



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

Chief Judge Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: JUNE 27, 2023
CALENDAR: 10:30 A.M. ADVERSARY PROCEEDINGS

Unless otherwise ordered, all matters before Chief Judge Fredrick E. Clement shall be heard simultaneously: (1) **IN PERSON** in Courtroom 28, (2) via **ZOOMGOV VIDEO**, (3) via **ZOOMGOV TELEPHONE**, and (4) via **COURTCALL**.

You may choose any of these options unless otherwise ordered.

Parties in interest and members of the public may connect to the ZoomGov video and audio feeds, free of charge, using the connection information provided:

Video web address:

<https://www.zoomgov.com/j/1604005547?pwd=Mk9oUkNJSi9RNlZHTy8zZjhyMnhzQT09>

Meeting ID: 160 400 5547

Passcode: 565629

ZoomGov Telephone: (669) 254-5252 (Toll Free)

To appear remotely for law and motion or status conference proceedings, you must comply with the following guidelines and procedures:

1. Review the [Pre-Hearing Dispositions](#) prior to appearing at the hearing.
2. Review the court's [Zoom Procedures and Guidelines](#) for these, and additional instructions.
3. Parties appearing via CourtCall are encouraged to review the [CourtCall Appearance Information](#).

Please join at least 10 minutes prior to the start of the calendar. You are required to give the court 24 hours advance notice on the [Court Calendar](#).

Unauthorized Recording is Prohibited: Any recording of a court proceeding held by video or teleconference, including screen shots or other audio or visual copying of a hearing is prohibited. Violation may result in sanctions, including removal of court-issued media credentials, denial of entry to future hearings, or any other sanctions deemed necessary by the court. For more information on photographing, recording, or broadcasting Judicial Proceedings, please refer to Local Rule 173(a) of the United States District Court for the Eastern District of California.

PRE-HEARING DISPOSITION INSTRUCTIONS

RULINGS

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

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. However, non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [20-23726](#)-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
[22-2076](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-29-2022 [[1](#)]

GOLDEN V. LIVINGSTONE COLLEGE
DAVID GOODRICH/ATTY. FOR PL.

Final Ruling

The matter resolved by settlement and a motion to approve the compromise having been granted, the adversary proceeding is dismissed, and the status conference concluded. A civil minute order shall issue.

2. [20-23246](#)-A-7 **IN RE: SACRAMENTO I STEAKHOUSE, L.P.**
[22-2039](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-29-2022 [[1](#)]

SMITH V. OUTWEST RESTAURANT
GROUP, INC. ET AL
J. CUNNINGHAM/ATTY. FOR PL.

Final Ruling

At the suggestion of the parties, Joint Status Report, ECF No. 45, the status conference is continued to October 17, 2023, at 10:30 a.m. In the event a judgment or dismissal has not been entered on the docket, not later than October 3, 2023, the parties shall file a joint status report. A civil minute order shall issue.

3. [20-23457](#)-A-7 **IN RE: ERNESTO/MARILYN PATACSIL**
[20-2167](#) [FEC-2](#)

PRE-TRIAL CONFERENCE RE: COMPLAINT FOR DETERMINATION THAT
DEBT IS NON-DISCHARGEABLE
11-2-2020 [[1](#)]

CABARDO ET AL V. PATACSIL ET
AL
HECTOR MARTINEZ/ATTY. FOR PL.

Tentative Ruling

The court intends to set trial. The order rescheduling the pretrial conference indicated likely trial dates are August 17-18, 2023, and September 13-14. Second Am. Pretrial Order, ECF no. 244. The

August 2023 dates are no longer available. As a result, trial will likely be set September 13-14 or the week of September 18-22, 2023. The parties are advised to confirm their, as well as their clients and other witnesses, availability for those dates. The court will provide other possible trial dates at the Pre-Trial Conference.

4. [22-20063](#)-A-13 **IN RE: NATHANIEL SOBAYO**
[22-2032](#) [BPC-3](#)

MOTION FOR SUMMARY JUDGMENT
5-5-2023 [\[68\]](#)

SOBAYO V. WELLS FARGO BANK,
N.A. ET AL
DOUGLAS STRAUS/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment
Notice: Written opposition filed
Disposition: Granted
Order: Civil minute order

Defendant Wells Fargo Bank moves to summarily adjudicate plaintiff Nathaniel Sobayo's stay violation claim against it. Plaintiffs Sobayo opposes the motion.

The sole issue is whether a letter, sent on June 2, 2022, to debtor's then attorney—but not to the debtor, violated the stay.

FACTS

On January 11, 2022, Nathaniel Sobayo filed a Chapter 13 bankruptcy. His attorney was Mark Shmorgon. Among the debtor's scheduled assets was real property located 2112 Lincoln Street, Palo Alto; that property was encumbered in favor of Wells Fargo Bank. There is a dispute as to whether Sobayo or his predecessor in interest executed the underlying promissory note and deed of trust. Compare, Schedule D # 2.3, ECF NO. 10 (indicating that Sobayo owes the debt), with Proof of Claim No. 11 (note signed by Elizabeth Shoaga). The servicer was Select Portfolio Servicing.

On June 1, 2022, Select Portfolio, acting through counsel, sent attorney Shmorgon a letter. It stated:

June 1, 2022

VIA EMAIL: shmorgonlaw@gmail.com

Mark Shmorgon
5015 Madison Ave., Suite A
Sacramento, CA 95841

Re: In re Sobayo, Nathaniel

Bankruptcy Case No.: 22-20063
Notice of Default/Intent to File Motion for In Rem Relief
From Automatic Stay and
Relief from Co-Debtor Stay
Loan No.: *****8915
Property Address: 2112 Lincoln Street, East Palo Alto,
California 94303
Our Client: Select Portfolio Servicing Inc
Our File No.: 000368-002213.002-M

Dear Mr. Shmorgon:

Please be advised that our office has been retained by Wells Fargo Bank, N.A. as Trustee f/b/o holders of Structured Asset Mortgage Investments II Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR4, beneficiary and/or servicing agent for the beneficiary of the Note and Deed of Trust dated June 14, 2007, in the original principal amount of \$569,050.00, which is a lien on the above-referenced property.

This notice is sent pursuant to Bankruptcy Local Rule 4001(b)(1) to inform you that we intend to file a Motion for In Rem Relief From Automatic Stay and Relief from Co-Debtor Stay. As you know, Mr. Sobayo is not a party to the above Loan. Therefore, we are not seeking payment of the Loan from Mr. Sobayo. We are simply seeking relief so that the foreclosure sale may move forward. The Motion will show that the loan is in default in the amount of \$152,158.76, which includes forty-three (43) missed principal and interest payments. Also, no post-petition payments have been made since the current bankruptcy case was filed. Lastly, there have been four (4) bankruptcy cases filed in the past 4 years affecting the Property. These facts are the basis for the relief we are seeking.

Please contact the undersigned within forty-eight (48) hours of the date of this notice to if you would like to discuss a resolution of these issues. Please note that absent resolution within forty-eight (48) hours, our office will immediately file a Motion for Relief from Automatic Stay. If you have any questions in regard to this matter, please contact the undersigned at (858) 750-7600.

Ex. A, Ex. in Support Mot. Summ. J., ECF No. 71.

There is no evidence that this letter Select Portfolio sent Sobayo the letter or that Shmorgon, acting in his role as debtor's counsel, conveyed the letter or its contents to Sobayo.

Sobayo never confirmed a Chapter 13 plan.

Shmorgon substituted out of the case in early July 2022. Order, ECF No. 73.

Sobayo's Chapter 13 case was dismissed on September 15, 2022.

PROCEDURE

On November 3, 2022, Plaintiff Sobayo filed this adversary proceeding. The complaint alleged state and/or federal common law and statutory actions and, somewhat obliquely, on June 1, 2022, a stay violation.

Select Portfolio moved to dismiss the action under Rule 12(b)(6). Finding an absence of jurisdiction, given the dismissal of the underlying Chapter 13 case, the court grant the motion as to all causes of action except the stay violation cause of action. Civ. Minutes, ECF No. 45.

Select Porfolio now moves for summary judgment. They argue that the letter did not violate the stay because: (1) it was addressed to counsel; (2) does not seek payment from the debtor; and (3) was merely an attempt to comply with local rules regarding stay relief motions in Chapter 13. LBR 4001-1(b).

JURISDICTION

As to the stay violation, this court has jurisdiction. 28 U.S.C. §§ 1334(a)-(b), 157(b); see also General Order No. 182 of the Eastern District of California. Jurisdiction is core. 28 U.S.C. § 157(b)(2)(A), (G), (O); *Johnston Env't. Corp. v. Knight* (In re Goodman), 991 F.2d 613, 617 (9th Cir. 1993); *In re Moore*, 631 B.R. 764, 777 (Bankr. W.D. Wash. 2021), appeal dismissed, No. 21-05529 RJB, 2021 WL 5824383 (W.D. Wash. Dec. 8, 2021), *aff'd sub nom. Moore v. Flagstar Bank, FSB*, No. 22-35042, 2023 WL 3092303 (9th Cir. Apr. 26, 2023). Moreover, jurisdiction survives dismissal. *In re Oakhurst Lodge, Inc.*, 582 B.R. 784, 791 (Bankr. E.D. Cal. 2018).

Plaintiff does not consent to the entry of final orders and judgments; defendants do consent to the entry of final orders and judgments by this court. 28 U.S.C. § 157(b)(3); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1945-46 (2015). Scheduling Order §§ 2.0, ECF NO. 55.

LAW

Summary Judgment

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of*

Am. Nat'l Trust & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.*

"Where the non-moving party [e.g., a plaintiff] bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* (citation omitted). The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which [the factfinder] could reasonably render a verdict in the non-moving party's favor." *Id.*

When the moving party has the burden of persuasion at trial (e.g., a plaintiff on claim for relief or a defendant as to an affirmative defense), the moving party's burden at summary judgment is to "establish beyond controversy every essential element of its . . . claim. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). In such a case, there is no need to disprove the opponent's case "[i]f the evidence offered in support of the motion establishes every essential element of the moving party's claim or [affirmative] defense." Hon. Virginia A. Phillips & Hon. Karen L. Stevenson, *Federal Civil Procedure Before Trials, Calif. & 9th Cir. Edit.*, Summary Judgment, Burden of Proof ¶ 14:126.1 (Rutter Group 2019).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." S.A.

Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982).

The Stay

The stay is governed by § 362(a). In the pertinent part it provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title...

11 U.S.C. § 362(a).

DISCUSSION

There are at least two fatal defects with plaintiff's argument that the June 1, 2022, letter violated the stay.

First, though the court has not found binding Ninth Circuit authority directly on point, this court does not believe that communication with debtor's counsel, at least without transmission of the creditor's information to the debtor, can form the basis of a stay violation. *Matter of Duke*, 79 F.3d 43 (7th Cir. 1996) (suggesting that mere communication with counsel does not violate the stay); *Pertuso v. Ford Motor Credit*, 233 F3d. 417 (6th Cir.

2000). Here, there is no dispute that the letter was communicated to attorney Shmorgan, not Sobayo, and there is no indication Shmorgan sent the letter to Sobayo or its contents to Sobayo. Insofar as is before the court Sobayo only became aware of the letter after dismissal of this Chapter 13.

Second and more importantly, not all communication with the debtor about prepetition debts are prohibited. It is only actions that are "coercive or harassing" that qualify as violations of the stay. *Morgan Guar. Tr. Co. of New York v. Am. Sav. & Loan Ass'n*, 804 F.2d 1487, 1491 (9th Cir. 1986); *In re Zotow*, 432 B.R. 252, 259 (B.A.P. 9th Cir. 2010); *In Barnes*, 2020 WL 6928623 * 3 (Bankr. C.D. Cal. 2020). Whether a particular communication is prohibited is fact specific and not susceptible to precise definition. *Barnes*, 2020 WL at *3. Frequently, the difference between permissible and impermissible communication is whether the creditor made a "direct and specify threat of further action against the debtor" if the debtor does not accede to the creditor's demands. *Id.*; *In re Parker*, 2019 WL 386842 (Bankr. N.D. Cal. January 29, 2019); *Duke*, 79 F.3d at 46.

Here, the direct and specific threat of further action standard is not met. The letter indicates that Sobayo himself is not obligated on the debt. Rather, by its terms, it relates only to the property of the debtor. Moreover, the letter only asks attorney Shmoran if he "would like to discuss resolution of these issues." Ex. A. There is no demand beyond that, nor is there a request for payment. Beyond that, while the letter did indicate the failure to respond to the letter within 48 hours would result in Select Portfolio filing a motion for stay relief, this court does not believe that rises to the level of coercion or harassment. *Barnes*, 2020 WL at * 4 (threat of motion for stay relief not coercion or harassment); *In re Parker*, No. 14-44083 CN, 2019 WL 386842, at *7 (Bankr. N.D. Cal. Jan. 29, 2019), *aff'd in part, vacated in part, remanded*, 644 B.R. 805 (N.D. Cal. 2021), *aff'd*, No. 21-15746, 2022 WL 15523089 (9th Cir. Oct. 27, 2022) (generally, courts look to acts "outside the bankruptcy court when considering threat of continued legal action outside of the Bankruptcy Court" in considering the coercive or harassment nature of the act).

There is no genuine issue of fact. The letter is not coercive, nor harassing. The motion will be granted.

CONCLUSION

For each of these reasons, the motion is granted.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Select Portfolio's motion has been presented to the court. Having considered the motion, oppositions, and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the motion is granted; and

IT IS FURTHER ORDERED that not later than 7 days after the entry of this order, defendant shall lodge a judgment consistent with this order with the Clerk of the Court.

5. [22-22290](#)-A-7 **IN RE: AMD METAL WORKS, INC**
[23-2017](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
12-6-2022 [[1](#)]

AMD METAL WORKS, INC. V.
JOHNSTONE MOYER, INC.
UNKNOWN TIME OF FILING/ATTY. FOR PL.

Final Ruling

The adversary proceeding is dismissed, the status conference is concluded.