

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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

DAY: TUESDAY
DATE: AUGUST 18, 2020
CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS

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. 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. [19-26426](#)-A-7 **IN RE: PRUDENCIO FARIAS**
[20-2043](#) [PLG-1](#)

MOTION FOR ORDER TO SHOW CAUSE
7-20-2020 [[18](#)]

VARGAS V. FARIAS
HANNAH KREUSER/ATTY. FOR MV.

No Ruling

2. [18-25346](#)-A-7 **IN RE: SHIV SINGH**
[18-2196](#)

PRE-TRIAL CONFERENCE RE: COMPLAINT FOR NON-DISCHARGE OF DEBT
12-17-2018 [[1](#)]

SANDHU V. SINGH
JUSTIN KUNEY/ATTY. FOR PL.

No Ruling

3. [19-23452](#)-A-7 **IN RE: CIAO RESTAURANTS, LLC**
[20-2110](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-2-2020 [[1](#)]

HUSTED V. OLD REPUBLIC TITLE
COMPANY
NICHOLAS KOHLMAYER/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to September 29, 2020, at 1:30 p.m. Not later than 14 days prior to the status conference the parties shall file a joint status report.

4. [19-26462](#)-A-7 **IN RE: GINA/GILBERT SAVALA**
[20-2005](#) [BHS-1](#)

MOTION TO COMPEL AND/OR MOTION FOR SANCTIONS
8-3-2020 [[40](#)]

THREE LAKES DESIGN V. SAVALA
BARRY SPITZER/ATTY. FOR MV.

No Ruling

5. [17-21266](#)-A-11 **IN RE: HARD STONE CBO TRUST**
[20-2102](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-22-2020 [[1](#)]

HARD STONE CBO TRUST V. CLEAR
RECON CORP. ET AL
CLIFFORD SCHERER/ATTY. FOR PL.

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

6. [17-21266](#)-A-11 **IN RE: HARD STONE CBO TRUST**
[20-2102](#) [SW-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-21-2020 [[10](#)]

HARD STONE CBO TRUST V. CLEAR
RECON CORP. ET AL
ADAM BARASCH/ATTY. FOR MV.

Final Ruling

Motion: Rule 12(b)(6) Motion to Dismiss

Notice: LBR 9014-1(f)(1); written opposition filed

Disposition: Granted

Order: Prepared by moving party

The movant Bank of America, National Association moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss Hard Stone CBO Trust's complaint for failure to plead sufficient facts upon which the court may grant relief. For the reasons discussed below, the defendant's 12(b)(6) motion will be granted.

FACTS:

Mortgage Electronic Registration Systems, Inc. (MERS) held a deed of trust securing interest in the plaintiff debtor Hard Stone CBO Trust's subject property 1757 Park Oak Drive, Roseville, California 95661. Case #2017-21266, Exhibit 2, ECF 40. Subsequently, MERS assigned the deed of trust to Bank of America, National Association ("BANA"), the defendant in this adversary proceeding. *Id.*, at Exhibit 3. BANA's records at the time reflect that "Bank of America, N.A. holds possession and/or control of the original Note." Case #2017-21266, ECF 39. Both the deed of trust and the assignment to BANA were promptly recorded upon execution.

Some years later, the plaintiff/debtor Hard Stone CBO Trust filed its sixth bankruptcy, No. 2017-21266-A-11. No notice of this chapter 11 case was filed until March 2, 2017. Case #2017-21266, ECF 8.

On March 1, 2017 – the day before notice of the bankruptcy was filed – BANA instituted a foreclosure sale of the property. Later realizing that it sold the property while the bankruptcy case and automatic stay were pending, BANA filed a Motion to Annul the Automatic Stay *nunc pro tunc* so that the stay shall “have no force or effect upon Movant’s foreclosure sale.” Case # 2017-21266, ECF 35. The court decided that BANA cannot have had notice of the debtor’s Chapter 11 bankruptcy or the automatic stay before the foreclosure sale. On May 9, 2017, court annulled the stay. Case # 2017-21266, ECF 42. The debtor did not contest the motion or the order prior to this adversary proceeding.

PROCEDURE:

A few months ago, the plaintiff filed this adversary proceeding against BANA and Clear Recon Corp., whom BANA directed to sell the subject property at the foreclosure sale. ECF 1. Over 2 years have passed since the court granted BANA’s Motion to Annul Stay. The plaintiff requests, first, that the court revoke the Order Granting Annulment of Stay. The plaintiff contends that BANA was not the original lender and the assignment of the Deed of Trust was fraudulent. Complaint, ¶ 24, ECF 1. The debtor requests, second, that the court find that BANA violated the stay under 11 U.S.C. § 362 by selling the subject property while the stay was in place. *Id.*

JURISDICTION

This court has jurisdiction. See 28 U.S.C. §§ 1334, 157(a), (b)(1); General Order No. 182 of the U.S. District Court for the Eastern District of California. This is a core proceeding in which this court may enter final orders. See 28 U.S.C. § 157(b)(2)(G).

DISCUSSION:

Filing an Adversary Proceeding to request Relief from Judgment

Fed. Rule Civ. Proc. 60(b)(3) requires that the plaintiff *file a motion* when requesting the court to rescind its own “final judgment, order, or proceeding for fraud.” See also *Std. Indus. v. Aquila Inc.* (*In re C.W. Mining Co.*), 625 F.3d 1240, 1246 (10th Cir. 2010) (stating “[t]he plain language of [Fed. Rules Bankr. Proc.] 7001(7), 9024, and [Fed. R. Civ. P.] 60(b) establishes that a party may seek Rule 60(b) relief from an order granting relief from stay by motion as a contested matter without filing an adversary proceeding”). In addition, the Ninth Circuit treats a violation of the automatic stay as a civil contempt of court, and Fed. Rule Bankr. Proc. 9020 specifically provides that relief for civil contempt must be requested by motion under Fed. Rule Bankr. Proc. 9014. *Havelock v. Taxel* (*In re Pace*), 67 F.3d 187, 193 (9th Cir.1995). An adversary proceeding is therefore improper for court to determine civil contempt. *In re Hackard & Holt*, 2014 WL 4966563,

at 6 (Bankr. E.D. Cal. Oct. 3, 2014), *citing In re C.W. Mining Co.*, at 1246.

The plaintiff alleged fraud in its request that the court revoke the Order Granting Annulment of Stay. The plaintiff's request is therefore subject to Fed. R. Civ. P. 60(b)(3). The court finds that the plaintiff improperly filed an adversary proceeding when requesting vacatur of the Order under Fed. R. Civ. P. 60(b)(3) and requesting the court to find that the defendant violated the automatic stay in civil contempt when the bankruptcy was pending. The court will rule on the plaintiff's complaint as it would a motion governed by Fed. Rule Bankr. Proc. 9014.

Timing to Request Relief from Judgment

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Federal Rule of Civil Procedure 60(b)(3), *incorporated by* Fed. R. Bankr. P. 9024. "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) *no more than a year after the entry of the judgment or order or the date of the proceeding.*" Fed. R. Civ. P. 60(c)(1), *incorporated by* Fed. R. Bankr. P. 9024.

Since the Order Granting Annulment of Stay was granted over two years ago, and Rule 60(c) prohibits the court from vacating an order granted two years ago in response to a 60(b)(3) motion, the court finds the plaintiff's request untimely and void.

Also, the court may not entertain the plaintiff's request to hold that the defendant violated the stay under 11 U.S.C. § 362. The linchpin to the plaintiff's entire case is BANA's alleged stay violation. The plaintiff stated, first, that BANA's assignment of the deed of trust was "fraudulently endorsed," so BANA was never a real party in interest in the case and had no standing to move for stay relief. Case # 2017-21266, Complaint, ¶ 18, ECF 1. The plaintiff stated, second, that BANA improperly sold the subject property while the stay was pending. *Id.*, at ¶ 17. Therefore, the Order Granting Annulment of Stay is fatal to all the plaintiff's causes of action in this proceeding.

For all of the foregoing reasons, the court finds that the plaintiff failed to state a claim upon which relief can be granted.

Extending Ruling to Clear Recon Corp.

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). A court may dismiss a claim sua sponte under Rule 12(b)(6) as well. *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

The complaint names Clear Recon. Corp, who sold the subject property for BANA, as a defendant. Since the court finds that the plaintiff failed to state a claim upon which relief can be granted against BANA, the court also finds that the plaintiff failed to state a claim against Clear Recon Corp. For these reasons, the court extends its ruling on BANA's motion to Clear Recon. Corp. and dismisses Clear Recon. Corp. from this proceeding.

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.

Bank of America, National Association's Rule 12(b)(6) motion to dismiss has been presented to the court. Having considered the complaint, the motion, the memorandum of points and authorities, and the opposition,

IT IS ORDERED that the motion to dismiss is granted.

IT IS ALSO ORDERED that this ruling is extended to Clear Recon. Corp. and that Clear Recon. Corp. is also dismissed from this case.

7. [19-27876](#)-A-7 **IN RE: OUTHAI XAYAVONGSA**
[20-2032](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-24-2020 [[1](#)]

GLOBAL FINANCIAL & LEASING
SERVICES, LLC V. XAYAVONGSA
MELODY ANDERSON/ATTY. FOR PL.

No Ruling

8. [20-21284](#)-A-7 **IN RE: DORSIE LAKE**
[20-2114](#)

STATUS CONFERENCE RE: COMPLAINT
6-10-2020 [[1](#)]

LAKE V. LAKE
JONATHAN STEIN/ATTY. FOR PL.

No Ruling

9. [19-25888](#)-A-7 **IN RE: RAMESHWAR PRASAD**
[19-2162](#) [KBT-1](#)

MOTION TO COMPEL
8-4-2020 [[36](#)]

ITRIA VENTURES LLC V. PRASAD
JASON TAKENOUCHI/ATTY. FOR MV.

No Ruling