UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 29, 2013 at 1:30 p.m.

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1. 09-34904-E-13 WILLIAM/DIANE METZELAAR
13-2015 PGM-3
METZELAAR ET AL V. UNITED GUARANTY RESIDENTIAL INSURANCE

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
7-10-13 [44]

CONT. FROM 8-8-13

Local Rule 9014-1(f)(1) Motion - No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant JPMorgan Chase Bank, N.A., Chapter 13 Trustee and the office of the U.S. Trustee on April 9, 2013. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

Final Ruling: The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is continued to 1:30 p.m. on October 3, 2013. No appearance at the August 29, 2013 hearing required.

PRIOR HEARING

Plaintiffs William & Diane Metzelaar, seek entry of a default judgment against United Guaranty Residential Insurance Company of North Carolina, the Defendant, in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

Debtors seek to continue the hearing to August 29, 2013, based on a Notice of Continued Hearing filed August 1, 2013. Though titled "Notice,"

the pleading is actually an *ex parte* motion requesting that the court continue the hearing. L.R.B.P. 9014-1(j). This "ex parte motion" states, "The parties request a continuance in order to discuss settlement with Defendant United Guaranty Residence Insurance Company fo North Carolina."

CONTINUANCE

The court continued the hearing. The parties subsequently filed a "Notice of Continued Hearing" on the Motion for Entry of Default Judgment, stating that the parties agreed to a continuance to October 3, 2013.

The court accepts Plaintiff's representation that the continuance is requested for the purpose of conducting settlement discussions and is not interposed for an improper purpose. This Adversary Proceeding is one to determine that a deed of trust recorded against property of the Debtors is void following the completion of payments through the Debtors' Chapter 13 Plan. In such a situation, the creditor has both a statutory and contractual obligation to reconvey the deed of trust. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case), *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013). If a creditor fails to so do, in addition to attorneys' fees and costs, statutory penalties arise under California law.

The court continues the hearing on the Motion for Entry of Default Judgment to 1:30 p.m. on October 3, 2013.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Entry of Default Judgment is continued to 1:30 p.m. on October 3, 2013.

2. 10-44610-E-7 JAMES MACKLIN — ORDER TO APPEAR RE: MOTION TO VACATE
11-2024 JLM-1 — 6-20-13 [338]
MACKLIN V. DEUTSCHE BANK NATIONAL TRUST CO.

No Tentative.

Notice Provided: The Order to Appear was served by the Clerk of the Court through the Bankruptcy Noticing Center on Counsel Daniel J. Hanecak, Robert A. Bleicher and Office of the U.S. Trustee on July 29, 2013. 31 days notice of the hearing was provided.

Plaintiff James Macklin seeks to vacate the court's Order on May 24, 2013, pursuant to Federal Rule of Civil Procedure 60(b). Counsel Daniel J. Hanecak failed to appear on the Motion and the court allowed Plaintiff James Macklin to appear in pro se. The court subsequently ordered Daniel J. Hanecak to appear.

3. 13-24512-E-13 AMOS SNELL — CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
13-2171 SF-1 — 6-20-13 [14]
SNELL V. DEUTSCHE BANK NATIONAL TRUST COMPANY ET AL

CONT. FROM 8-8-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on June 20, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Motion to Dismiss Adversary Proceeding. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Defendant Deutsche Bank National Trust Company, as Trustee for GSAMP Trust 2005-WMC1 (erroneously sued as Deutsche Bank National Trust Company, as Trustee for GSAMO Trust 2005-WMCI, Pooling and Servicing Agreement dated, as of September 1, 2-5) and Ocwen Loan Servicing, LLC, ("Movant") seeks dismissal of the adversary proceeding because Plaintiff failed to state a claim upon which relief can be granted.

However, the pleading titled motion is actually a combined notice of hearing and points and authorities. There is no actual "Motion" filed but rather a pleading in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

CONSIDERATION OF MOTION

Though Movant has failed to comply with Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 7007, and the Revised Guideline for Preparation of Documents in this District, the court will consider this Motion for several reasons.

The Plaintiff-Debtor, now represented by counsel have filed an extensive opposition. It appears that the Plaintiff-Debtor has been able to slog through a 24 page "Motion" to discern the grounds stated with particularity from the extensive citations, quotations, legal arguments, factual arguments, and mere counsel arguments. The Plaintiff-Debtor has also objected to the use of "judicial notice" to properly authenticate a document recorded with a governmental agency (the county recorder).

The court notes that the underlying bankruptcy case was dismissed as of August 2, 2013. Bankr. E.D. Cal. No. 13-24512-13, Dckt. 91. The parties

have not addressed the impact of the dismissal of the bankruptcy case on this Adversary Proceeding.

CONTINUANCE

The court continued the motion to allow the parties to file and serve supplemental pleadings addressing the appropriateness of the court conducting any further hearings in this Adversary Proceeding when the Plaintiff-Debtor is not a debtor in any pending bankruptcy case, and whether the court abstaining pursuant to 28 U.S.C. § 1334(c)(1) is necessary and proper. 28 U.S.C. § 1334(c)(1), See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013).

DEFENDANT'S SUPPLEMENTAL PLEADINGS

Defendant argues that the adversary complaint is a non-core proceeding and there is no connection between the adversary proceeding and the plaintiff's bankruptcy case. Defendant argues that Plaintiff's action to challenge foreclosure pursuant to a Deed of Trust and/or a possible violation of the Fair Debt Collection Practices Act is not a core proceeding. In addition, the Debtor's bankruptcy has been dismissed, there is no connection between the adversary proceeding and the bankruptcy case.

Defendants also argue that they will not consent to a jury trial. Defendant argues that since this is a non-core proceeding and because Defendants have not waived their right by jury and will not consent to the bankruptcy court's jurisdiction, this court must abstain from hearing this matter.

PLAINTIFF'S SUPPLEMENTAL RESPONSE

Plaintiff states he is in the process of filing a new Chapter 7 petition and this will resolve the court's concerns.

Plaintiff also argues that this adversary proceeding is now a core proceeding. Plaintiff argues that since the adversary proceeding is challenging the foreclosure of the real property and the validity of the lien and the standing of the purported creditor to foreclose on the real property, this is a core proceeding.

DISCUSSION

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. *See* 28 U.S.C. § 1334(c).

As provided in 28 U.S.C. § 1334(c)(1),

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction created by Congress and limited by the United States Constitution. *See Stern v. Marshall*, 564 U.S. ____ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. *See Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

Here, the Plaintiff is asserting non-bankruptcy code claims, non-bankruptcy case claims, and claims which are not related to the bankruptcy case. Rather, the Plaintiff seeks to assert normal, state law claims in this specially created forum. The court cannot identify any issues or rights arising under the Bankruptcy Code or arising in the bankruptcy case, or any related to matters which effect the administration of the bankruptcy case or the bankruptcy law rights of the Debtor, for which the bankruptcy court should exercise jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 in the place of the state court of general jurisdiction for these state law and non-bankruptcy law issued.

Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo,* 82 F.2d 121, 121-122 (9th Cir. 1936),

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

The court cannot identify, and the Plaintiff has not shown, the basis for any claim or controversy as required by Article III, Section 2 of the United States Constitution. The Plaintiff argues that he is entitled to his day in court, and wants to have that day in this federal bankruptcy court. Congress did not create, and the United States Bankruptcy Courts do not exist, as a "go to" alternative judicial process when a party does not want to litigate in the state court of general jurisdiction or the United States District Court if proper grounds exist for that court to exercise federal court jurisdiction pursuant to Article III of the United States Constitution. While very broad in scope, the exercise of federal judicial power pursuant to 28 U.S.C. § 1334 is limited to the matters arising under the Bankruptcy Code, arising in the bankruptcy case, or related to the bankruptcy case (which raises it's own constitutional issues as addressed by the Supreme Court in *Stern*).

To the extent that the Debtor files a Chapter 7 case, then it will be up to the Chapter 7 Trustee to decide if he or she is going to exercise the rights of the estate. The court will have to address with the Trustee how the automatic stay should apply in lieu of a preliminary injunction, and if so, how the court addresses the possible damages to the defendants if they are wrongly enjoined. If the Trustee does not elect to prosecute the claims and abandons them back to the Debtor, then the parties are back to this same situation where the litigation is of no moment to the bankruptcy case (as well as any stay for the Debtor dissolving upon the discharge being granted, 11 U.S.C. § 362(c)(1) and (2)(C)).

To the extent that federal court jurisdiction could be stretched to somehow may this a "related to" matter, abstention pursuant to 28 U.S.C. § 1334(c)(1) is appropriate. There is no reason shown for this federal bankruptcy court to wrestle away from the California Superior Court the determination of these non-federal law issues which have no impact on any bankruptcy case before the court. In the interests of comity with the State courts, and with due respect for State law, the court abstains from any further hearings or proceedings in this Adversary Proceeding.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Dismissal of Adversary Proceeding filed by Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the Complaint is dismissed without prejudice.

4. 07-27123-E-13 DOREEN GASTELUM
12-2295 PGM-1
GASTELUM V. CITY OF CHICAGO, DEPT. OF BUILDINGS ET AL

CONTINUED MOTION FOR LEAVE TO AMEND THE COMPLAINT
5-2-13 [133]

CONT. FROM 8-8-13; 4-25-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Defendant's Attorney, and Office of the United States Trustee on March 1, 2013. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The court has determined that oral argument will not be of assistance in resolving this matter.

No Tentative.

PRIOR RULING

Debtor-Plaintiff seeks leave to amend the complaint to plead with specificity the request for declaratory relief in determining:

(1) whether Debtor-Plaintiff should be held harmless for the post-petition liability arising from the "in rem" liability for the real properties located at 1517 W. 61st Street, Chicago, Illinois and 356 45th Street, Chicago, Illinois, from the defendant mortgage companies;

(2) whether Defendant City of Chicago would sell the properties pursuant to the filed tax liens; and

(3) whether the City of Chicago's post-petition claims are only an "in rem" liability, and that City of Chicago would not be seeking "in persona" liability from Plaintiff in the future.

Debtor-Plaintiff contends that she has been attempting to sell the properties without success. Debtor-Plaintiff states the values of the properties are $1,000.00 for 1517 W. 61st Street and $10,000.00 for 356 West 45th Street. Debtor-Plaintiff contends that no one will take the properties even as a donation because of the City's fines and penalties which are in excess of $100,000.00 each. Tax liens have recently been filed against the properties and eventually a tax lien sale will take place.

Debtor-Plaintiff now seeks a declaratory judgment on whether the remaining deficiency, after the sale of the properties is completed, will be a post-petition personal liability and if so, whether Fifth Third Bank and Select Portfolio Servicing have a duty to hold Debtor-Plaintiff harmless of the liability that ran with the land and arose pre-petition and prior to the Chapter 13 plan, confirmation and discharge.

CITY OF CHICAGO'S OPPOSITION

The City of Chicago argues that the motion for leave to amend should be denied because this third attempt will be futile. The City argues that Plaintiff's causes of action will be subject to a successful motion to dismiss given there is not basis for such claims, as they have provided no authority or facts that she is entitled to declaratory relief against the City.

The City also argues that Plaintiff only seeks declaratory relief against the City and that Federal courts do not have a duty to grant declaratory judgment. The City states that the declaratory relief the Plaintiff seeks relates to issues of state concern and does not rise under federal law and should be addressed in Illinois state court.

MERS, SELECT, & U.S. BANK'S NON-OPPOSITION

Mortgage Electronic Registration Systems, Inc. ("MERS"), U.S. Bank National Association, as Trustee, on behalf of the holders of the adjustable rate mortgage Loan Trust 2007-1 Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2007-1 ("U.S. Bank"), and Select Portfolio Servicing, Inc. ("Select") filed a non-opposition to the motion, reserving the right to challenge the sufficiency by motion to dismiss for failure to state a claim.

FIFTH THIRD BANK'S OPPOSITION

Defendant Fifth Third Bank ("Fifth Third") opposes the motion on the grounds that the proposed amendment is futile and would subject Fifth Third to the prejudice of continuing litigation expense. Fifth Third argues that the proposed amendment would not survive a Federal Rule of Civil Procedure 12 motion to dismiss.

Fifth Third argues that the Amended Complaint repeats the same allegations made against it in the original complaint, which the court addressed in its Motion to Dismiss. Fifth Third argues that the only new allegation is that her discharged debt to Fifth Third continues to be reflected on her credit report, but she does not allege that any entity has attempted to collect on the debt or the harm of it being on the report. Fifth Third argues that the act of furnishing information to reporting agencies alone is not a sufficient basis for a discharge injunction violation claim. Fifth Third states that Debtor-Plaintiff does not allege any additional facts that would qualify.

PLAINTIFF'S RESPONSE

Plaintiff responds to Fifth Third's opposition, asserting that leave to amend should be granted because the proposed amended complaint is not futile and Plaintiff has not obtained the fresh start as intended by Congress.

DISCUSSION

"A party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. § 15(a)(2), as incorporated by Fed. R. Bankr. P. 7015. There is a strong policy of liberal authorization to amend pleadings in the Federal Courts. *In re Kashami*, 190 B.A.P. 875 (9th Cir. 1995). In situations where Plaintiff's causes of actions have been dismissed without leave to amend, the Plaintiff bears the burden of proving there is a reasonable possibility of amendment. *Blank v. Kirwan*, 39 Cal.3d 311 (1985).

While there is a strong policy of liberal authorization to amend pleadings in the Federal Courts, the court is correct to deny leave where there is undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Moore v. Kayport Package Exp., Inc.* 885 F.2d 531 (9th Cir. 1989). Furthermore, an amendment that would serve no useful purpose, i.e. be subject to a motion to dismiss, should not be allowed. *Foman v. Davis* 371 U.S. at 182.

This court has previously addressed various claims and contentions asserted against a number of defendants concerning their duties and obligation as lien holders on property owned by the Debtor. Civil Minutes for hearing on Motion to Dismiss, DCN: RKS-1, Dckt. 48. This included addressing a contention by the Debtor that she had transferred her properly, unilaterally by granting relief from the automatic stay, to some of the Defendants. The points and authorities does not address the substance of the contention that some of the Defendants have obligations to the Plaintiff based on an alleged ownership of the Properties. The court will not merely allow the Plaintiff to amend a pleading to restate contentions which, after previous briefing were determined against the Plaintiff.

The proposed Second Amended Complaint seeks the following relief and determination against the Defendants:

A. First Cause of Action for Declaratory Relief

1. City of Chicago

a. That the City of Chicago holds a claim against the Debtor which is secured by real property in Chicago, Illinois (the "Properties"). The Plaintiff seeks a determination that the City of Chicago can enforce that claim notwithstanding the Debtor having obtained a discharge in her Chapter 13 case.

b. That any personal liability which the Plaintiff has for the obligations to the City of Chicago secured by the Properties, such obligations were discharge and the City of Chicago is enjoined pursuant to 11 U.S.C. §§ 1328, 524 and the discharge entered in the Plaintiff's Chapter 13 case.

c. A mandatory injunction (pled as part of the declaratory relief titled First Cause of Action) ordering the City of Chicago to conduct lien sales of the Properties.

2. Fifth Third Bank

a. Fifth Third Bank is liable for the fines, fees, and claims of the City of Chicago on the claim secured by 61st Street Property.

(1) Fifth Third Bank did not maintain or protect the 61st Street Property after obtaining relief from the automatic stay.

(2) Fifth Third Bank recorded a unilateral lien release after holding control over the property for five years after having received relief from the automatic stay.

b. Fifth Third Bank has not held the Plaintiff harmless from the claims of the City of Chicago.

3. Select Portfolio Servicing

a. Select Portfolio Servicing is liable for the fines, fees, and claims of the City of Chicago on the claim secured by 45th Street Property.

(1) Select Portfolio Servicing did not maintain or protect the 45th Street Property after obtaining relief from the automatic stay.

(2) Select Portfolio Servicing recorded a unilateral lien release after holding control over the property for five years after having received relief from the automatic stay.

B. Second Cause of Action - Violation of the Discharge Injunction

1. City of Chicago

a. The claim of the City of Chicago was discharged in the Plaintiff's Chapter 13 case.

b. The Plaintiff surrendered the 5361 S. Princeton Property to the City of Chicago.

c.

2. Fifth Third Bank

a. The claim of Fifth Third Bank was discharged in the Plaintiff's Chapter 13 case.

b. The Plaintiff surrendered the 61st Street Property under the Chapter 13 Plan.

c. Fifth Third Bank continues to report information on the discharged claims to consumer credit reporting agencies.

d. The City of Chicago asserts a claim against the Plaintiff caused by Fifth Third Bank failing to maintain and protect the 61st Street Property.

e. Plaintiff has not been in possession of the 61st Street Property.

f. Fifth Third Bank had a duty to foreclose on the 61st Street Property and to protect said Property.

g. Fifth Third Bank failed to foreclose, and after having tied up the Plaintiff's use of or ability to sell the 61st Street Property for five years, the Bank secretly and

silently released its lien after the completion of the Plaintiff's Chapter 13 Plan.

3. Select Portfolio Servicing

a. The claim of Select Portfolio Servicing was discharged in the Plaintiff's Chapter 13 case.

b. The Plaintiff surrendered the 45th Street Property under the Chapter 13 Plan.

c. Select Portfolio continues to report information on the discharged claims to consumer credit reporting agencies.

d. Select Portfolio asserts a claim against the Plaintiff caused by Fifth Third Bank failing to maintain and protect the 61st Street Property.

e. Plaintiff has not been in possession of the 45th Street Property.

f. Select Portfolio had a duty to foreclose on the 61st Street Property and to protect said Property.

g. Select Portfolio failed to foreclose, and after having tied up the Plaintiff's use of or ability to sell the 61st Street Property for five years, the Bank secretly and silently released its lien after the completion of the Plaintiff's Chapter 13 Plan.

Even assuming that the allegations are true, it appears on the face of the proposed Second Amended Complaint that the pleadings fall short of stating "plausible claims" against most of the remaining Defendants. *Ashcroft v. Iqbal*, ___ 556 U.S. ___, 129 S.Ct. 1937 (2009). While the court does not pre-judge a ruling on a Rule 12(b) motion, the Plaintiff has not offered any authorities to support the contentions that First Third Bank and Select Portfolio Servicing has (1) an obligation to foreclose on the properties securing their respective claims, (2) had a duty to maintain and protect the properties securing their respective claims, (3) have a duty to defend, hold harmless, and indemnify Plaintiff, or (4) have taken any act or action in violation of the discharge injunction. The court has previously address and ruled in connection with a Rule 12(b) motion on the issue of whether a bald assertion that these two defendants had an obligation to foreclose, concluding that the Plaintiff could not show any authority for that contention. No new or different authority has been offered by Plaintiff, and the court will not blindly allow the Plaintiff to circumvent

the court's prior ruling by filing a Second Amended Complaint which is presented on the same unsupported assertions.

The court does not grant the motion to allow the Plaintiff to file a Second Amended Complaint against First Third Bank and Select Portfolio Servicing for violation of the discharge injunction or for declaratory relief.

The Proposed Second Amended Complaint also seeks a declaration of the rights and liabilities of the Plaintiff and the City of Chicago for the obligation which is secured by the Properties. The Plaintiff asserts that the City of Chicago and its agents have attempted to collect from the Plaintiff personally the obligations secured by the Property, with those collection effects made after the Plaintiff received a discharge of those obligations in her Chapter 13 case. Further, that the City of Chicago conducted an administrative hearing after the entry of the discharge, and issued a judgement against the Plaintiff for the discharged obligations.

The Proposed Second Amended Complaint not only seeks a declaration of the rights and liabilities of the Plaintiff and the City of Chicago, but also alleges a plausible claim that the City of Chicago has violated the discharge injunction imposed by Congress for this Plaintiff. The Complaint identifies the following persons for who this violation of the discharge injunction is alleged:

A. City of Chicago

B. Law Offices of Talan & Ktsanes

C. Markoff & Kransy, Attorneys at Law

The Motion is granted and Plaintiff is granted leave to file a Second Amended Complaint for declaratory relief and for violation of the discharge injunction against the City of Chicago, the Law Offices of Talan & Ktsanes, and Markoff & Kransy, Attorneys at Law, and any specific employees, officers, attorneys, associate attorneys, and staff of each of these, against whom it is asserted by the Plaintiff that such individual personally violated the automatic stay.

Practicality of Litigation

The discharge granted in a bankruptcy case "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;..." 11 U.S.C. § 524(a)(2). In a Chapter 13 case, the discharge is of "all debts provided for by the plan or disallowed under section 502 [of Title 11]." 11 U.S.C. § 1328(a).

Though the court does not have current financial information for the Plaintiff, the information in her Chapter 13 cases discloses the following. Bankr. E.D. Cal. 07-27123.

A. The Plaintiff's Monthly Net Income was $3,931.90 from employment with the State of California (on a gross income of $4,742.00). Schedule I, 07-27123 Dckt. 1.

B. The Plaintiff owned a house in Fair Oaks, California with a value of $260,000 which was subject to liens of ($336,000.00). Of these liens, ($79,279.19) secured by a second deed of trust was valued at $0.00 and the subject of a "lien strip."

C. The Plaintiff owned no significant personal property.

At a prior hearing, counsel for the Plaintiff made the statement that the Plaintiff does not have any financial ability to pay any of the City of Chicago secured obligation is all or some portion of it is not subject to the discharge and the discharge injunction. The court also note that the Plaintiff, having filed her Chapter 13 case in 2007, would be eligible for obtaining a discharge in a new Chapter 13 case (11 U.S.C. § 1328(f)(2)) and a new Chapter 7 case filed after September 4, 2013 (11 U.S.C. § 727(a)(9)). While the parties can choose to litigate whatever issues they want, so long as it is in good faith and consistent with their obligations under (1) Federal Rule of Bankruptcy Procedure 9011, (2) the Local Rules of the Bankruptcy Court, and (3) the ethical and statutory obligations of their counsel, this situation causes the court pause. Rather than the creditors with secured claims taking steps to minimize their losses and claims, they appear to have been either petrified by fear from acting, or intentionally put in place a plan to maximize the amount of damages which the City of Chicago could heap on this Plaintiff (irrespective of any ability to pay).

Therefore, based on the liberal pleading standard and the showing of a reasonable possibility of an amended complaint that could survive a motion to dismiss, the court grants the Motion to Amend to the extent of allowing the filing of a second amended complaint asserting claims for declaratory relief and for violation of the discharge injunction as against the City of Chicago and its employees, officers, representative, attorneys, and agents. The Motion is denied as to all other relief requested.

The court continued the hearing as to Defendant City of Chicago and its employees, officers, agents, attorneys and representatives, in order to allow the parties to conduct settlement discussions.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Leave to Amend filed by Debtor-Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that xxxx

5. 09-33870-E-13 GERALD/JEANIE GONZALES — MOTION FOR ENTRY OF DEFAULT JUDGMENT
12-2703 JGD-3 — JUDGMENT
GONZALES V. US BANK NA ET AL — 7-30-13 [18]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant U.S. Bank, N.A., Defendant GMAC Mortgage, LLC, and Defendant Greenpoint Mortgage Funding, Inc. on July 30, 2013. By the court's calculation, 30 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Entry of Default Judgment has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Defendant, 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 motion, 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 motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Application for a Default Judgment. Oral argument may be presented by the parties at the schedule 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Plaintiff Jeanie Gonzales, seeks entry of a default judgment against Defendants U.S. Bank, N.A., as Indenture Trustee of Series 2006 HET and GMAC Mortgage, LLC ("Defendant"), in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced on December 4, 2012. Dckt. 1. Summons was issued by the Clerk of the United States Bankruptcy Court on December 4, 2012. The complaint and summons were properly served on Defendant.

Defendant failed to file a timely answer or response or a request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on February 20, 2013. Dckts. 13, 14.

FACTS

Defendant U.S. Bank, N.A. is the owner of the note and the second deed of trust (Defendant GMAC Mortgage, LLC is the authorized loan servicing agent on the note), recorded against Debtors' residence. On January 7, 2011, Plaintiffs confirmed a plan that valued the second note and deed of trust held by Defendant at $0.00.

Plaintiff obtained a discharge in their bankruptcy case on December 10, 2012. Included in the debts discharged is the claim of Defendant. The Chapter 13 Plan provided for the payment of the value of Defendant's secured claim as determined by the court pursuant to 11 U.S.C. § 506(a). The Debtor have completed their Chapter 13 Plan. Defendant failed to execute a reconveyance after the completion of the Chapter 13 Plan. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extend of Defendant's lien.

ANALYSIS

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and her interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services* (*In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of $0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendants U.S. Bank, N.A., as Indenture Trustee of Series 2006 HET and GMAC Mortgage, LLC and holds that the deed of trust is void.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment for Jeanie Gonzales, Plaintiff, and against U.S. Bank, N.A., Trustee, Defendant, determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by U.S. Bank, N.A., as Indenture Trustee of Series 2006 HET and GMAC Mortgage, LLC against the real property commonly known as 1425 Alberton Circle, Auburn,

California, recorded on March 29, 2006, with the County Recorder for Placer County, California, Document No. DOC-2006-0033602, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Defendants U.S. Bank, N.A., as Indenture Trustee of Series 2006 HET and GMAC Mortgage, LLC has no interest in the real property pursuant to the Deed of Trust.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.

IT IS FURTHERED ORDERED that on or before September 23, 2013, Plaintiff shall file a costs bill and motion for attorneys' fees, if any. The motion for attorneys' fees, if any, shall clearly set forth the contractual or legal basis for an award of attorneys' fees.

6. 11-44878-E-7 12-2573 VLADIMIR/SNEZHANNA SEMCHENKO DLB-13 U.S. TRUSTEE V. BRYANT

MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO CONSOLIDATE LEAD CASE 11-44878 WITH 12-02573 8-12-13 [159]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. No proof of Service was filed. The court is unable to discern whether the parties received proper notice. 14 days' notice is required.

Tentative Ruling: The Motion for Protective Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the 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 motion, 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 motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Protective Order. 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. If the court's tentative ruling becomes its final

ruling, the court will make the following findings of fact and conclusions of law:

Defendant David Bryant failed to file a proof of service with the motion. As such the court is unable to discern whether serve was proper on the interested parties. Furthermore, Defendant failed to file an actual Motion. The document titled "Memorandum of Points and Authorities in Support of Motion for Protective Order" is the only substantive document filed. No motion appears on the docket laying out the grounds for relief.

Even if the court were to look past these fatal deficiencies, there does not appear to be sufficient grounds for a protective order. Defendant's "Motion" mainly provides allegations that the UST is hindering Bryant from discovery and is preventing him from inquiring into any area. Defendant then states that there is an overlap in scope of discovery of matters concerning both the motion and the adversary proceeding and request that the court define the parties duties and responsibilities in each case to avoid confusion. Defendant does not explain how this request is a "protective order" pursuant to Federal Rule of Civil Procedure 26(c).

UST OPPOSITION

The United States Trustee ("UST") opposes the motion on the grounds that this is an attempt to delay reaching a determination of whether he has violated 11 U.S.C. § 110. The UST notes that no motion or proof of service have been filed to date.

The UST argues that no basis has been provided for an protective order. The UST states that Defendant fails to, and cannot, assert that for good cause he needs an order to protect him from annoyance, embarrassment, oppression or undue burden or expense.

The UST also notes that Defendant has waited until the very day his discovery is due to seek a protective order. UST states over a month before this motion was filed they served (1) as set of interrogatories, (2) a request for production of documents and (3) notice of deposition. The UST states that only days prior to being served with these discovery requests, Defendant was directing to be prepared, and himself preparing, pro se documents for at least one client whom he had received fees from. The UST also notes that after being served with the discovery requests, Defendant has taken time to issue subpoenas to the UST, his former employees and prepared for and conducted three depositions of his former employees. UST states Defendant also found time to draft these two motions, instead of responding to the UST's discovery requests.

Additionally, the UST states that Defendant has not attempted to meet and confer with Mr. Massey by telephone. UST states that there was a phone cal lin which Defendant asked for an extension of time to response, but was reminded of the due date for discovery requests.

The Trustee also argues that Defendant has conducted a huge about of discovery in the Semchenko case. The UST argues that Defendant has deposed Ms. Tsiberman three dates and Ms. Power three dates, suggesting he is

annoying, embarrassing, oppressing, and causing undue burden of expense to his former employees, including asking inappropriate questions.

UST suggests that a referee may be appropriate to deal with Mr. Bryant's continuing discovery abuses.

Lastly, UST states that an order for consolidation or combination of matters should be denied as being merely a delay tactic. UST argues that there is no confusion concerning discovery in the matters, as discovery is over for the UST motion for fines.

DISCUSSION

The court agrees with the UST that there is no need to combine the motion and the adversary proceeding. If Defendant is confused about the legal issues and required discovery, he should hire knowledgeable counsel to help him analyze the issues. FN.1.

FN.1. If the court is correct that the "Motion" referenced by Mr. Bryant is the Motion to Disgorge Fees in the Chapter 11 Case, 11-4487 DCN: UST-1, that contested matter is set for evidentiary hearing on September 23, 2013. Discovery closed long ago and there is no coordination or consolidation which would be possible. To the extent that Mr. Bryant it attempting to indirectly conduct discovery in the contested matter after the close of discovery, such is clearly improper.

Furthermore, the court agrees that these motions filed by Defendant appear to be merely delay tactics. Defendant has filed these meritless motions at the very end of the discovery deadline in an attempt to delay litigation on these matters. Defendant had sufficient time to respond to the discovery of the Trustee. The court finds no legal or factual basis to consolidate these cases or for a protective order.

Based on the foregoing, the Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Protective Order filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

7. 11-44878-E-7 VLADIMIR/SNEZHANNA SEMCHENKO DLB-14
12-2573
U.S. TRUSTEE V. BRYANT

MOTION FOR THE APPOINTMENT OF DISCOVERY REFEREE OR SPECIAL MASTER, COMPELLING RESPONSES TO DISCOVERY AND FOR CONSOLIDATION OF ACTIONS
8-15-13 [162]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff Office of the United States Trustee on August 15, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for the Appointment of Discovery Referee or Special Master was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the 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 motion, 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 motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for the Appointment of Discovery Referee or Special Master. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant seeks an order appointing discovery referee, an order compelling further testimony of Stacy Power, Julia Young and Alena Tsiberman at depositions and consolidation of actions. FN.1.

FN.1. The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings,

and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Defendant argues that at Ms. Tsiberman is a key witness and at her deposition on August 6, 2013, she was uncooperative and purposefully obstructive to the proper inquiries of examination propounded by Mr. Bryant. Defendant states Mr. Massey raised objections for her, which is improper, and a discovery referee should be appointed.

Defendant argues that at the depositions of Powers, Young, and Tsiberman, they have been less than forthcoming in their answers and the responses thus far have been totally evasive, non-responsive, based on frivolous objections, manifesting an attitude of arrogant contempt for the judicial process.

Additionally, the Defendant asks that the court clarify the scope of discovery in connection with the main case and the adversary proceeding.

Lastly, the Defendant asks that the court order deponents Powers, Young, and Tsiberman to respond fully to the questions put to them to avoid further delay and obstruction of the search for the truth.

UST OPPOSITION

UST argues that Defendants motion should be denied, or if the court allows additional depositions, a discovery referee, clarifying orders or other solutions, sanctions should be imposed on Defendant, as he fails to ask relevant questions and in bad faith annoys, embarrasses, oppresses and causes undue burden or expense to others.

Trustee argues that Mr. Bryant has subjected Ms. Tsiberman and Ms. Power to depositions on three different days each, and Ms. Young once, now asking that Ms. Tsiberman and Ms. Power come back for their fourth days and Ms. Young back for a second day. The UST argues that depositions of these three individuals would not require multiple appearances if Mr. Bryant asked relevant questions. Any relevant inquiry into whether Mr. Bryant has prepared or directed the preparation of pro se bankruptcy documents for a

fee as alleged in the Complaint, would involve bankruptcy documents. UST argues that in his latest round of depositions, Mr. Bryant went far beyond that inquiry and asked no questions concerning bankruptcy documents. The UST argues that throughout the recent depositions of Ms. Tsiberman, Ms. Power, and Ms. Young, Mr. Bryant asked no questions concerning the preparation bankruptcy documents and if he had relevant questions to ask, he should have already asked them.

UST argues that if the court allows Mr. Bryant more depositions, a referee may be appropriate to deal with Mr. Bryant's continuing discovery abuses. Counsel for the UST recalls that Chief Judge Klein has, several times, suggested a potentially contentious deposition could be conducted in his courtroom. The court agrees with this suggestion.

The UST also argues that Mr. Bryant again does not provide any discovery and, further, attempts to delay the process of reaching a determination of whether he has violated 11 U.S.C. § 110 as to the Semchenkos and of whether he has continued to violate 11 U.S.C. § 110 as to other individuals. Further, the UST states Mr. Bryant did not appear for his own deposition that was scheduled for August 19, 2013.

STACIE POWER OPPOSITION

Stacie Lynn Power, an interested third party, opposes Defendant's motion on the grounds that (1) Defendant has repeatedly abused the discovery process and deposed Power under the guise of this action to obtain information that is unrelated to this case for use in other unrelated matters; (2) Defendant has used the discovery process to harass, intimidate and attempt to humiliate deponent; and (3) Defendant's motion fails on its face because it does not state any property questions that Power refused to answer and simply attempts to compel further deposition testimony.

Power argues that Bryant has used these depositions to elicit information that was either used in later complaints made to the California State Bar or referred to complaints that he already prepared and filed on others' behalf. Power states that all the complaints were found to be frivolous by the State Bar, yet Bryant has used the deposition to make frivolous complaints, that would otherwise not be of record, a matter of record.

Powers also states Bryant asks personal questions that are inappropriate, undoubtedly irrelevant and nothing less than an attempt to harass and humiliate Power. For example, Bryant inquired into Power's driving history (Exhibit A, 120:5) and asks personal questions about a loved one's incarceration (Exhibit A, Pg. 129:17-19).

Lastly, Powers requests a protective order pursuant to Federal Rule of Civil Procedure 26(C)(1)(c) limiting the scope and manner of discovery in order to prevent the continued abuse of the discovery process and the undue annoyance, embarrassment and/or oppression of Power and other deponents.

DISCUSSION

Federal Rule of Civil Procedure 53 states:

(a) Appointment.

(1) *Scope*. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

Here, Defendant has not provided sufficient evidence to show that the appointment of a special master is appropriate. Defendant has not shown grounds pursuant to Federal Rule of Civil Procedure 53, including some exceptional condition or any pretrial matters that cannot be effectively and timely addressed by this court.

Further, Defendant has not sufficiently plead legal authority or factual allegations for an order to compel discovery.

The court has addressed Defendants argument regarding the request to consolidated the cases in the Motion for Protective Order (DCN DLB-13).

Finally, Federal Rule of Civil Procedure 53 has not been incorporated into the Federal Rule of Bankruptcy Procedure for adversary proceedings. Further, Federal Rule of Bankruptcy Procedure 9031 expressly states that Federal Rule of Civil Procedure 53 does not apply to cases under the Bankruptcy Code.

The exclusion of this Rule appears to exist for a very simple, practical reason – Congress created the bankruptcy court so that bankruptcy judges could hear the cases, contested matters, and adversary proceedings. Bankruptcy judges hear only matters arising under the Bankruptcy Code, in the Bankruptcy Case, and related to the bankruptcy case. 28 U.S.C. §§ 1334(a),(b) and 157(b). Bankruptcy judges do not have the responsibility for hearing general federal law cases, criminal cases, diversity cases, family law, and other matters which demand significant time and resources from the district court judges and their counterparts in the California Superior Court.

The court agrees with the Trustee for the recommendation of conducting a potentially contentious deposition in this courtroom, with the court making findings of fact to assist the parties in the process. Though the court is denying the relief requested, the court shall issue an order requiring that all further depositions shall be conducted at the United

States Bankruptcy Court, 501 I Street, Sixth Floor Courtroom 33. Any party desiring to take a deposition shall contact Janet Larson, courtroom deputy for Department E, to confirm the time for the deposition and that the judge for Department E will be in chambers at that date and time. At any time during the deposition when a discovery dispute arises, the judge for Department E will take the bench, hear the discovery dispute on the deposition record, and make a ruling at that time. FN.2.

FN.2. Conducting the deposition in the courtroom with a judge available to immediately hear discovery disputes is not novel or untried in this District. Other judges have done so with great success and much relief to all of the parties.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Appointment of a Referee filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.
>
> **IT IS FURTHER ORDERED** that all depositions taken after August 29, 2013, shall be conducted at the United States Bankruptcy Court, 501 I Street, Sixth Floor Courtroom 33. Any party desiring to take a deposition shall contact Janet Larson, courtroom deputy for Department E, to confirm the time for the deposition and that the judge for Department E will be in chambers at that date and time. At any time during the deposition when a discovery dispute arises, the judge for Department E will take the bench, hear the discovery dispute on the deposition record, and make a ruling at that time.

8. 09-22188-E-13 RICK SILLMAN
12-2023
SILLMAN V. WALKER ET AL

CONTINUED TRIAL RE: AMENDED COMPLAINT 1) TO VACATE COURT'S ORDER DISMISSING DEBTOR'S CASE IN ERROR, AND AFFIRMING THE AUTOMATIC STAY WAS IN EFFECT, ETC. AND 2) FOR RESCISSION, ETC.
3-28-12 [32]

CONT. FROM 6-25-13

PRIOR HEARING

The court has been presented with a Complaint in this Adversary Proceeding commenced and prosecuted by Rick Sillman (Plaintiff-Debtor) who has prosecuted this matter in *pro se*. The two Defendants, John Walker ("Walker") and Lisa Talcott ("Talcott"), collectively referred to as "Defendants," who also prosecuted this matter in pro se until the eve of trial, at which time they engaged counsel. The First Amended Complaint (FAC) has been winnowed down after a motion to dismiss to the claim that both Walker and Talcott violated the automatic stay. FN.1. The Plaintiff-Debtor seeks to assert such claims arising out of the alleged violation of the automatic stay.

FN.1. The Original and First Amended Complaint included a number of non-bankruptcy law claims being asserted by the Plaintiff-Defendant. Original and First Amended Complaint, Dckts. 1 and 32. The court granted in part Defendants' motion to dismiss. Dckt. 61.

Jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223. This Adversary Proceeding is a core matter arising under Title 11, including 11 U.S.C. §§ 362, as provided by 28 U.S.C. § 157(b)(2). The automatic stay arises under the Bankruptcy Code, and all orders and final judgment are to be entered by the bankruptcy judge.

Overview of Events Leading Up to Adversary Proceeding

The events leading up to and the Plaintiff-Debtor's bankruptcy case are good examples of Murphy's Law in legal proceedings – "what can go wrong, will go wrong." The Plaintiff-Debtor commenced a Chapter 13 case on February 9, 2009. Bankr. E.D. Cal. No. 09-22188. Plaintiff-Debtor was represented by counsel and prosecuted his case. On March 9, 2009, Walker, acting in *pro se*, filed a motion for relief from the automatic stay, which consisted of the following words,

> To Whom It May Concern:
>
> I am requesting relief from the Automatic Stay generated by this bankruptcy.

[John Walker signature] 3-3-09

09-22188, Dckt. 12. Walker asserted a secured claim in the Chapter 13 case ("Secured Claim") for which the collateral was real property commonly known as 5 Powtan Trail, Oroville, California ("5 Powtan Property"). No notice of hearing, points and authorities, evidence, Relief From Stay Information Sheet, or other supporting pleadings were filed by Walker. Walker also failed to pay the filing fee for such a motion, which resulted in the Clerk of the Court issuing an order to show cause as to why the court should not dismiss the motion based on Walker having failed to pay the required motion filing fee. *Id.*, Dckt. 14. The hearing on the order to show cause was set for March 31, 2009.

The order to show cause was set for hearing on the court's Chapter 13 dismissal calendar. After the March 31, 2009 hearing the court mistakenly issued an order which purported to dismiss the Plaintiff-Debtor's bankruptcy case, not Walker's motion for relief from the automatic stay. The order dismissing the Plaintiff-Debtor's Chapter 13 case was filed on April 3, 2009. Dckt. 18. The March 31, 2009 hearing, and what transpired during the hearing, has been the subject of dispute between the Plaintiff-Debtor and Defendants. The Plaintiff-Debtor asserts that Walker appeared at the March 31, 2009 hearing, misrepresented to the court that he (Walker) was the Plaintiff-Debtor, and misrepresented that the Plaintiff-Debtor did not oppose dismissing the Chapter 13 case. Walker testifies that he did not attend the March 31, 2009 hearing on the order to show cause for the dismissal of his motion for relief from the stay. The Plaintiff-Debtor and his Chapter 13 bankruptcy attorney both testified that they did not attend the March 31, 2009 hearing because it was merely an order to show cause for the dismissal of the Walker motion for relief from the automatic stay.

Unfortunately, the court reporter who recorded the March 31, 2009 hearing, and her notes, cannot be located and there is no transcript of the hearing to be presented to the court. No Civil Minutes were prepared by the court or filed in the Chapter 13 bankruptcy case. The court's records for the judge who conducted the March 31, 2009 hearing do not provide any information as to who was in attendance at that hearing. The attorney for the Chapter 13 Trustee who was in attendance for the March 31, 2009 hearing testified at trial that he has no recollection or record of who was in attendance at the March 31, 2009 hearing.

On April 15, 2009, twelve days after the court filed the order dismissing the Chapter 13 case, the Plaintiff-Debtor filed a motion to vacate the order dismissing the case. *Id.*, Dckt. 22. On April 15, 2009, the court issued and filed its order vacating the order dismissing the Chapter 13 case. *Id.*, Dckt. 23.

With the order purporting to have dismissed the Plaintiff-Debtor's Chapter 13 bankruptcy case in hand, Walker conducted a non-judicial foreclosure of 5 Powtan Property owned by Plaintiff-Debtor which was property of the bankruptcy estate. The non-judicial foreclosure sale was conducted on April 8, 2009, and the trustee's deed from the foreclosure sale was recorded on April 16, 2009. The proposed Chapter 13 Plan provided for the payment of the Walker Claim as a Class 1 Claim. *Id.* 10. At the time of

the non-judicial foreclosure sale, the plan payments were being made to Walker.

The uncontradicted testimony at trial was that bankruptcy counsel for the Plaintiff-Debtor contacted Walker and the parties agreed to execute a stipulation rescinding the non-judicial foreclosure sale. The Plaintiff-Debtor continued to make his Chapter 13 Plan payments and the Chapter 13 Trustee continued to pay Walker his monthly plan payment for the secured claim in the bankruptcy case. These payments continued through approximately December 2009.

Unfortunately, from April 2009 until the case was dismissed on July 30, 2010, no stipulation was prepared, executed, and filed with the court. The testimony at trial was that counsel for the Plaintiff-Debtor was to prepare the stipulation. No testimony was provided concerning any action taken by Walker to address the erroneous order dismissing the case or having conducted a non-judicial foreclosure sale on an order which Walker knew was issued in error.

On June 26, 2010, the Chapter 13 Trustee filed a motion to dismiss the Plaintiff-Debtor's Chapter 13 case. *Id.*, Motion Dckt. 28. The grounds were that the Plaintiff-Debtor was delinquent $4,668.00 in plan payments through June 2010. With monthly plan payments of $573.00 required, the Plaintiff-Debtor was eight months in default (November 2009 - June 2010). Further, the Plaintiff-Debtor had not filed a motion to confirm his Chapter 13 Plan. The court dismissed the Chapter 13 case by order filed on July 30, 2010, pursuant to the noticed motion of the Chapter 13 Trustee. *Id.*, Dckt. 33. The Chapter 13 bankruptcy case was closed on October 25, 2010. *Id.*, Dckt. 39.

No further action was taken by any persons in the Chapter 13 bankruptcy case until October 27, 2011, when the Plaintiff-Debtor filed a motion to re-open the bankruptcy case. Earlier in 2011, Walker pursued a state court unlawful detainer action against the Plaintiff-Debtor to obtain possession of the 5 Powtan Property based on the trustee's deed he obtained from the April 8, 2009 non-judicial foreclosure sale. The Plaintiff-Debtor did not assert any rights in the bankruptcy court concerning the alleged April 9, 2009 non-judicial foreclosure, but pursued a state court action against the Defendants. FN.2. The Plaintiff-Debtor's state court complaint was ultimately dismissed, though it was not clearly presented in the evidence whether the dismissal constituted an adjudication of the various claims being asserted. Walker ultimately prevailed in his unlawful detainer action and obtained possession of the 5 Powtan Property. In reliance on the trustee's deed from the April 9, 2009 non-judicial foreclosure, Walker has demolished the structure on the 5 Powtan Property and may have purported to execute lot-line adjustments between the 5 Powtan Property and other properties owned by Defendants.

FN.2. California Superior Court, Butte County, action no. 150224 against Walker on May 10, 2010. As set forth in various pleadings filed in the Adversary Proceeding, prior hearings, and referenced at trial, the Plaintiff-Debtor asserts that Defendants have engaged in a list of "legal horribles" which are not related to the Chapter 13 bankruptcy case. These

include concealing defects in the 5 Powtan Property when Walker sold it to the Plaintiff-Debtor, engaging in illegal and improper property transactions, and hiding assets. These appear to have been the subject of the state court litigation and are not claims being adjudicated in this Adversary Proceeding. A copy of the State Court Complaint has been presented as Exhibit Q by Defendants.

In October 2011, apparently after the state court battles were turning unfavorable for the Plaintiff-Debtor, his bankruptcy counsel filed a motion to reopen the Chapter 13 case. *Id.* Dckt. 40. The motion sought to reopen the case to allow the Plaintiff-Debtor to adjudicate whether the non-judicial foreclosure sale was void as a matter of bankruptcy law. The court reopened the Chapter 13 case, with the order filed on November 28, 2011. *Id.* Dckt. 49. The Plaintiff-Debtor filed a second motion requesting a declaration that the April 9, 2009 non-judicial foreclosure sale was void and of the Plaintiff-Debtor's interest in the 5 Powtan Property. That motion was denied without prejudice. *Id.*, Order and Civil Minutes, Dckts. 60, 58. The Plaintiff-Debtor then filed the present Adversary Proceeding.

The undisputed facts in this Adversary Proceeding are set forth in Attachment A to the Pre-Trial Order issued by the court. Dckt. 115. The testimony provided by the witnesses was generally consistent with the agreed undisputed facts.

CONTINUANCE

At the end of the two day trial, the court requested the parties to file supplemental briefing on the specific issue of whether the judgment was void.

Plaintiff-Debtor provides three arguments in his supplemental trial brief: (1) Plaintiff-Debtor made every effort to consider what court was appropriate to pursue his claims against Defendants; (2) Creditor Walker willfully violated the automatic stay, Defendant Talcott helped him violate the stay and Attorney Potter was obligated to act to stop the violation; and (3) Creditor Walker and Defendant Talcott deliberately and willfully set into motion a plan to fraudulently steal real estate in the debtor's bankruptcy by working as a team. Nowhere in the supplemental briefing does Plaintiff-Debtor address the legal authority for the judgment being void, as requested by the court. These three arguments are not relevant to the request made by the court and are merely an attempt to re-argue the issues that were determined at trial.

Defendant provides several cases addressing when an order dismissing a case that is subsequently vacated by the court. However, this legal authority is not relevant to the question of a void judgment. Defendant also attempts to argue that Debtor's due process rights were not violated because he received notice of the Order to Show Cause and associated hearing. However, this Order to Show Cause pertained to the Creditor's Motion for Relief from Stay, not the dismissal of the case, as established at trial. Plaintiff-Debtor did not receive notice of the potential dismissal of his bankruptcy case, rather the dismissal of the Motion for Relief from Stay. Lastly, Defendant states that this case is distinguishable from *In re*

Krueger because Defendants did not commit any "bad acts." However, the court in In re Krueger did not premise the order dismissing the case being void on any "bad acts" on the part of the creditor, rather it was void for lack of due process. The court is not persuaded by the Defendants supplemental briefing on void judgments. FN.3.

FN.3. The court notes that on pages 5-7 of the supplemental trial brief, the Defendants list several cases and statutes. The court is not sure how these citations are applicable to the request of the court. The court will not read, summarize, analyze the listed citations to determine how they are applicable to the Defendants' arguments. The court will not act as an associate or law clerk or provide legal services for Defendants.

STANDARD

Recently, the Supreme Court addressed the issue of whether an order was void when issued in error or merely one in which the error must be appealed.

> A void judgment is a legal nullity. See Black's Law Dictionary 1822 (3d ed. 1933); see also id., at 1709 (9th ed. 2009). Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See Restatement (Second) of Judgments 22 (1980); see generally id., § 12. The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule.
>
> A judgment is not "void," for example, "simply because it is or may have been erroneous." *Hoult v. Hoult*, 57 F.3d 1, 6 (CA1 1995); 12 J. Moore et al., Moore's Federal Practice § 60.44[1][a], pp. 60-150 to 60-151 (3d ed. 2007) (hereinafter Moore's). Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal. *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1229 (CA8 1997); see Moore's § 60.44[1][a], at 60-150. Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. See *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (CA1 1990); Moore's § 60.44[1][a]; 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2862, p. 331 (2d ed. 1995 and Supp. 2009); *cf. Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171-172, 59 S. Ct. 134, 83 L. Ed. 104 (1938). The error United alleges falls in neither category.

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270-271 (2010).

As addressed in *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990),

> A void judgment is from its inception a legal nullity. With this principle in mind, we must consider appellants' argument that the judgment entered was void, and that relief is proper regardless of the time elapsed, because relief from a void judgment has no time limitations. *United States v. Berenguer*, 821 F.2d at 22; *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645, 649 (1st Cir. 1972).)

The Bankruptcy Appellate Panel for the Ninth Circuit addressed this distinction in a void order dismissing the bankruptcy case and an order dismissing the bankruptcy case which was later vacated under Federal Rule of Civil Procedure 60(b) or reversed on appeal. In *Winer v. Krueger (In re Krueger)*, 88 B.R. 238 (B.A.P. 9th Cir. 1988), the Bankruptcy Appellate Panel faced with a situation where the bankruptcy court dismissed the debtor's bankruptcy case at a hearing for which no notice was provided to the debtor. When the order dismissing the case was entered, a creditor proceeded with a non-judicial foreclosure sale. Learning of the dismissal, the debtor sought and obtained from the court (after the non-judicial had occurred) an order vacating the order dismissing the bankruptcy case. The Bankruptcy Appellate Panel first concluded that the order dismissing the case, having been issued from a hearing at which the debtor was not provided notice that the case could be dismissed, was void.

> Moreover, notice is not only a statutory requirement, but a constitutional requirement as well. See *Blumer*, 66 B.R. at 113. The due process clause of the Fifth Amendment requires that due process be provided before property can be taken. Id. See also *In re Gregory*, 705 F.2d 1118, 1122-23 (9th Cir. 1983) (acknowledging that notice of a Chapter 13 confirmation hearing must meet due process standards). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). Here, because the Debtors were not informed that their confirmation hearing had been rescheduled, they clearly were not afforded due process.
>
> An order is void if it is issued by a court in a manner inconsistent with the due process clause of the Fifth Amendment. See, e.g., *Blumer*, 66 B.R. at 113; *In re Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (citing 11 C. Wright and A. Miller, Federal Practice and Procedure, section 2862, page 200, (1973)). Accordingly, in this case

> Judge Elliott properly vacated the dismissal order that had been issued in violation of the Debtor's due process rights.

Id. at 241. The order dismissing the case being void, the bankruptcy case was not dismissed and the automatic stay continued in full force and effect.

> We disagree with [the trial court conclusion that the non-judicial foreclosure sale violated the automatic stay because no order making the automatic stay retroactively effective for the period between the void order dismissing the case and the order vacating the void order]. In our view, because the order dismissing the case was void, the stay was continuously in effect from the date the petition was filed. Therefore, the foreclosure sale was held in violation of the stay. Acts taken in violation of the automatic stay are generally deemed void and without effect. *Kalb v. Feuerstein*, 308 U.S. 433, 443, 60 S. Ct. 343, 348, 84 L. Ed. 370, 376 (1940); *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 816 (9th Cir. 1985); *In re Albany Partners Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). Accordingly, the foreclosure sale should have been set aside on this basis.

Id. at 241-242.

The Ninth Circuit Court of Appeals addressed the effect of the automatic stay when a bankruptcy case has been dismissed without notice. In *Turtle Rock Meadows Homeowners Association v. Slyman (In re Slyman)*, 234 F.3d 1081 (9th Cir. 2000), the court addressed the situation where a bankruptcy case was dismissed based on a debtor's failure to appear at hearings, and then the order dismissing the case was vacated based on the debtor not having notice of the hearings. The bankruptcy court order vacating the dismissal in Slyman also expressly stated that the automatic stay was retroactively given full force and effect through the date of the dismissal order. This rendered a foreclosure sale conducted after the dismissal order and prior to the order vacating the dismissal order void. The Ninth Circuit concluded that because the order dismissing the bankruptcy case was void, the acts taken by the creditor violated the automatic stay and were void. *Id.* at 1087.

That an act taken in violation of the automatic stay is void, not merely voidable, is well established law in the Ninth Circuit.

> In fact, the automatic stay provision is so central to the functioning of the bankruptcy system that this circuit regards judgments obtained in violation of the provision as void rather than merely voidable on the motion of the debtor. See [*In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)]. Courts regularly void state court default judgments against debtors when the judgments are obtained in violation of the automatic stay provision, even where the debtor filed for bankruptcy in the midst of the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861

(7th Cir. 1999); *In re Graves*, 33 F.3d 242, 247 (3d Cir. 1994).

Far Out Productions, Inc. v. Oskar et al., 247 F.3d 986, 995 (9th Cir. 2001). *Schwartz v. United States of America (In re Schwartz)*,954 F.2d 569, 571 (9th Cir. 1992) (Emphasis in original).

As earlier stated by the Ninth Circuit addressed the significance of the automatic stay to bankruptcy proceedings. *Schwartz v. United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992).

> Our decision today clarifies this area of the law by making clear that violations of the automatic stay are void, not voidable. See *In re Williams,* 124 Bankr. 311, 316-18 (Bankr. C.D. Cal. 1991) (recognizing that the Ninth Circuit adheres to the rule that violations of the automatic stay are void and criticizing the BAP decision in this case). . .
>
> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. *It stops all collection efforts, all harassment, and all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added).

Creditors who wish to take action against a debtor or property which is subject to the automatic stay "[h]ave the burden of obtaining relief from the automatic stay." *Id.* at 572. The Ninth Circuit revisited this issue in *40235 Washington Street Corporation v. Lusardi (In re Lusardi)*, 329 F.3d 1076 (9th Cir. 2003), addressing a county tax sale of real property which occurred after a bankruptcy case was filed, with neither the county nor the purchaser with any knowledge of the bankruptcy case. The Ninth Circuit concluded that because the tax sale occurred while the bankruptcy case was pending, the sale was void, and that the debtor, not the purchaser, was the owner of the real property. This ruling finding that the sale was void was issued more than 12 years after the sale had occurred and notwithstanding the county not having refunded the purchase money paid by the buyer at the tax sale.

ANALYSIS

The Plaintiff-Debtor was not afforded the minimum notice he is guaranteed under the Due Process Clause of the United States Constitution. This rendered the April 3, 2009 order dismissing the bankruptcy case void, and of no force and effect in terminating the rights of the Plaintiff-Debtor in the bankruptcy case, including the automatic stay. Walker, then acting on the void order of dismissal, conducted the April 9, 2009 non-judicial foreclosure sale. While not acting malevolently or intending to violate the rights of Plaintiff-Debtor, the non-judicial foreclosure sale was in

violation of the automatic stay. This void non-judicial foreclosure sale did not transfer any interests or rights of the Plaintiff-Debtor in the 5 Powtan Property.

The Plaintiff-Debtor and his counsel acted promptly and obtained an order vacating the order dismissing the case on April 15, 2009. The Plaintiff-Debtor and his counsel again acted promptly in contacting Walker and Walker's counsel, with the parties agreeing to execute a stipulation rescinding the non-judicial foreclosure sale. The parties' agreement to stipulate to a rescission of the non-judicial foreclosure sale was not a necessary precedent to the automatic stay having rendered the non-judicial foreclosure sale void.

While Murphy's Law may of had a significant hand in putting the parties in the situation of there being a void non-judicial foreclosure sale and the agreement to rescind the non-judicial foreclosure sale as of April 2009, the next three years of litigation and dispute are the outcome of intentional, deliberate decisions of both the Plaintiff-Debtor and the Defendants. The Plaintiff-Debtor failed to follow through with a stipulation rescinding the non-judicial foreclosure sale or seeking relief from this court until the commencement of the current litigation in 2011. Instead, the Plaintiff-Debtor took his battle to state court, fighting the non-bankruptcy law issues relating to his purchase of the 5 Powtan Property from Walker.

Though represented by attorneys and having knowledge that the April 3, 2009 order dismissing the Chapter 13 bankruptcy case was in error and had been vacated, Walker did not seek knowledgeable bankruptcy counsel to address both his rights and obligations. The automatic stay is just that, automatic, with no obligation on a debtor to affirmatively enforce the stay. When a creditor has notice of a bankruptcy case, it is the creditor's burden to determine the extent of the automatic stay and seek such relief as is appropriate. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.02; *Carter v. Buskirk (In re Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers' Association (In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) ("Where through an action an individual or entity would exercise control over property of the estate, that party must obtain advance relief from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270-71 (9th Cir. 1990).")

The Plaintiff-Debtor and Defendants present themselves as sympathetic individuals on a personal level, each convinced that the other is out to do him or her wrong. However, on a legal basis, the Plaintiff-Debtor and Defendants have engaged in conduct which has been all but destined to create a multi-jurisdictional, multi-proceeding judicial quagmire. For the Plaintiff-Debtor, the court can understand how an individual driven to file bankruptcy may need to represent himself in legal proceedings. However, the Plaintiff-Debtor and his counsel obtained the agreement of Walker to execute a stipulation rescinding the non-judicial foreclosure sale, but then never followed through with the documentation. Instead of proceeding to enforce his bankruptcy rights (upon which the agreed to stipulation was based), the Plaintiff-Debtor allowed his

bankruptcy case to be dismissed and then launched into the State Court litigation asserting various non-bankruptcy law claims.

The Defendants, having knowledge of the bankruptcy case and that the dismissal was in error, mutely sat by and did nothing to get in place a stipulation addressing the April 9, 2009 non-judicial foreclosure sale which was conducted in violation of the stay. Walker continued to accept the monthly payments on his secured claim, clearly recognizing that the non-judicial foreclosure sale was invalid and that he was still a creditor of the Plaintiff-Debtor. Though Walker engaged counsel to advise him, that counsel did not represent him in the Chapter 13 bankruptcy case. The court does not know what advice was actually given to Walker, but the objective facts show that Walker took no action to address the violation of the automatic stay or determine what the effect of was in conducting a non-judicial foreclosure sale after the issuance of the void order dismissing the Chapter 13 case. Walker cannot plead "ignorance of the law" and ask this court to allow him to violate the automatic stay because he believes that the Plaintiff-Debtor has acted unreasonably with the various claims and contentions which were asserted in the State Court Action and the non-bankruptcy issues which the Plaintiff-Debtor attempted to assert in this Adversary Proceeding.

The burden is on the creditor to act when faced with the automatic stay. Though Walker has known since April 2009 that the Plaintiff-Debtor has asserted that the non-judicial foreclosure sale violated the automatic stay and was void, he has done nothing to address the issue. Rather, like the ostrich, he has chosen to stick his head in the sand and hope that the Plaintiff-Debtor never is able to assert this contention in the bankruptcy court. A creditor may seek relief from the stay for prospective conduct, as well under a limited set of circumstances for prior conduct in violation of the automatic stay. 11 U.S.C. § 362(d) providing for not only terminating, vacating, or modifying the automatic stay, but also annulling the automatic stay. Walker has chosen not take any such action, but merely oppose this Adversary Proceedings, putting all of his eggs in this one basket.

The automatic stay rendered the April 9, 2009 non-judicial foreclosure sale void, and as such the purported trustee's deed to Walker is of no force and effect. The Plaintiff-Debtor was, and is, the owner of the 5 Powtan Property.

CONCLUSION

The court having determined that the non-judicial foreclosure sale was void and that Walker did and has continued to violate the automatic stay, the court will issue a scheduling order for conducting the second phase of this trial – damages for violation of the automatic stay. The damages, as specified by 11 U.S.C. § 362(k), relate to the violation of the stay and not various other non-bankruptcy claims which the Plaintiff-Debtor has sought to assert against the Defendants.

The court shall issue a trial setting order in the following form:

The Court having conducted one day of trial in this Adversary Proceeding, the court having determined that the order purporting to dismiss the Chapter 13 case of the Plaintiff was void, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the court shall conduct the final presentation of witnesses and take oral argument on the issue of the damages in this Adversary Proceeding.

IT IS FURTHER ORDERED that no additional direct testimony statements or exhibits may be lodged with the court.

9. 12-34690-E-7 FAUSTO VILLALOBOS — **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
12-2644 DNL-3 — **6-6-13 [63]**
ACEITUNO V. TOWN & COUNTRY AUTO TECH ET AL

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants and Office of the United States Trustee on June 24, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default is granted. No appearance required.

Plaintiff Thomas A. Aceituno, as Trustee for the Bankruptcy Estate of Fausto Madrigal Villalobos, ("Plaintiff") moves the court for a default judgment against Defendants Town & Country Auto Tech, Edward Navarro, and Marco Cuevas("Defendants") in the amount of $33,300 for unpaid rent, together with attorneys fees and costs, amounting to $11,175.50.

Plaintiff contends that Town & Country is a Sacramento automotive repair and services business and that Navarro and Cuevas are each a co-owner of such business. Villalobos scheduled commercial real property located at 3300-3324 Fulton Avenue, Sacramento, California as an 100% interest, subject to notes held in the Fausto M. Villalobos Family Trust. Villalobos, as Trustee of the Fausto M. Villalobos Family Trust, entered into a commercial lease as landlord with tenant Town and Country for the subject property. The lease provided that Town & Country pay $4,500 per month to the Debtor for a period of five years, with Town & Country responsible for all costs incurred in connection with any legal action to recover on the subject property, including rent and attorney's fees.

Plaintiff contends that on October 12, 2012, as a result of Town & Country's on-payment under the lease, Trustee served Town & Country with a Three Day Notice to Pay Rent or Quit. The Trustee then filed this Adversary Proceeding by filing a complaint seeking possession of the subject property, injunctive relief and unpaid rent due to the estate. The court granted the application for temporary restraining order and subsequently a preliminary injunction, enjoining the Defendants from removing any personal property from the subject real property.

Defendants failed to answer or respond to the complaint by the December 9, 2012 deadline. Plaintiff states that on December 3, 2012, Defendants abandoned the subject real property and Trustee obtained possession. The Trustee then sought to abandon the estate's interest in the subject real property, not any claims the estate had against third parties for rent or other obligations due. On May 7, 2013, the clerk entered the Defendant's default.

Plaintiff contends that Defendants breached the lease by failing to pay rent and remaining in possession of the subject real property. The Trustee asserts he is entitled to recover the unpaid rent through the date that the Trustee obtained possession of the real property. Cal. Civ. Code § § 1951.2(a)(1) & 1952.3(a)(1).

ANALYSIS

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,

(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the judgment for the rent obligation under the lease is not entered. The Trustee has shown that he is entitled to recover the unpaid rent through the date that the Trustee obtained possession of the real property. California Civil Code §§ 1951.2(a)(1) provides:

> (a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:
>
> > (1) The worth at the time of award of the unpaid rent which had been earned at the time of termination

California Civil Code § 1952.3(a)(1) provides:

> (a) Except as provided in subdivisions (b) and (c), if the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, then case becomes an ordinary civil action in which:
>
> > (1) the lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1951.2

Here, Plaintiff has shown that Defendants breached the lease pre-petition when they failed to pay rent. Plaintiffs have provided evidence that Defendants then failed to cure the unpaid rent and continued in possession of the subject property without further paying rent. Trustee brought this action against Defendants for the unpaid rent due and owing in the amount of $33,300, for the four months of unpaid post-petition rent due from August 10, 2012 through December 2012, when the Trustee obtained possession of the subject real property.

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendants have not contested any facts in this Adversary Proceeding, nor did they dispute facts presented in the Plaintiff's bankruptcy case. Further, there is no evidence of excusable neglect by the Defendants. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to California Code of Civil Procedure Sections 1032(b) and 1033.5, which provide for attorney fees to the prevailing party, where authorized by contract. Plaintiffs state that the Lease provides that Defendants shall be responsible for all costs, including attorney's fees. Plaintiffs asserts that as a result of the breach of lease they have incurred attorney fees and costs totaling $11,175.50.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiffs direct the court to the Lease, which provides:

> 15. Tenant agrees that if any legal action is necessary to recover the property, collect any amounts due under the Lease, or correct a violation of any term of this lease, Tenant shall be responsible for all costs incurred by Landlord in connection with such action, including any reasonable attorney's fees.

Exhibit A, Dckt. 66.

Plaintiff's counsel has also provided a Declaration providing billing information, showing approximately 49.7 hours working on the adversary proceeding. The hourly rate for attorney fees is $225.00 for 35.0 hours (J. Luke Hendrix), $275 for 2.0 hours (J. Luke Hendrix) and $175 for 12.7 hours (Gabriel P. Herrera). Counsel asserts that $528.00 was expended in costs. The court finds the rate and time charged reasonable. However, Counsel has not provided the breakdown in costs, such as the rate and amount charged for copies, postage, etc. Therefore, the court cannot determine whether or not this amount is reasonable.

The court therefore grants Plaintiff's request for attorney's fees in relation to the Motion for Entry of Default in the amount of $10,647.50.

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendants for the amount of unpaid rent. The court further awards attorney fees in the amount of $10,647.50.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted and Plaintiff, Thomas A. Aceituno, as Trustee for the Bankruptcy Estate of Fausto Madrigal Villalobos, is awarded unpaid rent due and owing under the Lease Agreement, Exhibit A, Dckt. 66, in the amount of $33,300.00 against Defendants Town & Country Auto Tech, Edward Navarro, and Marco Cuevas.
>
> **IT IS FURTHER ORDERED** that the Plaintiffs are granted attorney fees in the amount of $10,647.50.
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order.