

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

June 29, 2016 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. | 16-23309-D-7 | ALMA CARO RODRIGUEZ | MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
5-20-16 [5] |
| 2. | 14-25820-D-11
FWP-32 | INTERNATIONAL
MANUFACTURING GROUP, INC. | MOTION FOR COMPENSATION FOR
BEVERLY N. MCFARLAND, CHAPTER
11 TRUSTEE
5-26-16 [861] |

3. 16-23223-D-11 SKYHIGH PROPERTY LLC STATUS CONFERENCE RE: VOLUNTARY
PETITION
5-17-16 [1]

4. 16-22427-D-7 ABEL RIOS AND LIZBETH MOTION FOR RELIEF FROM
APN-1 ESPINOZA AUTOMATIC STAY
SANTANDER CONSUMER USA, INC. 5-24-16 [18]
VS.

Final ruling:

This matter is resolved without oral argument. This is Santander Consumer USA, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

5. 16-20831-D-7 JANICE MARSTON MOTION TO CONVERT CASE TO
MRL-1 CHAPTER 13
5-27-16 [22]

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 convert case to Chapter 13 is supported by the record. As such the court will grant the motion and convert the case to Chapter 13 by minute order. No appearance is necessary.

6. 10-27432-D-11 JACK ROBINSON AND CHERYL MOTION FOR ENTRY OF DISCHARGE
MRL-212 BARQUEST 5-21-16 [103]

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 for entry of discharge in their Chapter 11 case is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

7. 15-21934-D-7 JAMES/MONICA HODGES
DMW-8

MOTION FOR COMPENSATION FOR
JEFFREY D. WILSON, ACCOUNTANT
5-20-16 [69]

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.

8. 11-43835-D-7 KIMBERLEY WORLEY
HAW-2

MOTION TO AVOID LIEN OF WILLIAM
V. PRIOR AND LYNIAIR A. PRIOR
5-18-16 [47]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by William V. Prior and Lynair A. Prior. The motion will be denied for two reasons. First, the motion depends on a purported amended Schedule C, filed May 17, 2016. However, the amended schedule was not accompanied by an amendment cover sheet and was not otherwise verified, as required by Fed. R. Bankr. P. 1008.

Second, the moving party failed to serve the Priors in strict compliance with Fed. R. Bankr. P. 7004(b)(1), as required by Fed. R. Bankr. P. 9014(b). The moving party served the Priors (1) by first-class mail at a post-office box address; (2) by certified mail at two street addresses; and (3) through the attorneys who obtained the Priors' abstract of judgment. The first method was insufficient because service on an individual must be to the individual's dwelling house, usual place of abode, or place of business, not a post office box. See Fed. R. Bankr. P. 7004(b)(1). The second method was insufficient because service on an individual must be by first-class mail, not certified mail. See preamble to Fed. R. Bankr. P. 7004(b). The third method was insufficient because service on an individual must be to the individual's dwelling house, usual place of abode, or place of business, not through his or her attorney. See Fed. R. Bankr. P. 7004(b)(1).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

9. 16-23345-D-7 MIA PENA

MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
5-23-16 [5]

10. 14-25148-D-11 HENRY TOSTA MOTION TO CONVERT CASE TO
UST-1 CHAPTER 7 AND/OR MOTION TO
DISMISS CASE
5-31-16 [590]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

11. 16-21649-D-7 MICHAEL LUEVANO MOTION TO COMPROMISE
JRR-1 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH AMERICAN EXPRESS
BANK
5-31-16 [28]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

12. 16-22760-D-7 OLEG RASHEVSKYI AND INNA MOTION FOR RELIEF FROM
APN-1 RASHEVSKA AUTOMATIC STAY
SANTANDER CONSUMER USA, INC. 5-25-16 [10]
VS.

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 debtors' Statement of Intentions indicates they 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.

13. 16-22464-D-7 CHANCE KELLY AND ILIANNA MOTION FOR RELIEF FROM
APN-1 VASQUEZ AUTOMATIC STAY
SANTANDER CONSUMER USA, INC. 5-24-16 [14]
VS.

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 debtors' Statement of Intentions indicates they 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.

Tentative ruling:

This is the trustee's objection to the debtor's claim of exemption of a 2006 Ford E150 (the "Ford Van"). The debtor has filed opposition and the trustee has filed a reply. For the following reasons, the objection will be sustained in part and the exemption will be limited in amount.

The debtor has claimed the full value of the Ford Van, \$7,000, as exempt under the "tools of the trade" exemption statute, Cal. Code Civ. Proc. § 704.060.1 The debtor has the burden of proving she is entitled to the exemption. § 703.580(b); Diaz v. Kosmala (In re Diaz), 547 B.R. 329, 337 (9th Cir. BAP March 11, 2016).

The trustee objects to the exemption on three grounds: (1) the debtor was not engaged in the operation of her business on the petition date, and therefore, the Ford Van was not reasonably necessary to and actually used by her, as required by the statute; (2) the Ford Van is not a "commercial" vehicle, and even if it is, the statute limits the exemption to \$4,085; and (3) the debtor has another vehicle, also claimed as exempt, which is reasonably adequate for use in the debtor's babysitting business. The court disagrees with the first and third of these positions and concludes the Ford Van is properly claimed as exempt as a tool of the debtor's trade or business, subject to the statutory limit of \$6,075.

Reasonably Necessary to and Actually Used by the Debtor in Her Business

The trustee begins with the well-known proposition that a debtor's exemption rights are determinated as of the petition date.² The trustee cites the following facts as supporting his conclusion that the debtor "was not using the Ford Van in furtherance of a babysitting business on the petition date." Trustee's Reply, DN 40, at 2:8-9. First, the debtor listed no income from her babysitting business on her Schedule I, only social security income. Second, she stated on her Schedule I she expects no changes to her income in the next year. Third, the debtor stated on her statement of financial affairs that she operated a business known as DuVall Child Care, which she listed as "closed December 2015." Fourth, according to the trustee's declaration, the debtor told him she closed the business due to anticipated knee replacement surgery. The trustee continues: "She informed me that she has been advised that she cannot receive the knee replacement surgery until six or seven months after she receives certain dental work, but that she plans on resuming her babysitting business after she receives the knee surgery." Trustee's Decl., DN 33, at 2:14-17.

It is true that these facts support the conclusion that the debtor was not using the Ford Van in furtherance of her business on the petition date. In the court's view, however, that is not the end of the analysis. Instead, the court agrees with a bankruptcy judge in the Northern District of California, who held as follows in response to virtually the same argument made by the trustee in that case:

The Trustee takes the position that there can be no claim of exemption at all under the statute where the debtor's business was closed and he was unemployed on the day he filed his bankruptcy petition. The Court does not adopt this view of the law. The statute exempts tools and implements used in a "trade, business or profession" by which the debtor earns a livelihood. The mere fact that a debtor has no business does not mean he has no trade. If the debtor has special skill or knowledge in an

occupation which requires such skill or knowledge, then any tools necessary to that occupation are exempt under the statute unless there is clear evidence that the debtor has abandoned that occupation or is incapable of continuing in it. See In re Schuette (Bkrtcy. D.Minn. 1986), 58 B.R. 417, 420. The Court interprets the phrase "by which the debtor earns a livelihood" as meaning his principal source of income when he has work, and not a requirement that he have work when he claims the exemption. To rule otherwise would strip the debtor of his means of earning a livelihood in the future, when the clear purpose of the statute is to preserve that ability.

In re Vigil, 101 B.R. 189, 190-91 (Bankr. N.D. Cal. 1989); see also In re Quintero, 2012 Bankr. LEXIS 3844 (Bankr. D. Neb. 2012) [debtor temporarily not working because of medical issues is entitled to tools of the trade exemption where she intends to return to work], and cases cited therein.

The debtor in this case is unmarried and has no dependents. She receives \$785 per month in social security income. On the petition date, she had no other income. Her expenses total \$2,751 per month. The court finds her scheduled expenses to be reasonable, even modest. As an example, she has scheduled \$47 per month in dental expenses, apparently to cover the dental work she referred to in her conversations with the trustee, over and above ordinary medical and dental expenses of \$132 per month. She has scheduled no health insurance expense. The debtor's social security income falls short by \$1,966 per month of meeting her expenses, even without health insurance.

In 2014 and 2015, the debtor received \$9,775 per year in social security income, and \$2,355 year-to-date in 2016. She also made \$14,801 in 2014 and \$14,000 in 2015 from her babysitting business. On her Form 122A-1, she lists her current monthly income, as defined in § 101(10A) of the Bankruptcy Code, as \$1,976.26, which on an annual basis, works out to \$23,715, less than half the median family income for a family of one in California.

The debtor testifies in her declaration that up until December 2015, she had been caring for 14 children from eight families, that she discontinued caring for most of them because of the pain associated with her knee issues but is still caring for two of the children while she awaits the surgery, and that she believes most of the original 14 children will need her care when school starts in August.³ She concludes, "I don't know at this point, when the surgery will be provided, but I do have to carry on with my business, as I need to survive." Based on this testimony, together with the figures on the debtor's schedules, statement of affairs, and Form 122A-1, the court concludes the debtor is temporarily unable to care for more than two children and that she intends and needs to resume caring for more in order to meet her living expenses. The debtor testifies her normal duties in this business include driving the children from school, to the tutor, to medical and dental appointments, and to her home. Thus, the court concludes the Ford Van is reasonably necessary to and actually used by the debtor in the exercise of the trade or business by which she earns a livelihood.

The Ford Van as a Commercial Vehicle

The court accepts for the sake of argument the trustee's position that the Ford Van is not a commercial motor vehicle. The court also agrees with the trustee that the exemption of a vehicle that is a commercial motor vehicle is limited to \$4,850. § 704.060(d)(1). Those points are not dispositive, however, because nothing in §

704.060 precludes a motor vehicle that is not a commercial motor vehicle from being exempt under the statute. First, under subdivision (a), a debtor may exempt tools, implements, and so on, and other personal property not exceeding \$6,075 in aggregate total equity, if such property is reasonably necessary to and actually used by the debtor in the trade, business, or profession by which he or she earns a livelihood. Second, under subdivision (c), a motor vehicle is not exempt under subdivision (a) if the debtor has another motor vehicle exempt under § 704.010 which is reasonably adequate for use in the debtor's trade, business, or profession. Subdivision (c) uses the term "motor vehicle," not "commercial motor vehicle." A "motor vehicle" could not be excluded from the exemption under subdivision (c) unless a "motor vehicle" could be included in the exemption under subdivision (a) to begin with. The court concludes that a motor vehicle may be exempt as a tool of the trade even though it is not a commercial motor vehicle, and if it is exempt as a tool of the trade other than a commercial motor vehicle, it is not subject to the \$4,850 limit.

The Debtor's Other Vehicle

If the debtor has another vehicle that is exempt under § 704.010, which is "reasonably adequate for use" in the trade or business for which an exemption is claimed under § 704.060(a), she may not exempt the Ford Van. § 704.060(c). The trustee claims the debtor's 2005 Dodge Caravan, which she has exempted under § 704.010, is such a comparable vehicle. The Ford Van and the Dodge Caravan are only a year apart in model year and are similar in mileage (50,000 miles on the Ford Van and 66,000 on the Dodge Caravan). However, the debtor testifies the Dodge Caravan is not in good condition and is "certainly not suitable for transporting someone else's children." DuVall Decl., DN 37, at 2:9-10. She states that is why she valued it at only \$1,700 as opposed to \$7,000 for the Ford Van.

The trustee objects that the testimony is too conclusory and that the debtor did not mention the condition of the Dodge Caravan on her schedules. The court finds, however, that the debtor's testimony, absent any contrary evidence or suggestion, is sufficient to carry her burden of demonstrating that the Dodge Caravan is not reasonably adequate for use in her babysitting business. Thus, the Ford Van is properly claimed as exempt up to the maximum amount of \$6,075 fixed by § 704.060(a) (1).

For the reasons stated, the court intends to sustain the objection in part, allowing the exemption in the amount of \$6,075 and disallowing the amount claimed over and above that amount. The debtor requested an evidentiary hearing in her opposition and declaration, but did not include a separate statement of disputed material factual issues, as required by LBR 9014-1(f) (1) (B). The trustee did not request an evidentiary hearing. The court finds an evidentiary hearing is not necessary and would not be helpful. The court will hear the matter.

1 Statutory citations are to the California Code of Civil Procedure.

2 See Wolfe v. Jacobson (In re Jacobson), 676 F.3d 1193, 1199 (9th Cir. 2012) ["bankruptcy exemptions are fixed at the time of the bankruptcy petition."]; Cisneros v. Kim (in Re Kim), 257 B.R. 680, 687 (9th Cir. BAP 2000) [same].

3 The debtor's business is licensed by the California Department of Social Services as a day care facility authorized to care for 14 children. A copy of her license is filed as an exhibit.

largest unsecured claims (except those listed in amounts unknown), and failed to serve David and Hannah Hooker, listed on the debtor's Schedule G. In addition, regardless of the Order, the debtor was required to list on his master address list all parties included or to be included on his Schedules D, E/F, and G (Fed. R. Bankr. P. 1007(a)(1)), yet neither Albert and Eva Fisher nor David and Hannah Hooker are listed on the master address list. The court pointed out these omissions in a tentative ruling issued prior to the initial status conference, adding that the court had pointed out these same issues to the debtor in rulings on status conferences in two prior cases, yet the same issues had been ignored here.

At the initial status conference, the debtor stated that Hannah Hooker is his paralegal and daughter. Thus, it was not necessary for the debtor to list her on his statement of 20 largest unsecured creditors. However, David and Hannah Hooker were nevertheless required to be listed on the master address list by Rule 1007(a)(1) and were required to be served with the Order and status report by virtue of their listing on Schedule G. As for Albert and Eva Fisher, the debtor stated he had received a notice of default indicating the current beneficiary of the obligation is Mark Weiner. The debtor stated he has not received notice that the obligation has been assigned by Albert and Eva Fisher, but would work on getting that documentation, as well as contact information for Mr. Weiner.

As of this date, the debtor has failed to add Albert and Eva Fisher and David and Hannah Hooker to his master address list. Thus, there is no evidence of record that they have received notice of the case in the several weeks it has been pending. (The court recognizes that Hannah Hooker has signed proofs of service in this case, but that does not demonstrate that David Hooker has been made aware of the case. The debtor offered at the initial status conference to file a declaration to that effect; to date, he has not done so.) The debtor has filed nothing further concerning Mr. Weiner. Thus, the holder of this claim, whether it be Albert and Eva Fisher or Mark Weiner, has never been notified of the case. The debtor scheduled this claim at \$35,000, not contingent, unliquidated, or disputed. Neither Albert and Eva Fisher, Mark Weiner, nor David and Hannah Hooker have ever been served with the Order and status report, as required by the Order.

The initial status conference was held May 18, 2016 and continued to June 15, 2016. On May 24, 2016, the debtor filed an ex parte application to continue the status conference from June 15 to June 29, 2016. The debtor served the application, his supporting declaration, and apparently, a proposed order on the United States Trustee and most of his creditors. However, he did not serve Albert and Eva Fisher, Mark Weiner, or David and Hannah Hooker. The order granting the ex parte application required the debtor to serve the order on the United States Trustee, all creditors, and any other party-in-interest by May 26, 2016, and to file a proof of service by May 27, 2016.

The debtor did not file a proof of service. Instead, he apparently relied on his service of the ex parte application, declaration, and what the court believes to have been a proposed order, evidenced by a proof of service filed May 24, 2016 at 10:15 a.m. The court's order granting the application was not filed until May 24, 2016 at 11:52 a.m. Thus, it appears the copy served by the debtor was an unsigned copy. Even if it was a signed copy, however, the debtor did not comply with the order because he did not serve all creditors.

Another concern is that the debtor stated at the hearing that the claim he listed as held by Albert and Eva Fisher is secured by a mobile home. However, there is no mobile home listed on the debtor's schedules and Albert and Eva Fisher were

listed on Schedule F, not Schedule D. Presumably, the mobile home is not owned by a third party, as the debtor lists himself as the sole obligor on the debt. Thus, it appears the debtor's schedules are inaccurate.

Finally, the court notes that the debtor has filed monthly operating reports for the corporation through which he conducts his business, for April and May of this year, as well as a statement pursuant to Fed. R. Bankr. P. 2015.3. The court indicated at the initial status conference those reports should state the amount of the unpaid tax liability of the corporation; they do not. The report for April shows post-petition liabilities, which are not identified, of \$2,500, and the report for May shows post-petition liabilities, also unidentified, of \$4,500. It appears likely those unpaid post-petition liabilities are payroll taxes, as there is no entry for payroll taxes on the profit and loss statements attached to the monthly reports. The reports show payroll of \$10,095 in April and \$8,491 in May; the reports do not suggest those figures include net pay and payroll taxes.

As the court noted in its tentative ruling for the initial status conference, the debtor is a bankruptcy attorney; thus, the court should be able to expect full compliance with applicable rules. Thus far, the debtor has failed to notify several creditors of the pending bankruptcy case, despite the rules and the court's clear cautions in its earlier tentative ruling and at the initial hearing that he had failed to do that. The court has significant concern that this case will not be prosecuted diligently and in compliance with applicable rules. Thus, as permitted by the Order, unless the debtor can satisfactorily address the above concerns, the court will consider at the hearing alternatives to permitting the debtor to continue as a debtor-in-possession or conversion or dismissal.

19.	16-21199-D-7	JOHN/DEVORA STOUT	MOTION FOR RELIEF FROM
	KAZ-1		AUTOMATIC STAY
	M&T BANK VS.		5-27-16 [12]

Final ruling:

This matter is resolved without oral argument. This is M&T Bank's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

20.	15-20600-D-11	SAEED ZARAKANI	CONTINUED MOTION FOR APPROVAL
	MHK-13		OF POST-PETITION SECURED
			FINANCING
			5-18-16 [289]

Final ruling:

This motion has been resolved by order dated June 17, 2016. Matter removed from calendar. No appearance is necessary.

21.	15-20600-D-11	SAEED ZARAKANI	CONTINUED MOTION TO DISMISS
	MHK-14		CASE
			5-18-16 [294]

Final ruling:

This motion has been resolved by order dated June 17, 2016. Matter removed from calendar. No appearance is necessary.

22.	16-23223-D-11	SKYHIGH PROPERTY LLC	MOTION TO USE CASH COLLATERAL
	HSM-2		6-15-16 [16]

23.	10-50339-D-7	ELEFThERIOS/PATRICIA	CONTINUED MOTION FOR ORDER
	HSM-10	EFSTRATIS	SURCHARGING COLLATERAL OF
			ALLEGED LIENHOLDERS
			4-27-16 [346]

24.	16-20948-D-7	AMRIK/INDERJIT DULAI	MOTION TO SELL
	DNL-2		6-6-16 [44]

25.	16-23649-D-7 SDH-1	SCOTT/KRISTI LANG	MOTION TO EXTEND AUTOMATIC STAY 6-3-16 [8]
26.	14-27267-D-7 HSM-15	SARAD/USHA CHAND	MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR PMZ REAL ESTATE, BROKER(S) 6-6-16 [290]
27.	16-23280-D-7	MICHAEL HESER	MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 6-3-16 [22]
28.	14-31685-D-7 DNL-15	CATHERINE PALPAL-LATOC	MOTION TO PAY 6-14-16 [192]

29. 16-22194-D-11 DAVID FOYIL

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
6-13-16 [38]

30. 16-23398-D-7 BENJAMIN PALAFOX AND
CLEOPATRA LOPEZ

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
6-8-16 [14]

Final ruling:

This case was dismissed on June 13, 2016. As a result the order to show cause will be removed from calendar as moot. No appearance is necessary.