UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 16, 2013 at 10:00 a.m.

1.	12-30911-A-11	VILLAGE CONCEPTS, INC.	MOTION TO
	13-2212	PP-1	DISMISS AND FOR MANDATORY AND
	FLEMMER V. NEWELL ET AL		PERMISSIVE ABSTENTION
			8-6-13 [11]

Tentative Ruling: The motion will be denied.

The defendants in this proceeding, Brian R. Katz, as trustee for the Harold O. Newell Trust, and Zandee Newell and Marianne Newell, in their individual capacities, ask the court to dismiss the claims in this proceeding, contending that the plaintiff, David Flemmer, as the chapter 11 trustee in the underlying chapter 11 bankruptcy case, does not have standing to prosecute the subject claims because the claims were assigned by debtor Village Concepts, Inc. to the debtor's principals and the principals have pending usury claims against the defendants in state court. In the alternative, the defendants are asking the court to abstain from adjudicating the claims.

The plaintiff opposes the motion, contending that the assignment of the claims involved only the usury interest claim, while the other two avoidance claims were not assigned by the debtor. Also, the plaintiff says that the assignment is void as it took place post-petition, outside the debtor's ordinary course of business and without court approval.

Rule 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012(b), permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

Although a court must take all factual allegations in the complaint as true, the court is not bound to accept as true legal conclusions couched as factual allegations. Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss under Rule 12(b)(6). Caviness at 812 (quoting Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)).

Dismissal for lack of standing is proper under Rule 12(b)(6). Harris v. Amgen, Inc., 573 F.3d 728, 732 n.3 (9th Cir. 2009).

28 U.S.C. § 1334(c)(2) provides that this court "shall" abstain from hearing a proceeding based on state law claims, "related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section," if "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." Williams v. Shell Oil Co., 169 B.R. 684, 688, 690-91 (S.D. Cal. 1994). This is mandatory abstention.

"Mandatory abstention requires a finding of the following elements: (1) a timely motion; (2) a purely state law question; (3) a non-core proceeding that is merely a proceeding related to a bankruptcy case; (4) no basis for federal jurisdiction apart from the bankruptcy case; (5) a pending action in state court; (6) the state court action can be timely adjudicated; (7) appropriate jurisdiction exists in the state forum."

Schulman v. California State Water Resources Control Board (In re Lazar), 200 B.R. 358, 370 (Bankr. C.D. Cal. 1996).

28 U.S.C. § 1334(c)(1) provides that "[n]othing 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." This is discretionary abstention.

In the Ninth Circuit, the factors that a court must consider when deciding whether to apply discretionary abstention include: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties. Christensen v. Tucson Estates, Inc. (In re Tuscon Estate, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990).

Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

The facts giving rise to this dispute are as follows. The debtor filed the underlying bankruptcy case on June 8, 2012. In September 2012, the defendants sued the debtor's principals, Mark and Nancy Weiner, in state court. The Weiners had personally guaranteed a $550,000 note executed by the debtor. In that litigation, the Weiners countered with usury interest claims. In January 2013, the Weiners started a second lawsuit in state court, against the defendants, asserting a usury interest claim on a $50,000 note executed by the

debtor. In June and July 2013, after the defendants challenged the Weiners' standing to assert the usury interest claims, the Weiners revealed that the debtor had assigned its usury interest claims against the defendants to the Weiners on April 17, 2013. This court appointed a chapter 11 trustee in the debtor's bankruptcy case on April 24, 2013. The hearing on the motion to appoint a trustee was held on April 19, 2013, two days after the debtor assigned the usury interest claims to the Weiners. See Dockets 130 & 131. The plaintiff initiated the instant adversary proceeding on June 26, 2013, asserting three claims against the defendants, one claim for usury interest and two avoidance claims pursuant to 11 U.S.C. §§ 544(b), 548(a)(1)(A), 550 and Cal. Civ. Code § 3439.05.

Although the motion asks for dismissal of the entire action, this aspect of the motion actually concerns only the usury interest claim. It says nothing about the avoidance claims. And, the motion offers no evidence that the debtor assigned the avoidance claims to the Weiners. Hence, the standing argument makes no sense as to the avoidance claims. The motion has not established any basis for dismissal of the avoidance claims.

The motion has not established any basis for abstention as to the avoidance claims either. The motion does not brief how abstention applies to the avoidance claims. And, while there is a pending state court proceeding, that proceeding does not include any avoidance claims by the debtor's bankruptcy estate, which is still the only party with standing to prosecute such claims. More, the avoidance claims do not involve purely state law questions. They are brought under 11 U.S.C. §§ 544, 548 and 550. Hence, the court recognizes no basis for this court's abstention as to the avoidance claims. The motion will be denied as to the avoidance claims.

Turning solely to the usury interest claim, based on representations by the parties at the last, September 3 hearing on the motion, the Weiners had transferred back to the debtor the usury claim the debtor had assigned to them post-petition. This means that the plaintiff - as the trustee for the debtor's estate - has standing to prosecute the usury claim on behalf of the debtor's bankruptcy estate. Hence, the motion will be denied as to the usury claim as well.

2. 12-30911-A-11 VILLAGE CONCEPTS, INC. — CONTINUED STATUS CONFERENCE
13-2212 — 7-10-13 [7]
FLEMMER V. NEWELL ET AL

Tentative Ruling: None.

3. 12-35330-A-12 BETTE SPAICH — MOTION TO COMPROMISE O.S.T.
BS-10 — 9-3-13 [103]

Tentative Ruling: The motion will be granted.

The debtor seeks approval of a settlement agreement between the estate, on one hand, and John Roth, Standard Holdings, LLC, John Meissner, Michael Roth, Alfred Nevis and Cornelius Farms, LLC, on the other hand.

The settlement had fallen apart due to the failure of Alfred Nevis and Cornelius Farms to execute it. This motion revives the settlement with one added or altered term - Alfred Nevis and Cornelius Farms will have 90 days to perform their obligations under the agreement. With this change in the terms of the settlement, the court will approve the agreement, as previously outlined

in the May 28, 2013 ruling on the debtor's prior motion to compromise.

The debtor says she was the victim of mortgage fraud. Alfred Nevis offered to purchase the debtor's Bloyd Road property. The debtor agreed but did not retain a professional to assist her with the sale. She executed a deed of trust unknowingly encumbering two real properties owned by her, the Bloyd Road property and the Encinal Road property. The debtor never agreed to sell the Encinal Road property.

In executing the deed of trust encumbering the Bloyd Road property, the debtor also subordinated a first priority deed securing a loan held by Tookit Farms, LLC, an entity controlled by the debtor and established to purchase the loan on the Bloyd Road property some years earlier.

The debtor also executed a $600,000 promissory note, secured by the deed of trust, due in one year with interest paid monthly. The loan was made to the debtor by Standard Holdings, LLC, an entity formed by Jeffrey Morgan. Points were paid from the loan proceeds to John Roth ($5,000), Jeffrey Morgan ($3,000), and Scott Speckert ($10,000), a nephew of Otto Speckert, who was a neighbor of the debtor. Although the purported loan broker was John Roth's son, Michael Roth, Michael Roth did not participate in the transaction.

The debtor received none of the loan proceeds.

Mr. Nevis guaranteed the $600,000 note and paid the interest payments on the note for several months. When he stopped paying the interest on account of the note, a notice of default was recorded. The note and deed of trust were assigned to John Roth III (a.k.a. John Roth or John Roth, Jr.). A foreclosure sale was scheduled, but the debtor filed this bankruptcy case prior to consummation of the sale.

The motion recites that under the proposed compromise, "[t]he Deed of Trust will be fully reconveyed as to 2740 Enema Rd., Live Oak, CA and 2653 Bloyd Rd., Live Oak, CA; The Note will be marked paid and returned to Debtor; and Mutual general releases will be exchanged releasing John Roth, Standard Holdings, LLC, John Meissner, Michael Roth, Alfred Nevis and Cornelius Farms, LLC by the Debtor and the estate." Docket 73. As part of the settlement, Alfred Nevis will dismiss the state court action against the debtor and the debtor will dismiss the pending adversary proceeding.

11 U.S.C. § 1203 provides that "[s]ubject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation."

On a motion by a chapter 12 debtor, then, and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The motion will be granted.

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given the extraordinary fraudulent scheme alleged by the debtor, given the anticipated risks, costs and delay of further litigation, given the anticipated collection difficulties against Alfred Nevis and Cornelius Farms, and given that the settlement unwinds the transaction of encumbering the debtor's two properties by the deed of trust, eliminating the debtor's largest secured creditor, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the debtor, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. The court will authorize the debtor to enter into the settlement agreement described above.

4. 12-35330-A-12 BETTE SPAICH — MOTION FOR ORDER COMPELLING DISCOVERY RESPONSES, COMPELLING ATTENDANCE AT DEPOSITION, DEEMING REQUESTS FOR ADMISSION ADMITTED, AND SANCTIONS
BS-11 — 9-9-13 [112]

Tentative Ruling: The hearing on the motion will be continued.

The debtor is seeking discovery sanctions, as well as an order to deem requests for admission admitted and to compel discovery with respect to John Roth, a creditor of the debtor in this proceeding.

As John Roth is a defendant in an adversary proceeding brought by the debtor, Adv. Proc. No. 12-2669, and there is a pending motion for the approval of a global settlement with all defendants in that proceeding, the court will not adjudicate this motion at this time. Rather, the hearing on this motion will be continued, to allow consummation of the settlement agreement among the debtor and her creditors.

5. 08-31231-A-7 LUCY WHITTIER — MOTION FOR SUMMARY JUDGMENT
09-2624 WSS-2 — 6-14-13 [74]
CARROLL V. WHITTIER ET AL

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants, Jennifer Miller and Lucy Whittier (the debtor in the underlying bankruptcy case), move for summary judgment on the three claims by the plaintiff, Michael Carroll, including one fraudulent conveyance claim under Cal. Civ. Code § 3439.04, one 11 U.S.C. § 523(a)(6) claim, and one 11 U.S.C. § 727(a)(2) claim. Ms. Whittier is the mother of Ms. Miller.

While the motion is wholly styled as a summary judgment motion under Fed. R. Civ. P. 56, part of the motion is more akin to a motion for judgment on the pleadings.

Fed. R. Civ. P. 12© provides that "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." The standard for judgment on the pleadings is the same as that of a motion to dismiss. New. Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle

him to relief. Id. The court must construe the complaint, and resolve all doubts, in the light most favorable to the plaintiff. Id. Even though the court must accept all material allegations in the complaint as true, the court need not accept as true conclusory allegations or legal characterizations. Id.

To the extent the motion is seeking summary judgment, summary judgement is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©. The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

The subject complaint contains six causes of action:

(1) a fraudulent conveyance claim against Ms. Miller pursuant to Cal. Civ. Code § 3439 (not specified whether 3439.04 or 3439.05), involving the pre-petition transfer of ownership of two horses from Ms. Whittier to Ms. Miller,

(2) an 11 U.S.C. § 523(a)(2)(A) claim against Ms. Whittier,

(3) an 11 U.S.C. § 523(a)(6) claim against Ms. Whittier,

(4) an 11 U.S.C. § 727(a)(2)(A) claim against Ms. Whittier,

(5) an 11 U.S.C. § 727(a)(2)(B) claim against Ms. Whittier, and

(6) an 11 U.S.C. § 727(a)(4)(A) claim against Ms. Whittier.

First, the court will dismiss the fraudulent conveyance claim against Ms. Whittier. Only the trustee in a chapter 7 case may file and prosecute an avoidance action. A creditor may file and prosecute an avoidance claim only if so agreed by the trustee and permitted by the bankruptcy court. Avalanche Mar., Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029, 1030-31 (9th Cir. 1999).

In this case, the plaintiff is a creditor of the estate and the avoidance action still belongs to the estate. The estate has not abandoned the avoidance claim against Ms. Miller and the trustee has not stipulated to the plaintiff's prosecution of the claim. And, the court has not given permission to the plaintiff to prosecute the claim either. Hence, the plaintiff has no standing to assert an avoidance claim against Ms. Miller. As such, the claim will be dismissed.

Additionally, this claim will be dismissed because the trustee settled the fraudulent conveyance claim against Ms. Miller in connection with her return of the horses to the estate. Also, the trustee has sold the horses for the benefit of the estate. In other words, the trustee previously disposed of the fraudulent conveyance claim already. See Case No. 08-31231, Docket 337.

Second, the court will dismiss the 11 U.S.C. § 523(a)(2)(A) claim against Ms.

Whittier as the complaint does not plead facts upon which relief can be granted under 11 U.S.C. § 523(a)(2)(A).

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff *justifiably* relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")).

These elements are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999). But, only justifiable reliance is required under 11 U.S.C. § 523(a)(2). Justifiable reliance is less demanding than the reasonable reliance required for actual fraud under California law. See Field v. Mans, 516 U.S. 59, 61 (1995).

There are no allegations of actionable misrepresentations in the complaint. The alleged fraud arises from Ms. Whittier's transfer of two horses to her daughter one month before she filed for bankruptcy and on the eve of a substantial arbitration award against her.

And, to the extent the plaintiff may be basing his 11 U.S.C. § 523(a)(2)(A) claim on Ms. Whittier's representations in the bankruptcy petition documents she filed in this case, such representations are not actionable as they could not have induced any reliance on the plaintiff's part. By the time this case was filed, Ms. Whittier had made her intentions of not paying the plaintiff clear.

Moreover, a claim under 11 U.S.C. § 523(a)(2) cannot arise post-petition because the statute applies only to the dischargeability of pre-petition debt. Only pre-petition debt is discharged in a chapter 7 proceeding. Post-petition debt is not discharged.

Also, there are no references in the complaint to a reliance by the plaintiff on anything Ms. Whittier represented to him. In fact, he provided his services to the defendant before the transfer; hence the transfer could not have been relied upon by the plaintiff. The elements of 11 U.S.C. § 523(a)(2)(A) do not fit within the facts described in the complaint.

Third, the court will dismiss the 11 U.S.C. § 523(a)(6) claim against Ms. Whittier as that claim is anchored solely in the pre-petition transfer of ownership of the two horses.

To prevail on his 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001). The term willful means a deliberate or intentional act. Brown v. Brown (In re Brown), 331 B.R. 243, 250 (Bankr. W.D. Va. 2005). Debts arising from intentional, *i.e.*, willful conduct, are not necessarily malicious for purposes of Section 523(a)(6). A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005). Determining the intent aspect of a malicious

injury is a *subjective standard*, focusing on the debtor's state of mind. In re Su, 290 F.3d at 1144-46. The debtor must have the subjective intent to harm or the belief that harm is substantially certain. In re Su, 290 F.3d at 1144.

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The plaintiff cannot show any injury to person or property in the two horses. He did not own them or have any other interest in them. His claim had not even been reduced to judgment.

In addition, the Ninth Circuit has rejected the argument that an interest in a fraudulent conveyance action is sufficient to create an actionable 11 U.S.C. § 523(a)(6) claim. A "claim that [the plaintiff] possesses a property interest in the fraudulent transfer remedies provided by state law does not fit within the definitions of either 'debt' or 'property' for purposes of section 523(a)(6), and runs counter to the long-standing principle that exceptions to dischargeability are to be narrowly construed." Saylor at 221.

The fraudulent conveyance claims and 11 U.S.C. § 523(a) claims will be dismissed.

Finally, this leaves the three claims against Ms. Whittier under 11 U.S.C. § 727. 11 U.S.C. § 727(a)(2)(A) and (B) and (a)(4)(A) provide that:

"(a) The court shall grant the debtor a discharge, unless—

. . .

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

. . .

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account."

The complaint alleges that Ms. Whittier transferred ownership of two of her horses pre-petition to Ms. Miller, with intent to hinder, delay or defraud the plaintiff in his collection efforts; that Ms. Whittier did not physically transfer the horses to Ms. Miller until after she filed her bankruptcy case; and that Ms. Whittier concealed her transfer of the horses in her petition documents. These allegations are sufficient to raise a genuine issue of material fact as to all three claims.

But, even if this were not the case, the court is unable to infer Ms. Whittier's state of mind, knowledge of falsity and/or intent to hinder, delay or defraud from declaration testimony. Those elements of 11 U.S.C. § 727(a)

are established only by circumstantial evidence as there can be no direct evidence of one's state of mind or intent.

Importantly, courts are hesitant to grant summary judgment on issues involving motive or intent because such issues are provable only by circumstantial evidence. See, e.g., Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); see also Maffei v. N. Ins. Co. of New York, 12 F.3d 892, 898 (9th Cir. 1993); Morgan Creek Prods., Inc. v. Franchise Pictures LLC (In re Franchise Pictures LLC), 389 B.R. 131, 144-45 (Bankr. C.D. Cal. 2008).

Assessing circumstantial evidence includes assessing the veracity of witness testimony, especially when factual characterizations are involved. Some of the factual characterizations here include *false* oath, concealed and defraud.

To assess the veracity of witness testimony and adjudicate state of mind and/or intent issues, the court must have the opportunity to observe, listen to and assess the demeanor, appearance, mannerism, and speaking intonation of the witnesses while in live testimony. Declaration testimony denies such opportunity to the court.

The need for live testimony is even more true where, as here, Ms. Whittier has denied the principal characterizations and factual allegations by the plaintiff. Ms. Whittier has denied intent to hinder, delay or defraud in her transferring ownership of the horses, and has denied knowingly and fraudulently making a false oath in failing to disclose the transfer in her bankruptcy schedules. Docket 74 at 10-15. The court cannot determine state of mind, motive or intent on the 11 11 U.S.C. § 727 claims without live testimony. The motion will be denied as to those claims.

6. 08-31231-A-7 LUCY WHITTIER — STATUS CONFERENCE
09-2624 — 9-24-09 [1]
CARROLL V. WHITTIER ET AL

Tentative Ruling: None.

7. 13-22534-A-11 SUPPLY HARDWARE, INC. — MOTION FOR FURTHER USE OF CASH COLLATERAL O.S.T. 9-4-13 [126]
WSS-9

Tentative Ruling: The motion will be granted in part.

The debtor is requesting permission for the use of cash collateral under two new stipulations with the secured creditor, NCB Capital Corporation. The two new stipulations cover use for the periods of July 31 through August 31 and August 31 through September 30, respectively.

The court has approved use of cash collateral under the same terms several times before. However, some of the provisions of the stipulation seem to apply to third parties.

The cash collateral stipulations will be approved subject to the following limitations: (1) they can be binding only on the parties that executed them, the debtor in possession and the creditor, and (2) the court will not allow the use of cash collateral after conversion or dismissal of this case. Otherwise, the two new stipulations are "under the same terms and conditions as the prior stipulation[s]," permitting cash collateral use through July 31, 2013. Docket 126 ¶ 8. The motion will be granted in part.

8. 11-28942-A-11 JAMES/MANUELA NORTON — MOTION TO APPROVE AMENDED DISCLOSURE STATEMENT
MRT-7 — 7-10-13 [254]

Final Ruling: The motion will be dismissed without prejudice because it does not comply with Local Bankruptcy Rule 9014-1(e)(3). When it was filed, it was not accompanied by a separate proof of service. Appending a proof of service to one of the supporting documents (assuming such was done) does not satisfy the local rule. The proof of service must be a separate document so that it will be docketed on the electronic record. This permits anyone examining the docket to determine if service has been accomplished without examining every document filed in support of the matter on calendar.

Notwithstanding the foregoing, the court has been unable to locate a proof of service anywhere with this motion.

The motion will be dismissed also because the notice of hearing requires written opposition to be filed no later than September 1, 2013, in violation of Local Bankruptcy Rule 9014-1(f)(1) (presumably the rule under which this motion was filed), which requires written opposition to be filed 14 days prior to the hearing. See Docket 255 at 2. The hearing for this motion is set for September 16, 2013. 14 days prior to the hearing is September 2, 2013. Because September 2, 2013 was a legal holiday, written oppositions were due August 30, 2013. See Fed. R. Bankr. P. 9006(a)(2)©.

As a final note, the court reminds counsel for the debtor to utilize docket control numbers sequentially.

9. 13-28248-A-11 GLENN BARNEY — MOTION TO DISMISS CASE
DJH-5 — 8-18-13 [61]

Final Ruling: The motion will be denied because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions. This violates Local Bankruptcy Rule 9014-1(d)(6), which provides that "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e)."

10. 12-29757-A-7 RICHARD/DANA TOWNSEND — MOTION TO COMPEL AND FOR ISSUANCE OF AN ORDER TO SHOW CAUSE
12-2449 PCB-2 — 8-30-13 [55]
AQUATECH CORPORATION V. TOWNSEND ET AL

Final Ruling: The motion will be dismissed without prejudice because it was filed, served and set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(2) but in violation of Local Bankruptcy Rule 9014-1(f)(2)(A), which prescribes: "This alternative procedure shall not be used for a motion filed in connection with an adversary proceeding."

11. 07-26077-A-12 JOSIASSEN FARMS INC. — MOTION TO SELL
WW-26 — 8-5-13 [249]

Final Ruling: The hearing on this motion was continued by the parties to November 12, 2013 at 10:00 a.m.

12. 13-28493-A-12 BUCKHORN RANCH, LLC — MOTION TO CONFIRM PLAN
WW-5 — 8-2-13 [40]

Final Ruling: The hearing on this motion has been continued by the parties to September 30, 2013 at 10:00 a.m. Docket 64.

13. 13-28493-A-12 BUCKHORN RANCH, LLC — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEES $25,951, EXP. $1,069.19)
WW-7 — 8-16-13 [48]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the chapter 12 trustee, the U.S. Trustee, and any other party 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 as consent to the granting of the motion. 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 Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Walter & Wilhelm Law Group, attorney for the debtor in possession, has filed its first interim motion for approval of compensation. The order approving the applicant's employment was entered on July 8, 2013. The movant seeks approval and payment of $25,951 in fees and $1,069.19 in expenses, for a total of $27,020.19. The requested compensation is for the period from June 25, 2013 through August 9, 2013. The compensation includes hourly rates of $50, $80, $125, $145, $250, $285, $385 and $435.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The applicant's services included, without limitation: (1) communicating with the debtor to develop strategy about the administration of the estate, (2) preparing petition documents not filed on the petition date, (3) representing the debtor at the meeting of creditors, (4) preparing an objection to a claim, (5) discussing issues, including cash collateral issues, with counsel for the debtor's principal secured creditor, (6) reviewing and addressing a violation of the stay by one of the debtor's creditors, (7) preparing and filing the debtor's chapter 12 plan, and (8) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual, necessary, and beneficial services rendered. The compensation will be approved.

14. 12-23595-A-7 JEFFREY PHILLIPS — MOTION TO DISMISS
13-2068 USA-1 — 8-9-13 [45]
PHILLIPS V. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Tentative Ruling: The motion will be granted in part.

The defendant, the United States Department of Health and Human Services, seeks dismissal of the two student loan nondischargeability claims in the plaintiff's first amended complaint (FAC), pursuant to Fed. R. Civ. P. 12(b)(6), as made applicable here by Fed. R. Bankr. P. 7012(b). One of the claims is under 11 U.S.C. § 523(a)(8) and the other is under 42 U.S.C. § 292f(g).

The plaintiff, Jeffrey Phillips, has filed a response to the motion, acknowledging the deficiencies in the FAC and stating that he has filed a motion for leave to amend the FAC.

The proposed second amended complaint (SAC) eliminates the cause of action brought under 11 U.S.C. § 523(a)(8) and makes changes to the allegations pertaining to the claim under 42 U.S.C. § 292f(g).

Given the plaintiff's response to the motion, acknowledging the deficiencies in the FAC, the court will grant the instant motion, dismissing both claims in the FAC, but with leave for the plaintiff to amend that complaint. The plaintiff shall file the SAC within 14 days of the September 16 hearing for this motion.

The court rejects the United States' assertion that it should not grant leave for the plaintiff to amend the FAC, but rather should make the plaintiff obtain leave to amend the FAC under Fed. R. Civ. P. 15(a)(2). The court is dismissing the entire FAC upon this motion brought by the United States. Such outcome warrants at least one opportunity for the plaintiff to amend his complaint and correct the deficiencies that have led to the dismissal of the FAC. The court notes that the prior amendment to the complaint was for the adding of the real party in interest as a defendant.

15. 12-35623-A-7 RONALD/KIMBERLY SUTTON — MOTION TO CONTINUE TRIAL
12-2590 MWT-6 — 8-30-13 [101]
KOSTECKI, ET AL. V. SUTTON

Tentative Ruling: The motion will be conditionally granted.

One of the plaintiffs, Andrew Kostecki, asks the court to continue the trial in this proceeding for 90 days. Currently, the trial is set for September 26, 2013 at 10:00 a.m. before The Honorable David Russell. Mr. Kostecki's father, Gene Kostecki, the president of the other plaintiff, Alloy Steel North America, Inc., has been hospitalized in Australia due to his diagnosis with a serious illness. Andrew Kostecki asks for 90 days to travel to Australia to "care of [his] father during his treatment, tend to the business [of Alloy Steel] and return back to the United States." Docket 102 at 2.

Counsel for Andrew Kostecki has spoken to counsel for the defendant, Ronald Sutton, and the defendant does not have objection to the continuance, subject to the plaintiffs "not later seek[ing] a lifting of the [a]utomatic [s]tay." Docket 103 at 2.

Given Andrew Kostecki's circumstances, the court is inclined to continue the trial date for 90 days, subject to hearing from the defendant.