

**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: WEDNESDAY
DATE: NOVEMBER 1, 2017
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [16-12615](#)-A-7 WILLIAM/DEBRA NEWMAN CONTINUED STATUS CONFERENCE RE:
[17-1041](#) COMPLAINT
SALVEN V. UNITED STATES 4-11-17 [[1](#)]
DEPARTMENT OF TREASURY,
RUSSELL REYNOLDS/Atty. for pl.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to January 10, 2018, at 10:00 a.m. If the adversary proceeding has not been dismissed, not later than 14 days prior to the continued status conference the parties will file a joint status report.

2. [17-12272](#)-A-7 LEONARD/SONYA HUTCHINSON CONTINUED STATUS CONFERENCE RE:
[17-1076](#) COMPLAINT
HUTCHINSON ET AL V. THE UNITED STATES OF AMERICA, DEPARTMENT 8-8-17 [[1](#)]
DAVID JENKINS/Atty. for pl.

No Ruling

3. [17-12272](#)-A-7 LEONARD/SONYA HUTCHINSON MOTION TO DISMISS ADVERSARY
[17-1076](#) US-1 PROCEEDING/NOTICE OF REMOVAL
HUTCHINSON ET AL V. THE UNITED STATES OF AMERICA, DEPARTMENT 9-27-17 [[9](#)]
JONATHAN HAUCK/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding Complaint

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

Disposition: Granted

Order: Civil minute order

The United States, Department of the Treasury, Internal Revenue Service ("IRS") moves under Rule 12(b)(6) to dismiss the complaint filed by plaintiffs Leonard E. Hutchinson and Sonia C. Hutchinson's (the "Hutchinsons").

FACTS

Prior to the date the Hutchinsons filed bankruptcy, the IRS perfected a tax lien, including penalties, against their property, including their home. The penalty portion of that lien is \$75,000.00 ("§ 726(a)(4) claim").

The Hutchinsons are Chapter 7 debtors. The trustee overseeing their case is James E. Salven ("Salven"). The Hutchinsons exempted their home in the amount of \$100,000.

When the trustee did not exercise his tax lien avoidance powers under

11 U.S.C. §§ 724(a), 726(a)(4), the Hutchinsons filed a complaint to avoid the penalty component of the tax lien under 11 U.S.C. § 522(h) and preserve that lien to the lesser of the § 726(a)(4) claim or the \$100,000 homestead for their benefit. 11 U.S.C. § 522(i).

The Hutchinson named the IRS and Salven as defendants.

Salven answered and cross-complained asserting his rights under 11 U.S.C. §§ 724(a), 726(a)(4).

The IRS moved to dismiss, arguing that only the trustee has standing to assert § 724(a) rights and § 522(c)(2)(B) allows it to assert its lien against exempt property.

The Hutchinsons apparently believe that if they are successful, the combined effect of §§ 724(a), 726(a)(4), 522(g), 522(h), 522(i) will preclude the IRS from enforcing the penalty component of its lien against their home. The IRS disagrees, and believes that § 522(2)(c)(B) allows it to continue to enforce its lien, including the penalty component, against the Hutchinsons homestead.

LAW

Rule 12(b)(6) motions

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Tax Liens

Chapter 7 trustees may avoid tax liens for fines, penalties or forfeitures. Section 724(a) provides, "The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title." Section 726(a) establishes the distribution priority for various claims in chapter 7 cases. Section 726(a)(4) identifies the type of claim that has the fourth priority as "any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not

compensation for actual pecuniary loss suffered by the holder of such claim[.]”

When the trustee does not do so, debtors acting on their own behalf, not for the estate, may avoid those liens, exempt the property subject to the lien and preserve it for their own benefit. The key is § 522(h), “The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g) (1) of this section if the trustee had avoided such transfer, if--(1) such transfer is avoidable by the trustee under section . . . 724(a) of this title . . . ; and (2) the trustee does not attempt to avoid such transfer.”

Section 522(g) provides, “Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c) (2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--(1) (A) such transfer was not a voluntary transfer of such property by the debtor; and (B) the debtor did not conceal such property; or (2) the debtor could have avoided such transfer under subsection (f) (1) (B) of this section.”

Section 522(i) preserves the lien for a debtor’s benefit. It provides:

(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

11 U.S.C. § 522.

DISCUSSION

First Cause of Action: § 724(a) Lien Avoidance

The Hutchinsons and the IRS debate the Hutchinsons’ standing to pursue avoidance of the IRS’s tax lien. See *Gill v. Kirresh (In re Gill)*, -- B.R.--, 2017 WL 4785350 (B.A.P. 9th Cir. Sept. 26, 2017) (“Taken together, §§ 724(a) and 726(a) (4) allow a chapter 7 trustee (but not the debtor or a third party) to avoid a lien to the extent the lien secures the claim for a penalty, including a tax penalty.”). But see 11 U.S.C. § 522(h) (allowing the debtor to avoid a transfer that the trustee could have avoided under § 724(a) if the trustee does not attempt to avoid such transfer and the debtor could have exempted the property under § 522(g) (1)). But the court need not reach this standing issue to decide this motion.

The threshold issue for a debtor’s assertion of § 724(a) lien avoidance is the trustee’s failure to do so. 11 U.S.C. § 522(h) (2).

Salven has now done so. Cross-claim, September 7, 2017, ECF # 7. As a result, the motion to dismiss will be granted without leave to amend.

Second Cause of Action: § 522(i) Lien Preservation

Debtors rights to preserve an avoided tax lien under § 522(i) arise only if the debtor has avoided such transfer under § 522(h). See 11 U.S.C. § 522(i)(2). In pertinent part, subsection (i)(2) states "**a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor**" (emphases added).

Because it is Salven, the trustee, who now pursues tax-lien avoidance, the debtors cannot avoid the tax lien under § 522(h). As a result, they may not preserve the lien for their benefit under § 522(i)(2).

CIVIL MINUTE ORDER

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

The United States Department of the Treasury, Internal Revenue Service's motion has been presented to the court. Having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted without leave to amend.

4. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1026](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. MCEWEN FAMILY FARMS 3-16-17 [[1](#)]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

5. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1028](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. ADAM & PHILLIP 3-16-17 [[1](#)]
KOLIGIAN
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

6. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1029](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. 3F PROPERTIES 3-16-17 [[1](#)]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

7. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1030](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. DERAN KOLIGIAN 3-16-17 [[1](#)]
FARMS ET AL
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

8. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1031](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. CERVELLI 3-17-17 [[1](#)]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

9. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1032](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. FOGLIO ET AL 3-17-17 [[1](#)]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

10. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1033](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. FOGLIO ET AL 3-17-17 [[1](#)]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

11. [15-11079](#)-A-7 WEST COAST GROWERS, INC. CONTINUED STATUS CONFERENCE RE:
[17-1034](#) A CALIFORNIA CORPORATION COMPLAINT
HAWKINS V. PAUL TOSTE FARMS ET 3-17-17 [[1](#)]
AL
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling