

**UNITED STATES BANKRUPTCY COURT
Eastern District of California**

**Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California**

November 19, 2015 at 1:30 p.m.

1. [09-27153](#)-E-13 GIL/JOANNE RAPOSO
[15-2095](#)
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
5-14-15 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Nichole L. Glowin

Adv. Filed: 5/14/15
Answer: none

Nature of Action:
Declaratory judgment

Notes:

Continued from 10/14/15 to be conducted in conjunction with the court order for the appearance of the attorneys identified as representing Defendants.

2. [09-27153-E-13](#) GIL/JOANNE RAPOSO
[15-2095](#) PLC-1
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED MOTION FOR ENTRY OF
DEFAULT JUDGMENT
7-28-15 [[11](#)]

Tentative Ruling: The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties 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 to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-OneWest on July 28, 2015. By the court's calculation, 30 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 Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties 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 to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is denied without prejudice. Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.
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Gil and Joanne Raposo ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on July 28, 2015. Dckt. 11. The Plaintiff-Debtor is seeking an entry of default judgment against OneWest Bank FSB ("Defendant-OneWest"), in the instant Adversary Proceeding No. 15-02095.

The complaint lists both OneWest Bank FSB and Ocwen Loan Servicing, LLC as defendants and seeks to have defendants held jointly and severally liable for the judgment. The court, after review of the underlying bankruptcy case, concludes that the reason for the Plaintiff-Debtor's request for joint and several liability is due to Ocwen Loan Servicing, LLC filing a Notice of Transfer of Claim. Proof of Claim No. 7 was filed on May 27, 2009 in this case

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by OneWest Bank, FSB. Case No. 09-27153. Proof of Claim No. 7 is signed by Marisol A Nagata, an attorney in Covina, California.

On September 4, 2015, a Notice of Transfer of Claim was filed stating that the claim of OneWest Bank, FSB, had been transferred to Ocwen Loan Servicing, LLC. Dckt. 96. No copies of any transfer documents were attached to the Notice and no amended Proof of Claim No. 7 setting forth Ocwen Loan Servicing, LLC standing as a creditor has been filed. The Certificate of Service for the Notice of Transfer of Claim does not provide notice to OneWest Bank, FSB that Ocwen Loan Servicing, LLC asserts that OneWest Bank, N.A. is no longer a creditor and that Ocwen Loan Servicing, LLC has obtained all of the rights held by OneWest Bank, N.A. for the debt upon which Proof of Claim No. 7 is based.

Complicating this Notice of Transfer is that in other cases when Ocwen Loan Servicing, LLC is just serving as the loan servicer for the actual creditor, it (and its attorneys) have filed statements under penalty of perjury incorrectly stating that it is the creditor and that the former creditor has transferred all of its right relating to a debt (the claim) to Ocwen Loan Servicing, LLC. Such a misrepresentation could lead the consumer debtor and consumer debtor's counsel to improperly sue Ocwen Loan Servicing, LLC to avoid a lien, value a claim, or the like. Then Ocwen Loan Servicing, LLC allows a default to be entered and then an order or judgment effecting only the "rights" of Ocwen Loan Servicing, LLC in the lien or debt (for which Ocwen Loan Servicing, LLC has none). Then, at a later date the actual creditor or third-party debt purchaser could assert that no order was entered against the creditor, the creditor's interests were never effected, and Ocwen Loan Servicing, LLC never had the right to misrepresent the transfer of the claim (for which the creditor was not provided notice).

The instant Adversary Proceeding was commenced on May 14, 2015. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on May 14, 2015. Dckt. 3. The complaint and summons were properly served on Defendant-OneWest. Dckt. 6.

Defendant-OneWest failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-OneWest pursuant to Fed. R. Bankr. P. 7055(a) by the Clerk of the United States Bankruptcy Court on July 1, 2015. Dckt. 10.

COMPLAINT

The Complaint contains the following general allegations as summarized by the court. As a preface, the court notes that the Plaintiff-Debtor does not differentiate between OneWest Bank FSB and Ocwen Loan Servicing LLC as "Defendant(s)" in the Complaint:

1. Plaintiff-Debtor owns and resides in a parcel of real property known as 9090 Locust Street, Elk Grove, California ("Property").
2. The Property had a fair market value of approximately \$187,000.00.
3. Plaintiff-Debtor filed a Chapter 13 Bankruptcy Case No. 09-

27153 on April 16, 2009.

4. As of the petition date the following liens encumbered the Property:
 - a. First Deed of Trust in favor of BAC Home Loans Servicing, LP (now serviced by Greentree Servicing LLC in the amount of approximately \$613, 319.00.
 - b. Second Deed of Trust in favor of OneWest Bank, FSB, now serviced by Ocwen Loan Servicing, LLC.
5. Defendant-OneWest has made a claim on Plaintiff-Debtor related to the Second Deed of Trust in the amount of approximately \$66,586.00.
6. As of the date of filing of the Chapter 13 bankruptcy, only the First Deed of Trust was a secured claim.
7. As of the date of the filing of the Chapter 13 bankruptcy, the Second Deed of Trust was entirely unsecured. The Honorable Judge Bardwil ordered that the Second Deed of Trust had a secured value of zero. Case No. 09-27153, Dckt. 24.
8. Plaintiff-Debtor completed their plan on September 8, 2014.

First Claim of Relief - Declaratory Relief

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

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. Plaintiff-Debtor alleges that the Property because property of the bankruptcy estate upon the filing of the petition.
3. An actual controversy exists between Plaintiff-Debtor and Defendant-OneWest with respect to the validity, priority, and extent of liens or other interest in the Property of the Plaintiff-Debtor.
4. Plaintiff-Debtor seeks a Declaratory Judgment pursuant to Fed. R. Bankr. P. 7001(9) as the relief requested requires the voiding and subsequent release of lien of Defendant-OneWest thereby invoking Fed. R. Bankr. P. 7001(2) and Fed. R. Bankr. P. 7001(6).
5. Plaintiff-Debtor further seeks that the value stated in the Motion to Value ruled by Judge Bardwil on July 14, 2009 which ordered that the Second Deed of Trust had a secured value of zero is a final non-appealable order.
6. Plaintiff-Debtor is informed and believes that the Second Deed of Trust is completely unsecured and under applicable law has

been determined to be a general unsecured claim.

7. The court has the authority under applicable law, including 11 U.S.C. § 1322(b), to confirm a chapter 13 plan which treats the holder of the Second Deed of Trust as an unsecured creditor. Said plan was confirmed by the court.
8. Under applicable law, upon completion of Plaintiff-Debtor's chapter 13 plan, the court has the authority to void the Second Deed of Trust.
9. Plaintiff-Debtor has completed their plan.
10. Defendant-OneWest has not reconveyed via a Deed of Reconveyance, a process required under California law, the Second Deed of Trustee, and Plaintiff-Debtor requests judgment to void the Second Deed of Trust, recorded in Sacramento County on October 5, 2006, in Book 20061005, Page 00967, in a form allowing for recording with the Sacramento County Recorder.
11. Plaintiff-Debtor requests that any such judgment contain language consistent with a Deed of Reconveyance that directs that title be reconveyed and restored to the Plaintiff-Debtor which includes "all right, title, and interest" acquired by said Deed of Trust to Defendant-OneWest related to the Second Deed of Trust they Hold.
12. The Second Deed of Trust contains an attorney's fees and cost provision (Dckt. 1, Exhibit B, pg. 4, ¶ 10). Pursuant to California Civil Code § 1717, the Plaintiff-Debtor is entitled to reimbursement of attorney's fees. Plaintiff-Debtor requests an award of attorney's fees as allowed for in the contract with Defendant.
13. As Defendant-OneWest has not taken any action to remove the deed of trust, it calls into question whether Defendant-OneWest believes it has been satisfied and discharged. Therefore, Plaintiff-Debtor seeks, pursuant to Fed. R. Bankr. P. 4007(a) - (b), a determination that the debt has been fully discharged and any security interest voided.

Second Cause of Action - Violation of California Civil Code § 2941(d)

The Plaintiff-Debtor alleges the following in the Second Cause of Action:

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. On October 6, 2006 for a valuable consideration, made and delivered a HELOC Agreement (the note) in the sum of approximately \$51,000.00.
3. On the same day, Plaintiff-Debtor executed and delivered to Defendant-OneWest, a certain trust deed recorded in Sacramento

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County, California covering the property.

4. Plaintiff-Debtor on or about September 8, 2014, by Notice from Trustee, competed their Chapter 13 plan which required the Defendant-OneWest to reconvey the Deed of Trust on said property.
5. Defendant-OneWest were placed on additional notice by the BNC's notification of the filing of the Trustee's final report after the plan completion.
6. "In spite of plaintiff's full compliance with the Court approved Chapter 13 plan defendants failed and refused, and continues to fail and refuse, to reconvey the deed of trust." Dckt. 1, pg 5, ¶ 41.
7. As a proximate result of the lack of reconveyance, Plaintiff-Debtor has been required to file an adversary proceeding, which is a breach of Defendant-OneWest's statutory duty and has damaged Plaintiff-Debtor by this cost.
8. Section 2941(b)(1) requires that within 30 days after an obligation secured by a deed of trust has been satisfied, the beneficiary or the assignee, Defendant-OneWest shall execute and deliver a full reconveyance. Plaintiff-Debtor asserts that this did not happen.
9. Plaintiff-Debtor contends that the obligation was satisfied upon completion of the plan.
10. More than 30 days have passed from the date that the Defendant-OneWest's time began in which to reconvey and Defendant-OneWest has not reconveyed.
11. § 2941(d) provides that a violation of § 2941 shall make the violator liable to the plaintiff for all damages sustained by the Plaintiff-Debtor.
12. Section 2491(d) provides that a violation of Civil Code § 2941 shall make the Defendant-OneWest liable to the Plaintiff-Debtor for a statutory penalty of \$500.00.
13. Plaintiff-Debtor requests damages, as allowed for in § 2941, equal to all attorneys fees and costs, as allowed for in the contract between the parties, they will sustain as a result of bringing an action to enforce § 2941 and a statutory penalty of \$500.00.

Third Cause of Action - Attorney's Fees

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. Effective December 1, 2014, Plaintiff-Debtor is no longer required to plead attorney's fees as a separate claim for

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relief. However, in order to maintain consistency with the court holdings in this district, Plaintiff-Debtor is pleading attorney's fees as a separate claim for relief for clarity.

3. Plaintiff-Debtor is entitled to attorney's fees by statute, California Civil Code § 2941, and pursuant to the terms of the contract between the parties.
4. By contract, the note and Deed of Trust contains an attorney's fees and cost provision for the benefit of Defendant-OneWest.
5. As such, under California Civil Code § 1717, a reciprocal contractual attorneys' fees statute, the Plaintiff-Debtor is entitled to reimbursement of attorney's fees.
6. By statute, pursuant to § 2941, Plaintiff-Debtor is entitled to attorneys fees as the prevailing party in this action.

Prayer

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

1. Grants Declaratory relief that the order of the Honorable Robert S. Bardwil on July 14, 2009, was a final non-appealable order in determining the secured status of Defendant-OneWest lien as zero.
2. Grants Declaratory relief that the Plaintiff-Debtor has completed their confirmed plan and granted a discharge, that the debt and security interest therein has been discharged and the lien is void.
3. Grants Declaratory relief for a judgment in a format allowed for recording that voids the Deed of Trust of Defendant-OneWest.
4. Attorney's fees and costs as allowed for in the contract between Plaintiff-Debtor and Defendant-OneWest and pursuant to California Civil Code § 2941
5. A statutory penalty of \$500.00 pursuant to California Civil Code § 2491.
6. For such other and further relief as the court deems just and proper.

MOTION

Debtor filed a Motion on July 28, 2015. Dckt. 11. The Plaintiff-Debtor requests the following in the Motion:

1. Declaratory Relief - First Claim for Relief - Void the Junior Lien of OneWest Bank FSB

2. Attorney's Fees and Costs Against OneWest Pursuant to the Contract Between the Parties and California Civil Code § 1717

a. Seeking a total of \$5,134.00

i. Instant Motion: fees \$4,140.00 and costs \$6.00

ii. Anticipated Costs:

(1) Hearing: \$875.00

(2) Supplemental costs for courier and recording fees of the order voiding the lien \$113.00, which includes recording fees of \$33.00, courier to obtain certified order from the court of \$40.00 and courier to record the order of an additional \$40.00.

3. Statutory Penalty Against OneWest Bank FSB Pursuant to Civil Code § 2941(d)

The Plaintiff-Debtor requests that the Defendant-OneWest and co-defendant Ocwen Loan Servicing, LLC be jointly and severally liable for the judgment.

AUGUST 27, 2015 HEARING

On August 27, 2015, pursuant to a stipulation entered by all parties on August 25, 2015, the court continued the Motion until October 14, 2015 at 2:30 p.m. Dckt. 23.

SEPTEMBER 25, 2015 STIPULATION

On September 25, 2015, the parties entered a stipulation requesting the court continue the hearing scheduled for October 14, 2015, at 2:30 p.m. to November 19, 2015, at 1:30 p.m. Dckt. 43. On September 30, 2015, the court granted the stipulation and continued the hearing until November 19, 2015, at 1:30 p.m. Dckt. 46.

PLAINTIFF-DEBTOR'S OCTOBER 20, 2015 SUPPLEMENTAL RESPONSE

Debtor filed a supplemental response on October 20, 2015. Dckt. 61. Debtor asserts the following:

- A. The Declaration of Nicole Glowin and the Declaration of Rebecca Marks, both filed September 17, 2015, introduce Deutsche Bank National Trust Company, as Indenture Trustee for Indymac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H4 ("DBNT"). Debtor asserts DBNT may be a real party in interest to the subject loan;
- B. Proof of Claim 7-1 does not mentioned DBNT, and no assignment of Deed of Trust was found in Debtor's review of the public record;
- C. Debtor can no longer pursue the reconveyance recorded on September 4,

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2015, because the substitution of Trustee was also executed on September 4, 2015 by co-defendant Ocwen. Based on the Declarations and Exhibits filed, co-defendant's Substitution of Trustee and the Deed of Reconveyance may be void;

Dckt. 61. On these grounds, Debtor requests the court either grant leave to amend the complaint or, in the alternative, to deny the Motion for Default Judgment.

APPLICABLE LAW

As an initial point, Fed. R. Civ. P. 18 was not incorporated into the bankruptcy law and motion practice. Local Bankr. R. 9014-1(d)(1) provides "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

Next, Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *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.* at 770.

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. 3rd 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, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which 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. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

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

DISCUSSION

First Cause of Action

That First Cause of Action seeks a declaration as between the parties that the court's July 14, 2009 order is a real, enforceable order, and that it really means that Defendant-OneWest's secured claim has a value of \$0.00 (now that the plan has been completed), and therefore there is no debt for the Deed of Trust to secure. Further, it seeks a declaration that the court's order granting the Plaintiff-Debtor's discharge really means that the Defendant-OneWest's debt has been discharged.

The court does not enter redundant orders or judgments confirming that a prior order or judgment is "really an order of judgment." The party who obtains such order or judgment just enforces the judgment or order. Second, there are no allegations that there is an actual case or controversy (any dispute among the parties) that the court "really" entered the order valuing the secured claim or that the court "really" granted the Plaintiff-Debtor a discharge. There are no allegations that Defendant-OneWest has ever disputed that the debt was discharged. If such a dispute existed, Plaintiff-Debtor should be enforcing the orders and obtaining a judgment thereon, not merely seeking a declaration that such orders exist.

However, within the First Cause of Action, is the request that the court grant declaratory relief "for a judgment in a format allowed for recording that voids the Deed of Trust of Defendant." To the court, this appears to be a request for a request of quit title and obtain a judgment that the deed of trust is not a lien on the property. The court, therefore, construes the First Cause of Action as a request for quiet title.

Plaintiff-Debtor states that on April 16, 2009 they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) "BAC Home Loans Servicing, LP (now serviced by Greentree Servicing LLC)" first deed of trust in the amount of \$613,319.00 and (2) Defendant-OneWest's second deed of trust in the amount of \$66,586.00.

Plaintiff-Debtor states that on or about September 8, 2014, the Plaintiff-Debtor completed their Chapter 13 plan which required the Defendant-OneWest to reconvey the Deed of Trust on the Property. Plaintiff-Debtor was discharged on November 3, 2014.

According to the Trustee's Final Report and Account in the Plaintiff-Debtor's bankruptcy case, Case Number: 2009-27153, Debtor's Plan was confirmed on June 11, 2009, and completed on June 14, 2014. Bankr. E.D. Cal. No. 09-27153, Dckt. 101, September 12, 2014. The discharge of Plaintiff-Debtor was entered on November 3, 2014. Bankr. E.D. Cal. No. 09-27153, Dckt. 111. Plaintiff-Debtor states that more than 30 days have passed and Defendants have not reconveyed, and that Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to the full reconveyance of the Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan which provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803

(Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant-OneWest, and creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA 9 LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant-OneWest in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant-OneWest having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant-OneWest] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff-Debtor completed their plan on September 8, 2014. To date, Defendant-OneWest has not reconveyed the Deed of Trust as required by § 2941 within 30 days after the obligation has been satisfied (here being after the completion of the plan).

Second Cause of Action

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars (\$500).

Cal. Civ. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- I. Within 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:
 - A. execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - B. The trustee shall execute and record the reconveyance within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - C. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.
- II. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within 60 calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

Cal. Civ. § 2924(b)

The 30-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff-Debtor presents evidence, which is uncontradicted, that as of September 8, 2014, Defendant-OneWest knew of the bankruptcy plan being completed and a "demand" by Plaintiff-Debtor that the deed of trust had to be reconveyed.

Defendant-OneWest, failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the 30-day period.

Third Cause of Action

The Plaintiff-Debtor in their Third Cause of Action request attorney's fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, the Plaintiff-Debtor argues that they are entitled to reimbursement of attorney's fees under the reciprocal contractual attorney's fees because the Deed of Trust contains an attorney's fees and cost provision. Dckt. 13, Exhibit B, pg. 4, ¶ 10.

For their request pursuant to § 2941, the Plaintiff-Debtor asserts that it they are entitled to fees as the prevailing party in this action. Plaintiff-Debtor has not provided evidence of the award of any actual damages, and the court awards \$0.00 of actual damages pursuant to Plaintiff's motion for summary

judgment.

CONCLUSION

While the court could "grant" the motion as against the requested party, OneWest Bank, FSB, the court does not know if such judgment is of any force and effect. It appears that the actual real party in interest may now be Deutsche Bank National Trust Company, as Indenture Trustee. Additionally, in other cases it has been demonstrated to the court that the entity OneWest Bank, FSB no longer exists, having been merged into CIT Bank, N.A.

In the October 20, 2015 Response, Plaintiff-Debtor requests leave to amend the complaint to add a new party, Deutsche Bank National Trust Company, Indentured Trustee.

The court denied the Motion without prejudice.

The court grants leave for Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.

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 by Gil Mariano Raposo and Joanne Carol Raposo, 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 Motion is denied without prejudice.

IT IS FURTHER ORDERED that court grants leave for Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.

IT IS FURTHER ORDERED that if such amended complaint is not timely filed, the court shall dismiss without prejudice this Adversary Proceeding, no further hearing or notice given.

No further or additional relief is granted.

3. [09-27153-E-13](#) GIL/JOANNE RAPOSO
[15-2095](#) PLC-2
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED MOTION FOR ENTRY OF
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7-28-15 [[16](#)]

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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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Ocwen on July 28, 2015. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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The Motion for Entry of Default Judgment is denied without prejudice. Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.
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Gil and Joanne Raposo ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on July 28, 2015. Dckt. 16. The Plaintiff-Debtor is seeking an entry of default judgment against Ocwen Loan Servicing LLC ("Defendant-Ocwen"), in the instant Adversary Proceeding No. 15-02095. FN.1.

The complaint lists both OneWest Bank FSB and Ocwen Loan Servicing, LLC as defendants and seeks to have defendants held jointly and severally liable for the judgment. The court, after review of the underlying bankruptcy case, concludes that the reason for the Plaintiff-Debtor's request for joint and several liability is due to Ocwen Loan Servicing, LLC filing a Notice of Transfer of Claim. Proof of Claim No. 7 was filed on May 27, 2009 in this case

by OneWest Bank, FSB. Case No. 09-27153. Proof of Claim No. 7 is signed by Marisol A Nagata, an attorney in Covina, California.

On September 4, 2015, a Notice of Transfer of Claim was filed stating that the claim of OneWest Bank, FSB, had been transferred to Ocwen Loan Servicing, LLC. Dckt. 96. No copies of any transfer documents were attached to the Notice and no amended Proof of Claim No. 7 setting forth Ocwen Loan Servicing, LLC standing as a creditor has been filed. The Certificate of Service for the Notice of Transfer of Claim does not provide notice to OneWest Bank, FSB that Ocwen Loan Servicing, LLC asserts that OneWest Bank, N.A. is no longer a creditor and that Ocwen Loan Servicing, LLC has obtained all of the rights held by OneWest Bank, N.A. for the debt upon which Proof of Claim No. 7 is based.

Complicating this Notice of Transfer is that in other cases when Ocwen Loan Servicing, LLC is just serving as the loan servicer for the actual creditor, it (and its attorneys) have filed statements under penalty of perjury incorrectly stating that it is the creditor and that the former creditor has transferred all of its right relating to a debt (the claim) to Ocwen Loan Servicing, LLC. Such a misrepresentation could lead the consumer debtor and consumer debtor's counsel to improperly sue Ocwen Loan Servicing, LLC to avoid a lien, value a claim, or the like. Then Ocwen Loan Servicing, LLC allows a default to be entered and then an order or judgment effecting only the "rights" of Ocwen Loan Servicing, LLC in the lien or debt (for which Ocwen Loan Servicing, LLC has none). Then, at a later date the actual creditor or third-party debt purchaser could assert that no order was entered against the creditor, the creditor's interests were never effected, and Ocwen Loan Servicing, LLC never had the right to misrepresent the transfer of the claim (for which the creditor was not provided notice).

The instant Adversary Proceeding was commenced on May 14, 2015. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on May 14, 2015. Dckt. 3. The complaint and summons were properly served on Defendant-Ocwen. Dckt. 6.

Defendant-Ocwen failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Ocwen pursuant to Fed. R. Bankr. P. 7055(a) by the Clerk of the United States Bankruptcy Court on July 1, 2015. Dckt. 10.

COMPLAINT

The Complaint contains the following general allegations as summarized by the court. As a preface, the court notes that the Plaintiff-Debtor does not differentiate between OneWest Bank FSB and Ocwen Loan Servicing LLC as "Defendant(s)" in the Complaint:

1. Plaintiff-Debtor owns and resides in a parcel of real property known as 9090 Locust Street, Elk Grove, California ("Property").
2. The Property had a fair market value of approximately \$187,000.00.
3. Plaintiff-Debtor filed a Chapter 13 Bankruptcy Case No. 09-

27153 on April 16, 2009.

4. As of the petition date the following liens encumbered the Property:
 - a. First Deed of Trust in favor of BAC Home Loans Servicing, LP (now serviced by Greentree Servicing LLC in the amount of approximately \$613, 319.00.
 - b. Second Deed of Trust in favor of OneWest Bank, FSB, now serviced by Ocwen Loan Servicing, LLC.
5. Defendant-Ocwen has made a claim on Plaintiff-Debtor related to the Second Deed of Trust in the amount of approximately \$66,586.00.
6. As of the date of filing of the Chapter 13 bankruptcy, only the First Deed of Trust was a secured claim.
7. As of the date of the filing of the Chapter 13 bankruptcy, the Second Deed of Trust was entirely unsecured. The Honorable Judge Bardwil ordered that the Second Deed of Trust had a secured value of zero. Case No. 09-27153, Dckt. 24.
8. Plaintiff-Debtor completed their plan on September 8, 2014.

First Claim of Relief - Declaratory Relief

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

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. Plaintiff-Debtor alleges that the Property because property of the bankruptcy estate upon the filing of the petition.
3. An actual controversy exists between Plaintiff-Debtor and Defendant-Ocwen with respect to the validity, priority, and extent of liens or other interest in the Property of the Plaintiff-Debtor.
4. Plaintiff-Debtor seeks a Declaratory Judgment pursuant to Fed. R. Bankr. P. 7001(9) as the relief requested requires the voiding and subsequent release of lien of Defendant-Ocwen thereby invoking Fed. R. Bankr. P. 7001(2) and Fed. R. Bankr. P. 7001(6).
5. Plaintiff-Debtor further seeks that the value stated in the Motion to Value ruled by Judge Bardwil on July 14, 2009 which ordered that the Second Deed of Trust had a secured value of zero is a final non-appealable order.
6. Plaintiff-Debtor is informed and believes that the Second Deed of Trust is completely unsecured and under applicable law has

been determined to be a general unsecured claim.

7. The court has the authority under applicable law, including 11 U.S.C. § 1322(b), to confirm a chapter 13 plan which treats the holder of the Second Deed of Trust as an unsecured creditor. Said plan was confirmed by the court.
8. Under applicable law, upon completion of Plaintiff-Debtor's chapter 13 plan, the court has the authority to void the Second Deed of Trust.
9. Plaintiff-Debtor has completed their plan.
10. Defendant-Ocwen has not reconveyed via a Deed of Reconveyance, a process required under California law, the Second Deed of Trustee, and Plaintiff-Debtor requests judgment to void the Second Deed of Trust, recorded in Sacramento County on October 5, 2006, in Book 20061005, Page 00967, in a form allowing for recording with the Sacramento County Recorder.
11. Plaintiff-Debtor requests that any such judgment contain language consistent with a Deed of Reconveyance that directs that title be reconveyed and restored to the Plaintiff-Debtor which includes "all right, title, and interest" acquired by said Deed of Trust to Defendant-Ocwen related to the Second Deed of Trust they Hold.
12. The Second Deed of Trust contains an attorney's fees and cost provision (Dckt. 1, Exhibit B, pg. 4, ¶ 10). Pursuant to California Civil Code § 1717, the Plaintiff-Debtor is entitled to reimbursement of attorney's fees. Plaintiff-Debtor requests an award of attorney's fees as allowed for in the contract with Defendant-Ocwen.
13. As Defendant-Ocwen has not taken any action to remove the deed of trust, it calls into question whether Defendant-Ocwen believes it has been satisfied and discharged. Therefore, Plaintiff-Debtor seeks, pursuant to Fed. R. Bankr. P. 4007(a) - (b), a determination that the debt has been fully discharged and any security interest voided.

Second Cause of Action - Violation of California Civil Code § 2941(d)

The Plaintiff-Debtor alleges the following in the Second Cause of Action:

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. On October 6, 2006 for a valuable consideration, made and delivered a HELOC Agreement (the note) in the sum of approximately \$51,000.00.
3. On the same day, Plaintiff-Debtor executed and delivered to Defendant-Ocwen, a certain trust deed recorded in Sacramento

County, California covering the property.

4. Plaintiff-Debtor on or about September 8, 2014, by Notice from Trustee, competed their Chapter 13 plan which required the Defendant-Ocwen to reconvey the Deed of Trust on said property.
5. Defendant-Ocwen were placed on additional notice by the BNC's notification of the filing of the Trustee's final report after the plan completion.
6. "In spite of plaintiff's full compliance with the Court approved Chapter 13 plan defendants failed and refused, and continues to fail and refuse, to reconvey the deed of trust." Dckt. 1, pg 5, ¶ 41.
7. As a proximate result of the lack of reconveyance, Plaintiff-Debtor has been required to file an adversary preceding, which is a breach of Defendant-Ocwen's statutory duty and has damaged Plaintiff-Debtor by this cost.
8. Section 2941(b)(1) requires that within 30 days after an obligation secured by a deed of trust has been satisfied, the beneficiary or the assignee, Defendant-Ocwen shall execute and deliver a full reconveyance. Plaintiff-Debtor asserts that this did not happen.
9. Plaintiff-Debtor contends that the obligation was satisfied upon completion of the plan.
10. More than 30 days have passed from the date that the Defendant-Ocwen's time began in which to reconvey and Defendant-Ocwen has not reconveyed.
11. § 2941(d) provides that a violation of § 2941 shall make the violator liable to the plaintiff for all damages sustained by the Plaintiff-Debtor.
12. Section 2491(d) provides that a violation of Civil Code § 2941 shall make the Defendant-Ocwen liable to the Plaintiff-Debtor for a statutory penalty of \$500.00.
13. Plaintiff-Debtor requests damages, as allowed for in § 2941, equal to all attorneys fees and costs, as allowed for in the contract between the parties, they will sustain as a result of bringing an action to enforce § 2941 and a statutory penalty of \$500.00.

Third Cause of Action - Attorney's Fees

1. Plaintiff-Debtor incorporates all preceding paragraphs as though fully set forth herein.
2. Effective December 1, 2014, Plaintiff-Debtor is no longer required to plead attorney's fees as a separate claim for relief. However, in order to maintain consistency with the

court holdings in this district, Plaintiff-Debtor is pleading attorney's fees as a separate claim for relief for clarity.

3. Plaintiff-Debtor is entitled to attorney's fees by statute, California Civil Code § 2941, and pursuant to the terms of the contract between the parties.
4. By contract, the note and Deed of Trust contains an attorney's fees and cost provision for the benefit of Defendant-Ocwen.
5. As such, under California Civil Code § 1717, a reciprocal contractual attorneys' fees statute, the Plaintiff-Debtor is entitled to reimbursement of attorney's fees.
6. By statute, pursuant to § 2941, Plaintiff-Debtor is entitled to attorneys fees as the prevailing party in this action.

Prayer

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

1. Grants Declaratory relief that the order of the Honorable Robert S. Bardwil on July 14, 2009, was a final non-appealable order in determining the secured status of Defendant-Ocwen lien as zero.
2. Grants Declaratory relief that the Plaintiff-Debtor has completed their confirmed plan and granted a discharge, that the debt and security interest therein has been discharged and the lien is void.
3. Grants Declaratory relief for a judgment in a format allowed for recording that voids the Deed of Trust of Defendant-Ocwen.
4. Attorney's fees and costs as allowed for in the contract between Plaintiff-Debtor and Defendant-Ocwen and pursuant to California Civil Code § 2941
5. A statutory penalty of \$500.00 pursuant to California Civil Code § 2491.
6. For such other and further relief as the court deems just and proper.

MOTION

The instant Motion was filed on July 28, 2015. Dckt. 16. The Plaintiff-Debtor requests the following in the Motion:

1. Declaratory Relief - First Claim for Relief - Void the Junior Lien of Defendant-Ocwen.
2. Attorney's Fees and Costs Against OneWest Pursuant to the Contract Between the Parties and California Civil Code § 1717

- a. Seeking a total of \$5,134.00
 - i. Instant Motion: fees \$4,140.00 and costs \$6.00
 - ii. Anticipated Costs:
 - (1) Hearing: \$875.00
 - (2) Supplemental costs for courier and recording fees of the order voiding the lien \$113.00, which includes recording fees of \$33.00, courier to obtain certified order from the court of \$40.00 and courier to record the order of an additional \$40.00.

- 3. Statutory Penalty Against Defendant-Ocwen Pursuant to Civil Code § 2941(d)

The Plaintiff-Debtor requests that the Defendant-Ocwen and co-defendant OneWest Bank, FSB be jointly and severally liable for the judgment.

AUGUST 27, 2015 HEARING

On August 27, 2015, pursuant to a stipulation entered by all parties on August 25, 2015, the court continued the Motion until October 14, 2015 at 2:30 p.m. Dckt. 28.

SEPTEMBER 25, 2015 STIPULATION

On September 25, 2015, the parties entered a stipulation requesting the court continue the hearing scheduled for October 14, 2015, at 2:30 p.m. to November 19, 2015, at 1:30 p.m. Dckt. 43. On October 14, 2015, the court granted the stipulation and continued the hearing until November 19, 2015, at 1:30 p.m. Dckt. 60.

DEBTOR'S OCTOBER 20, 2015 SUPPLEMENTAL RESPONSE

Debtor filed a supplemental response on October 20, 2015. Dckt. 64. Debtor asserts the following:

- A. The Declaration of Nicole Glowin and the Declaration of Rebecca Marks, both filed September 17, 2015, introduce Deutsche Bank National Trust Company, as Indenture Trustee for Indymac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H4 ("DBNT"). Debtor asserts DBNT may be a real party in interest to the subject loan;
- B. Proof of Claim 7-1 does not mention DBNT, and no assignment of Deed of Trust was found in Debtor's review of the public record;
- C. Debtor can no longer pursue the reconveyance recorded on September 4, 2015, because the substitution of Trustee was also executed on September 4, 2015 by co-defendant Ocwen. Based on the Declarations and Exhibits filed, co-defendant's Substitution of Trustee and the

November 19, 2015 at 1:30 p.m.

Deed of Reconveyance may be void;

Dckt. 64. On these grounds, Debtor requests the court either grant leave to amend the complaint or, in the alternative, to deny the Motion for Default Judgment.

APPLICABLE LAW

As an initial point, Fed. R. Civ. P. 18 was not incorporated into the bankruptcy law and motion practice. Local Bankr. R. 9014-1(d)(1) provides "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

Next, Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *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.* at 770.

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. 3rd 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, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which 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. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

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

DISCUSSION

First Cause of Action

That First Cause of Action seeks a declaration as between the parties that the court's July 14, 2009 order is a real, enforceable order, and that it really means that Defendant's secured claim has a value of \$0.00 (now that the plan has been completed), and therefore there is no debt for the deed of trust to secure. Further, it seeks a declaration that the court's order granting the Plaintiff-Debtor's discharge really means that the Defendant-Ocwen's debt has been discharged.

The court does not enter redundant orders or judgments confirming that a prior order or judgment is "really an order of judgment." The party who obtains such order or judgment just enforces the judgment or order. Second, there are no allegations that there is an actual case or controversy (any dispute among the parties) that the court "really" entered the order valuing the secured claim or that the court "really" granted the Plaintiff-Debtor a discharge. There are no allegations that Defendant-Ocwen has ever disputed that the debt was discharged. If such a dispute existed, Plaintiff-Debtor should be enforcing the orders and obtaining a judgment thereon, not merely seeking a declaration that such orders exist.

However, within the First Cause of Action, is the request that the court grant declaratory relief "for a judgment in a format allowed for recording that voids the Deed of Trust of Defendant." To the court, this appears to be a request for a request of quit title and obtain a judgment that the deed of trust is not a lien on the property. The court, therefore, construes the First Cause of Action as a request for quiet title.

Plaintiff-Debtor states that on April 16, 2009 they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) "BAC Home Loans Servicing, LP (now serviced by Greentree Servicing LLC)" first deed of trust in the amount of \$613,319.00 and (2) OneWest's second deed of trust in the amount of \$66,586.00.

Plaintiff-Debtor states that on or about September 8, 2014, the Plaintiff-Debtor completed their Chapter 13 plan which required Defendant-Ocwen to reconvey the Deed of Trust on the Property. Plaintiff-Debtor was discharged on November 3, 2014.

According to the Trustee's Final Report and Account in the Plaintiff-Debtor's bankruptcy case, Case Number: 2009-27153, Debtor's Plan was confirmed on June 11, 2009, and completed on June 14, 2014. Bankr. E.D. Cal. No. 09-27153, Dckt. 101, September 12, 2014. The discharge of Plaintiff-Debtor was entered on November 3, 2014. Bankr. E.D. Cal. No. 09-27153, Dckt. 111. Plaintiff-Debtor states that more than 30 days have passed and Defendants have not reconveyed, and that Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to the full reconveyance of the Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan which provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc.* (*In re*

Martin), 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant-Ocwen, and creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA 9 LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant-Ocwen in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant-Ocwen having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant-Ocwen] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff-Debtor completed their plan on September 8, 2014. To date, Ocwen Loan Servicing, LLC has not reconveyed the Deed of Trust as required by § 2941 within 30 days after the obligation has been satisfied (here being after the completion of the plan). While not providing the underlying documents, Ocwen Loan Servicing, LLC has filed a Notice of Transfer by which it asserts that it, and not OneWest Bank, FSB, is the creditor, has all of the rights of a creditor, and has all of the burdens (including reconveying the deed of trust) of the creditor.

Second Cause of Action

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of

five hundred dollars (\$500).

Cal. Civ. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- I. Within 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:
 - A. execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - B. The trustee shall execute and record the reconveyance within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - C. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.
- II. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within 60 calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

Cal. Civ. § 2924(b)

The 30-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff-Debtor presents evidence, which is uncontradicted, that as of September 8, 2014, Defendant-Ocwen knew of the bankruptcy plan being completed and a "demand" by Plaintiff-Debtor that the deed of trust had to be reconveyed.

Defendant-Ocwen, failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the 30-day period.

Third Cause of Action

The Plaintiff-Debtor in their Third Cause of Action request attorney's fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, the Plaintiff-Debtor argues that they are entitled to reimbursement of attorney's fees under the reciprocal contractual attorney's fees because the Deed of Trust contains an attorney's fees and cost provision. Dckt. 13, Exhibit B, pg. 4, ¶ 10.

For their request pursuant to § 2941, the Plaintiff-Debtor asserts that it they are entitled to fees as the prevailing party in this action. Plaintiff-

Debtor has not provided evidence of the award of any actual damages, and the court awards \$0.00 of actual damages pursuant to Plaintiff's motion for summary judgment.

CONCLUSION

While the court could "grant" the motion as against the requested party, Owen Loan Servicing, LLC, the court does not know if such judgment is of any force and effect. It appears that the actual real party in interest may now be Deutsche Bank National Trust Company, as Indenture Trustee.

In the October 20, 2015 Response, Plaintiff-Debtor requests leave to amend the complaint to add a new party, Deutsche Bank National Trust Company, Indentured Trustee.

The court denies the Motion without prejudice.

The court grants leave for Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.

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 by Gil Mariano Raposo and Joanne Carol Raposo, 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 Motion is denied without prejudice.

IT IS FURTHER ORDERED that court grants leave for Plaintiff-Debtor to file and serve an amended complaint on or before December 11, 2015.

IT IS FURTHER ORDERED that if such amended complaint is not timely filed, the court shall dismiss without prejudice this Adversary Proceeding, no further hearing or notice given.

No further or additional relief is granted.

4. [09-27153](#)-E-13 GIL/JOANNE RAPOSO
[15-2095](#) RHS-1
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED ORDER TO APPEAR
9-4-15 [[29](#)]

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

The Order to Appear was served by the Clerk of the Court on Gil and Joanne Raposo ("Plaintiff-Debtor"), Plaintiff-Debtor's attorney, Nichole Glowin, Peter Cianchetta, Creditor, Trustee, and the Office of the U.S. Trustee on September 10, 2015. The court computes that 14 days' notice has been provided.

The Order to Appear to ~~XXXXXX~~.

On September 4, 2015, the court issued an Order to Appear Re Attorney Representation. Dckt. 29. Specifically, the court ordered the following:

In light of the inconsistent statements made by Ocwen Loan Servicing, LLC in the Plaintiff-Debtor's bankruptcy case, the inconsistent statements in other bankruptcy cases and failure to respond to Rule 2004 subpoenas (which issues are being addressed through a separate order to show cause being issued by the court), the purported counsel for OneWest Bank, FSB and Ocwen Loan Servicing, LLC failing to appear at the August 27, 2015 hearing that they sought to have continued, and good cause appearing;

IT IS ORDERED that the court shall conduct a hearing regarding attorney representation at **1:30 p.m. on September 24, 2015**, in Department E of the United States Bankruptcy Court, 501 I Street, Sixth Floor, Sacramento, California.

IT IS FURTHER ORDERED that Nichole L .Glowin, Esq., of Wright, Finlay & Zak, LLP, as the attorney who filed the Stipulation to Continue purportedly for OneWest Bank, FSB and Ocwen Loan Servicing, LLC, and Peter Cianchetta, attorney for Plaintiff-Debtor, shall each appear at the September 24, 2015 hearing. No telephonic appearances are permitted for any attorneys attending the hearing, including any other attorneys from the Wright, Finlay & Zak, LLP who may choose to appear with Ms. Glowin or "monitor" the hearing.

IT IS FURTHER ORDERED that Nichole L Glowin and Wright Finlay & Zak, LLP shall file on or before **September 17, 2015**, a written Response, supported by credible, admissible evidence, identifying the representatives of Ocwen Loan Servicing, LLC and the representatives of OneWest Bank, LLC with which they communicated with about serving as attorneys for those respective parties and who the persons were that agreed to engage the services of Wright, Finlay & Zak, LLP to represent Ocwen Loan Servicing, LLC and to represent OneWest Bank, FSB.

IT IS FURTHER ORDERED that Wright Finlay & Zak, LLP shall include with its Response a copy of the fully executed engagement letter with Ocwen Loan Servicing, LLC and the fully executed engagement letter with OneWest Bank, FSB (each redacted as appropriate) for the legal services to be provided to each of the two named defendants in connection with this Adversary Proceeding. If such engagement was based on a power of attorney being asserted by either Ocwen Loan Servicing, LLC or OneWest Bank, FSB, a copy of that power of attorney shall be included with the Response (redacted as appropriate).

BACKGROUND

In this Adversary Proceeding, Gil Mariano and Joanne Raposo ("Plaintiff-Debtor") sued both OneWest Bank, FSB and Ocwen Loan Servicing, LLC for the failure to reconvey a deed of trust following the completion of the Chapter 13 plan and payment in full of the allowed secured claim for which the deed of trust was collateral. Neither Ocwen Loan Servicing, LLC nor OneWest Bank, FSB responded to the complaint or filed any opposition to entry of the default judgments against each of them.

In *Raposo v. Ocwen, et al.*, the court perceives that the need to sue both Ocwen Loan Servicing, LLC and OneWest Bank, FSB was caused by the documents filed in the *Raposo* bankruptcy case. Bankr. E.D. Cal., Case No. 09-27153. In the *Raposo* bankruptcy case, Proof of Claim No. 7 was filed on May 27, 2009, by OneWest Bank, FSB. On September 4, 2015, a Notice of Transfer of Claim was filed stating that the claim of OneWest Bank, FSB had been transferred to Owen Loan Servicing, LLC. Case No. 09-27153, Dckt. 96. No copies of any transfer documents were attached to the Notice and no amended Proof of Claim No. 7 setting forth Owen Loan Servicing, LLC standing as a creditor had been filed. The Certificate of Service for the Notice of Transfer of Claim did not provide notice to OneWest Bank, FSB that Owen Loan Servicing, LLC asserted that OneWest Bank, FSB was no longer the creditor and that Owen Loan Servicing, LLC has obtained all of the rights held by OneWest Bank, FSB for the debt upon which Proof of Claim No. 7 was based. The Notice of Transfer in the *Raposo* bankruptcy case was signed by attorney Audrey J. Dixon (Fla. Bar No. 39288), of the Robertson, Anschutz & Schneid, PL law firm, as the attorney for Ocwen Loan Servicing, LLC.

The Plaintiff-Debtor set for hearing two motions for entry of defaults judgments; one against Ocwen Loan Servicing, LLC and the other against OneWest Bank, FSB. The hearings for the two motions were scheduled for August 27, 2015. Having provided at least twenty-eight days notice of the hearing, written oppositions were required to be filed at least fourteen days prior to

August 27, 2015. Local Bankruptcy Rule ("LBR") 9014-1(f)(1).

On August 25, 2015, at 4:00 p.m., a Stipulation to Continue Hearing was filed. Dckt. 21. The Stipulation is purported to have been executed between Plaintiff-Debtor, Ocwen Loan Servicing, LLC, and OneWest Bank, FSB. The Stipulation is executed for Ocwen Loan Servicing, LLC and OneWest Bank, FSB by Nichole L. Glowin, Esq., of the Wright, Finlay & Zak, LLP law firm. This would be the first appearance in the Adversary Proceeding by Ms. Glowin or any attorney for the Wright, Finlay & Zak, LLP law firm for either Ocwen Loan Servicing, LLC or OneWest Bank, FSB.

On the morning of August 27, 2015, when the court became aware of the Stipulation, the courtroom deputy for Department E called both Peter Cianchetta, attorney for Plaintiff-Debtor, and Nichole Glowin. The message was left for both that the matter had not been continued by the court, as there were some issues for the attorneys to address. Telephonic appearances were available for both attorneys and the court pre-notified CourtCall (the telephonic appearance service) that the court authorized day-of-the-hearing addition of either attorney (or other attorney from their respective firms).

When the court called the two motions on the 1:30 p.m. calendar, Mr. Cianchetta appeared in court. No appearance was made by Ms. Glowin or anyone from her firm to address the request to continue the hearing and the questions of the court. Mr. Cianchetta stated that he had spoken with Ms. Glowin about the court not having continued the hearing based on the Stipulation.

The court's concerns are stated on the record and available for Ms. Glowin, the purported counsel for both OneWest Bank, FSB and Ocwen Loan Servicing, LLC. The basic issue the court was seeking to address was whether the Wright, Finlay & Zak, LLP law firm had been engaged by officers of both OneWest Bank, FSB and Ocwen Loan Servicing, LLC, or whether Ocwen Loan Servicing, LLC had engaged the law firm's services, representing that it had a power or other authorization that allowed it to act for OneWest Bank, FSB.

The court's concerns relate to conduct of Ocwen Loan Servicing, LLC in other cases in which it has misidentified itself as the "creditor," has failed to identify the actual creditor when requested by consumer counsel, and has refused to comply with Bankruptcy Rule 2004 subpoenas.

The fact that counsel purporting to represent Ocwen Loan Servicing, LLC and OneWest Bank, FSB failed to appear at the August 27, 2015 hearing when such counsel had been advised that the court was conducting the hearing raises additional concerns. Such counsel was seeking to have the hearings continued but was unwilling to attend the hearing to address any questions the court has concerning such a continuance.

The court honored Plaintiff-Debtor counsel's word that Plaintiff-Debtor agreed to continue the hearings. The hearings have been continued by separate order of the court.

NICHOLE GLOWIN'S RESPONSE

Nichole Glowin ("Glowin"), associate with the Law Offices of Wright, Finlay & Zak, LLP, ("WFZ") filed a response to the instant Order to Appear on September 17, 2015. Dckt. 35.

November 19, 2015 at 1:30 p.m.

Glowin declares that WFZ has been retained as counsel of record for Defendants Ocwen Loan Servicing, LLC ("Ocwen") and OneWest Bank, FSB ("OneWest") on all litigation involving Debtor's primary residence, located at 9090 Locust Street, Elk Grove CA ("Property"); this representation includes Adversary Proceeding No. 15-02095. Dckt. 35 ¶ 1, 9; Dckt. 36, Exhibit 4. Glowin has been the associate at WFZ responsible for oversight of Adversary Proceeding No. 15-02095 since August 5, 2015. Dckt. 35 ¶ 2; Dckt. 36, Exhibit 4.

Glowin's Declaration asserts that around October 2, 2006, Gil Mariano Raposo and Joanne Carol Raposo ("Debtors") executed a Home Equity Line of Credit ("HELOC") with IndyMac Bank, FSB. Dckt. 35 ¶ 3; Dckt. 36, Exhibit 1. The HELOC was secured by a second credit priority position Deed of Trust recorded against the Property. Dckt. 35 ¶ 3; Dckt. 36, Exhibit 2. Further, Glowin asserts that around April 16, 2009, (the time Plaintiff-Debtor filed the Chapter 13 petition) Deutsche Bank National Trust Company, as Indenture Trustee for IndyMac Home Equity Mortgage Loan Asset-Back Trust, Series 2006-H4 ("Investor") owned and held the HELOC and Deed of Trust; OneWest acted as servicer of the HELOC and Deed of Trust on behalf of Investor. Dckt. 35 ¶ 4, 5. Glowin asserts OneWest transferred its servicing rights to Ocwen; Ocwen sent Debtors a letter dated November 15, 2013 of this transfer. Dckt. 35 ¶ 6; Dckt. 36, Exhibit 3.

Glowin declares that on May 14, 2015, Plaintiff-Debtor filed the Adversary Proceeding No. 15-02095 to compel Defendants, Ocwen and OneWest, to record a release of the Deed of Trust on the Property because the HELOC and Deed of Trust were allegedly avoided in the bankruptcy case. Dckt. 35 ¶ 7. This court scheduled a hearing on August 27, 2015, to address the Default Judgment filed by Debtors against Defendants on this issue. Case No. 15-02095, Dckt. 25. Between August 5, 2015, and August 25, 2015, Glowin asserts she spoke with counsel for Plaintiff-Debtor, the Law Offices of Peter Cianchetta, and agreed to continue the hearing to allow Ocwen time to record a release of the Deed of Trust and to allow Ocwen to pay the damages in the Default Motion. Dckt. 35 ¶ 10; Dckt. 36, Exhibits 5, 6.

On August 27, 2015, Glowin asserts she received the voicemail message from this court informing Glowin the court would not enter the order to continue the Default Motion hearing. Dckt. 35 ¶ 11. Glowin alleges she was not informed that her presence at the August 27, 2015 hearing was mandatory, nor was she aware that the court had questions on Glowin's role in this action; instead, she requested Cianchetta to appear for all parties to request a continuance due to a pending settlement. Dckt. 35 ¶ 11.

Glowin states that on September 2, 2015, Ocwen executed a Full Reconveyance regarding the Deed of Trust. Dckt. 36, Exhibit 5 and 6. Glowin asserts that the parties are in the process of completing a full settlement of the Adversary Proceeding No. 15-02095 by addressing the remaining issue of the damages set forth in the Default Motion.

Additionally, Glowin alleges that this Declaration is only an initial response to the Order to Appear, and that she will file a supplemental declaration with supporting documents as soon as the proof is received. Dckt. 35 ¶ 13. Glowin asserts she is drafting a stipulation to file to continue the hearing on the Order to Appear by Cianchetta's request.

SEPTEMBER 22, 2015 ORDER

On September 22, 2015, the court issued an order continuing the instant hearing to 1:30 p.m. on November 19, 2015. Dckt. 40. The court further ordered the following:

IT IS FURTHER ORDERED that Nichole L. Glowin or Wright Finlay & Zak, LLP, shall file Supplemental Documents which include the following:

A. The legal authority for filing a declaration under penalty of perjury in which the declarant provides testimony "under information and belief." 28 U.S.C. § 1746; Fed. R. Evid.; Fed. R. Evid. 602; Weinstein's Federal Evidence § § 602.02, 602.04.

B. The reason why Wright Finlay & Zak, LLP was not able to provide the court with copies (redacted as appropriate) of the engagement letter or letters, and any powers of attorney upon which such engagement was based, as counsel for Ocwen Loan Servicing, LLC and OneWest Bank, FSB, and each of them, by the September 14, 2015 deadline set by this court.

C. An explanation of how Exhibit 4 is the basis for the statement (which was not qualified as being merely on information and belief) in the declaration that, "On August 5, 2015, Ocwen retained WFZ to defend Ocwen and OneWest in the Adversary Action." Additionally, why the document filed as Exhibit 4, a purported email, contains no date, when it is common for all emails to contain a date the email was transmitted.

D. An explanation as to how the email provided as Exhibit 4 from an entity identified in the email signature block as "Ocwen Financial Solutions" is submitted as evidence of Ocwen Loan Servicing, LLC and OneWest Bank, FSB, and each of them, having engaged the services of Wright Finlay & Zak, LLP as counsel in this Adversary Proceeding.

E. Copies of the engagement letters (and powers of attorney if any were used for the engagement of counsel) between Ocwen Loan Servicing, LLC and Wright Finlay & Zak, LLP, and OneWest Bank, FSB and Wright Finlay & Zak, LLP (redacted as appropriate).

IT IS FURTHER ORDERED that all Supplemental Pleadings filed by Nicole L. Glowin and Wright, Finlay & Zak, LLP, and each of them, shall be filed and served on or before October 15, 2015.

NICHOLE GLOWIN'S DECLARATION

Nichole L. Glowin filed a Declaration on October 15, 2015 in response to this court's September 4, 2015 Order to Appear.

Ms. Glowin declares that she is an associate of the Law Offices of

November 19, 2015 at 1:30 p.m.

Wright, Finlay & Zak LLP. Wright, Finlay & Zak LLP was retained as counsel of record for Defendants Ocwen Loan Servicing, LLC and OneWest Bank, FSB on August 5, 2015, concerning all litigation involving the property located at 9090 Locust Street, Elk Grove, California. This includes the Adversary Proceeding in Case No. 15-02095, filed on May 14, 2015.

After receiving this court's Order to Appear on September 4, 2015, Ms. Glowin states:

Both OneWest and Ocwen service a large number of loans, and as such, requests for documents and/or declarations often take a few weeks to be returned. Despite my best efforts, I was unable to obtain the documentation, client approval [sic] to produce the documentation and/or a client declaration to substantiate the documentation requested by the Court in order to Appear before the September 17, 2015 deadline.

In lieu of the requested documents, Ms. Glowin states that:

I filed a Declaration on September 17, 2015 under information and belief as a good faith attempt to meet the Court's deadline and to provide preliminary information addressing the concerns of the Court. I understand that a declaration under information and belief does not meet the standard of Federal Rule of Evidence Rule 602 of testimony. The Sept. Declaration was filed under information and belief as OneWest and Ocwen were and are the best parties to address the issues raised by the Court in the Order to Appear.

The court granted Ms. Glowin's Stipulation to Continue, and further ordered Ms. Glowin to respond to certain concerns on that September 17, 2015 Declaration.

Ms. Glowin's response is that, in the September 15, 2015 Declaration:

Paragraphs 4 and 5 [of the September 15, 2015 Declaration] address the issues raised in Paragraphs A and B of the Stipulation Order and explain why I was unable to provide the Court with its requested documentation and why I filed the Sept. Declaration under information and belief.

In addition, Ms. Glowin asserts that the following paragraphs from the Ocwen and OneWest Declarations, filed concurrently, and certain exhibits filed with the September 15, 2015 Declaration, address the concerns of the court listed in the Order to Appear paragraphs C, D, and E:

- A. Exhibit 4, attached to the September Declaration, contains a copy of the referral in which Ocwen retained WFZ as counsel for the Adversary Action;
- B. Paragraph 11 of the Ocwen Declaration states that WFZ was retained as counsel to defend both Ocwen and OneWest in the Adversary Action on August 5, 2015;
- C. Exhibit 4, "the referral e-mail," was not sent directly to WFZ but was

instead uploaded into Ocwen's CounselLink case management system for WFZ to view. Because the referral e-mail was not sent directly to WFZ, but was instead uploaded into the CounselLink case management system, no date appears on the referral e-mail;

- D. Paragraph 9 of the Ocwen Declaration states no retainer agreements or engagement letters exist between Ocwen, OneWest, and WFZ. Ocwen employs a "Managing Counsel" program and designates several law firms throughout the country to handle litigation matters that rise to the level of Ocwen's Legal Department. WFZ is one of Ocwen's Managing Counsel. Ocwen does not execute a retainer agreement as to each individual referral to Managing Counsel. Instead, Managing Counsel receives referrals through Ocwen's CounselLink case management system;
- E. Exhibit 5 is another copy of the referral email between Ocwen and WFZ, which Ms. Glowin asserts is evidence of WFZ's authority to represent both Ocwen and OneWest in the Adversary Proceeding;
- F. Paragraphs 7 and 8 of the OneWest Declaration states that Ocwen has authority to retain counsel to defend OneWest in litigation concerning the Property, and OneWest specifically consents to WFZ's representation in the Adversary Action.

Ms. Glowin describes Ocwen Financial Solutions as an authorized agent of Ocwen Loan Servicing, LLC.

EVIDENCE OF OCWEN LOAN SERVICING, LLC

Ocwen Loan Servicing, LLC, filed a response to this court's September 4, 2015 Order to Appear on October 15, 2015. Ocwen addresses this court's Order by filing the following documents:

- A. a Declaration from Kevin Flannigan;
- B. the Docket for Bankruptcy Case 09-27153;
- C. a Deed of Trust;
- D. a Service Transfer Letter;
- E. a Power of Attorney; and
- F. an Ocwen Referral E-mail.

Dckt. 56 and 57.

Declaration of Kevin Flannigan

Ocwen filed the Declaration of Kevin Flannigan. Dckt. 56. Mr. Flannigan declares he is a Senior Loan Analyst of Ocwen Financial Corporation, whose direct subsidiary is Defendant, Ocwen Loan Servicing, LLC.

Mr. Flannigan summarizes his duties as including: reviewing and interpreting Ocwen's servicing records, "including those related to the Subject Loan and the property at issue in this action." He declares that he is the

custodian for "these business records" and is "authorized" to execute the Declaration on behalf of Ocwen.

In response to the Order, Mr. Flannigan quotes from "Ocwen's business records." The following testimony comes from various portions of Ocwen's business records:

- A. Ocwen has been designated the servicer and attorney in fact for the current owner and holder of the Subject Loan, i.e. the Investor, Deutsche Bank National Trust Company, as Indenture Trustee for IndyMac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H4.
- B. On May 14, 2015 Plaintiffs filed an Adversary Action against OneWest Bank and Ocwen.
- C. Mr. Flannigan explains that Ocwen employs a Managing Counsel program whereby it has designated several law firms throughout the country to handle certain litigation matters that rise to the level of Ocwen's Legal Department. "WFZ" is one of Ocwen's Managing Counsel.
- D. Ocwen does not execute a retainer agreement as to each individual case referral to managing Counsel. Instead, matters are referred to Managing Counsel through referrals that are uploaded into Ocwen's CounselLink case management system.
- E. On August 5, 2015, Ocwen's Legal Department retained WFZ to defend Ocwen and OneWest Bank in the Adversary Action by providing access to the referral via CounselLink case management system and by uploading an e-mail notification directly into the CounselLink case management system. The e-mail was not sent directly to WFZ; rather, it was uploaded into the CounselLink case management system when WFZ was assigned this matter.
- F. WFZ is the designated authorized counsel for Ocwen and OWB in the Adversary Action. Ocwen specifically consents to and authorized WFZ's representation of OneWest Bank and Ocwen in the Adversary Action.

Exhibits

Ocwen attached five Exhibits to the Flannigan Declaration: a court docket, a Deed of Trust, a Service Transfer Letter, a Power of Attorney, and an Ocwen Referral E-mail. Dckt. 57, filed October 16, 2015.

Exhibit 1 is described as a Docket for Bankruptcy Case 09-27153. This document lists the contact information for parties in the Eastern District of California Bankruptcy Case No. 09-27153.

Next, Exhibit 2 is a Deed of Trust dated October 2, 2006, between Gil and Joanne Raposo as joint tenants, IndyMac Bank, F.S.B. as lender, and Old Republic National Title Insurance Company as trustee. The Deed of Trust secures real property located at 9090 Locust Street, Elk Grove, California.

Attached as Exhibit 3 is a Notice of Servicing Transfer to Ocwen Loan Servicing, LLC, dated November 15, 2013. The Letter informs Plaintiff-Debtors that "IndyMac Mortgage Services, a division of OneWest Bank, FSB (IndyMac)"

transferred the servicing of the Home Equity Line of Credit to Ocwen Loan Servicing, LLC.

Exhibit 4 is a Limited Power of Attorney between Deutsche Bank National Trust Company, as Indenture Trustee, and Ocwen Loan Servicing, LLC, as the Service. The document allows for Ocwen Loan Servicing, LLC, to perform the following:

This Appointment shall apply only to the following enumerated transactions and nothing herein or in the Agreement shall be construed to the contrary:

1. The modification or re-recording of a Mortgage or Deed of Trust, where said modification or re-recording is solely for the purpose of correcting the Mortgage or Deed of Trust to conform same to the original intent of the parties thereto or to correct title errors discovered after such title insurance was issued; provided that 9i0 said modifications or re-recording, in either instance, does not adversely affect the lien of the mortgage or Deed of Trust as insured and (ii) otherwise conforms to the provisions of the Agreement.
2. The subordination of the lien of a Mortgage or Deed of Trust to an easement in favor of a public utility company of a government agency or unit with powers of eminent domain; this section shall include, without limitation, the execution of partial satisfactions/releases, partial reconveyances or the execution or requests to trustees to accomplish same.
3. The conveyance of the properties to the mortgage insurer, or the closing of the title to the property to be acquired as real estate owned, or conveyance of title to real estate owned.
4. The completion of loan assumption agreements.
5. The full satisfaction/release of a Mortgage or Deed of Trust or full conveyance upon payment and discharge of all sums secured thereby, including, without limitation, cancellation of the related Mortgage Note.
6. The assignment of any Mortgage or Deed of Trust and the related mortgage Note, in connection with the repurchase of the mortgage loan secured and evidenced thereby.
7. The full assignment of a Mortgage or Deed of Trust upon payment and discharge of all sums secured thereby in conjunction with the refinancing thereof, including, without limitation, the assignment of the related Mortgage Note.
8. The full enforcement of an preservation of the

Indenture Trustee's interest in the Mortgage Notes, Mortgages or Deeds of Trust, and in the proceeds thereof, by way of, including but not limited to, foreclosure, the taking of a deed in lieu of foreclosure, or the completion of judicial or non-judicial foreclosure or the termination, cancellation or rescission of any such foreclosure, the initiation, prosecution and completion of eviction actions or proceedings with respect to, or the termination, cancellation or rescission of any such eviction actions or proceedings, and the pursuit of title insurance, hazard insurance and claims in bankruptcy proceedings, including, without limitation, any and all of the following acts:

- a. The substitution of trustee(s) serving under a Deed of Trust, in accordance with state law and the Deed of Trust;
 - b. The preparation and issuance of statements of breach or non-performance;
 - c. The preparation and filing of notices of default and/or notices of sale;
 - d. The cancellation/recission of notices of default and/or notices of sale;
 - e. The taking of deed in lieu of foreclosure;
 - f. The filing, prosecution and defense of claims, and to appear on behalf of the Trustee, in bankruptcy cases affecting Mortgage Notes Mortgages or Deeds of Trust;
 - g. The preparation and service of Notices to quit and all other documents necessary to initiate, prosecute and complete eviction actions or proceedings;
 - h. The tendering, filing, prosecution and defense, as applicable, of hazard insurance and title insurance claims, including but not limited to appearing on behalf of the Indenture Trustee in quiet title actions; and
 - i. The preparation and execution of such other documents and performance of such other actions as may be necessary under the terms of the Mortgage, Deed of Trust or state law to expeditiously complete said transactions in paragraphs 8.a through 8.h. above.
9. With respect to the sale of property acquired through a foreclosure or deed-in lieu of foreclosure, including, without limitation, the execution of the

following documentation:

- a. Listing agreements;
 - b. Purchase and sale agreements;
 - c. Grant/warranty/quit claim deeds or any other deed causing the transfer of title of the property to a party contracted to purchase same;
 - d. escrow instructions; and
 - e. any and all documents necessary to effect the transfer of property
10. The modification or amendment of escrow agreements established for repairs to the mortgaged property or reserves for replacement of personal property.

Also included as part of Exhibit 4 is a document labeled "Exhibit A," which appears to be page numbered sequentially with the Power of Attorney and referenced on page 6 of the Power of Attorney (which is only a signature page), which states that Deutsche Bank National Trust Company, Trustee, under the below listed agreements, executes the power of attorney:

- A. Indymac Home Equity Mortgage Loan Asset-Back Trust, Series 2006-H2 pursuant to that Sale and Servicing Agreement dated June 19, 2006, between Indymac ABS, Inc. as "Depositor," Indymac Bank, F.S.B. as "Seller and Servicer," Ocwen Loan Servicing, LLC as "Successor Servicer" to One West Bank, N.A. as "Successor Servicer" to IndyMac Bank, FSB as "Master Servicer," and Deutsche Bank National Trust Company as "Indenture Trustee;"
- B. Indymac Home Equity Mortgage Loan Asset-Back Trust, Series 2006-H3 pursuant to that Sale and Servicing Agreement dated September 14, 2006 between Indymac ABS, Inc. as "Depositor," Indymac Bank, F.S.B. as "Seller and Servicer," Ocwen Loan Servicing, LLC as "Successor Servicer" to One West Bank, N.A. as "Successor Servicer" to IndyMac Bank, FSB as "Master Servicer," and Deutsche Bank National Trust Company as "Indenture Trustee;"
- C. Indymac Home Equity Mortgage Loan Asset-Back Trust, Series 2006-H4 pursuant to that Sale and Servicing Agreement dated December 12, 2006 between Indymac ABS, Inc. as "Depositor," Indymac Bank, F.S.B. as "Seller and Servicer," Ocwen Loan Servicing, LLC as "Successor Servicer" to One West Bank, N.A. as "Successor Servicer" to IndyMac Bank, FSB as "Master Servicer," and Deutsche Bank National Trust Company as "Indenture Trustee;"

Finally, Exhibit 5 appears to be an e-mail to T. Robert Finlay and Robin Wright, with "IIP," Dominic, and Gilbertbalaraj Carbon-copied. The subject is "-Gil Raposo-," with an attachment labeled "Notification - Default Motion/Judgment." The unredacted portion only states "...active matter in CL for which you are managing counsel hence please review and handle as you deem

appropriate." It is signed by Hema Dhapola, a Litigation Analyst in the Law Department of Ocwen Financial Solutions.

EVIDENCE PRESENTED FOR ONEWEST BANK

Declaration of Rebecca Marks

OneWest Bank concurrently submitted the Declaration of Rebecca Marks in response to the court's Order to Appear on October 15, 2015. Dckt. 51.

Rebecca Marks is the Assistant Vice President for Defendant, CIT Bank, N.A. formerly known as and sued herein as OneWest Bank, FSB. Ms. Marks declares that IMB Holdco, LLC, the parent company of OneWest, recently merged with CIT Group, Inc. As a part of this merger, CIT Bank, a subsidiary of CIT Group, Inc., merged with and into OneWest, which was renamed CIT Bank, N.A.

Ms. Marks provides a brief description regarding the filing of the Chapter 13 by Gil Mariano Raposo and Joanne Carol Raposo on April 16, 2009. Ms. Marks states that as of the date of the filing, OneWest acted as the servicer of the Subject Loan - in the amount of \$51,000.00 - made to IndyMac Bank, F.S.B. by Plaintiffs-Debtors, which was secured by a Deed of Trust recorded on the subject property located at 9090 Locust Street, Elk Grove, CA 95624, on October 5, 2006. Ms. Marks further states that OneWest serviced the loan on behalf of Deutsche Bank National Trust Company, as Indentured Trustee for IndyMac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H4.

On or about June 13, 2013, OneWest entered into an agreement to sell, transfer, and assign its servicing rights regarding several loans, including the Subject Loan to Defendant, Ocwen Loan Servicing, LLC ("Ocwen") effective December 13, 2013. Ms. Marks states that pursuant to the agreement, Ocwen was authorized to retain counsel to defend OneWest in any litigation concerning the Subject Loan, including the adversary proceeding at issue. That in accordance to the agreement, Ocwen retained the Law Offices of Wright, Finlay and Zak, LLP ("WFZ") to defend Ocwen and OneWest in the adversary action.

Ms. Marks attached the following two documents as Exhibits 1 and 2 to her declaration: 1) a document described as "Docket for Bankruptcy Case 09-27153," which appears to list the interested parties in this matter, as well as a list of dates related to the Bankruptcy Case; and 2) a Deed of Trust.

Exhibits With Rebecca Marks' Declaration

Exhibit 2, in support of Ms. Marks' Declaration, is the Deed of Trust. The Deed of Trust was recorded October 5, 2006, having been executed by Gil H. Raposo and Joanne C. Raposo, for the subject property located at 9090 Locust Street, Elk Grove, CA 95624. The Lender appears as IndyMac Bank, F.S.B., a federally chartered savings bank. The total principal amount secured is in the amount of \$51,000.00, to be paid in full by November 15, 2026.

DISCUSSION

The court first addresses the responses to the supplemental order filed on September 22, 2015. Dckt. 40.

As to the issue of Ms. Glowin's September 17, 2015 Declaration being

filed under "information and belief," Ms. Glowin states that she understands that a declaration under such does not meet the Rule 602, Federal Rule of Evidence, standard. Ms. Glowin filed the September 17th Declaration "under information and belief as OneWest and Ocwen were and are the best parties to address the issues raised by the Court. Dckt. 54. The only explanation provided by Ms. Glowin as to why such declaration was filed was that there would be a supplemental declaration from the client and that Ms. Glowin was unable to provide the court with the requested documentation at the time of the September Declaration.

This response seems to be lacking. Ms. Glowin does not provide explanation as to why such documentation was not available at the time of the initial filing. The court issued the first order on September 4, 2015, in response to OneWest and Ocwen's failure to reconvey the deed of trust, failure to respond to the complaint, and failure to file any opposition to the request for entry of default judgment. As the alleged counsel for both entities (discussed further infra), Ms. Glowin does not state why such documentation was not available in the client file or, as the attorney for the parties, why such information was readily available.

As to why WFZ was not able to provide engagement letters or power of attorney by the September 15th deadline, Ms. Glowin (instructing the court to reference the declaration filed on behalf of Ocwen) states that there are no retainer agreements or engagement letters between Ocwen, OneWest, and WFZ, as Ocwen employs a "Managing Counsel" program. The effect of this program, as alleged by Ms. Glowin and Mr. Flannigan on behalf of Ocwen, that no specific retainer agreement is executed to each individual case referral. Instead, "matters are referred to Managing Counsel through referrals that are uploaded into Ocwen's CounselLink case management system." Dckt. 56, ¶ 10. Mr. Flannigan then refers to the same e-mail sent from "Hema Dhapola, Litigation Analyst, Law Dept, Ocwen Financial Solutions" as the basis for the authority. Dckt. 57, Exhibit 5. Mr. Flannigan's declaration states:

Ocwen's business records reflect that on August 5, 2015, Ocwen's Legal Department retained WFZ to defend Ocwen and OWB in the Adversary Action by providing access to the referral via CounselLink case management system and by uploading an e-mail notification directly into the CounselLink case management system. The e-mail was not sent directly to WFZ; rather it was uploaded into the CounselLink case management system when WEZ was assigned this matter.

Dckt. 56, ¶ 11.

However, instead of providing the court with information as to how CounselLink creates a fiduciary relationship between attorney and client, Ocwen and Ms. Glowin seem to rely solely on the fact that CounselLink assigns it and, even without any retainer or employment agreement, WFZ is the attorney of record as to the instant matter. This is once again insufficient.

In response to the reason why the signature block of Ms. Dhapola's email states the entity is "Ocwen Financial Services," Ms. Glowin states that "Ocwen Financial Solutions is an authorized agent of Ocwen Loan Servicing, LLC." Mr. Flannigan merely states that "Ocwen's business records reflect that WFZ is the designated authorized counsel for Ocwen and OWB in the Adversary

Action. Ocwen specifically consents to and authorized WFZ's representation of OWB and Ocwen in the Adversary Action." Dckt. 56, ¶ 12.

However, Ms. Glowin nor Mr. Flannigan provides any actual authorization of such.

Ms. Marks' response on behalf of CIT Bank, N.A. formerly known as OneWest Bank, FSB does not fair any better. In regards to representation, it appears that CIT Bank, retroactively, is attempting to authorize the employment of WFZ. Specifically, Ms. Marks' response states:

7. On or about June 13, 2013, ONEWEST entered into an agreement ("Agreement") to sell, transfer and assign its servicing rights regarding several loans, including the Subject Loan herein, to Defendant, OCWEN LOAN SERVICING, LLC ("OCWEN") effective December 1, 2013. Pursuant to the Agreement, OCWEN was and is authorized to retain counsel to defend ONEWEST in any litigation concerning the Subject Loan, including the above-referenced adversary proceeding filed May 14, 2015. .
8. Pursuant to the above-referenced Agreement, OCWEN retained the Law Offices of Wright, Finlay and Zak, LLP ("WFZ") to defend OCWEN and ONEWEST in the Adversary Action. ONEWEST specifically consents to and authorizes WFZ's representation of ONEWEST in the Adversary Action.

Dckt. 51. However, no such "Agreement" is attached to Ms. Marks' response.

Furthermore, the court's reading of the email, as indicated in the court's subsequent order on September 22, 2015, the email alone from Ms. Dhapola does not provide any indication of the retention of WFZ.

As to the powers of attorney between Ocwen Loan Servicing, LLP and Wright Finlay & Zak, LLP and OneWest Bank, FSB and Wright Finlay & Zak, LLP, the court is once again left lacking sufficient information. A review of all the documentation filed by responding parties, there is only one exhibit titled "Limited Power of Attorney." Dckt. 57, Exhibit 4. This Limited Power of Attorney is between " Deutsche Bank National Trust Company. . . as Indentured Trustee. . . by and between Indentured Trustee and OCWEN LOAN SERVICING, LLC." *Id.* This appears to be the first time that Deutsche Bank National Trust Company has been indicated as a party in the transaction at all.

The Deed of Trust is between "Gil H. Raposo and Janne C. Raposo, husband and wife, as joint tenants" and "IndyMac Bank, F.S.B." as lender. Exhibit 2, Dckt. 57.

Mr. Marks' declaration states that "ONEWEST serviced the loan on behalf of Deutsche Bank National Trust Company, as Indentured Trustee for IndyMac Home Equity Mortgage Loan Asset-Backed Trustee, Series 2006-H4." Dckt. 51, ¶ 6. However, there is no evidence provided showing that Deutsche Bank National Trust Company is the Indenture Trustee.

Mr. Flannigan's declaration states that:

Ocwen's business records reflect that as of the date of the filing of the Bankruptcy Action, on or about April 16, 2009, Defendant ONEWEST BANK, FSB ("OWB") acted as the servicer of the Subject Loan for Deutsche Bank National Trust Company, as Indenture Trustee for IndyMac Home Equity Mortgage Loan Asset-Backed Trust, Series 2006-H4. . .which is a loan in the amount of \$51,000.00 made to Indymac Bank, FSB by Plaintiffs. . .and was secured by a Deed of Trust.

Dckt. 56, ¶ 5.

Mr. Flannigan's declaration includes a copy of a letter sent to Plaintiff-Debtor on November 15, 2013. This letter states:

Effective 12/01/2013, IndyMac Mortgage Services, a division of OneWest Bank, FSB (IndyMac) will transfer the servicing of your Home Equity Line of Credit (HELOC) to Ocwen Loan Servicing, LLC (Ocwen).

Exhibit 3, Dckt. 57.

There is no transfer of the Deed of Trust from IndyMac Bank, F.S.B. to Deutsche Bank National Trust Company. Much like the court's other issues with the instant case, there appears to be a "hiding the ball." None of the responding parties address why, since May 14, 2015, this is the first time that the responding parties have indicated Deutsche Bank National Trust Company as the Trustee and holder of the Note.

Taking the representation that the actual creditor is Deutsche Bank National Trust Company, as Indentured Trustee, is true, the Transfer of Claim filed on September 4, 2014 (09-27153, Dckt. 96) appears to be inaccurate (though stated under penalty of perjury). It states that the claim has been assigned from OneWest Bank, FSB (which is now acknowledged to only have been a servicer) to Ocwen Loan Servicing, LLC (which now asserts to be a servicer, not the owner of the claim). It is Deutsche Bank National Trust Company, Indentured Trustee, who is identified as the actual creditor.

The court is further concerned that on August 25, 2015, Ms. Glowin and WFZ represented to this court that said attorney and law firm represented an entity which did not exist - OneWest Bank, FSB. Stipulation, Dckt. 21. Ms. Marks testifies that on August 3, 2015, OneWest Bank, FSB and CIT Bank, N.A. were merged into one entity, with the surviving entity being CIT Bank, N.A. Declaration ¶ 1, Dckt. 51. Thus, the representation by counsel and WFZ on August 25, 2015 (Dckt. 21), and then continuing on the subsequent pleadings that there is an person identified as OneWest Bank, FSB appearing in this Adversary Proceeding. (The latest filed on October 15, 2015, stating that counsel and WFZ represent "OneWest Bank, FSB;" Dckt. 57.) No such entity exists.

At the hearing, **xxxxxx**

The court shall issue a minute order substantially in the following form

November 19, 2015 at 1:30 p.m.

- Page 40 of 49 -

holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Appear having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the court having previously continued the hearing to 1:30 p.m. on November 19, 2015 (Dckt. 40); and good cause appearing;

IT IS ORDERED that ~~xxxxxx~~

5. [14-29284-E-7](#) CHARLES MILLS
[15-2099](#) APN-3
BMW BANK OF NORTH AMERICA V.
MILLS, JR.

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
10-19-15 [[23](#)]

**APPEARANCE OF COUNSEL FOR PLAINTIFF REQUIRED
ONLY IF PLAINTIFF DOES NOT AGREE WITH COMPUTATION
OF PREJUDGMENT INTEREST**

TELEPHONIC APPEARANCE PERMITTED

Tentative Ruling:

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Defendant's attorney on October 19, 2015. By the court's calculation, 31 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 Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties 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 to be the equivalent of a statement of nonopposition. *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 Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered

The Motion for Entry of Default Judgment is granted.

BACKGROUND

Charles Mills, Jr. ("Defendant-Debtor") filed for Chapter 11 relief on September 17, 2014. E.D. Cal. Bankr. Case No. 14-29284, Dckt. 1. The case was converted to a Chapter 7 on December 23, 2014. *Id.* at Dckt. 154.

BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services, NA, LLC ("Plaintiff-Creditor") filed the instant adversary proceeding on May 22, 2015, for a determination of the nondischargeability of the debt incurred by Defendant-Debtor in the purchase agreement of a 2011 Maserati GranTurismo between Plaintiff-Creditor and Defendant-Debtor. Plaintiff-Creditor filed the instant motion seeking entry of a default judgment against Defendant-Debtor. Fed. R. Civ. P. 55(b)(2), Fed. R. Bankr. P. 7055(b)(2). The court entered an Order Granting an

Extension to file the Motion for Entry of Default Judgment, extending the deadline to October 31, 2015. Dckt. 29.

Plaintiff-Creditor's motion states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the relief is based:

- A. On May 22, 2015, Plaintiff-Creditor filed a Complaint to Determine Dischargeability of Debt (the "Complaint") against the Defendant pursuant to 11 U.S.C. 523(a)(2) with respect to Defendant's Credit Application associated with his stated interest in purchasing a 2011 Maserati GranTurismo vehicle under the terms of a written agreement (the "Account");
- B. Defendant-Debtor has not filed an Answer to the Complaint;
- C. On September 15, 2015, prior to the status conference held, the court would [sic] issued as Order Setting Deadlines to File Documents. The court ordered that the Status Conference was continued to January 20, 2016, to allow Counsel for Plaintiff-Creditor to file a request for entry of Defendant's default and to file a Motion in Support of Entry of Default Judgment;
- D. On September 17, 2015, Plaintiff-Creditor filed a Request for Entry of Default by Clerk;
- E. On September 18, 2015, the court subsequently filed and entered an Entry of Default by Clerk;
- F. As a result of Defendant-Debtor's failure to respond, no defenses to the Complaint have been asserted;

No opposition has been filed by Defendant-Debtor.

DISCUSSION

I. Legal Framework

Legal Standard for 11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) provides, in pertinent part:

(a) A discharge under section 727, 1141, 1128(a), 1128(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Muegler v. Bening, 413 F.3d 980, 983 (9th Cir. 2005). In order to prevail on the § 523(a)(2)(A) nondischargeability claim, the moving party needs to provide by a preponderance of the evidence:

- (1) that the debtor made material misrepresentations;
- (2) that the debtor knew the misrepresentations were false at the time they were made;
- (3) that the debtor made the misrepresentations with the intention and purpose of deceiving the creditor;
- (4) that the creditor justifiably relied on such misrepresentations; and
- (5) that the creditor sustained a loss or injury as a proximate result of the misrepresentation have been made.

In re Vidov, No. CC-13-1421-KiBlPa, 2014 Bankr. LEXIS 3268, at *8 (B.A.P. 9th Cir. July 31, 2014).

The exception to dischargeability of debts under § 523(a)(2)(A) balances two competing policy goals: first, debtors are entitled to a fresh start, and the exception "should be construed strictly against creditors and in favor of debtors;" second, "Congress created the exception to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010) (internal quotations and citations omitted).

The intent to deceive can be inferred from surrounding circumstances. *In re Kennedy*, 108 F.3d 1015, 1018 (9th Cir. 1997).

"Justifiable reliance" is determined by looking at "all of the circumstances surrounding the particular transaction, and must particularly consider the subjective effect of those circumstances on the creditor." *In re Kirsh*, 973 F.2d 1454, 1460 (9th Cir. 1992). The Bankruptcy Appellate Panel in *In re Apte* stated:

The general rule is that a person may justifiably rely on a representation even if the falsity of the representation could have been ascertained upon investigation. In other words, negligence in failing to discover an intentional misrepresentation is no defense. However, a person cannot rely on a representation if he knows that it is false or its falsity is obvious to him. In sum, although a person ordinarily has no duty to investigate the truth of a representation, a person cannot purport to rely on preposterous representations or close his eyes to avoid discovery of the truth.

In re Apte, 180 B.R. 223, 229 (B.A.P. 9th Cir. 1995) (citations and quotation marks omitted).

In line with Ninth Circuit precedent, "there is no requirement that the

debtor 'ha[s] received a direct or indirect benefit from his or her fraudulent activity in order to make out a violation of § 532(a)(2)(A)." *In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010).

Finally, even if these elements are met, if the statement relied on is "a statement respecting the debtor's or an insider's financial condition" then the claim is specifically exempted by the language of § 523(a)(2)(A). *In re Montano*, 501 B.R. 96 n. 5 (B.A.P. 9th Cir. 2013).

Legal Standard for 11 U.S.C. § 523(a)(2)(B)

Section 523(a)(2)(B) provides, in pertinent part:

(a) A discharge under section 727, 1141, 1128(a), 1128(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

(B) use of a statement in writing-

(I) That is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;...

The Bankruptcy Appellate Panel in *In re Gertsch* articulated factors very similar to the § 523(a)(2)(A) requirements, but imposed a heightened showing of "reasonable reliance" on the creditor. See *In re Gertsch*, 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999). "Reasonable reliance" was explained in *In re Barlaam*:

Reasonable reliance under § 523(a)(2)(B) means reliance that would have been reasonable to a hypothetical average person. *Heritage Pac. Fin. LLC v. Machuca (In re Machuca)*, 483 B.R. 726, 736 (B.A.P. 9th Cir. 2012). Reasonable reliance is analyzed under a "prudent person" test. *Cashco Fin. Servs., Inc. v. McGee (In re McGee)*, 359 B.R. 764, 774 (B.A.P. 9th Cir. 2006); *In re Cacciatori*, 465 B.R. at 555 (bankruptcy court must objectively assess the circumstances to determine if creditor exercised degree of care expected from a reasonably cautious person in the same business transaction under similar circumstances). Reasonable reliance is judged in light of the totality of the circumstances on a case-by-case basis. *In re Machuca*, 483 B.R. at 736. A

creditor is under no duty to investigate in order for its reliance to be reasonable. *In re Gertsch*, 237 B.R. at 170 ("[A]lthough a creditor is not entitled to rely upon an obviously false representation of the debtor, this does not require him or her to view each representation with incredulity requiring verification."). Furthermore, a creditor's reliance may be reasonable if it adhered to its normal business practices. *Id.* at 172.

In re Barlaam, 2014 WL 3398381, at *10 (B.A.P. 9th Cir. 2014).

II. DEFENDANT-DEBTOR'S 2013 VEHICLE PURCHASE

The threshold question on whether this is a § 523(a)(2)(A) or § 523(a)(2)(B) exception is whether there is a written statement respecting the debtor's financial condition. Here, as described above, Plaintiff-Creditor seeks exception to discharge based on Defendant-Debtor's representations about his income on the Consumer Credit Application. Thus, the court may proceed with the analysis under § 523(a)(2)(B).

Applying the standard to the instant case, Defendant-Debtor made the material misrepresentation that he had a 2013 salary of \$1,920,000.00 and was employed as the President of EMA Services; Defendant-Debtor's Schedules and Statement of Financial Affairs in the underlying bankruptcy case state that his pre-tax income in 2013 was \$180,000.00 and that he was a Husband American Energy Partner. *Compare* Dckt. 27, Exh. B (Consumer Credit Application), and Cal. Bankr. Case No. 14-29284, Dckt. 50 p. 27 (Statement of Financial Affairs). Thus, Defendant-Debtor made a material misrepresentation.

Defendant-Debtor's knowledge of the misrepresentations is evident from the same Statement of Financial Affairs, where Debtor's 2012 income as a "Husband American Energy Partners" was \$73,461.00. E.D. Cal. Bankr. Case No. 14-29284, Dckt. 50 p. 27 (Statement of Financial Affairs).

The court may infer, from the large disparity between represented and actual 2013 incomes and the two different employer names, that Defendant-Debtor made the misrepresentation of his income with the intent and purpose of deceiving Plaintiff-Creditor into extending credit for the purchase of the Vehicle. *Compare* Dckt. 27, Exh. B, and Cal. Bankr. Case No. 14-29284, Dckt. 50 p. 27.

For the heightened "reasonable reliance" standard, Plaintiff-Creditor relies on the Declaration of Greg Essman, a Bankruptcy Specialist employed by BMW Financial Services N.A., LLC, service provider for Plaintiff, BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services NA, LLC. Dckt. 25 ¶ 1. Further, "[i]t is Plaintiff's practice to require prospective borrowers, including the Defendant herein, to complete a Consumer Credit Application so it can evaluate whether or not the borrower is qualified to borrow the funds necessary to purchase a vehicle." *Id.* at ¶ 6. FN.1. Thus, Plaintiff-Creditor reasonably relied on Defendant-Debtor's Consumer Credit Application, and that materially false statement was a proximate cause of the harm felt.

FN.1. The court notes that the standard for "reasonable reliance" described in *In re Gertsch* is that "'Industry Custom' is merely a guideline, and not an element that must be proven before reliance can be said to be reasonable. As noted in *Cohn*, 54 F.3d at 1117, absent other factors, a creditor demonstrates reasonable reliance by showing that it followed its normal business practices." *In re Gertsch*, 237 B.R. 160, 170 (B.A.P. 9th Cir. 1999).

Here, while Plaintiff-Creditor did not provide evidence of the industry custom to rely solely on the Consumer Credit Application, the Essman Declaration does state that "It is Plaintiff's practice to require prospective borrowers, including the Defendant herein, to complete a Consumer Credit Application so it can evaluate whether or not the borrower is qualified to borrow the funds necessary to purchase a vehicle." Dckt. 25 ¶ 6. Because there is no opposition by Defendant-Debtor, this is sufficient evidence to support a finding that Plaintiff-Creditor reasonably relied on the Application as a part of its normal business practices.

As set forth the Declaration of Greg Essman, after applying the proceeds from the sale of the vehicle, the obligation due Plaintiff-Creditor has been reduced to \$58,158.81. Dckt. 25. This amount was computed as of October 1, 2015. Declaration, Dckt. 25; and Exhibit D, October 1, 2015 demand for payment letter, Dckt. 27.

Thus, on the evidence provided, and with no opposition by Defendant-Debtor, the court finds that Plaintiff-Creditor has satisfied the elements of 11 U.S.C. § 523(a)(2)(B). Plaintiff-Creditor reasonably relied on a fraudulent written statement by Defendant-Debtor. The court infers that Defendant-Debtor's intent was to defraud Plaintiff-Creditor into extending credit for the Vehicle, and that the statement proximately caused Plaintiff-Creditor's financial harm.

III. Relief Requested

Non-Dischargeability Determination

Plaintiff-Creditor requests two forms of relief on the grounds explained above: first, that this court deny Defendant-Debtor's dischargeability of debt owed to Plaintiff and to enter default judgment in the sum of \$58,158.81; and second, that the court award "damages as the Court deems just and proper and for reasonable attorney fees; including, but not limited to the maximum judicial rate of interest." Dckt. 26 p. 10.

As stated above, Plaintiff-Creditor is entitled to a determination that the balance due under the contract for the vehicle of \$58,158.81 is non-dischargeable in Defendant-Debtor's Chapter 7 Bankruptcy Case No. 14-29284. 11 U.S.C. § 523(a)(2)(A, B).

The Complaint also requests pre-judgment interest at the rate of 9.74% per annum. The Motion does not compute the prejudgment amount for the period after October 1, 2015. The court grants judgment for additional pre-judgment interest on the October 1, 2015 balance of \$58,158.81, which after the identified costs and expenses, remains of the original principal obligation, for the period from October 1, 2015 through November 19, 2015 as

additional pre-judgment interest in the amount of \$775.98 ($\$58,158.81 \times 9.74\% = \$5,664.67 / 365 = \$15.20/\text{day} \times 50 \text{ days} = \775.98).

Attorney's Fees and Damages

The Memorandum of Points and Authorities requests attorney's fees and damages with no contractual or statutory basis pleaded. Dckt. 26 p. 10. Contrarily, the Motion prays for "entry of judgment in its favor in the amount of \$112,101.32, plus interest and costs, and any other such relief as the Court may deem appropriate." Dckt. 23 ¶ 8.

As amended December 2014, Federal Rule of Bankruptcy Procedure 7008 no longer requires that a demand for attorneys' fees be pleaded as a separate claim in the Complaint. "The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R.Civ.P. As specified by Rule 54(d)(2)(A) and (B) F.R.Civ.P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply." Advisory Committee Notes for 2014 Amendments.

The Motion is granted and the court shall issue a judgment determining that

The attorneys' fees, if any, shall be requested by a timely post-judgment motion. Costs shall be required by a costs bill.

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 BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services, NA, LLC ("Plaintiff-Creditor") against Charles Mills, Jr. ("Defendant-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 for Entry of Default Judgment is granted, and the balance of the contract between BMW Bank of North America, a Utah Industrial Bank and wholly owned subsidiary of BMW Financial Services, NA, LLC ("Plaintiff-Creditor") and Charles Mills, Jr. ("Defendant-Debtor"), for the remaining balance on the contract of \$58,1934.79 (\$58,1581.81 principal and \$775.98 pre-judgment interest), is nondischargeable pursuant to 11 U.S.C.

§ 523(a)(2).

IT IS FURTHER ORDERED that the a motion for attorneys' fees, if any, shall be filed and served in timely compliance with Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, and costs requested by a timely costs bill.

Counsel for Defendant shall prepare and lodge with the court a proposed judgment consistent with this Order.