

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

July 26, 2017, at 2:00 p.m.

1.	<u>15-28108-E-11</u>	WILLARD BLANKENSHIP Stephen Reynolds	CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-17-15 [1]
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Final Ruling: No appearance at the July 26, 2017 hearing is required.

Debtor's Atty: Stephen M. Reynolds

Notes:

Continued from 5/31/17 in light of the ongoing prosecution of this case by the Plan Administrator-Debtor.

[RLC-11] Order denying Motion to Approve Proposed Distribution filed 7/17/17 [Dckt 212]

The Status Conference is continued to 2:00 p.m. on November 1, 2017.

JULY 26, 2017 STATUS CONFERENCE

In connection with the hearing on a motion to approve proposed distribution under the Chapter 11 Plan (Civil Minutes, Dckt. 210) the court was afforded the opportunity to address the status of this bankruptcy case and prosecution thereof. On July 21, 2017 the Plan Administrator/Debtor filed a Status Report. Dckt. 213. The Plan Administrator/Debtor reports about an agreement to modify the confirmed plan to address the financial issues identified post-confirmation.

The court continues the Status Conference to afford the Parties to continue in their good faith efforts to keep a confirmed plan in this case moving forward.

July 26, 2017, at 2:00 p.m.

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2. [13-24610-E-13](#) DAX/TINA CHAVEZ
[17-2076](#)

STATUS CONFERENCE RE:
COMPLAINT
5-10-17 [\[1\]](#)

CHAVEZ ET AL V. GREGORY
FUNDING LLC ET AL

Final Ruling: No appearance at the July 26, 2017 hearing is required.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Renee M. Parker

Adv. Filed: 5/10/17
Answer: none

Nature of Action:
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
[RMP-1] Motion to Dismiss Adversary Proceeding filed 5/22/17 [Dckt 7]; heard 7/6/17 and continued to 7/27/17 at 11:00 a.m. [Dckt 17]

The Status Conference is continued to 11:00 a.m. on July 27, 2017, to be conducted in conjunction with the Defendants' Motion to Dismiss this Adversary Proceeding.

3. [16-28316-E-13](#) SHARRY STEVENS-GOREE
[17-2070](#)

STATUS CONFERENCE RE:
COMPLAINT
4-28-17 [\[1\]](#)

STEVENS-GOREE V. CITIZENS
EQUITY FIRST CREDIT UNION

Plaintiff's Atty: Gary Ray Fraley
Defendant's Atty: Mark K. Worthge; Ji Yeon Yoo

Adv. Filed: 4/28/17
Answer: 5/31/17

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Stipulation Between Debtor Stevens-Goree and Creditor Citizens Equity First Credit Union as to Adequate Protection Payments filed 7/6/17 [Dckt 11]; proposed order not provided by parties as of 7/20/17

The Status Conference is XXXXXXXXXXXXXXXXXXXXXXXXXXXX.
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SUMMARY OF COMPLAINT

Sharry Stevens-Goree ("Plaintiff-Debtor") alleges that Defendant has "improperly filed a Proof of Claim that would make it impossible for Defendant to Comply with the standard [Chapter 13] plan in this District. . . ." Complaint ¶ 13; Dckt.1 It is alleged that in its Proof of Claim Defendant demands payment of excessive arrearage.

In the First Cause of Action, Plaintiff-Debtor alleges that the amounts sought in the Proof of Claim violates the automatic stay. The Second Cause of Action is an objection to Proof of Claim No. 3 filed by Defendant. The Third Cause of Action is one for "Declaratory Relief." In the Third Cause of Action it is asserted that the past, completed conduct of Defendant in filing Form 1098's to the Internal Revenue Service were inaccurate. The "Declaration" sought appears to be the determination of the Defendant's claim. In the Fourth Cause of Action, Plaintiff-Debtor asserts that Defendant has violated RESPA in computing the escrow amount obligations and payments. For a Fifth Cause of Action, Plaintiff-Debtor alleges that Defendant's conduct violates California Business and Professions Code §§ 17200 et seq.

Plaintiff-Debtor requests an award of attorney's fees pursuant to 11 U.S.C. § 362(k) and the contract between the parties.

SUMMARY OF ANSWER

Citizens Equity First Credit Union (“Defendant”) has filed an Answer. Dckt. 8. Defendant admits and denies specific allegations in the Complaint. The Answer asserts twenty-one affirmative defenses.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint “[m]ust contain: (1) a short and plain statement of the grounds for the court’s jurisdiction...,” apply to complaints in Adversary Proceedings. In addition to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the additional pleading requirement concerning whether the matters in the complaint are core or non-core:

“Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. **In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.**

FED. R. BANKR. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceedings. FED. R. BANKR. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matters are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

“(b) Applicability of Rule 12(b)—(I) F. R.Civ.P. Rule 12(b)—(I) F.R.Civ.P. applies in adversary proceedings. A **responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.**”

FED. R. BANK. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff-Debtor alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b). Plaintiff-Debtor also expressly consents to the bankruptcy judge issuing all orders and final judgment for all non-core matters. Complaint ¶¶ 2, 3, 4, Dckt. 1.

In its Answer, Defendant fails to admit or deny the allegations of federal court jurisdiction, core matters, and the consent of Plaintiff-Debtor to the bankruptcy judge issuing final judgments and orders. Answer ¶¶ 2, 3, 4, Dckt. 8.

Defendant fails to comply with the requirements of Federal Rule of Bankruptcy Procedure 7012 and expressly address the allegations of jurisdiction and expressly state whether Defendant consents to the entry of final orders and judgments (for non-core matters). The court will address this oversight at the Status Conference.

CONSENT TO BANKRUPTCY JUDGE ISSUING FINAL ORDERS AND JUDGMENT FOR ALL NON-CORE MATTERS

To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

ADDRESSING OF CLAIMS ASSERTED BY PLAINTIFF-DEBTOR

At the heart of Plaintiff-Debtor’s Complaint is a objection to Proof of Claim No. 3 filed by Defendant in Plaintiff-Debtor’s bankruptcy case. It is asserted that Defendant mis-computes the amount of its claim. It is alleged that the “error” in computing the amount due under the Proof of Claim is conduct that Defendant engaged in prior to the commencement of Plaintiff-Debtor’s bankruptcy case.

It is also alleged that the misstatement of the amount due in Proof of Claim No. 3 constitutes a violation of the automatic stay.

Both of the above core proceedings are to be conducted as contested matters rather than adversary proceedings. FED. R. BANKR. P. 7001. When other matters for which an adversary proceeding is required are related to the forgoing, however, the objection to claim and violation of automatic stay can be included in one adversary proceeding with the other claims.

At the Status Conference, the court addressed with the Parties the wisdom of segmenting the litigation. First, the court address the objection to claim. Once that is completed, next is the alleged violation of the automatic stay. Finally, there are the remaining claims asserted in the Complaint. That would allow the parties to address the substantive dispute, the amount of and proper computation of the obligation of Defendant in the Plaintiff-Debtor’s bankruptcy case before addressing what may be academic issues or put those legal issues in the economic context of any such violations.

The parties xxx.

JOINT DISCOVERY PLAN

Plaintiff-Debtor and Defendant have worked productively to develop a discovery plan. Dckt. 12. With respect to discovery, the Parties suggest:

- A. Plaintiff-Debtor will disclose, within fourteen days of July 21, 2017:
 - 1. Identity of all potential witnesses, now known, including expert witnesses.
 - 2. All documents and other tangible things, including expert witness reports.
 - 3. Information concerning damages.
 - 4. Copies of relevant insurance policies.
- B. For the Defendant:
 - 1. Defendant has served its initial disclosures on Plaintiff-Debtor.
 - 2. Defendant will initiate written discovery after the July 26, 2017 Status Conference.
- C. Proposed Deadlines:
 - 1. Discovery Cut-Off, Including Experts and the Hearing of Discovery Motions.....February 15, 2018.
 - 2. Dispositive Motions.....April 20, 2018
 - 3. Pretrial Conference.....May----, 2018
 - 4. Trial.....June 5, 2017 through June 8, 2018

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O). **First Amended** Complaint, ¶¶ X, X, Dckt. X. The Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶¶ X, X, Dckt. X. **To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this is Adversary Proceeding are related**

to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

- b. Initial Disclosures shall be made on or before -----, **2016**.
- c. Discovery closes, including the hearing of all discovery motions, on -----, **2018**.
- d. Dispositive Motions shall be heard before -----, **2018**.
- e. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at -----
p.m. on -----, 2018.

4.

[17-21525](#)-E-13
EWV-116

CHERI GOETZ
Eric Vandermey

**PRE-EVIDENTIARY HEARING
CONFERENCE RE: MOTION TO VALUE
COLLATERAL OF TRINITY FINANCIAL
SERVICES, LLC
3-26-17 [14]**

Debtor's Atty: Eric W. Vandermey

Creditor's Atty: Henry D. Paloci, III [Trinity Financial Services, LLC]

Notes:

Set by order of the court dated 6/15/17 [Dckt 54]; Pre-Evidentiary Hearing Conference Statements to be filed on or before 7/12/17.

Pre-Evidentiary Hearing Statement [Trinity Financial Services, LLC] filed 7/12/17 [Dckt 62]

Pre-Evidentiary Hearing Statement [Debtor] filed 7/14/17 [Dckt 64]

Amended Pre-Evidentiary Hearing Statement [Debtor] filed 7/19/17 [Dckt 66]

The Pre-Evidentiary Conference is XXXXXXXXXXXXXXXXXXXXXX.

Cheri Goetz, the Movant-Debtor, has filed a motion to determine the value of the Trinity Financial Services, LLC secured claim in this bankruptcy case pursuant to 11 U.S.C. § 506(a). The determination of the amount of a secured claim pursuant to § 506(a) is a core proceeding for which the bankruptcy judge issues all final orders.

Movant-Debtor's Conference Statement (Dckt. 66)

Movant-Debtor asserts that Respondent's secured claim has a value of \$0.00. Movant-Debtor asserts that the real property securing the claim has a value of \$317,000.00 and that it is subject to a \$345,083 obligation secured by a senior deed of trust.

The Movant-Debtor will present the following evidence in support of the Motion:

- A. Testimony and written appraisal of XXXXXXXXXX.
- B. Testimony of XXXXXXX for a broker's price opinion.
- C. Exhibits
 - 1. Letter from the county tax assessor stating the assessed value of property for 2017,

2. Proof of claim filed by senior lien holder,
3. Signed deed of trusts for ING (predecessor for Capital One, senior mortgage) and 11 National City (predecessor for Trinity Financial LLC, junior mortgage) and
4. Recorded deed of trusts for ING and National City.

Respondent's Conference Statement (Dckt. 62)

Respondent asserts that the real property securing its claim has a value of \$350,000.00. Respondent asserts that Movant-Debtor has not carried its burden of proof to establish the junior lien priority of Respondent's lien. It is not disputed that a proof of claim has been filed in the amount of \$345,083.33 by the other creditor asserting a lien against the property that secures Respondent's claim in this bankruptcy case.

The Respondent will present the following evidence in support of the Motion:

- A. Testimony and written appraisal of **XXXXXXXXXXXX**.

COURT'S REVIEW OF CLAIMS FILED IN THE BANKRUPTCY CASE

The court has reviewed the proofs of claim filed in this case. It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the *prima facie* validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Holm* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173–74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

Proof of Claim No 1 filed by Capital One, N.A. asserts a claim in the amount \$345,083.30 and that the claim is secured by the real property commonly known as 374 Aaron Circle, Vacaville, California. Attached to Proof of Claim No. 1 is a copy (not certified) of a deed of trust that is identified as documenting the lien given to Capital One, N.A. to secure the claim. That Deed of trust has a recording date of August 2, 2007, in the upper right hand corner with the time 9:28 a.m. The Document Number included in the recording information is 200700085187.

Proof of Claim No. 3 has been filed by Trinity Financial Services, LLC, Respondent. That claim is filed in the amount of \$76,212.66, for which real property identified as 374 Aaron Circle, Vacaville, California. The deed of trust (not certified) attached to Proof of Claim No. 3 that is to document the lien granted to secure Respondent's claim has a recording date of August 2, 2007, in the upper right hand corner, with the time 9:28 a.m. The Document Number included in the recording information is 200700085188.

EVIDENTIARY HEARING SCHEDULING ORDER

The court shall issue a Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2017**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2017**.
- F. The Trial shall be conducted at ----**x.m.** on -----, **2017**.

5.

[17-21525](#)-E-13
DPC-1

CHERI GOETZ
Eric Vandermey

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID P.
CUSICK
4-26-17 [\[30\]](#)

No 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on April 26, 2017. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is XXXXX.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

- A. The Plan relies on a pending Motion to Value the Secured Claim of Trinity Financial Services on June 13, 2017.
- B. Debtor cannot afford the plan payment.

The Trustee's objections are well-taken.

Debtor proposes to value the secured claim of Trinity Financial Services, LLC, for a Second Deed of Trust, to reduce the secured claim from \$71,339.00 to \$0.00. That Motion to Value was continued to 3:00 p.m. on June 13, 2017.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at the First Meeting of Creditors held on April 20, 2017, that she failed to list an expense on Schedule J for real estate taxes and insurance. Debtor stated that her insurance expense was \$78.00 per month and her real property tax was \$3,800.00 per year, which is \$316.67 per month. Debtor is proposing a plan payment of \$120.00 per month for thirty-six months. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

JUNE 6, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 27, 2017. Dckt. 49.

JUNE 27, 2017 HEARING

At the hearing, the court continued the matter to 2:00 p.m. on July 26, 2017. Dckt. 56.

DISCUSSION

The motion to value that is referenced in the Trustee's Objection is scheduled to be heard at 2:00 p.m. on July 26, 2017. Dckt. 53.

6. [16-20734-E-13](#) EUGENE SPENCER
[16-2059](#)
SPENCER V. SPENCER, III

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
3-25-16 [1]

Plaintiff's Atty: Mark A. Serlin
Defendant's Atty: Pro Se

Adv. Filed: 3/25/16
Answer: 4/25/16

Counterclaim & Jury Demand Filed: 4/25/16
Answer: 5/9/16
Amd. Answer: 5/10/16

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny

The Status Conference is xxxxxxxxxxxxxxxxx.

Notes:
Continued from 5/31/17

Status Report of Plaintiff Disarie Ranessa Spencer; Request to Postpone Continued Status Conference filed 6/6/17 [Dckt 42]

JULY 26, 2017 STATUS CONFERENCE

Plaintiff filed a Status Report on June 6, 2017. Dckt. 42. Plaintiff advises the court that the state court action has not been conducted because "for a second time" Golden One Credit Union has failed to comply with a state court subpoena. That has resulted in the state court proceedings being continued to September 29, 2017.

The court is uncertain, based on the Status Report, how the Creditor Union has been able to, and allowed, to ignore a subpoena of the California Superior Court. Clearly the Creditor Union would be subject to substantial corrective and punitive sanctions for willfully violating a subpoena and wasting the time and money of the parties and the Superior Court. If the parties cannot diligently prosecute those issues in State Court, then this court can timely adjudicate the matter and ensure that all subpoenas are complied with for the scheduled trial.

At the Status Conference xxxxxxxxxxxxxxxxx.

ORDER MODIFYING AUTOMATIC STAY TO ALLOW STATE COURT TO MAKE FAMILY LAW ISSUE DETERMINATION

On June 29, 2016, the court issued an order modifying the automatic stay to allow the State Court judge to determine the respective underlying state law claims of the Plaintiff/Counter-Defendant and Defendant-Debtor/Counter-Plaintiff. Order, Dckt. 31. This court will then use such findings and conclusions in ruling on the federal bankruptcy law issues.

CONFIRMED CHAPTER 13 PLAN

In Defendant-Debtor's Chapter 13 case, a Chapter 13 Plan has been confirmed, with the stipulation of Plaintiff. 16-20734; Order Confirming Plan, Dckt. 48.

The confirmation of the plan does not resolve the claims and counter-claims asserted in this action. Civil Minutes for June 14, 2016 Confirmation hearing. *Id.*, Dckt. 45 at 3.

MAY 31, 2017 STATUS CONFERENCE

No additional pleadings have been filed since the November 2016 Status Conference. At the May 31, 2017 Status Conference Plaintiff reported that the state court matter is still pending. Counsel for Plaintiff shall file an updated status report by June 16, 2017.

NOVEMBER 16, 2016 STATUS CONFERENCE

No status reports have been filed by the parties. At the Status Conference, it was reported that the Parties are set to conduct the state court trial in the first quarter of 2017.

SUMMARY OF COMPLAINT

Disarie Spencer, Plaintiff, has filed a Complaint requesting that the court determine that the obligation owed by Eugene Spencer, the Defendant-Debtor, is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and (15). Dckt. 1.

The Complaint alleges that Defendant-Debtor willfully concealed and hid from Plaintiff community property assets in excess of \$100,000.00 in value. A breach of fiduciary duty action was pending in the State Court when Defendant-Debtor filed his bankruptcy case.

SUMMARY OF ANSWER

Defendant-Debtor admits and denies specific allegations of the Complaint. Answer, Dckt. 7. Defendant-Debtor also alleges eighteen affirmative defenses. Defendant-Debtor filed a counter-claim that Plaintiff hid assets from Defendant-Debtor, which are asserted to be in excess of \$90,000.00. Defendant-Debtor asserts that Plaintiff breached her fiduciary duty to Defendant-Debtor.

7. [15-29555](#)-E-13 DIANNE AKZAM
[15-2247](#)
U.S. TRUSTEE V. AKZAM

**CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT FOR INJUNCTIVE
RELIEF
12-18-15 [1](#)**

Plaintiff's Atty: Allen C. Massey
Defendant's Atty: Pro Se

Adv. Filed: 12/18/15
Answer: none

Nature of Action:
Injunctive relief - other

<p>Judgment having been entered, the Pre-Trial Conference is removed from the Calendar.</p>
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Notes:
Continued from 5/31/17 to allow the Parties to complete settlement discussions.

Agreement and Stipulation to Entry of Judgment filed 7/5/17 [Dckt 37]

Judgment for Injunctive Relief filed 7/6/17 [Dckt 39]

8. [08-30669](#)-E-13 CRECYNTHIA MCLUCAS
[17-2034](#)
MCLUCAS V. T.D. SERVICE
COMPANY ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
3-9-17 [\[1\]](#)

ADV. PROC. DISMISSED 7/18/17

Final Ruling: No appearance at the July 26, 2017 hearing is required.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Patrick Reider

Adv. Filed: 3/9/17
Answer: 4/26/17

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.

Notes:
Stipulation to Dismiss Adversary Proceeding filed 7/17/17 [Dckt 30]; Order approving filed 7/18/17 [Dckt 32]

9. [17-21173](#)-E-13 ODETE CABRAL
[17-2056](#)
CABRAL V. NATIONSTAR MORTGAGE,
LLC

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
4-11-17 [\[1\]](#)

Final Ruling: No appearance at the July 26, 2017 hearing is required.

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Erica T. Loftis

Adv. Filed: 4/11/17
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 11:00 a.m. on August 17, 2017, to be heard in conjunction with the pending Motion to Dismiss.

Notes:
Continued from 6/21/17

[ETL-1] Defendant's Motion to Dismiss Plaintiff's Complaint filed 7/3/17 [Dckt 11], set for hearing 8/17/17 at 11:00 a.m.

Plaintiff's Status Statement filed 7/19/17 [Dckt 17]

JULY 16, 2017 STATUS CONFERENCE

The court has taken a preliminary look at the Complaint and the Motion to Dismiss. The Complaint identifies Causes of Action titled: (1) Declaratory Relief, (2) Negligence, (3) Breach of the Covenant of Good Faith and Fair Dealing, (4) Unjust Enrichment, (5) Violation of California Business and Professions §§ 17200 et seq., (6) Violation of California Civil Code § 2923.6(C), and (7) Violation of California Civil Code § 2924.10. FN.1.

FN.1. The request for declaratory relief stated in the Complaint is "Plaintiff therefore seeks a declaratory judgment pursuant to F.R.B.P. § 7001(9), invoking F.R.B.P. § 7001(2) & F.R.B.P. § 7001(6), determining that Defendant is liable for negligence processing of the loan modification, costs, and attorney fees." Complaint ¶ 31, Dckt. 1. Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. "In effect, it brings to the present a litigable controversy,

which otherwise might only be tried in the future.” *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

It appears that the parties have acted, the bell has rung, and to paraphrase the catch line of a late twentieth century cinema hero, “Sue for damages or sue not: There is no declaration of what your rights would be if you sued for what has happened.”

In the Motion to Dismiss, Nationstar Mortgage, LLC, “Defendant,” asserting that because under the Chapter 13 Plan the real property that secures the obligation that is Defendant’s claim in Plaintiff-Debtor’s bankruptcy case, the court should abstain from determining the claims asserted in this Adversary Proceeding. It is asserted that determination of the claims asserted do not have any impact on the administration of this bankruptcy case with a confirmed Chapter 13 Plan. Defendant also attacks the claims on the legal merits.

The confirmed Chapter 13 Plan provides for the payment of 100% of general unsecured claims, which are stated to be in the amount of \$1.00. The Plan provides for the payment of Defendant’s secured claim through the plan, including curing the arrearage on the claim during the term of the Plan. No other claims are provided for in the Chapter 13 Plan. 17-21173; Plan, Dckt. 10.

10. [17-20875](#)-E-13 **EVA LUNA** **SCHEDULING CONFERENCE RE:**
AP-1 **Richard Jare** **OBJECTION TO CONFIRMATION OF**
 PLAN BY BANK OF AMERICA, N.A.
 3-23-17 [16]

Debtor's Atty: Richard L. Jare

Notes:

Set by order of the court dated 6/27/17 [Dckt 38]; Eva Luna (the Debtor), Hilario Hernandez (purported co-owner of property with Debtor and witness for Debtor in this Contested Matter), and Richard Jare (attorney for Debtor in this bankruptcy case and attorney for Hilario Hernandez in his ongoing Chapter 13 case, 16-20891) ordered to appear. No telephonic appearances permitted.

[AP-1] Debtor's Response Re Scheduling Conference and Order to Appear filed 7/11/17 [Dckt 41]

JULY 26, 2017 STATUS CONFERENCE
OBJECTION TO CONFIRMATION EVIDENTIARY HEARING

An evidentiary hearing was scheduled on the Bank of America, N.A. Objection to Confirmation for June 22, 2017. On June 20, 2017 counsel for Debtor filed a "Status as to Witness Testimony" advising the court that: (1) client (Debtor) is ill and short of a miracle Debtor will not attend the evidentiary conference, and (2) Debtor's other witness, Hilario Hernandez "is not likely to appear" for the trial." Dckt. 34.

Presented with Debtor's Counsel's status that his witnesses would not be at the scheduled evidentiary hearing, the court removed the evidentiary hearing from the calendar and issued the order for this Status Conference. Order, Dckt. 38. The Order setting this Status Conference addresses a number of issues and the court incorporates it herein by this reference. The discussion of the conduct of Debtor, Debtor's counsel, and Hilario Hernandez in the Order includes the following:

"On February 11, 2017, Eva Luna, the Debtor, commenced this voluntary Chapter 13 case. Her attorney of record is Richard Jare. The court notes that Mr. Jare is also the attorney for Hilario Hernandez, the purported co-owner of the property (the "Property") that is asserted to secure the claim of Bank of America, N.A. ("BofA"), the creditor filing the Objection to Confirmation that is now before the court. In Mr. Hernandez's Chapter 13 Case, the confirmed Chapter 13 Plan provides for the surrender (allowing creditor to foreclose) of the Property to creditors having claims secured by the Property. 16-20891; Amended Order Confirming, Dckt. 82.

On March 23, 2017, BofA filed an objection to the Chapter 13 Plan proposed by Debtor in this case. . .

Debtor Opposition

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Pursuant to the Evidentiary Hearing Order, Debtor filed her opposition evidence. Debtor did not file a written opposition or evidentiary hearing brief. The court extrapolates the following opposition from the declarations of Eva Luna, the Debtor, and Hilario Hernandez. The two declarations are almost identical, and stated under penalty of perjury:

- A. The two witnesses have poor English language skills.
- B. Debtor currently lives at the Property.
- C. Debtor and Hilario Hernandez share title to the Property.
- D. Debtor and Hilario Hernandez state that unidentified “professionals” said that sharing title would be “acceptable.”
- E. Hilario Hernandez was the only person who would go to the notary public to sign documents for the loan and sign a deed to transfer a portion of the interest in the Property to Debtor.
- F. The loan was to be only in the name of Hilario Hernandez.
- G. Debtor states that she supplied the money for the down payment to purchase the Property.
- H. Debtor states that she made the payments on the Note signed by Hilario Hernandez.
- I. Both Debtor and Hilario Hernandez state their legal opinion that the dealings of Debtor and Hilario Hernandez have:
 - 1. Caused there to be a “resulting trust in favor of Debtor;” and
 - 2. Hilario Hernandez holds “bare legal title.”
- J. Hilario Hernandez states that though he does not have copies of property tax bills, he “recalls” that both Debtor’s and Mr. Hernandez’s name were on the tax bills. Debtor provides no testimony about or having any knowledge concerning property tax bills.

Exhibit A submitted by Debtor is identified as the deed by which Hilario Hernandez is purported to have transferred title to Debtor as a joint tenant. Exhibit A is dated and has a notary stamp dated October 29, 2007. Exhibit A is not a

certified copy from the County Recorder or a copy of the recorded document. In the upper right-hand corner there is a stamp for “Financial Title Company” and someone has handwritten that the document was recorded on November 1, 2007.

Exhibits B - D are documents relating to the Note and loan, in which only Hilario Hernandez is identified as the borrower.

...

Unavailability of Debtor’s Witnesses and Translator

On June 19, 2017, two days before the scheduled evidentiary hearing, Richard Jare (counsel for Debtor) called the courtroom deputy for Department E to advise the court that the interpreter that he had arranged for the evidentiary hearing was only available from 9:30 a.m. to 10:30 a.m. No reason was given for this unavailability being “realized” a mere two days before the evidentiary hearing. The court did not remove the evidentiary hearing from the calendar, it being Debtor’s and Debtor’s Counsel’s responsibility to have any required interpreters in attendance.

On June 20, 2017, after the court had not removed the evidentiary hearing from the calendar due to the translator “unavailability,” Richard Jare, Counsel for Debtor, filed a pleading titled “Status as to Witness Testimony for the Debtor at Evidentiary Hearing.” Dckt. 34. In this “Status” notice, subject to the strictures of Federal Rule of Bankruptcy Procedure 9011, Counsel for Debtor states:

- A. “The latest information which is communicated to me is that my client is ill . . .”
- B. “short a miracle recovery, [Debtor] believes she will not be at the evidentiary hearing on Thursday morning.”
- C. “I am informed also that my client believes the other witness Hilario Hernandez is not likely to appear.”

In closing, Debtor’s Counsel then places the burden on telling the court and opposing party a day before the evidentiary hearing that he would not have his witness available due in part to one suffering from an illness for which a miracle cure would be necessary, stating:

“The court and counsel for Bank of America may wish to consider these matters.”

The court cannot identify the grant of authority to Debtor’s Counsel to issue a status statement and then place the burden of action on the court and other party for Counsel’s inability to have his witnesses at the evidentiary hearing.

The “Status” statement includes curious language not offering any basis for Hilario Hernandez not appearing, other than he (or they - Debtor, Mr. Hernandez, and

Debtor's Counsel) choose not to as part of their strategy in not bringing this Objection to Confirmation to a conclusion.

ORDER FOR SCHEDULING CONFERENCE

Upon reviewing the evidence, the court is first struck by what evidence is in dispute or cannot be determined on declarations and the exhibits. The Opposition, as stated in the Declarations, appears to be one in which Debtor states that she, behind the scenes, was involved with Hilario Hernandez purchasing the property, and then was put on title after Hilario Hernandez had obtained the loan and granted the deed of trust. This is consistent with the BofA Objection in which it asserts that the Note and loan transaction was just with Hilario Hernandez.

Debtor and Hilario Hernandez state that there were other unidentified "professionals" involved at the time. No contrary evidence is offered to Hilario Hernandez solely having entered into two subsequent loan modifications.

Debtor and Hilario Hernandez do not dispute that the loan was obtained by Hilario Hernandez and that it is in default. Debtor offers no opposition or evidence to the assertions that based on her income, the Plan is not feasible. Debtor does not address how the court goes beyond the face of the Note with respect to who are the parties to that contract and the basis for which Debtor can force BofA to consider a loan modification application from her. Debtor does not address BofA's rejection of a request of a person not a party to the Note to modify the Note of another, here Hilario Hernandez."

For this Status Conference the court has ordered Mr. Jare, Eva Luna, and Hilario Hernandez to appear in person at the Status Conference, No Telephonic Appearances permitted for them. The court has also ordered Eva Luna to provide the court with documentation of the "illness" for which a miracle recovery was the only prospect for her to be at the scheduled evidentiary hearing. Finally, the court has ordered Hilario Hernandez to provide evidence of why he was "unlikely to appear" as a witness for Debtor in this Contested Matter.

CLAIMS OF OWNERSHIP IN PROPERTY

On Schedule A filed in the present bankruptcy case, Debtor Eva Luna states under penalty of perjury that she is the only person who has an interest in the 84 Morell Court Property. Dckt. 1 at 11. In listing this property, Debtor Eva Luna includes the following information, "50% per Grant Deed intended to be Quit Claim Deed County Recorder Book 2007101 Page 0975." *Id.* In his 2016 Chapter 13 case, 16-20891, Hilario Hernandez (who is represented by the same attorney as Debtor Eva Luna) states under penalty of perjury that 324 Jefferson Ave is his "principal residence," however. 16-20891; Schedule A, Dckt. 1 at 11. Hilario Hernandez further states under penalty of perjury that he owns the 84 Morell Court Property, holding fee simple title as the only owner. *Id.* at 12.

Both Debtor Eva Luna and Hilario Hernandez provide conflicting statements under penalty of perjury concerning ownership of, and their interests in, the 84 Morell Court Property.

ADDITIONAL PLEADINGS

Debtor Eva Luna filed a Response for the Status Conference. Dckt. 41. In the Reply, Mr. Jare now states that it was he who would have conflicts with being at the scheduled evidentiary hearing. With respect to the failure to provide an interpreter, Mr. Jare states (without any basis) that “debtor had hoped the court would provide an interpreter.” The court does not provide interpreters for, or assist one party against the other, in this civil litigation. From this Response, it appears that it may well have been counsel’s failure to pay for an interpreter that one was not “available.”

Though ordered by the court, neither Eva Luna nor Hilario Hernandez have provided testimony or competent credible evidence addressing: (1) Ms. Luna’s “illness” for which only a “miracle recovery” would allow her to participate at the Evidentiary Hearing, and (2) why Mr. Hernandez was refusing to appear at the Evidentiary Hearing to assist Ms. Luna in protecting the property that purportedly the two of them own. Instead, Mr. Jare merely provides his declarations, stating “he was told” or “he believes.”