

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: TUESDAY
DATE: SEPTEMBER 15, 2015
CALENDAR: 9:00 A.M. CHAPTER 7 CASES

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [15-12911](#)-A-7 RYAN MORAGA AND ANGELA MOTION FOR RELIEF FROM
APN-1 MOYA AUTOMATIC STAY
WELLS FARGO BANK, N.A./MV 8-18-15 [[11](#)]
SCOTT LYONS/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

Final Ruling

Motion: Stay Relief

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

Disposition: Granted

Order: Prepared by moving party

Subject: 2007 Dodge Durango

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

2. [13-11736](#)-A-7 FRANKIE/LUCY VALENZUELA CONTINUED MOTION TO AVOID LIEN
NES-5 OF AQUA FINANCE, INC.
FRANKIE VALENZUELA/MV 3-11-15 [[58](#)]
NEIL SCHWARTZ/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption

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

Disposition: Granted

Order: Prepared by moving party

The court previously entered the default of the respondent for failing to appear, oppose and otherwise defend in this matter. The hearing was continued to determine the effect of a related lien avoidance motion that was contested. That other motion has been resolved by stipulation which will have no impact on this matter given the lack of an agreed valuation of the property.

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such

lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of - (i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

3. [14-14370](#)-A-7 DAVID/DONNA SILER MOTION FOR COMPENSATION FOR
JES-3 LONDON PROPERTIES, LTD.,
JAMES SALVEN/MV REALTOR(S)
8-12-15 [[47](#)]
F. GIST/Atty. for dbt.

Tentative Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

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

Disposition: Approved in part, denied in part

Order: Civil minute order

COMPENSATION AND EXPENSES

Although the court finds that the compensation and expenses sought are reasonable, the court cannot approve compensation for Amy Strausser, but only London Properties, Ltd. The employment order makes no mention of Amy Strausser, and although the employment application does mention Strausser, it is ambiguous about whether she is employed, and is fairly read as requesting employment of only the broker, London Properties, Ltd. Thus, the court will approve the application in part to allow compensation for London Properties, Ltd.

NONCOMPLIANCE WITH RULE 9013

The application does not clearly state the relief sought. The application merely states that the "[e]mployment agreement called for a payment of \$400" but does not unequivocally state how much is requested at this time. The court infers that \$400 is requested but in the future, the court may not make such inferences in movant's favor. See Fed. R. Bankr. P. 9013.

CIVIL MINUTE ORDER

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

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

The trustee, on behalf of London Properties, Ltd., has filed an application for allowance of final compensation and reimbursement of expenses. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved in part on a final basis. The court allows final compensation for London Properties, Ltd. in the amount of \$400 and reimbursement of expenses in the amount of \$0.00. The application is disapproved in part as to compensation for Amy Strausser and payment of such compensation from the estate may not be made payable directly to Strausser.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

4. [15-13074](#)-A-7 JOSE GALINDO MOTION FOR DENIAL OF DISCHARGE
UST-1 OF DEBTOR UNDER 11 U.S.C.
TRACY DAVIS/MV SECTION 727(A)
8-12-15 [[14](#)]

TERRI DIDION/Atty. for mv.
DISMISSED

Final Ruling

The case dismissed, the matter is dropped from calendar as moot.

5. [15-10292](#)-A-7 DONALD LEMLEY MOTION FOR COMPENSATION FOR
JES-2 JAMES E. SALVEN, ACCOUNTANT(S)
JAMES SALVEN/MV 8-14-15 [[29](#)]
THOMAS ARMSTRONG/Atty. for dbt.

Tentative Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

PROCEDURAL PROBLEMS

The notice of hearing was not transmitted to all parties in interest and creditors appearing on the court's mailing matrix. However, the final application and supporting declaration was transmitted to the court's mailing matrix. Accordingly, all creditors and parties in interest have received notice of this matter and the relief sought and the identity of the applicant to be paid compensation and reimbursement.

But because the notice was not sent to the court's matrix, potential respondents received no information about whether and when to oppose the application. See LBR 9014-1(d)(4). The court will treat the matter as having been noticed under LBR 9014-1(f)(2) and permit oral opposition at the hearing despite the lack of any written opposition.

COMPENSATION AND EXPENSES

In this Chapter 7 case, James E. Salven, accountant for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$1075.00 and reimbursement of expenses in the amount of \$151.58.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

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

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

James E. Salven's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$1075.00 and reimbursement of expenses in the amount of \$151.58.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

6. [15-11394](#)-A-7 CARLOS GONZALEZ AND KARLA MOTION TO REDEEM AND/OR MOTION
MAR-2 GOMEZ-DIAZ TO BORROW , MOTION FOR
CARLOS GONZALEZ/MV COMPENSATION BY THE LAW OFFICE
OF RIVERA LAW CORPORATION
DEBTORS ATTORNEY(S)
8-7-15 [[17](#)]

MICHAEL RIVERA/Atty. for dbt.

Tentative Ruling

Motion: Redeem, Borrow and Compensate Debtor's Counsel

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

Disposition: Denied without prejudice

Order: Civil minute order

Debtors Carlos Gonzalez and Karla Gomez-Diaz move to Redeem a 2010 Volkswagen Jetta Sedan from Wells Fargo Bank, to borrow money from Pizm Financial Company, LLC to do so and to pay debtor's counsel Michael Riveera \$600 in fees for the redemption. The motion will be denied.

DISCUSSION

Section 722

Title 11 of the United States Code § 722 provides, "An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption."

Summarized, the statute has three elements: (1) the property to be redeemed must be tangible personal property intended primarily for personal, family or household use; (2) the underlying debt must be dischargeable consumer debt; and (3) the property that secures that debt must have been exempted under § 522 or abandoned under § 554 of the Bankruptcy Code.

An order moving to redeem collateral may establish these elements either by declaration, LBR 9014-1(d) (7) (admissible evidence) or by application of the default rules, Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). In this case, the movant has not made a prima facie case for relief under either method. The only supporting declaration is that of Michael A. Rivera, debtor's counsel. Rivera lacks personal knowledge. Fed. R. Evid. 601-602. Beyond that, Rivera's declaration does not establish the prima facie elements for relief under § 722.

Nor has the movant shown entitlement to relief by default. Fed. R. Bankr. P. 9014(c). To be clear, the lack of opposition—as is the case here—does not entitle a party to relief. Rather, the default of the respondent allows the court to accept well plead facts contained in the complaint, or in this case motion, as true. As one commentator noted, "Factual allegations of complaint deemed admitted: Upon default, the factual allegations of the complaint, except those

relating to the amount of damages, will be taken as true. [*TeleVideo Systems, Inc. v. Heidenthal* (9th Cir. 1987) 826 F2d 915, 917; *Domanus v. Lewicki* (7th Cir. 2014) 742 F3d 290, 2303 Only "well-pleaded" allegations admitted: "The defendant, by his default, admits the plaintiff's well-pleaded allegations of facts, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established." [*Nishimatsu Construction Co., Ltd. v. Houston Nat'l Bank* (5th Cir. 1975) 515 F2d 1200, 1206 (emphasis added); and see *Danning v. Lavine* (9th Cir. 1978) 572 F2d 1386, 1388 ; *Cotton v. Massachusetts Mut. Life Ins. Co.* (11th Cir. 2005) 402 F3d 1267, 1278—but not facts not well-pleaded or conclusions of law]."

Tashima & Wagstaff, *California Practice Guide: Federal Civil Procedure Before Trial*, Defaults, Entry of Default 6:46 (Rutter Group 2015).

The simple point is that the court may—but is not obligated to—accept well-pleaded facts as true and, if those facts support entitlement to relief, may rule in favor of the moving party on that basis. But the court need not accept mere conclusions. In this case, the motion alleges conclusions, not facts. See, Motion ¶¶ 1, 2, filed August 7, 2015, ECF # 17. For these reasons, the motion will be denied.

Revised Guidelines for Preparation of Documents

In the Bankruptcy Court for the Eastern District of California each component part of a motion must be filed as a separate document.

"Filing of Separate Documents. Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for Preparation of Documents III(A), EDC Form 2-901.

In this case, the motion, notice, declarations, exhibits were filed as but a single document. See Motion, filed August 7, 2015, ECF # 17. This does not comply with the Revised Guidelines for Preparation of Documents. Future submissions by counsel shall comply with applicable local rules and guidelines.

CIVIL MINUTE ORDER

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

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

Carlos Gonzalez and Karla Gomez-Diaz motion to redeem, borrow and pay has been presented to the court and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is denied without prejudice.

7. [14-14995](#)-A-7 PAUL/CARRIE ESTES MOTION FOR COMPENSATION FOR
JES-4 ROBERT CASEY, REALTOR(S)
JAMES SALVEN/MV 8-12-15 [[37](#)]
MARK ZIMMERMAN/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

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

Disposition: Denied without prejudice

Order: Civil minute order

The court cannot tell from the application when the work was performed. The court cannot determine whether the work was authorized at the time it was performed or whether it had not yet been authorized. The application must be clear about precisely when compensable work was performed.

8. [14-13796](#)-A-7 EDGAR SALAZAR MOTION TO SELL
JES-3 7-29-15 [[49](#)]
JAMES SALVEN/MV
ROSALINA NUNEZ/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

Tentative Ruling

Motion: Sell Property

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

Disposition: Denied without prejudice

Order: Civil minute order

Property: 3180 Birch Dr., Firebaugh, CA

Buyer: Debtor

Sale Price: \$155,000 (\$7000 cash plus \$9445 exemption credit plus the amount of \$138,555 of debt secured by a lien to which the sale is made subject)

Sale Type: Private sale subject to overbid opportunity

NOTICE OF HEARING

The notice of a proposed private sale should contain all material terms and conditions of the sale. See Fed. R. Bankr. P. 2002(c)(1) (requiring the terms and conditions of any private sale be included in the notice of hearing); see also LBR 9014-1(d)(4). The notice of hearing, the document that was sent to all creditors and parties appearing on the court's mailing matrix, does not sufficiently set forth the material terms of the sale.

In particular, the notice states that the sale price is \$7000 cash. In fact, the sale is made subject to liens and encumbrances, including a lien of \$138,555. Such a term of sale is an integral component of the price term. The property would not be sold for \$7000 if such lien did not exist against the property or the sale were not made subject to such lien. In addition, to clarify the price term, the fair market

value of the property should be provided in the notice. The same is true for any exemption credit that reduces the cash price paid by a debtor (where the estate simply avoids payment of the exemption by offsetting a portion of the price owed by the debtor equal to the value of the exemption), and where a party in interest would have to include such amount in the purchase price to bid effectively.

RELIEF SOUGHT

The motion also has included a nominee that is unnamed in the prayer for relief. The court will not authorize sales to undisclosed nominees as a buyer. Such language should be removed from future sale motions and any orders granting them.

CIVIL MINUTE ORDER

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

Trustee James Salven's motion to sell real property has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

9. [14-13796](#)-A-7 EDGAR SALAZAR AMENDED MOTION FOR COMPENSATION
JES-4 FOR ROBERT CASEY, REALTOR(S)
JAMES SALVEN/MV 8-12-15 [[59](#)]
ROSALINA NUNEZ/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

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

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

In this Chapter 7 case, trustee James Salven on behalf of applicant and realtor Robert Casey, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$400.00 and reimbursement of expenses in the amount of \$0.00.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee,

examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

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

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

Robert Casey's application (filed on his behalf by James Salven, trustee) for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$400.00 and reimbursement of expenses in the amount of \$0.00.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.