

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, December 2, 2021
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

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

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [21-12101](#)-A-13 **IN RE: EMILIANO HERNANDEZ**
[SLL-1](#)

MOTION TO CONFIRM PLAN
10-25-2021 [\[18\]](#)

EMILIANO HERNANDEZ/MV
STEPHEN LABIAK/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

2. [21-11703](#)-A-13 **IN RE: REYMUNDO GARZA**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-4-2021 [\[38\]](#)

BENNY BARCO/ATTY. FOR DBT.
FINAL INSTALLMENT OF \$76.00 PAID 11/10/21

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid. The case shall remain pending.

MOTION TO DISMISS CASE
11-2-2021 [\[58\]](#)

MICHAEL MEYER/MV
ALAN EIGHMEY/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The court will issue an order after the
hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The debtors timely filed written opposition on November 18, 2021. Doc. #66. The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the non-responding parties in interest are entered.

The debtors' bankruptcy case was converted to chapter 13 from chapter 7 on September 10, 2021. Doc. #45. On November 2, 2021, the chapter 13 trustee ("Trustee") moved to dismiss this bankruptcy case for unreasonable delay by the debtors that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) and failure to cooperate with Trustee as required by 11 U.S.C. § 521(a)(3) and (4). Doc. #58. Trustee alleges that David W. Ebel and Diane L. Ebel (together, "Debtors") have failed to provide evidence supporting food, housing, and medical and dental expenses, and Debtors also have not provided a vehicle registration for Debtors' 2017 Chevrolet Equinox. Doc. #58.

On November 18, 2021, Debtors responded to Trustee's motion, contending (without a supporting declaration under penalty of perjury or other supporting evidence) that Debtors delivered all information to Trustee that Trustee requested. Doc. #66. Debtors also claim to be current on all monthly plan payments. Debtors oppose dismissal of their bankruptcy case because they claim to be in full compliance with all of Trustee's requests.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011).

Here, Debtors contend to have turned over all information requested by Trustee but have not provided any admissible evidence in support of their contentions. If Trustee's motion is not withdrawn at or before the hearing, the court is inclined to deny this motion if Debtors are able to supplement the record demonstrating that Debtors have complied with Trustee's requests.

4. [19-10438](#)-A-13 **IN RE: JOSE/JENNIFER RODRIGUEZ**
[NES-3](#)

MOTION TO MODIFY PLAN
10-29-2021 [[90](#)]

JENNIFER RODRIGUEZ/MV
NEIL SCHWARTZ/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to January 13, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to modify the chapter 13 plan. Tr.'s Opp'n, Doc. #94. Unless this case is dismissed or Trustee's opposition to confirmation is withdrawn, the debtors shall file and serve a written response no later than December 16, 2021. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. Trustee shall file and serve a reply, if any, by December 30, 2021.

If the debtors elect to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than December 30, 2021. If the debtors do not timely file a modified plan or a written response, this motion will be denied on the grounds stated in Trustee's opposition without a further hearing.

5. [21-12272](#)-A-13 **IN RE: AMANDA MANUEL**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
11-8-2021 [[15](#)]

JASON VOGELPOHL/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This motion is OVERRULED AS MOOT. The debtor filed a modified plan on November 19, 2021 (JV-2, Doc. #22), with a motion to confirm the modified plan set for hearing on January 13, 2022 at 9:30 a.m. Doc. ##23-28.

6. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[MHM-6](#)

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-27-2021 [[263](#)]

MICHAEL MEYER/MV
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

The chapter 13 trustee objects to the debtor's Schedule C that purports to claim an exemption under 11 U.S.C. § 522(b). On November 19, 2021, the court entered an order sustaining an objection to the same exemption filed by creditor T2M Investment LLC. Doc. #287. Accordingly, this objection will be OVERRULED AS MOOT.

1. [21-11450](#)-A-7 **IN RE: ANTHONY FLORES**
[21-1036](#) [BGR-1](#)

MOTION TO STRIKE
10-29-2021 [\[14\]](#)

SAWUSCH ET AL V. FLORES
JESSICA WELLINGTON/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with leave to amend.

ORDER: The minutes of the hearing will be the court's findings
and conclusion. The Moving Party shall submit a proposed
order after the hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The defendant timely filed written opposition on November 18, 2021. Doc. #21. This matter will proceed as scheduled.

Carole Sawusch, Administrator of the Estate of Mark Sawusch, and Patsy Ann Sawusch, Beneficiary of the Estate of Mark Sawusch, (together, "Plaintiffs") move to strike the defendant's answer pursuant to Federal Rule of Civil Procedure ("Civil Rule") 12(f) and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7012. Doc. #14. Plaintiffs filed their complaint on August 24, 2021 (the "Complaint"). Doc. #1.

After stipulating to extend the deadline to answer, Anthony David Flores ("Defendant") answered the Complaint on October 8, 2021 (the "Answer"). Doc. #9. As to the allegations against Defendant, the Answer contains two paragraphs generally denying the entirety of Plaintiffs' Complaint. Answer, Doc. #9. First, Defendant states that he lacks sufficient information or knowledge to admit or deny the allegations of the Complaint. Answer 1:28-2:1, Doc. #9. In the second paragraph, Defendant "generally denies each and every allegation of the Complaint." Answer 2:2-10, Doc #9. The Answer then sets forth sixteen affirmative defenses, of which fifteen are single sentences each asserting a particular legal doctrine. Answer 2:13-4:6, Doc. #9. The last affirmative defense is not an affirmative defense but rather a reservation of the right to assert additional affirmative defenses and amend the Answer. Answer 4:7-10, Doc. #9.

Plaintiffs request the court strike the Answer, including all affirmative defenses. Doc. #14. Civil Rule 12(f), made applicable to this proceeding by Bankruptcy Rule 7012(b), governs motions to strike. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Civil Rule 12(f). A motion to strike functions to streamline litigation by dispensing with "spurious issues," but "courts freely grant leave to amend stricken pleadings." Kohler v. Staples the Office Superstore, LLC, 291 F.R.D. 464, 467 (S.D. Cal. 2013).

Defendant's General Denial is Insufficient

Plaintiffs argue that striking Defendant's Answer is appropriate because the Answer does not respond to the allegations of the Complaint. Doc. #16. Civil

Rule 8(b) requires a party responding to a complaint "state in short and plain terms its defenses to each claim asserted against it [and] admit or deny the allegations asserted against it." Civil Rule 8(b)(1). "A denial must fairly respond to the substance of the allegation." Civil Rule 8(b)(2). A general denial is appropriate only if the party "intends in good faith to deny all the allegations of the pleading[,]including the jurisdictional grounds[.]" Civil Rule 8(b)(3). "A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial." Civil Rule 8(b)(5).

By the Answer, Defendant makes a general denial. However, Defendant's general denial does not fairly respond to the substance of the allegations set forth in the Complaint, and Defendant cannot reasonably intend to deny all the allegations of the Complaint. For example, Paragraph 1 of the Complaint states that Defendant filed a voluntary chapter 7 bankruptcy petition with this court on June 2, 2021. Complaint ¶ 1, Doc. #1. A review of this court's docket indicates that to be true. Rather than generally deny the entire Complaint, to satisfy Civil Rule 8(b), Defendant "must admit the part that is true and deny the rest." Civil Rule 8(b)(4). Alternatively, Defendant may state that he lacks knowledge or information sufficient to form a belief about the truth of an allegation, which may function as a denial but is a different response than explicitly denying the allegation.

By the opposition, Defendant contends that the general denial in the Answer is adequate, but then proceeds to provide particular reasons why the general denial is appropriate to discrete allegations. Doc. #21. This only bolsters the argument that a general denial to the Complaint is inappropriate. If there are discrete reasons why Defendant can and will deny discrete allegations, then a general denial is inappropriate. For example, if Defendant lacks knowledge or information sufficient to form a belief about the truth of an allegation, that must be stated. Civil Rule 8(b)(5). Alternatively, if Defendant denies an allegation in the Complaint because the allegation purports to claim fraud (i.e., states a legal conclusion) but otherwise does not deny the particular factual allegation, Defendant must admit the part of the allegation that is true and deny the rest. Civil Rule 8(b)(4).

Defendant's general denial does not satisfy Civil Rule 8 and will be stricken. The court will grant Defendant leave to amend the Answer.

Defendant's Affirmative Defenses are Insufficient

Plaintiffs further contend that the affirmative defenses in the Answer should be stricken because they fail to provide fair notice of the defenses asserted. Doc. #16.

Affirmative defenses must satisfy the "fair notice" pleading standard that "requires describing the defense in 'general terms.'" Kohler v. Flava Enters., 779 F.3d 1016, 1019 (9th Cir. 2015); e.g., Frazier v. City of Rancho Cordova, No. 2:15-CV-00872, 2016 U.S. Dist. LEXIS 11769, 2016 WL 374567, at *4-5 (E.D. Cal. Jan. 29, 2016). Satisfying the fair notice standard "generally requires that the defendant state the nature and grounds for the affirmative defense. It does not, however, require a detailed statement of facts." Kohler v. Staples, 291 F.R.D. at 468 (citations omitted). Though an affirmative defense "need not be supported by detailed factual allegations, it must at least give notice of the 'grounds upon which it rests.'" Id at 469 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "A reference to a doctrine . . . is insufficient notice." Qarbon.com Inc. v. eHelp Corp., 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004); Beco Dairy Automation, Inc. v. Global Tech Sys., No. 1:12-CV-01310, 2015 U.S. Dist. LEXIS 130503, at *36 (E.D. Cal. Sept. 28, 2015). Simply

referring to a doctrine without setting forth the elements or providing some factual basis of the affirmative defense does not provide fair notice. Id. at 1049-50.

Defendant's affirmative defenses fail to provide fair notice. In Qarbon, the district court found the defendant's affirmative defenses failed to provide fair notice of what the defenses were and the grounds upon which they rested, and granted a motion to strike the affirmative defenses with leave to amend. Qarbon.com Inc., 315 F. Supp. 2d at 1049. The defendant asserted affirmative defenses of waiver, estoppel, and unclean hands, but only identified the legal doctrines by name. Id. The defendant did not set forth any elements of the affirmative defenses and did not provide any allegations or other factual grounds for the affirmative defenses. Id. at 1049-50.

Here, none of Defendant's affirmative defenses are more than one sentence long and none of them set forth any legal standard or elements. Defendant offers no factual grounds for any of the asserted affirmative defenses. For example, Defendant's Second Affirmative Defense states that Plaintiffs' "claims are barred in whole or in part by the doctrine of unjust enrichment, as Plaintiff's [sic] receipt of assets is directly attributable to Defendants actions [sic] in securing, protecting, and retaining the assets." Answer 2:19-22, Doc. #9. Defendant does not set forth any elements of unjust enrichment, does not set forth any underlying facts that allegedly give rise to Plaintiffs' unjust enrichment, and does not identify what allegations in the Complaint may be part of Plaintiffs' conduct giving rise to unjust enrichment. Further, it is unclear whether the affirmative defense is asserted against a single plaintiff or both Plaintiffs. Similarly, Defendant's Fifteenth Affirmative Defense states that "Plaintiffs' claims are barred by their prior breach of an agreement with Defendant." Answer 4:6, Doc. #9. To the extent that prior breach of contract is an affirmative defense, Defendant does not set forth any elements of breach of contract, factual grounds supporting the affirmative defense, or other information that would rise to the level of fair notice. The same is true for each of Defendant's other affirmative defenses. Through the Complaint, Plaintiffs seek a judgment rendering a debt created by a prior settlement and state-court judgment nondischargeable under 11 U.S.C. § 523(a)(2)(A) (false pretenses, false representation, or actual fraud), § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny), and/or § 523(a)(6) (willful and malicious injury). Doc. #1. Defendant fails to provide any factual or legal support explaining how the asserted affirmative defenses would apply to render the debt Defendant owes to Plaintiffs to be dischargeable.

Additionally, Defendant sets forth affirmative defenses that are not affirmative defenses. See Barnes v. AT&T Pension Benefit Plan, 718 F. Supp. 2d 1167, 1173-74 (N.D. Cal. 2010); Vogel v. Huntington Oaks Del. Partners, LLC, 291 F.R.D. 438, 442 (C.D. Cal. 2013). For example, the Fourth Affirmative Defense states that the Complaint "fails to state a claim or cause of action for which relief may be granted and fails to state a claim or cause of action entitling Plaintiff[s] to the relief sought therein." Answer 2:27-3:1, Doc. #9. "But failure to state a claim is not an affirmative defense[.]" Vogel, 291 F.R.D. at 442. Defendant's Fourteenth Affirmative Defense states that "[a]ll acts done by Defendant were performed fairly, in good faith, and for a lawful purpose, and were reasonable and justified under the circumstances." Answer 4:3-4, Doc. #9. "Such a defense" is not an affirmative defense but "is merely rebuttal against the evidence presented by the plaintiff." Barnes, 718 F. Supp. 2d at 1173-74.

The court will strike each of the affirmative defenses. Defendant will be given leave to amend.

Conclusion

The court will STRIKE Defendant's Answer. Although Defendant is permitted to amend the Answer and recast affirmative defenses, Defendant must include more than conclusory recitations of legal doctrines in the amended answer. Defendant is further encouraged to consider carefully whether the affirmative defenses he chooses to reassert actually apply to Plaintiffs' Complaint.

2. [21-11450](#)-A-7 **IN RE: ANTHONY FLORES**
[21-1036](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-24-2021 [[1](#)]

SAWUSCH ET AL V. FLORES
JESSICA WELLINGTON/ATTY. FOR PL.

NO RULING.