

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

October 8, 2015 at 10:30 a.m.

1. **14-29716-E-13** **MICHAEL SCARZELLA** **MOTION TO DISMISS CASE**
MRL-1 **Mikalah R. Liviakis** **9-26-15 [[33](#)]**

No Tentative Ruling: The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(3).

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Bank of New York Mellon, parties requesting special notice, and Office of the United States Trustee on October 1, 2015. By the court's calculation, 7 days' notice was provided.

The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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. At the hearing -----
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The Motion to Dismiss Case is -----.

On September 26, 2015, Michael Scarzella ("Debtor") filed an Ex-Parte Application for Dismissal. Dckt. 33. The Application states:

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"Debtor hereby requests dismissal of the above-referenced Chapter 13 bankruptcy without prejudice, effective immediately."

On September 30, 2015, the court issued an Order Setting Hearing on Motion to Dismiss, setting the Motion to Dismiss at 10:30 a.m. on October 8, 2015. Dckt. 34.

DEBTOR'S DECLARATION

On October 4, 2015, the Debtor filed a Declaration in support of the Application to Dismiss. Dckt. 36.

The Debtor states that he and his non-filing spouse fell behind on payments to their mortgage company because Debtor's wife needed to pay federal and state income taxes that they had fallen behind on. The Debtor states that his wife have been accidentally under withholding and wanted to correct the issue. The Debtor states that they paid approximately \$5,000.00 in income taxes during this time. The Debtor states that he felt it was critical to pay these tax debts because the Debtor's wife works in the financial industry and is at risk of losing her job if her personal financial management is not kept up to date which is also the reason she is not a co-debtor in the instant case. The Debtor also states that they paid \$2,000.00 for dental costs and \$500.00 for tires. The Debtor states that they have adjusted the withholdings for the future to a level where there should not be a delinquency.

The Debtor argues that while the Debtor and his wife believed they had good reasons for being unable to keep up with the original plan commitments (making the mortgage payments directly), the Debtor argues that he felt that there was a large risk that they would be unsuccessful if the Debtor applied for a modification of the plan or if Debtor were to oppose the motion for relief from the automatic stay in the instant case because of the uncertainty of whether a modification would be approved.

The Debtor argues that he and his wife could have done more to anticipate and plan for their personal expenses and so the Debtor did not expect the creditors and trustee to excuse them from the issues the Debtor states they are dealing with.

Based on these facts, the Debtor states that is why he preferred filing a new chapter 13 case. The Debtor states that he met with his attorney to discuss the options and the Debtor found that filing a new case was the best decision to ensure that the Debtor did not lose his home after falling behind in payments. The Debtor argues the filing a new case allows for a new 60 month plan period which will allow more time to establish a catch up payment plan before the mortgage company forecloses.

The Debtor concludes by states that the Debtor's attorney was planning on requesting the dismissal of the instate case prior to filing the new one but Debtor's counsel did not do so.

BACKGROUND

The Debtor commenced this Chapter 13 case on September 30, 2014, and the court confirmed Debtor's Chapter 13 Plan on November 11, 2014. Dckt. 18.

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Under the terms of the Plan, Debtor was to make monthly payments of \$2,169.00 to the creditor holding the claim secured by the Para Drive Property. Dckt. 17. The court granted relief from the automatic stay to Bank of New York Mellon to allow it to foreclose on the Para Drive Property due to what were then \$8,655.56 in post petition defaults (4 months) in payments due to that creditor under the confirmed plan. Dckt. 30.

Debtor commenced another bankruptcy Case, Bankr. E.D. Cal. No. 15-26895 on August 31, 2015 (two weeks before the hearing on the motion for relief in the instant case). Debtor's plan in the second bankruptcy case states that there was \$12,000.00 in arrears (approximately six months of payments) on the claim secured by the Para Drive Property. Case No. 15-26895, Dckt. 5.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

DISCUSSION

In the Motion to Dismiss, the Debtor does not provide an explanation as to where the monies which were to be paid to the creditor as required under the confirmed plan in this case were spent. Debtor does not provide an explanation as to why this case should be dismissed, rather than Debtor seeking to modify the plan in this case. When the motion for relief was filed, there were only four monthly payments in arrears.

Additionally, Debtor does not disclose in the Motion to Dismiss this case is that he has previously filed a subsequent case which has been assigned to a different judge. Finally, Debtor offered no opposition to the Motion for Relief from the Automatic Stay which was filed by Bank of New York Mellon.

While the Debtor's declaration does provide some explanation of where the funds went, namely to the tax delinquency, the dental costs, and new tires,

the Debtor's entire argument appears to be based upon the Debtor's spouse and not the Debtor himself. Additionally, the Debtor's declaration still lacks explanation as to why, instead of objecting to the Motion for Relief or filing a modified plan, filing a new case was the most prudent move. The Debtor states in one line that the decision to file a new case was to allow more time for the Debtor to catch up on mortgage payments prior to the Bank of New York Mellon foreclosing on the Debtor's home. This, however, does not explain the Debtor's failure to actively prosecute the instant case in good faith. The Debtor does not provide any specifics as to why cause exists for the dismissal of the instant cause pursuant to 11 U.S.C. § 1307.

At the hearing, -----

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 to Dismiss filed by Debtor 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 xxxx.