-16-17 [7]

Tentative ruling:

This is the debtor's motion to impose the automatic stay, pursuant to § 362(c)(4)(B) of the Bankruptcy Code. The hearing was continued to permit the debtor to supplement the record, which, as of this date, he has not done. For the following reasons, the motion will be denied.

The debtor has failed to rebut by clear and convincing evidence the presumption that this case was not filed in good faith. In the court's view, the presumption arises under all three subdivisions of § 362(c)(4)(D): the debtor was a debtor in two previous cases pending within the one year prior to the commencement of this case; at least one of those previous cases was dismissed because the debtor failed, without substantial excuse, to file and obtain confirmation of an amended plan within the deadline fixed by the court; and 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 or any other reason to conclude this case will be concluded with a confirmed plan that will be fully performed.

The debtor testifies that his first prior case (not actually his first prior case, but the first of the two that were pending and dismissed within the year prior to the filing of this one) was dismissed because he and his wife (who was also a debtor in that case) were unable to confirm a plan by a deadline fixed by the court. He states the plan was denied confirmation because they had not filed their tax returns, did not have liability insurance on income property, and had not provided for the payment of real property taxes on income property. Those are not the reasons the plan was denied confirmation, although they were among the trustee's several grounds for opposing the debtors' motions to confirm plans. In both instances, the debtors' motions were denied by final ruling and without a hearing because the plan proposed to pay the \$295,122 claim of Wallace Miller, secured by liens against five parcels and 48 rental units owned by the debtors in Georgia, a total of \$88,181 (increased to \$100,000 in the second amended plan) based on the value of the creditor's collateral, whereas the debtors had failed to file a motion to value that collateral, as required by LBR 3015-1(j).¹

The case was filed on March 31, 2016 and from the beginning, the debtors' various plans proposed to strip down Mr. Miller's claim, first to \$88,181 and later to \$100,000, yet during the seven months the case was pending, the debtors never filed a motion to value his collateral. The debtor's declaration in support of the present motion does not mention this issue at all: it does not recognize that this was the reason the plans were denied confirmation and does not suggest how the debtor intends to treat Mr. Miller's secured claim in the present case. Further, in addition to the issues addressed in the debtor's declaration in the present case - the failure to file tax returns, to carry liability insurance, and to provide for property taxes - the trustee raised serious questions of feasibility in opposition to the debtors' two motions to confirm plans in the prior case, yet the debtor makes no mention of those issues in his declaration. The court cannot assess how the debtor intends to treat Mr. Miller's claim or whether the debtor's plan in this case is likely to be feasible because, although the case was filed May 16, 2017, the debtor's schedules, statements, and plan have not been filed.

Finally, the debtor refers to a third previous case that was not pending within the year prior to the filing of this one, but was dismissed one year and six weeks before this new case was filed. He states that case was dismissed because he and his wife were unable to make plan payments under their confirmed plan "because of issues arising in Georgia with [their] income property there." He does not offer specifics, but the reference to the Georgia property in connection with the first case filed by the debtor and his wife raises additional questions. In the schedules in that case, filed November 25, 2014, the debtor and his wife (who was also a debtor in that case as in the other two previous cases) listed the property as being worth \$450,000. The debtors' confirmed plan provided for Mr. Miller's claim against the property to be paid outside the plan, through the debtors' wholly-owned

management company in Georgia. This is the same property the debtors, in their case filed March 31, 2016, valued at only \$150,000 on their Schedule A and in their proposed plan at only \$88,181. In other words, the debtors ultimately defaulted on their plan payments in the 2014 case and the day after that case was dismissed, filed their second case, proposing to strip down to just \$88,181 Mr. Miller's claim on property the debtors had valued in their first case at \$450,000. This suggests that something other than inability to make the plan payments due to unexplained "issues" with the Georgia property was in play in the dismissal of the first case.

The debtor concludes by testifying that his tax returns are now current, he has insurance on the Georgia property, and his income has stabilized. These statements are too conclusory for the court to be able to conclude that this case, when viewed in light of the facts in the debtor and his wife's previous cases, will conclude with a confirmable plan that will be completed. They are also too conclusory to permit the court to conclude that this case has been filed in good faith and not for purposes of further delay. To conclude, the court is not persuaded the debtor's declaration constitutes clear and convincing evidence that this third case filed within one year - and the fourth in just two and one-half years - has been filed in good faith. Accordingly, the motion will be denied. The court will hear the matter.

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- 1 The documents in that case are confusing, if not misleading. On their Schedule A, filed April 29, 2016, the debtors listed the value of the Georgia property at \$150,000, yet in their original plan, filed the same day, they listed the value at only \$88,181 and proposed to strip down Mr. Miller's claim against the property to that amount. In an amended plan filed July 19, 2016, the debtors again listed the property at \$88,181, with the same proposed strip-down, and in a second amended plan, filed September 13, 2016, they listed the value at \$100,000 and proposed to strip down the claim to that amount. There is no explanation where those valuations came from or why they differed so substantially from the value listed on Schedule A.

18. 12-92784-D-13 ROBERT/ROCHELL WILLIAMS MOTION TO INCUR DEBT
MSN-1 5-24-17 [48]