UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 18, 2021 at 10:30 a.m.

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1. 19-24134-E-7 **FELIX/DEBORAH KIARSIS** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
21-2036 **6-1-21 [1]**

FARRIS V. CARUSO ET AL

Plaintiff's Atty: J. Russell Cunningham
Defendant's Atty:
Shanna M. Kaminiski [Troy Caruso; Radium2 Capital, LLC; Boris Yankovich]
Bernard J. Lomberg [Wells Fargo Bank, N.A.]

Adv. Filed: 6/1/21
Reissued Summons: 6/14/21
Answer:
7/28/21 [Troy Caruso; Radium2 Capital, LLC; Boris Yankovich]
7/28/21 [Wells Fargo Bank, N.A.]
Cross-Claim filed: 7/28/21 [by Wells Fargo Bank, N.A.]
Answer: none

Nature of Action:
Recovery of money/property - preference

Notes:
Continued from 10/20/21 to be conducted in conjunction with the hearing on the Motion to Approve Compromise

The Status Conference is xxxxxxx

NOVEMBER 18, 2021 STATUS CONFERENCE

No further pleadings have been filed. At the Status Conference **xxxxxxx**

OCTOBER 20, 2021 STATUS CONFERENCE

On September 30, 2021, Plaintiff-Trustee Nikki Farris and Defendants Boris Yankovich and Wells Fargo Bank, N.A. filed their Joint Status Report and Request for Continuance of Status Conference. Dckt. 26. The Parties report that this matter has been settled and a Motion to Approve Compromise will be filed by the Plaintiff-Trustee in the related Chapter 7 bankruptcy case.

The court continues the Status Conference as requested by the Parties, specially setting it for 10:30 a.m. law and motion calendar on November 18, 2021.

2. **21-23270-E-7** **JOSEPH NOVAK** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Pro Se **10-14-21 [18]**

Tentative Ruling: 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, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*) and Chapter 7 Trustee as stated on the Certificate of Service on October 16, 2021. The court computes that 33 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $32.00 due on September 30, 2021.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $32.00.

The court shall issue an 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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

3. **20-23267-E-7** **SHON/JILL TREANOR** **MOTION TO VACATE AND/OR MOTION TO MODIFY THE ORDER APPROVING SETTLEMENT O.S.T. 11-8-21 [377]**

FF-2

Tentative Ruling: 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)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Trustee's Attorney on November 8, 2021. By the court's calculation, 10 days' notice was provided. 14 days' notice is required.

Under the facts and circumstances of this Motion, the court entered an order shortening the time to the 10 days given. Dckt. 383.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 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 offer 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. At the hearing, **----------**.

The Motion to Vacate is xxxxx, and the order on the Motion for Approval of Compromise (Dckt. 376) is xxxxx.

On November 8, 2021, Gary Ray Fraley ("Movant") filed the instant Motion to Vacate or Modify the Order Approving Settlement Entered on November 4, 2021. Dckt. 377. On October 28, 2021, the parties reached a settlement agreement. *Id.* Movant claims the following:

1. The agreement discussed between Movant and Mr. Cunningham, the Chapter 7 Trustee's Attorney, included the release of all claims of the Bankruptcy Estate. Movant argues this is not in the court's Order.

2. The agreement included "some sort" of agreement that the Treanor's would not make harming statements to anyone regarding the Fraleys.

3. The agreement included releasing the bankruptcy estate's claim against Movant and prohibited any party from "speaking ill" of any other party or pursuing action against them in regards to this case.

4. There has been an attempt to put all issues to rest and obtain appropriate releases, but it has failed.

5. The Order does not provide for releases by the Bankruptcy Estate nor has there been a settlement of the releases. These additional items were put on the record from the podium.

6. Mr. Cunningham has"mutual releases" or "universal settlement agreements" he can use to resolve the matter. Movant will determine the exact wording by the date of the hearing.

7. There is too much ado about the presenting of the forced sales amount and the impropriety of those having been presented to the court.

8. Should the court set aside the order, Movant would match the $20,000.00 sale to the Treanors or slightly increase the amount offered.

9. Movant does not want the trailer. Rather, Movant wants the agreement to include the releases as discussed with Mr. Cunningham and in statements on the record that identified the issue and what Mr. Cunningham stated he would do.

Id. Movant seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 59 and 60. Movant evidences the above matters through hi Declaration in Support of Motion to Vacate. Dckt. 379.

Upon review of the court's order the following is provided:

1. The Claim of Movant is allowed in the amount of $9,400.00.

2. Movant releases any liens against the trailer, and Movant's claim shall be paid as a priority unsecured administrative expense.

3. Debtors Shon and Jill Treanor divide their $100,000.00 homestead exemption equally.

4. Debtor Shon Treanor immediately purchases the Trailer for $20,000.00 from his exemption proceeds.

5. Trustee is authorized to pay the $9,400.00 to Movant prior to payment of other administrative expenses.

Dckt. 376.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 59(e) provides a motion to alter or amend a judgment must be filed no later than twenty-eight (28) days after the entry of judgment.

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

DISCUSSION

As an initial policy matter, the finality of judgments and orders is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

The Motion to Vacate was filed on November 8, 2021, four (4) days after the Order was entered. Movant provides a declaration as evidence for the additional issues he would like the settlement to address. Dckt. 379.

The Court's Civil Minutes from the October 28, 2021 hearing state:

> The Settlement Agreement is amended (as stated on the Record at the October 28, 2021 hearing) as follows:
>
> > A. The Claim of Gary Fraley, Esq. and Fraley and Fraley, PC, is allowed in the amount of $9,400.00.
> >
> > B. Gary Fraley, Esq. and Fraley and Fraley, PC, release any liens he may assert against a trailer, and Mr. Fraley's claim shall be paid as a priority "unsecured administrative expense" pursuant to 11 U.S.C. § 503(b) rather than the Trustee providing other replacement collateral.
> >
> > C. Shon Treanor and Jill Treanor orally stated on the record that they have agreed to divide their $100,000.00 homestead exemption equally between the two of them, giving them each $50,000.00 in exempt sales proceeds from the sale of their residence. The court has relied upon this representation of dividing the homestead exemption in approving the Settlement as amended.
> >
> > D. Shon Treanor immediately purchases the Trailer for $20,000.00, which $20,000.00 will first be paid from his share of the exemption proceeds before they are distributed to him.
> >
> > E. The Trustee is authorized to pay the $9,400.00 to Gary Fraley, Esq. and Fraley and Fraley, PC prior to payment of other administrative expenses.

Civil Minutes, p. 20-21; Dckt. 375.

The Order granting the Motion and approving the Compromise states the above amendments and authorizes the settlement on the terms set forth in the Settlement Agreement, as amended as stated in the Order:

IT IS ORDERED that the Motion for Approval of **Compromise** between Movant and Fraley & Fraley, PC and Gary Fraley (collectively "Settlor") **on the terms and conditions set forth in the Settlement Agreement**, filed as Exhibit A, Dckt. 352, amended as follows in this Order to provide:

Dckt. 376 (emphasis added).

The Settlement Agreement incorporated into the Order, which Settlement Agreement has been filed Exhibit A, Dckt. 352 includes the following provisions:

> 3. Mutual Release. Excepting only the rights and obligations created by this Settlement Agreement, and in consideration of the provisions of this Settlement Agreement, the Releasing Parties hereby release and forever discharge one another and each of their respective members, beneficiaries, representatives, executors, administrators, trusts, attorneys, insurers, predecessors, successors and assignees, individually, and collectively, from any and all actions, causes of action, obligations, costs, expenses, attorney fees, damages, losses, claims, debts, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, including all claims that have been asserted or could be asserted with respect to the Trailer.
>
> 4. Unknown Claims; Waiver of California Civil Code Section 1542. The releases set forth above shall be effective as a bar to all actions, obligations, costs, expenses, attorney fees, damages, losses, claims, liabilities and demands of whatsoever character, nature and kind, known or unknown, suspected or unsuspected. In furtherance of this intention, the Releasing Parties expressly waive all rights and benefits conferred upon them by the provisions of Section 1542 of the California Civil Code, which reads as follows:
>
> > A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.
>
> The Releasing Parties acknowledge that the foregoing waiver of the provisions of Section 1542 of the California Civil Code was separately bargained for. The Releasing Parties expressly agree that the release herein contained shall be given full force and effect in accordance with its express terms and provisions, including those terms and provisions related to any other claims, demands, causes of action herein above specified. The Releasing Parties assume the risk of discovery or understanding of any matter, fact or law which if known or understood would in any respect have affected the releases herein.

Settlement Agreement, Dckt. 352. The Settlement Agreement already contains general releases for the "Releasing Parties" (which does not appear to be a defined term in the Settlement Agreement).

The court does not see in the Civil Minutes a "The Treanors shall not speak ill of the Fraley parties." Additionally, given the tortured history of the relationships between the Treanors and almost every attorney who has crossed their path, it appear that such general language would only foment litigation.

At the hearing, XXXXXXXXXX

Therefore, in light of the foregoing, the Motion is xxxxx, and the order on the Motion for Approval of Compromise (Dckt. 376) is xxxxx.

The court shall issue an 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 Vacate filed by Gary Ray Fraley ("Movant") 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 xxxxx, order on the Motion for Approval of Compromise (Dckt. 376) is xxxxx.

FINAL RULINGS

4.	**18-90029-E-11** **FWP-13**	**JEFFERY ARAMBEL** **Pro Se**	**CONTINUED MOTION TO ABANDON** **4-8-21 [1410]**

Final Ruling: No appearance at the November 18, 2021 hearing is required.

The hearing is further continued to 10:30 a.m. on December 16, 2021.

The Plan Administrator filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary

The court shall issue an 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 Status Conference for this Motion to Abandoned having been scheduled for November 18, 2021, the Plan Administrator having filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary, and upon review of the pleadings, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference is continued to December 16, 2021, to be conducted in the Modesto Division Courthouse.

5. **18-90029-E-11 FWP-18** **JEFFERY ARAMBEL** **Peo Se** **CONTINUED MOTION TO ABANDON 8-26-21 [1513]**

Final Ruling: No appearance at the November 18, 2021 hearing is required.

The hearing on the Motion to Abandon is further continued to 10:30 a.m. on December 16, 2021.

The Plan Administrator filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary

The court shall issue an 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 Status Conference for this Motion to Abandoned having been scheduled for November 18, 2021, the Plan Administrator having filed an updated Status Report on November 16, 2021, reporting that the abandonment cannot be completed at this time and a further continuance was necessary, and upon review of the pleadings, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference is continued to December 16, 2021, to be conducted in the Modesto Division Courthouse.

6. **19-26574-E-7** **SEAN ALMEIDA** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
21-2041 **6-7-21 [1]**

HOPPER V. NAVY FEDERAL CREDIT UNION ET AL

Final Ruling: No appearance at the November 18, 2021 Status Conference is required.

Plaintiff's Atty: J. Russell Cunningham
Defendant's Atty:
Unknown [Kelstin Group, Inc.; Patelco Credit Union; SolarCity Corporation; Tesla, Inc.]
Bryan M. Grundon [Navy Federal Credit Union]

Adv. Filed: 6/7/21 [reissued Summons 7/22/21]
Answer: 7/12/21

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 10/20/21

Joint Status Report & Discovery Plan filed 10/26/21 [Dckt 38]

[DNL-2] Order for Dismissal [re: Tesla, Inc. and Solarcity Corporation] filed 10/27/21 [Dckt 40]

The Plaintiff-Trustee having filed a Motion for Judgment on the Pleadings (Dckt. 43), which is set for hearing in December 2021, **the Status Conference is continued to 2:00 p.m. on January 5, 2022.**

7. **10-90281-E-7** **LORRAINE/GARY ERWIN** **CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT**
21-9005 **Martha Passalaqua** **9-9-21 [23]**

ERWIN ET AL V. U.S. BANK, NATIONAL ASSOCIATION ET AL

Final Ruling: No appearance at the November 18, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor, Plaintiff-Debtor's Bankruptcy Attorney, and Office of the United States Trustee on September 22, 2021. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by the Federal Rules of Civil Procedure 55(b) incorporated into the Federal Rules of Bankruptcy Procedure 7055. Federal Rules of Civil Procedure 55(b) requires notice at least 7 days before the hearing *if* the party against whom default judgment is sought has appeared personally or by a representative. Here, Defendant has failed to appear personally. Therefore, notice is not required for the entry of default judgment.

The Motion for Entry of Default Judgment is denied without prejudice.

Lorraine Dennise Erwin and Gary Richard Erwin ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on September 9, 2021. Dckt. 23. Plaintiff-Debtor seeks an entry of default judgment against U.S. BANK, N.A. ("Defendant") in the instant Adversary Proceeding No. 21-09005.

The instant Adversary Proceeding was commenced on May 24, 2021. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on May 24, 2021. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 13.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant U.S. BANK NA and pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on August 13, 2021. Dckt. 18.

REVIEW OF COMPLAINT

Plaintiff-Debtor filed a complaint for injunctive relief against Defendant. Dckt. 1. The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff-Debtor Lorraine Dennise Erwin and Gary Richard Erwin are joint legal owners of subject property: 1320 Oak Leaf Cir. Oakdale, CA

95361 ("The Property"). *Id.* at ¶ 1, 2.

B. Plaintiff purchased the Property and obtained fee simple title by a grant dated October 27, 2004. *Id.* at ¶ 12.

C. One of the purchase money mortgages held by Defendants U.S. Bank N.A. and U.S. Bancorp, serviced formerly by Defendant Saxon, is a second mortgage to Plaintiff-Debtor to secure the Property. *Id.* at ¶ 13.

D. The obligation is evidenced by a Note and secured by Deed of Trust. *Id.*

E. The Deed of Trust exists on official records of the government as a recorded lien (the Lien) and cloud of title on the Property. *Id.*

F. The Lien presents a current and permanent cloud of title, reducing the value and utility of the Property. *Id.* at ¶ 14.

G. Plaintiff-Debtor's filed a Chapter 13 bankruptcy on January 28, 2010. *Id.* at ¶ 16.

H. Defendant Saxon filed a Proof of Claim on behalf of U.S. Bank N.A. as their registered agent and servicer. *Id.*

I. The Chapter 13 filing was converted to a Chapter 7 case and the debtor was discharged. *Id.*

J. Plaintiff-Debtor received a personal injury settlement to which the court re-opened the bankruptcy proceeding to disburse the new assets to creditors. *Id.*

K. Defendants U.S. Bank N.A. and U.S. Bancorp cannot locate the corporate records and accounts relating to the Property and Lien. *Id.* at ¶ 20.

L. Defendant Saxon went out of business, so communication with them has also been unsuccessful. *Id.* at ¶ 19.

First Claim for Relief - Quiet Title

Plaintiff-Debtor alleges the following for the First Cause of Action:

A. Cause of Action for Quiet Title - Plaintiffs seek quiet title by adverse possession regarding the Lien on the Property as of the date of filing the complaint.

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

A. Plaintiff-Debtor's title in and to the Property be quieted, Plaintiff-Debtors are the owners in fee simple, Defendants have no interest in the property adverse to the Plaintiff-Debtors, including the Lien.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (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.*

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. 3d 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, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that 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. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor'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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion."

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for

"particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

DISCUSSION

The Motion/Points and Authorities/Affidavit running 13 pages in length [Fn.1.] provides extensive discussion on the law relating to entry of default judgments but little on adverse possession as it applies to a lien or the legal right of a person to have a deed of trust for a lien they obtained stripped from the property because they cannot identify the current owner of the obligation.

FN. 1. In addition to the substantive law concerns, Plaintiff does not comply with the Local Bankruptcy Rules requiring that the motion, points and authorities, declaration, exhibits must be filed as separate documents. L.B.R. 9004-2, 9014-1(d).

Possible Deficient Service of Subpoena

Attached to the Complaint is a Summons issued by Jeffrey P. Allsteadt, Clerk of the Bankruptcy Court. Mr. Allsteadt is the Clerk of the Bankruptcy Court for the Northern District of Illinois. https://www.ilnb.uscourts.gov/. The Certificates of Service, Dckts. 6-7, state that "service of this summons" was made by the person signing the Certificate. No copy is attached and it is not clear which Summons, the Northern District of Illinois or the Eastern District of California was served.

Well Pleaded Facts in Complaint

As summarized above, Plaintiff-Debtor purchased the property that is encumbered by the Deed of Trust. Plaintiff-Debtor purchased the property with the obligation secured by the Deed of Trust at issue, with the money obtained through the loan secured by the Deed of Trust.

Without regard to the validity of the Deed of Trust, Plaintiff-Debtor disputes the Deed of Trust because it encumbers his Property to secure the loan Plaintiff-Debtor obtained to purchase the Property.

Plaintiff-Debtor has attempted to locate the owner of the obligation to pay the debt secured by the Deed of Trust, but has been unable to find anyone to take his money.

Plaintiff-Debtor asserts that the court should "quiet title" based on adverse possession of the Property owned by Plaintiff-Debtor.

What these well pleaded facts appear to state is that Plaintiff-Debtor admits he owes the obligation secured by the Deed of Trust, but is unable to pay the undisputed obligation because there is no one to take his money.

Adverse Possession Claim for Relief

The first, and only, cause of action is to seek quiet title through adverse possession. Dckt. 1 at ¶ 23. Both the complaint and the motion, however, fail to present any law on adverse possession.

In 12 Witkin Summary 11th Real Property § 233, the elements that must be met in order for a Plaintiff to obtain title through adverse possession are reviewed, which discussion includes occupying the property in an averse and hostile manner to other persons who may assert right to possession of the property. The lien interests at issue are not possessory interest that conflict with Plaintiff-Debtor, the undisputed owner of the Property, being in possession.

Over the years the California courts have addressed assertions that the Doctrine of Adverse Possession may be used to remove a lien from real property. The California Supreme Court addressed this issue in 1954 in *Laubish v. Roberdo*, 43 Cal.2d 703, 706 (1954), stating (emphasis added):

> In at least two respects Mrs. Cowan failed to establish title by adverse possession. To be considered hostile, the acts relied upon must operate as an invasion of the right of the party against whom they are asserted. (*City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 133 [287 P. 475].) The situation here is analogous to a mortgagor-mortgagee relationship. **A mortgagor or his grantee in possession of mortgaged property** may not set up the statute of limitations against the mortgagee; the possession of the mortgagor **is presumed to be amicable and in subordination to the mortgage**. (*Comstock v. Finn*, 13 Cal.App.2d 151, 157; *Baumgarten v. Mitchell*, 10 Cal.App. 48, 51.)

Recently the District Court of Appeal addressed this issue in *Bailey v. Citibank, N.A.*, 66 Cal. App. 5th 335, 352 - 357 (2021). The Court of Appeal's statement of California law relating to adverse possession and liens includes the following (emphasis added):

> At its most basic level, **the doctrine of adverse possession relates to possessory estates, i.e., it involves possession of property hostile to the corresponding rights of the true owner.** (*Gilardi v. Hallam, supra*, 30 Cal.3d 317, 321; *Sorensen v. Costa, supra*, 32 Cal.2d 453, 460 [statute accrues when owner deprived of possession]; *see Unger v. Mooney* (1883) 63 Cal. 586, 590.) Here, however, **Citibank's interest** in the property until it obtained fee title under the 2018 trustee's deed **was not that of an owner with a right of possession, but merely that of a trust deed beneficiary**. **Therefore**, under the particular facts of this case, prior to Citibank gaining possessory rights at the time of the foreclosure sale and delivery of the trustee's deed in 2018, **plaintiffs' occupation of the property was not hostile to Citibank's rights as a secured lienholder**, and therefore the five-year statute was not running against Citibank under the undisputed facts of this case.
>
> In our discussion of these principles, an elaboration of the nature of the interest held by a trust deed beneficiary, i.e., Citibank's interest prior to foreclosure, is helpful. "'[**D]eeds of trust, except for the passage of title [to the trustee] for the purpose of the trust, are practically and substantially only mortgages with a power of sale … .**'" *(Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460 [261 Cal. Rptr. 587, 777 P.2d 623].)"**In practical effect**, if not in legal parlance, **a deed of trust is a lien on the property**." (*Ibid.*)

It conveys title to the trustee only so far as may be necessary to the execution of the trust for purposes of security. (*Ibid*.) Thus, "[t]he right to possession does not pass to the trustee or the beneficiary under a trust deed in the absence of a special agreement." (*Snyder v. Western Loan & Bldg. Co.* (1934) 1 Cal.2d 697, 701 [37 P.2d 86].) **To summarize, a deed of trust carries none of the incidents of ownership of the property**, other than the trustee's right to convey upon default, and in the absence of a special agreement **conveys no right of possession to the trustee or beneficiary**. (*Ibid.; MacLeod v. Moran* (1908) 153 Cal. 97, 99; *Zolezzi v. Michelis* (1948) 86 Cal.App.2d 827, 830.) Because of their similarities, deeds of trust and mortgages are generally treated as analogous under the law. (*See, e.g., Monterey S.P. Partnership v. W. L. Bangham, Inc., supra*, 49 Cal.3d at pp. 460–461; *Snyder v. Western Loan & Bldg. Co., supra*, 1 Cal.2d at pp. 701–702.) "[T]he substantial rights of the parties should not be altered because of the more or less accidental form which the security takes." (Wilson v. McLaughlin (1937) 20 Cal.App.2d 608, 611 [67 P.2d 710] (Wilson).) **For these reasons, in the context of adverse possession law it is appropriate to apply the cases discussing the status of mortgagees to that of the situation here of a trust deed beneficiary.**

For purposes of a claim of adverse possession, "**[t]o be considered hostile, the acts relied upon must operate as an invasion of the right of the party against whom they are asserted**." (*Laubisch v. Roberdo, supra*, 43 Cal.2d 702, 706, citing *City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105, 133 [287 P. 475].) Because, as here, **a trust deed beneficiary does not have a right of possession**, but stands in substance as a lienholder, **the occupation of the property by a person seeking to acquire title by adverse possession would not be considered hostile to the trust deed beneficiary whose rights under the preexisting trust deed would be unaffected.** (*See Comstock v. Finn* (1936) 13 Cal.App.2d 151, 156–158 [applying this principle in context of a mortgagee].) . . .

Comstock v. Finn, supra, 13 Cal.App.2d 151 (*Comstock*) further exemplifies the application of these principles. . . . In affirming the judgment [denying relief pursuant to adverse possession against a mortgagee], Comstock relied on two distinct rationales. The first was **the general rule that the possession of property by a mortgagor or his or her assignees "'cannot be adverse'" to the mortgagee** unless or until the possessor's conduct has invaded the mortgagee's rights under the mortgage. (*Id.* at p. 156.) Based on this rule, *Comstock* held the trial court had reasonably concluded that the **possession of the property, although open and notorious, was not hostile to the rights of the mortgagee**. (*Id.* at p. 157.)

The second rationale relied on by *Comstock* was based on the recognition that a mortgagee ordinarily does not have a right of possession. (*Comstock, supra,* 13 Cal.App.2d at pp. 156–157.) *Comstock* explained the significance of this fact at length: "A further reason appears why the judgment must be affirmed. **In California a mortgage does not give the mortgagee right of possession of the mortgaged premises** in the absence of a special agreement

to that effect. . . .

. . .

> Based on the entire analysis presented in Comstock, the principle that emerges is that **where a mortgage was recorded prior to the start of the period of alleged adverse possession, the possession of the land will not be deemed hostile or adverse to the rights of the mortgage holder or to a successor thereof**, until such time as a right to possession of the property is acquired under the mortgage through foreclosure and delivery of the trustee's deed. *(Comstock, supra*, 13 Cal.App.2d at pp. 155–158; *see Harvey v. Nurick* (1968) 268 Cal.App.2d 213, 215 [since a mortgage does not give the mortgagee the right of possession in the absence of a special agreement, the adverse possession statute does not begin to run in the possessor's favor "until foreclosure and … the delivery of the trustee's deed"].) *Comstock* also made the following important clarification of the case law: "There are cases holding that a person in possession may gain title by adverse possession, against a mortgagee, where the adverse possession antedated the mortgage. Those cases are not controlling here, as in the instant case the asserted adverse possession started, if at all, subsequent to the date and recordation of the mortgage." (Comstock, supra, 13 Cal.App.2d at p. 158.)

Though not presented by Plaintiff-Debtor, it appears that well established California law provides that adverse possession is not a Doctrine that can be applied to a deed of trust beneficiary or mortgagee prior to that beneficiary or mortgagee having the right to be in possession of the property. [Fn.1.]

FN. 1. As required by the principles enunciated in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, FN. 15 (2010), while a federal judge is dependent on the parties to present the evidence from which factual determinations are to be made, the federal judge should correctly state and apply the law, even if such law is not presented or the requested relief is not opposed:

> In other contexts, we have held that courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit. *See Day v. McDonough*, 547 U.S. 198, 202, 209, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (statute of limitations); *Granberry v. Greer*, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987) (*habeas corpus* petitioner's exhaustion of state remedies). Section 1325(a) does more than codify this principle; it requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.

Lost Note

Additionally, the Plaintiff-Debtor suggests that a valid Note secured by a Deed of Trust, existing on official government records, and properly recorded, can become invalid simply due to the holder not being able to locate the Note. A question then exists as to whether an individual can clear debt because a note is "lost." The Plaintiff-Debtor has again failed to provide any grounds to support such a conclusion. The court declines to conduct legal research on Plaintiff-Debtor's behalf to support their arguments.

Further, in the Complaint no claim is asserted seeking relief based on a "Lost Note."

Movant has not provided any legal grounds for relief requested in the Complaint.

Plaintiff-Debtor's counsel could not obtain a copy of the tentative decision before the hearing and requested a continuance. The court continues the hearing and affords counsel the opportunity to file supplemental pleadings addressing issues raided in the Tentative Ruling (which is stated above).

AMENDED AFFIDAVIT

On November 4, 2021, Jesus Xavier Delgado filed an Amended Affidavit of History of Attempted Service with the Court, Dckt. 33. Mr. Delgado is employed in the City of Los Angeles, County of Los Angeles, State of California. The Affidavit states on May 25, 2021, Mr. Delgado served U.S. Bank, National Association by leaving the process with an agent of defendant, Gabriel Sanchez of CT Corporation located, then, at 818 W. 7th Street, Suite 930, Los Angeles, CA 90017. The process referred to herein was service of the precise seven (7) documents listed Exhibits A-G hereto.

On May 25, 2021, Mr. Delgado served U.S. Bancorp by leaving the process with an agent of defendant, Gabriela Sanchez of CT Corporation located, then, at 818 W. 7th Street, Suite 930, Los Angeles, CA 90017. The process referred to herein was service of the precise seven (7) documents listed Exhibits A-G hereto.

On May 25, 2021, Mr. Delgado served Saxon Mortgage Services, Inc., by sending the process to the defendant through regular, first-class United States mail, postage fully pre-paid and addressed to 4700 Mercantile Dr., Fort Worth, TX 76137. The process referred to herein was service of the precise seven (7) documents listed Exhibits A-G hereto.

On June 3, 2021, Mr. Delgado received a letter from CT Corporation which stated that they were no longer the registered agent for service of process for U.S. Bank, National Association.

On June 11, 2021, Mr. Delgado attempted second service of U.S. Bank, National Association by sending the process to the defendant through Certified United States Mail with return receipt requested, addressed to 425 Walnut Street, Floor 14, Cincinnati, OH 45202.

On June 23, 2021, Mr. Delgado received a stamped and certified Domestic Return Receipt, associated with the 2nd service attempt of U.S. Bank, National Association, which listed Thurlin Roberts as an Agent of the corporation who received the process on June 18, 2021.

On June 28, 2021, Mr. Delgado served U.S. Bancorp via their Registered Agent CT Corporation, with document titled "Affidavit in Support of Request to Enter Default Against Defendant U.S. Bancorp."

On July 12, 2021, Mr. Delgado received the original service attempt of Saxon Mortgage Services, Inc., back in office with notice of inability to forward to listed defendant, Saxon Mortgage, at the listed address, 1270 Northland Drive, Suite 200, Mendota Heights, Minnesota 55120.

EXHIBITS TO AMENDED AFFIDAVIT

All Exhibits were filed separately on November 4, 2021. Dckt. 34-40.

Exhibit A, Dckt. 34 - Adversary Cover Sheet indicating the Plaintiffs as Lorraine Dennise Erwin and Gary Richard Erwin, with the Defendants as U.S. Bank, National Association; U.S. Bancorp; and Saxon Mortgage Services, Inc. Page 2 indicates the Bankruptcy Case in Which this Adversary Proceeding Arises.

Exhibit B, Dckt. 35 - Civil Minutes Order for the Status Conference regarding the Motion/Application for Payment of Unclaimed Funds in the Amount of $47,805.58, Filed by Debtor Lorraine Dennise Erwin on May 20, 2021 at 2:00 p.m.

Exhibit C, Dckt. 36 - Civil Minutes Order for the Continued Order to Show Cause regarding the unclaimed funds in the amount of $47,805.58 on May 20, 2021 at 2:00 p.m.

Exhibit D, Dckt. 37 - Notice of Availability of Bankruptcy Dispute Resolution Program dated May 24, 2021 from the Clerk of the Court, Wayne Blackwelder.

Exhibit E, Dckt. 38 - Order to Confer on Initial Disclosures and Setting Deadlines dated May 24, 2021, from the Clerk of the Court, Wayne Blackwelder.

Exhibit F, Dckt. 39 - Debtors' Summons in an Adversary Proceeding to U.S. Bank, NA; U.S. Bancorp; and Saxon Mortgage Services, issued by Jeffrey P. Allsteadt, Clerk of the Bankruptcy Court. The date of issuance is unknown.

Exhibit G, Dckt. 40 - Duplicate of Exhibit F, Debtors' Summons in an Adversary Proceeding to U.S. Bank, NA; U.S. Bancorp; and Saxon Mortgage Services, issued by Jeffrey P. Allsteadt, Clerk of the Bankruptcy Court. The date of issuance is unknown.

SUPPLEMENTAL BRIEF

Plaintiff-Debtor filed a Supplemental Brief on November 8, 2021. Dckt. 41. In it, Plaintiff-Debtor candidly addresses some of the challenges and unique situation concerning the Property and this lien.

In it, Plaintiff-Debtor accepts the denial of this Motion without prejudice.

Plaintiff-Debtor requests the court continue the Status Conference for 60 days while they conduct further investigation. The court concurs that under these facts and circumstances that such a continuance of the Status Conference is warranted.

In conducting their further investigation, in additional to this Adversary Proceeding, Federal Rule of Bankruptcy Procedure 2004 provides for discovery concerning claims (for which a purported lien may provide security) and property of the debtor and bankruptcy estate.

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 Lorraine Dennise Erwin and Gary Richard Erwin ("Plaintiff-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 hearing on the Motion for Entry of Default Judgment is denied without prejudice.

8. **10-90281-E-7** **LORRAINE/GARY ERWIN** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
21-9005 **5-24-21 [1]**

ERWIN ET AL V. U.S. BANK, NATIONAL ASSOCIATION ET AL

Final Ruling: No appearance at the November 18, 2021 Status Conference is required.

Plaintiff's Atty: Darren Marcus Salvin
Defendant's Atty: unknown

Adv. Filed: 5/24/21
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 10/21/21 [specially set on Sacramento Division Calendar].

Amended Affidavit of History of Attempted Service filed 11/4/21 [Dckt 33]

Exhibits filed 11/4/21 [Dckts 34 - 40]

Supplemental Brief on Tentative Ruling re Motion for Entry of Default Judgment Against U.S. Bank, N.A. filed 11/8/21 [Dckt 41]

Pursuant to the Plaintiff-Debtor's request for time to conduct further investigation and discovery, and the unique facts and circumstances, **the Status Conference is continued to 2:00 p.m. on February 9, 2022.**