

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, November 02, 2016

Hearing Room 303

11:00 AM

6:16-18840 Jeannette Oke

Chapter 7

#1.00 Order to show cause re dismissal for failure to comply with rule 1006(B) -
Installments

EH__

Docket 14

***** VACATED *** REASON: INSTALLMENT PAID ON 10/19/16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Jeannette Oke

Pro Se

Trustee(s):

Larry D Simons (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

Wednesday, November 02, 2016

Hearing Room 303

11:00 AM

6:16-18299 Carlos A Acosta, Sr. and Juana R Acosta

Chapter 7

#2.00 Motion to Compel Chapter 7 Trustee to Abandon Business Pursuant of 11 U.S.C sect554(b)

EH__

Docket 8

Tentative Ruling:

11/02/2016

BACKGROUND

On September 16, 2016, Carlos & Juana Acosta ("Debtors") filed their petition for Chapter 7 relief. Karl Anderson is the duly appointed trustee ("Trustee"). Schedule A/B #53 included an entry for \$7000 for "Value of the business which includes misc Tools like Welder Compression, Drills; Benders and goodwill of the business." On Schedule C, \$7000 of the property was exempted under C.C.P. § 703.140(b)(5). Debtors only used \$5,000 of their § 703.140(b)(1) exemption for other property.

On October 5, 2016, Debtors filed a motion to compel Trustee to abandon the business described above. Service was proper and no opposition has been filed.

DISCUSSION

Any interested party may seek to compel the trustee (or DIP) to abandon property by showing that the property is burdensome or of inconsequential value and benefit to the estate. 11 U.S.C. § 554(b) (2010).

11 U.S.C. § 554(b) states:

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon *any property of the estate* that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

Id. (emphasis added). "The effect of an exemption is that the debtor's interest in the property is 'withdrawn from the estate (and hence from the creditors) for the benefit of

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CONT... **Carlos A Acosta, Sr. and Juana R Acosta** **Chapter 7**

the debtor.'" See *In re Gebhart*, 621 F.3d 1206, 1210 (9th Cir. 2010) (quoting *Owen v. Owen*, 500 U.S. 305, 308 (1991)). See generally 11 U.S.C. § 522(b); see also 4 Collier on Bankruptcy § 522.01 (2009) ("In many, if not most, bankruptcy cases, an individual debtor may claim exemptions sufficient to remove all unencumbered property from the bankruptcy estate."). "As we have recognized, most of these categories (and all of the categories applicable to Reilly's exemptions) define the 'property' a debtor may 'claim as exempt' as the debtor's 'interest'-up to a specified dollar amount-in the assets described in the category, *not* as the assets themselves." *Schwab v. Reilly*, 560 U.S. 770, 782 (2010). Therefore, "when a debtor claims an exemption in an amount that is equal to the full value of the property as stated in the petition and the trustee fails to object, the asset itself remains in the estate, *at least if its value at the time of filing is in fact higher than the exemption amount.*" 621 F.3d 1206 at 1210 (emphasis added).

Here, there has been no evidence presented that the value of the property at the time of filing is in fact higher than the value as stated in the schedule or the exemption amount. Nevertheless, in this Circuit, dollar amount exemptions do not cause the asset to be removed from the estate. See *In re Perry*, 540 B.R. 710, 725 (Bankr. C.D. Cal. 2015) (Judge Mund) ("*Mwangi* distinguished between the deposit accounts in that case, which were themselves exempt, and property such as the Vehicle, in which the debtor's 'interest' in the asset was exempt under the state exemption law. In the former case, the asset reverts in the debtor as the 30 day period for objecting to exemptions has passed without objection; in the latter case the asset remains estate property until it is administered or abandoned, or the case is closed."). Therefore, the "asset" is still technically property of the estate.

Here, the Trustee has not filed an objection to the motion for abandonment. The Trustee's decision not to oppose the motion is entitled to deference under the business judgment standard. See e.g., *Sheehan v. Scotchel*, 536 B.R. 166, 171 (Bankr. N.D.W.V. 2015) (Judge Keeley) ("Based on the foregoing, the Court acknowledges the role of the business judgment rule in (1) evaluating a trustee's motion to abandon under § 554(a), and (2) evaluating a trustee's decision not to oppose a motion to abandon filed by a debtor under § 554(b)."). Given the information in the schedules and the absence of any opposition, it appears that the property is of inconsequential value to the estate and may be abandoned by the Trustee.

On 10/19, the Trustee filed a report of no distribution. This is the first steps

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toward achieving a "technical abandonment" under § 554(c) (2010). *See* 1 Ginsberg & Martin § 5.06; *see also In re Woods*, 173 F.3d 770, 776 (10th Cir. 1999). Therefore, the property will likely be abandoned ultimately, even without the filing of this motion.

TENTATIVE RULING

The Court is inclined to GRANT the motion to abandon pursuant to § 554(b).

APPEARANCES WAIVED. If written or oral opposition is presented at the hearing, the hearing may be continued. Movant to lodge order within 7 days.

Party Information

Debtor(s):

Carlos A Acosta Sr.

Represented By
Sunita N Sood

Joint Debtor(s):

Juana R Acosta

Represented By
Sunita N Sood

Movant(s):

Juana R Acosta

Represented By
Sunita N Sood
Sunita N Sood
Sunita N Sood
Sunita N Sood

Carlos A Acosta Sr.

Represented By
Sunita N Sood
Sunita N Sood
Sunita N Sood
Sunita N Sood

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Trustee(s):

Karl T Anderson (TR)

Pro Se

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11:00 AM

6:16-18002 Samuel Sosa

Chapter 7

#3.00 Motion by United States Trustee to Dismiss Case with a Re-Filing Bar

EH__

Docket 7

Tentative Ruling:

11/02/2016

BACKGROUND

On September 6, 2016 (the "Petition Date"), Samuel Sosa (the "Debtor") filed his petition for Chapter 7 relief. Debtor had two previous Chapter 7 petitions in 2016 that were dismissed for failure to file information on March 22, 2016, and July 1, 2016.

The deadline to file the accompanying schedules was September 20, 2016. No schedules were filed and Debtor did not file a request for an extension. On September 27, 2016, the Office of the United States Trustee ("UST") filed its Motion to Dismiss Case with a Re-Filing Bar (the "Motion"). Service was proper and no opposition has been filed.

DISCUSSION

Dismissal-Bad Faith Filing

A Chapter 7 petition filed in bad faith may be dismissed "for abuse" pursuant to 11 U.S.C. § 707(b) when the debtor has primarily consumer debts. *See* 11 U.S.C. § 707(b)(3)(a) (2014). *See e.g., In re Mitchell*, 357 B.R. 142, 153 (Bankr. C.D. Cal. 2006) (Judge Robles) ("abuse might include, but is not necessarily limited to, the filing of a petition in bad faith"). The Court evaluates "whether, in light of all the relevant facts and circumstances, it appears that the debtor's intention in filing a bankruptcy petition is inconsistent with the Chapter 7 goals of providing a 'fresh start' to debtors and maximizing the return to creditors." *Id.* at 154-55. The *Mitchell* court developed a list of nine non-dispositive factors:

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1. Whether the chapter 7 debtor has a likelihood of sufficient future income to fund a chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims;
2. Whether debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity;
3. Whether debtor obtained cash advances and consumer goods on credit exceeding his or her ability to repay;
4. Whether debtor's proposed family budget is excessive or extravagant;
5. Whether debtor's statement of income and expenses misrepresents debtor's financial condition;
6. Whether debtor made eve of bankruptcy purchases;
7. Whether debtor has a history of bankruptcy petition filings and dismissals;
8. Whether debtor has invoked the automatic stay for improper purposes, such as to delay or defeat state court litigation; and
9. Whether egregious behavior is present.

In re Siegenberg, 2007 WL 6371956 at *4 (Bankr. C.D. Cal. 2007) (Judge Donovan) (citing *Mitchell* at 154-55).

Here, Debtor has failed to file required documentation, and Debtor has four previous bankruptcy filings, including two in the past seven months that were dismissed for failure to file information. Moreover, Debtor lists only one creditor in the mailing list, Bank of America Home Loans, suggesting that the case was filed to stall a foreclosure. Finally, Debtor falsely represented that he did not file bankruptcy in the previous eight years, and, in totality, has demonstrated a pattern of failing to comply with the requirements of the Bankruptcy Code. While this case could be dismissed under § 707(a)(3) for failure to file required information, *see e.g., In re Young*, 92 B.R. 782, 784 (Bankr. N.D. Ill. 1988) (Judge Katz) (dismissal for cause under 707(a) when debtor fails to timely file information), Debtor's pattern of conduct indicates that his intent is not to earn the "fresh start" provided by bankruptcy.

Bar to Refiling under § 349.

The court is empowered to impose a refiling bar under 11 U.S.C. § 349(a) (1994). As Collier notes, courts' analysis of this section is somewhat confused due to confounding "dismissal with prejudice" with "dismissal with injunction against future

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filings." Collier on Bankruptcy ¶ 349.02[3]; compare *In re Garcia*, 479 B.R. 488 (Bankr. N.D. Ind. 2012) (Judge Klingeberger) (denying motion for dismissal with prejudice, but imposing three-year filing bar) with *In re Craighead*, 377 B.R. 648 (Bankr. N.D. Cal. 2007) (appearing to equate dismissal with prejudice with an injunction against refiling) (Judge Weissbrodt).

There is also a circuit split concerning whether an injunction on refiling for more than 180 days is allowed under the Bankruptcy Code. Compare *In re Frieouf*, 938 F.2d 1099 (10th Cir. 1991) (180 days is maximum allowed length of refiling injunction) with *Casse v. Key Bank Nat. Ass'n*, 198 F.3d 327 (2nd Cir. 1999) (injunction against filing for more than 180 days permissible). 11 U.S.C. § 349(a) reads:

- (a) Unless, the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

The disagreement revolves around whether the qualifier "Unless, the court, for cause, orders otherwise" modifies the content after the semi-colon. *In re Leavitt* noted this disagreement, but since the court was dealing with a dismissal with prejudice, rather than an injunction against refiling, it did not resolve the issue. 209 B.R. 935, 942 (9th Cir. B.A.P. 1997). Within the Ninth Circuit, it appears the trend is to adopt the reasoning of the Second Circuit and allow injunctions for more than 180 days. See e.g. *In re Velasques*, 2012 WL 8255582 at *3 (Bankr. E.D. Cal. 2012) (Judge Lee).

In re Velasques stated: "The Defendant's failure to perform duties imposed by the Bankruptcy Code constitutes willful behavior sufficient to impose a 180-day bar against refiling pursuant to 11 U.S.C. § 109(g)(1)." The court imposed a two-year refiling ban. In *Velasques*, the debtor failed to disclose prior bankruptcy filings, failed to file the required documents, failed to pay the filing fee, and had filed four bankruptcies in the previous eighteen months. In separate decisions by Bankruptcy Judge Lee, two-year refiling bans were imposed when the filing fee was paid, when it did not appear the debtor had omitted the previous bankruptcy filings, and when fewer bankruptcies were filed. *In re Pinedo*, 2011 WL 10723288 (Bankr. E.D. Cal. 2011)

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(three bankruptcies in eleven months); *In re Ortega*, 2011 WL 10723285 (Bankr. E.D. Cal. 2011) (two bankruptcies in four months). Therefore, it is appropriate for this Court to enter a one-year re-filing ban.

TENTATIVE RULING

Based on the foregoing, including the Debtor's failure to file opposition which is deemed consent to the granting of the Motion pursuant to LBR 9013-1(h), the Court is inclined to GRANT the Motion in its entirety, dismiss the case and impose a one-year re-filing bar.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Samuel Sosa	Pro Se
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Movant(s):

United States Trustee (RS)	Represented By Abram Feuerstein esq
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Trustee(s):

Lynda T. Bui (TR)	Pro Se
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6:16-16275 Kum Hee Choi

Chapter 7

#4.00 CONT Motion to avoid lien under 11 U.S.C. sec 522(f) with Daimler Trust

From: 9/28/16

Also #5

EH__

Docket 10

***** VACATED *** REASON: CONTINUED TO 11/9/16 AT 11:00 A.M.**

Tentative Ruling:

9/28/16

Tentative Ruling

Service is improper because Debtor failed serve the motion, notice, and supporting papers on any other holder of a lien or encumbrance against the subject property (Bank of America, and Real Time Resolution), as required by LBR 4003-2(c) (2).

Debtor has provided insufficient evidence regarding the fair market value of the Property, because Debtor's declaration does not establish that he has personal knowledge regarding the fair market value of the Property.

Debtor does not provide sufficient evidence regarding the identity of any holder of a lien encumbering the subject property and the amount due and owing on such lien, as required by LBR 4003-2(d).

The Court also notes that neither Debtor nor Debtor's counsel's signature are dated, and that Debtor's signature is with a /s/ (Debtor's Electronic Signature), but there is no Electronic Filing Declaration as required by the Local Rules and Court Manual.

Based on the foregoing, the Court is inclined to CONTINUE the matter as an

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CONT... Kum Hee Choi Chapter 7

evidentiary hearing to determine the amount of Debtor's homestead exemption, and also to correct the deficiencies noted above.

The Court notes that the deadline to object to Debtor's exemption is October 6, 2016.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Kum Hee Choi

Represented By
David Marh
Andy J Epstein

Movant(s):

Kum Hee Choi

Represented By
David Marh
Andy J Epstein

Trustee(s):

Todd A. Frealy (TR)

Pro Se

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6:16-16275 Kum Hee Choi

Chapter 7

#5.00 Motion to Extend Time To File Reply Brief in Response To Daimler Objection

Also #4

EH__

Docket 27

*** VACATED *** REASON: ORDER ENTERED 10/12/16

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Kum Hee Choi

Represented By
David Marh
Andy J Epstein

Movant(s):

Kum Hee Choi

Represented By
David Marh
Andy J Epstein

Trustee(s):

Todd A. Frealy (TR)

Pro Se

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6:16-15813 John E. Tackett and Ellen O. Tackett

Chapter 7

#6.00 Motion Objecting to Debtors' Claims of Exemption in (1) Provident Account Pursuant to CCP § 704.115(B); and (2) Bayonne Property Pursuant to CCP § 704.730

EH__

Docket 25

Tentative Ruling:

11/02/16

BACKGROUND

On June 29, 2016, John & Ellen Tackett ("Debtors") filed a Chapter 7 voluntary petition. Steven Speier ("Trustee") is the duly appointed trustee.

On Schedule A/B #21, Debtors listed, under IRA, a \$250,000 with Provident Trust Group. On Schedule A/B #53, Debtors listed the interest in the Property with a value of N/A. On Schedule C, the Provident Trust Group account is claimed as exempt under Cal. Civ. Proc. Code § 704.115(b) and the Property is claimed as exempt under Cal. Civ. Proc. Code § 704.730.

On October 10, 2016, Trustee filed a motion objecting to both exemptions on the grounds that: (1) the Property was not considered a homestead under the statute; and (2) the Provident Trust Group account could not be considered a private retirement account under § 704.115(b).

FACTUAL BACKGROUND

On March 30, 1992, Debtor-wife's parents executed a Family Trust to provide for their two daughters. On February 13, 2012, Debtor-wife's mother passed away. Debtor-wife's mother lived at 716 Bayonne St., El Segundo, CA 90245 ("the Property"), and the Property, pursuant to the terms of the family trust, vested in Debtor-wife and her sister ("Evelyn"), although Evelyn and Evelyn's son resided at the property. It was determined that, instead of selling the Property, Evelyn would

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provide value roughly equivalent to Debtor-wife's interest in the Property. Evelyn was able to obtain a mortgage in the amount of \$300,000 (the Property was valued at \$660,000) and the funds were transferred to Debtor-wife. As for the remainder, Debtor-wife was to receive the greater of: (i) \$30,000, or (ii) her share of the 9% remaining equity at the time she was finally divested of her interest in the Property. Debtor-wife remained on the title as joint tenant.

Debtor-wife used approximately \$50,000 of the funds to pay off various personal expenses, and deposited the remaining \$250,000 into an individual cash account held by Provident Trust Group ("Providence Account"). The funds in this account appear to have been exclusively invested in life settlement funds.

SERVICE

Debtor's contend that notice was improper. Debtor's make two arguments in that regard: (1) that e-mail service is improper and (2) that notice was late. Regarding the former, Trustee's proof of service contemplates service on Debtor's counsel by both e-mail and mail. Regarding, the latter, Local Rule 9013-1(d)(2) requires 21 day notice for motions. Trustee has provides 23 day notice in this case. Therefore, service is proper.

DISCUSSION

"A claimed exemption is 'presumptively valid.'" *In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999). *In re Carter* further elaborated:

Once an exemption has been claimed, it is the objecting party's burden to prove that the exemption is not properly claimed. Initially, this means that the objecting party has the burden of production and the burden of persuasion. The objecting party must produce evidence to rebut the presumptively valid exemption. If the objecting party can produce evidence to rebut the exemption, the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. The burden of persuasion, however, always remains with the objecting party.

Id.

I. Exemption Under Cal. CCP § 704.730

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Cal. Civ. Proc. Code § 704.730(a)(2) states:

(a) The amount of the homestead exemption is one of the following:

(2) One hundred thousand dollars if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

The Trustee points out that the statute requires that the exempted property be the Debtor's principal residence. *See e.g. In re Karr*, 278 Fed. Appx. 741, 742 (9th Cir. 2008) ("California's automatic homestead exemption applies to a debtor's 'principal dwelling' in which the debtor resided 'on the date the judgment creditor's lien attached to the dwelling' and in which the debtor 'resided continuously until the date of the court determination that the dwelling is a homestead.>"). "A court considers two factors in determining residency for homestead purposes: (1) intent to make the property a residence and (2) physical occupancy of the property." *Id. (citing In re Pham*, 177 B.R. 914, 918 (Bankr. C.D. Cal. 1994) (Judge Greenwald). "Exemptions are determined as of the date the bankruptcy petition was filed." *Id.*

The Trustee provides the sworn declaration of Debtor-wife who stated that her sister and nephew have resided on the Property for nearly twenty years. Furthermore, Debtors claimed a homestead exemption in a different property, located near the employment of Debtor-husband, while the Property is located approximately 80 miles away. Therefore, Trustee has produced sufficient evidence to rebut the presumptive validity of the claimed exemption.

Debtors have not provided a material response. Debtors' only response regarding the Property was that they never intended to use the Property as a homestead.

II. Exemption Under Cal. CCP § 704.115(b)

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Cal. Civ. Proc. Code § 704.115(b) states:

- (b) All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.

And Cal. Civ. Proc. Code § 704.115(a) states:

- (a) As used in this section, "private retirement plan" means:
 - (1) Private retirement plans, including, but not limited to, union retirement plans.
 - (2) Profit-sharing plans designed and used for retirement purposes.
 - (3) Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986, as amended, including individual retirement accounts qualified under Section 408 or 408A of that code, to the extent the amounts held in the plans, annuities, or accounts do not exceed the maximum amounts exempt from federal income taxation under that code.

As the Trustee notes, California courts have construed § 704.15(a)(1) to only apply to plans set up in the employment context. *In re Simpson*, 557 F.3d 1010, 1018 (9th Cir. 2009) ("While the California Supreme Court has not expressly held that the statute limits 'private retirement plans' to those 'established or maintained' by an employer, it has applied the exemption only to such plans. . . . A survey of recent California Court of Appeal cases construing the statute does not reveal a single instance in which that court has interpreted section 704.115(a)(1) to include independent retirement investments."). Also, it is clear that the plan is not a profit sharing plan. *See e.g. In re Barnes*, 275 B.R. 889, 897 (Bankr. E.D. Cal. 2002) (Judge McManus) ("The debtors do not contend that the annuity comprises a profit-sharing plan and there is no indication that the annuity was purchased with the profits of a business or some other enterprise."). Nor does it appear that the account at issue fits within § 704.115(a)(3):

Cal. Civ. Proc. Code § 704.115(a)(3) exempts all amounts held in private retirement plans, including individual retirement annuities or accounts

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qualified under Section 408 or 408(A) of the IRC, to the extent that such amounts do not exceed the maximum amounts exempt from federal income taxation. Cal. Civ. Proc. Code § 704.115(a)(3) only exempts individual retirement annuities or accounts that are tax-qualified plans as provided for in the IRC.

In re Simpson, 366 B.R. 64, 75 (9th Cir. B.A.P. 2007) (Judge Klein). Trustee contends that this type of account does not qualify under the statute, and no evidence has been put forward to refute that contention. Instead, Debtors appear to argue that an inheritance from a family trust is automatically exempt. This argument has no legal basis. Therefore, the Providence Account is not properly exempted under Cal Civ. Proc. Code § 704.115(a)(3).

TENTATIVE RULING

The Court is inclined to GRANT the objection in its entirety.

Appearances REQUIRED.

Party Information

Debtor(s):

John E. Tackett

Represented By
Stefan R Pancer

Joint Debtor(s):

Ellen O. Tackett

Represented By
Stefan R Pancer

Movant(s):

Steven M Speier (TR)

Represented By
Robert P Goe

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Trustee(s):

Steven M Speier (TR)

Represented By
Robert P Goe

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6:15-19998 Jack C Pryor

Chapter 7

#7.00 Motion For Sale of Property of the Estate under Section 363(b) - No Fee ;
Approving Payment of Real Estate Commission; and Granting Related Relief
including Reimbursement of Broker for Actual Costs Incurred

EH__

Docket 179

Tentative Ruling:

11/2/16

PROCEDURAL BACKGROUND

On October 13, 2015, Jack Pryor ("Debtor") filed a Chapter 11 voluntary petition. On November 4, 2015, the U.S. Trustee filed a motion to convert to Chapter 7. The motion was granted and an order was entered converting the case to Chapter 7 on February 25, 2016. Karl Anderson ("Trustee") is the duly appointed trustee.

On July 20, 2016, Trustee filed a motion for turnover of property (records). That motion was granted on August 25, 2016. On September 2, 2016, Debtor filed an opposition to the motion for turnover. On September 9, 2016, Trustee filed a motion for contempt for violation of the turnover order. On September 16, 2016, Debtor filed his opposition to the motion for contempt. On September 26, 2016, Trustee filed a reply. On October 4, 2016, Debtor filed a reply. The motion was continued to November 16, 2016.

On August 15, 2016, Trustee filed an application to employ Richard Halderman ("Halderman") as realtor. On August 26, 2016, Debtor filed opposition to the employment of Halderman. On September 26, 2016, Trustee filed his reply. On October 4, 2016, Debtor filed a reply. The Court granted that application on October 5, 2016. On October 11, 2016, Trustee filed a motion for sale of property of the estate pursuant to 11 U.S.C. § 363(b).

On September 14, 2016, Trustee filed a motion for turnover of property of the

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Chapter 7

estate. The motion was granted on October 5, 2016.

On October 11, 2016, Trustee filed a motion for sale of property of the estate under § 363(b). On October 20, 2016, Pontis Capital, LLC ("Creditor") filed a late objection. On October 27, 2016, Trustee filed a reply, revising the motion and alleging that the objection of Creditor had been resolved. The reply makes the following revisions: (1) the estate will receive a carveout from Pontis in the amount of \$45,000; (2) in the event of an overbid up to \$700,000, the proceeds of the increase will be split 50% to Pontis and 50% to the estate; (3) in the event there is an overbid over \$700,000, the increase over \$700,000 will be split 60% to Pontis and 40% to the estate; (4) CEDA will not receive a payoff because it does not appear on the updated preliminary title report.

SERVICE

Trustee's reply does not appear to have been served on CEDA despite the reply's determination that CEDA no longer holds a lien on the subject property.

FACTUAL BACKGROUND

The subject property is real property located at 19024 Ruppert St., Palm Springs, CA 92262. Debtor's Schedule A/B lists the property's value as \$800,000. A preliminary title report dated March 23, 2016 lists four outstanding liens against the property, held by California Enterprise Development Authority (\$9304.92), Pontis Capital, LLC (\$675,000), North Palm Springs Business Center Owners Association (\$602.93), and Blue Tee Corp. (\$576,239.94). Additionally, there are some unpaid real estate taxes.

On March 3, 2015, Debtor and Creditor entered into a Secured Promissory Note and a Deed of Trust with Assignment of Leases and Rents. On August 15, 2015, Debtor and Creditor entered into a Change in Terms Agreement. The "Allocation of Principal Amount Among Collateral Properties" reads, in part:

The parties agrees that if and when Borrower refinances or sells any of the following properties, Borrower shall pay back from the sale or refinance proceeds the allocated amount as minimum amount to reduce the Principal balance:

- (a) Palm Springs Property: \$550,000 . . .

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Borrower may pay down more or pay back the entire Principal at his sole discretion at any time, subject to the pre-payment fee provision of the Promissory Note at Section 17. Upon said payment, Lender shall reconvey its lien interest in the applicable property(s). The allocations herein are made solely to accommodate Borrower in case of sale or refinancing of respective property, and is not intended to change the cross-collateral nature of the properties in securing the Loan, and Lender is not bound by the allocated amount if it should commence a judicial or non-judicial foreclosure of any or all of the properties.

Beginning in May 2016, Richard Halderman began marketing the property on a range of listing services and websites. After approximately thirty-five inquiries and seven to twelve showings, an offer of \$675,000 was tendered. The Trustee seeks authorization to accept this offer. Creditor argues its payoff amount is too low and that a recalculation of the payoff amount would result in an inability to satisfy the statutory requirements of § 363(f).

DISCUSSION

I. Sale of Estate Property Pursuant to Section 363(b)

The trustee, after notice and a hearing, may sell property of the estate. 11 U.S.C. § 363(b)(1); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). "To confirm a sale, the trustee must establish that: (1) a sound business purpose exists for the sale; (2) the sale is in the best interest of the estate, i.e., the sale price is fair and reasonable; (3) notice to creditors was proper; and (4) the sale is made in good faith." *In re Slaters*, 2012 WL 5359489 at *11 (9th Cir. B.A.P. 2012) (Judge Klein) (*citing In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) (Judge Riddle).

Here, Trustee provides the following reasons in support of the sale: the sale is expected "to generate net proceeds of approximately \$68,861 after taxes on the sale, calculated as follows (amounts are estimated):

Sale Price ...	\$675,000
-----------------------	------------------

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Less Pontis Capital payoff	\$550,000 (revised to \$630,000)
Less CEDA payoff	\$9,305 (revised to \$0)
Less Broker Commission ...	\$18,000
Less Real Property Taxes	\$7,800
Less Capital Gains Tax	\$7,500
Less Out of Pocket Reimbursement	\$33.90
<u>Less Costs of Sale (2%) ...</u>	<u>\$ 13,500</u>
Net for Estate After Taxes:	\$68,861.10 (revised to -\$1834)

Trustee's reply, purporting to resolve the objection of Creditor, provides for a carveout of \$45,000 from the proceeds. This carveout is no longer enough to cover the administrative costs identified in the original motion, and would not generate a distribution to unsecured creditors.

Based on the fact that the sale should generate a distribution to unsecured creditors, Trustee has articulated a sound business reasons for the sale. Nevertheless, whether the sale does, in fact, generate a distribution to unsecured creditors is reviewed in section II, *infra*.

Trustee requested further bidding on the property and no party has provided evidence that the sale price is not fair and reasonable. Additionally, the property has been extensively marketed since May, supporting the contention that \$675,000 is a fair and reasonable price.

Wilde Horse Enterprises sets forth the factors in considering whether a transaction is in good faith. 136 B.R. 830 at 842. The court stated:

'Good faith' encompasses fair value, and further speaks to the integrity of the transaction. Typical 'bad faith' or misconduct, would include collusion between the seller and buyer, or any attempt to take unfair advantage of other potential purchasers. . . . And, with respect to making such determinations, the court and creditors must be provided with sufficient

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information to allow them to take a position on the proposed sale.

Id. at 842 (citations omitted). Exhibit 5 of Trustee's motion indicates that the sale was an arm's length transaction. Therefore, the Trustee has established the sale is in good faith.

II. Sale Free and Clear of non-Debtor Interests

11 U.S.C. § 363(f) states:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363 (2010). Here, the third and fourth provisions are relied on by the Trustee.

Trustee uses the third provision to sell free and clear of: (1) real property taxes; (2) the lien of CEDA; and (3) the lien of Pontis Capital. Trustee refers to Exhibit 2, a preliminary title report, for his account of the amount of these liens. Regarding real property taxes, there is no amount listed on the preliminary title report that is approximately equal to the \$7,800 listed by Trustee. Instead, there appear to be two due installments of \$3319.04 (totaling \$6638.08) and a penalty of \$331.90. Nevertheless, these numbers do demonstrate that the total amount is similar to that identified by Trustee. The lien of CEDA is identified in the preliminary title report. In the reply, Trustee states that CEDA's lien is not present on the updated title reports and has removed the proposed payoff to CEDA. CEDA was not noticed of the reply

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Creditor objected and argued that the payoff amount is \$686,705.46. Creditor's calculation includes \$550,000 in principal and \$136,705.46 in interest and fees. Trustee and Creditor appear to have resolved the issue with Trustee's reply. Trustee's reply provided the following compromise: (1) the estate will receive a carveout from Pontis in the amount of \$45,000; (2) in the event of an overbid up to \$700,000, the proceeds of the increase will be split 50% to Pontis and 50% to the estate; (3) in the event there is an overbid over \$700,000, the increase over \$700,000 will be split 60% to Pontis and 40% to the estate. The specifics of the carveout, however, in addition to the amount of Creditor's claim, and the resulting net for distribution to unsecured creditors are not clear.

Trustee relies on the fourth provision to sell free and clear of the following two liens: (1) North Palm Springs Business Center Owners Association; and (2) Blue Tee Corp. With regard to the former, Trustee states that the lien was recorded within ninety days prior to the petition date and, with regard to the latter, that it was recorded after the petition date. "The term 'bona fide dispute' is not defined in 11 U.S.C. § 363 (f)(4). However, many courts, including the Seventh Circuit Court of Appeals, have stated that courts must determine 'whether there is an objective basis for either a factual or legal dispute as to the validity of the debt.'" *In re Gaylord Grain L.L.C.*, 306 B.R. 624, 627 (8th Cir. B.A.P. 2004) (Judge Kressel) (*quoting In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987)). As Trustee notes, both transfers may be avoidable under § 547:

The recordation of the abstract of judgment occurred within ninety days of the filing of Rhoads' bankruptcy petition. The filing of an abstract of judgment constitutes a transfer of property within the meaning of § 547(b). Therefore, the recording of Jordan's abstract of judgment within ninety days of Rhoads' bankruptcy filing establishes the transfer element of an avoidable preference under § 547(b).

In re Rhoades, 130 B.R. 565, 568 (Bankr. C.D. Cal. 1991) (Judge Wilson) (citations omitted). Therefore, Trustee may be permitted to sell free and clear of the identified interests.

III. Compensation of Real Estate Brokers

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Here, the Debtor seeks authorization to pay from escrow the broker commission and out of pocket costs, totaling \$18,033.90. Sections 327 and 328 provide for employment of professionals "on any reasonable terms and conditions of employment." 11 U.S.C. § 327 (1986); 11 U.S.C. § 328 (2005). 11 U.S.C. § 506(c) allows payment to be made from proceeds of the sale. 11 U.S.C. § 506 (2005). The Court has reviewed the terms of the compensation and finds them reasonable.

IV. Bidding Procedures

Under § 105, the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105 (2010). Approval of the bidding procedures is appropriate to carry out the Trustee's sale under § 363. The procedures should be reasonable and appropriate. *See e.g. In re Chrysler LLC*, 2009 WL 1360869 at *3 (Bankr. S.D.N.Y. 2009) (Judge Gonzalez) ("Under the circumstances, and particularly in light of the extensive prior marketing of the Purchased Assets, the Bidding Procedures constitute a reasonable, sufficient, adequate and proper means to provide potential competing bidders with an opportunity to submit and pursue higher and better offers for all or substantially all of the Purchased Assets."); *see also In re Fortunoff Fine Jewelry & Silverware, LLC*, 2008 WL 618986 at *1 (Bankr. S.D.N.Y. 2008) (Judge Peck) ("Accordingly, the Bidding Procedures and the Expense Reimbursement are reasonable and appropriate and represent the best method for maximizing value for the benefit of the Debtors' estates."). The Court has reviewed the bidding procedures and finds them reasonable and appropriate.

V. Fourteen Day Stay

Trustee requests waiver of the fourteen day stay pursuant Fed. R. Bankr. P. 6004 (h). Trustee submits that he "desires to close the sale as soon as practicable after the entry of an order approving the sale." In the absence of objection, the Court finds this to be sufficient cause to waive the 14-day stay.

TENTATIVE RULING

Subject to discussion on notice to CEDA, as well as specifics of Trustee's resolution

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with Pontis, the Court is inclined to GRANT the relief requested in §§ 1-9.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Jack C Pryor

Represented By
Stephen R Wade

Movant(s):

Karl T Anderson (TR)

Represented By
Leonard M Shulman
Melissa Davis Lowe

Trustee(s):

Karl T Anderson (TR)

Represented By
Leonard M Shulman
Melissa Davis Lowe

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6:13-26277 Charles Frederick Biehl

Chapter 7

#8.00 CONT Order to Show Cause Re: Civil Contempt on Motion For Contempt for an Order Holding Creditor Lawrence M. Shanahan and Creditor Nicole Rudat in Civil Contempt

From: 6/22/16, 7/27/16, 9/21/16

EH__

Docket 101

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Charles Frederick Biehl

Represented By
Daryl L Binkley - INACTIVE -
Steven L Bryson

Movant(s):

Steven L. Bryson

Represented By
Steven L Bryson

Trustee(s):

John P Pringle (TR)

Represented By
James C Bastian Jr
Elyza P Eshaghi

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6:13-27610 Baleine LP

Chapter 7

Adv#: 6:15-01271 Ebarb v. Revere Financial Corporation

#9.00 CONT Status Conference RE: Adversary case 6:15-ap-01271. Complaint by Nicole Ebarb against Revere Financial Corporation . (72 (Injunctive relief - other)) (91 (Declaratory judgment))

From: 12/2/15, 1/27/16, 7/27/16

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 12/14/16 AT 11:00 AM**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Baleine LP

Represented By
Summer M Shaw

Defendant(s):

Revere Financial Corporation

Represented By
Franklin R Fraley Jr

Plaintiff(s):

Nicole Ebarb

Pro Se

Trustee(s):

Larry D Simons (TR)

Represented By
Carmela Pagay
Todd A Frealy

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6:13-30133 Nabeel Slaieh

Chapter 7

Adv#: 6:16-01190 Fraleigh v. Simons et al

#10.00 CONT Order Show Cause Why Joanne Fraleigh and her counsel, George Saba, Should not be held in Contempt for Violation of the Automatic Stay; and Sanctioned Under sect 105 for Civil Contempt Damages Compensable to the Trustee for Attorney's Fees and Costs

From: 10/5/16

EH__

Docket 39

Tentative Ruling:

11/02/16

BACKGROUND

On December 18, 2013 ("Petition Date"), Nabeel Naiem Slaieh ("Debtor") filed a Chapter 7 voluntary petition. Larry Simons is the duly appointed chapter 7 trustee ("Trustee"). Among the assets of the Debtor's bankruptcy estate on the Petition Date was his principal residence located at 40834 Baccarat Rd. in Temecula, California (the "Property").

On or about April 6, 2016, the Trustee filed his Motion to Sell the Property (the "Sale Motion"). A hearing on the Motion was held on April 27, 2016. At the hearing, the Court orally granted the Sale Motion as to the sale but continued the hearing as to an issue regarding the Debtor's homestead exemption. On May 26, 2016, the Court entered its Order Granting Trustee's Sale Motion (the "Sale Order"), which included an order compelling the Debtor to vacate and turnover the Property. The Court's Sale Order is currently on appeal to the District Court. However, both this Court and the District Court denied the Debtor's requests for a stay pending appeal.

On June 10, 2016, the Court issued a Writ of Assistance authorizing the

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CONT... Nabeel Slaieh

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United States Marshal to take any and all necessary actions, to enter and remain on the Property for the purpose of enforcing this Court's Sale Order. On June 13, 2016, the Debtor filed a Motion in Opposition to the Writ of Assistance. On July 2, 2016, the Debtor filed a Motion to Vacate the Sale Order. Both motions were denied. Additionally, the Debtor has three times attempted to have the case converted. The last of these conversion motions was denied on July 8, 2016.

In addition to the various motions filed seeking to set aside or otherwise to invalidate this Court's Sale Order, on May 11, 2016 (following the hearing on the Sale Motion but prior to entry of the Sale Order), the Debtor recorded an Interspousal Transfer Grant Deed granting Joanne Fraleigh ("Plaintiff") title to the Property.

On July 19, 2016, the Plaintiff filed Case No. RIC 1609095 (the "Complaint" or "Removed Action") in the Riverside Superior Court ("State Court"), alleging causes of action to Quiet Title; for Declaratory and Injunctive Relief; and for Violation of Business and Professions Code § 17200, et. seq. against the Trustee and his Counsel of Record in the bankruptcy case, Marshack Hays LLP, Matthew Grimshaw, David Wood, and Edward Hays (collectively, Defendants").

On July 20, 2016, the State Court heard a motion by the Plaintiff for a temporary restraining order. Based on the representations of the parties, it appears that a short stay was granted by the State Court. On the same date, the Trustee filed a notice of removal of the Complaint to the Bankruptcy Court and concurrently filed his Emergency Motion for an Order: (1) To Dissolve the Stay Improperly Obtained by Plaintiff in the Superior Court of the State of California, County of Riverside and Proceed with Previously Scheduled Eviction; and (2) Confirm that the Superior Court of California, County of Riverside Lacked Jurisdiction to Issue the Stay (the "Emergency Motion"). The Court set the hearing on the Emergency Motion for the following day and entered an Order Granting the Emergency Motion on July 21, 2016.

On August 23, 2016, this Court issued an Order to Show Cause Why Plaintiff and her Counsel, George Saba ("Counsel") (who has also primarily represented the Debtor in the related proceedings and who is counsel of record for the Debtor in the main case) should not be held in contempt for violation of the automatic stay and sanctioned pursuant to 11 U.S.C. § 105 (the "OSC"). The OSC specifically references the actions of Ms. Fraleigh and her Counsel (collectively, "Respondents") in:

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(1) filing the underlying State Court Action, Case No. RIC 1609095 in the Riverside Superior Court on July 19, 2016, seeking to quiet title in that certain real property located at 40834 Baccarat Rd., in Temecula, CA 92591. . . which is property of the Debtor's bankruptcy estate; (2) recordation of a lis pendens regarding the State Court Action; and (3) filing of a Motion to Temporary Injunction in the State Court Action, all in an effort to gain control over the Property, and thus in direct violation of 11 U.S.C. § 362(a)(3), after having failed to first obtain relief from the automatic stay from this Court.

On October 5, 2016, the Court granted the order to show cause and continued the hearing for a determination of fees. On October 13, 2016, Trustee filed a declaration of Matthew W. Grimshaw in support of the Chapter 7 Trustee's request for attorneys fees and costs pursuant to court's orders to show cause.

DISCUSSION

The Ninth Circuit has held that: "the Trustee may be entitled to recovery for violation of the automatic stay 'under section 105(a) as a sanction for ordinary civil contempt.'" *In re Dyer*, 322 F.3d 1178, 1189 (9th Cir. 2003) (*quoting In re Pace*, 67 F.3d 187, 193 (9th Cir. 1995)). Furthermore, "attorneys' fees are an appropriate component of a civil contempt award." *Id.* at 1195.

In *In re H Granados Commc'ns, Inc.*, 503 B.R. 726 (9th Cir. B.A.P. 2013) (Judge Taylor), the Bankruptcy Appellate Panel reviewed this Court's order granting attorneys fees in response to a finding of civil contempt based on the filing of a state court complaint in violation of the automatic stay. On appeal, the court stated:

Sanctions for civil contempt must either be compensatory or designed to coerce compliance. Attorneys' fees are an appropriate component of civil contempt sanctions. This includes reasonable attorneys' fees incurred in the process of voiding the stay violation. An award of fees incurred in litigating an issue that does not flow from the stay violation, however, is improper.

The record shows that Debtor's counsel submitted a detailed time summary of fees incurred. These entries reflect legal tasks performed by counsel in connection with the stay violation issues and within the appropriate time frame.

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The bankruptcy court approved these costs. In doing so, it implicitly determined that the costs were reasonable and supported by evidence. This, in turn, is supported by the bankruptcy court's statement at the sanctions hearing, providing that it awarded almost but not all of the requested fees and costs. As reflected in the Sanctions Award, it subtracted messenger fees and costs to copy the pleadings filed in the State Court Action. Nor is there anything in the record showing that the Appellants objected to any particular cost or expense with any level of detail or specificity. It, thus, is clear that the bankruptcy court not only reviewed the pertinent documents, but determined that the costs were reasonable and adequately supported.

Id. at 736; *see also id.* at 731 (award included "attorneys' fees for review of the Appellants' opposition to the Damages Memorandum and appearance at the sanctions hearing.").

The Court has reviewed the proposed request for attorneys fees and costs to determine reasonableness. The Court takes issue with the following entries:

- (1) 10/4 (\$84): Prepare for hearing re: status conference on Slaieh v. Simons
- (2) 10/5 (\$42): Draft correspondence to Bruce Boice re: continuance of hearing
- (3) 7/21 (\$165): Draft written correspondence to Larry Simons re: settlement negotiations with Bruce Boice
- (4) 7/22 (\$605): Telephone conference with Bruce Boice re: settlement, *etc.*
- (5) 7/22 (\$110): Telephone conference with Bruce Boice re: eviction
- (6) 7/22 (\$165): Telephone conference with Larry Simons re: completed eviction, fixing windows in dining room, and potential settlement alternatives
- (7) 7/24 (\$165): Written correspondence with Bruce Boice re: settlement
- (8) 7/25 (\$110): Exchange written correspondence with Larry Simons and Layla Buchanan re: keys to property and repair of missing window in dining room
- (9) 7/25 (\$42): Review correspondence from Gloria Diaz on 7/21 re: lockout issues
- (10) 7/26 (\$42): Review correspondence from trustee re: turning over keys

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(11) 8/1 (\$165): Written correspondence with Nabeel Slaieh re: negotiations

The first eleven entries do not appear to be closely related to the issue here, or, at least, their connection is unclear. Nabeel Slaieh, Gloria Diaz and Bruce Boice are not parties or counsel to this proceeding. Additionally, issues related to the repair of the property are not related to this legal proceeding and would have been necessary in any event.

In the absence of any further objections to the requested fees and costs, the Court is inclined to allow attorneys fees and costs in the amount of \$39,205.49. Additionally, the failure to object to reasonableness of fees deemed consent under the Local Bankruptcy Rules.

TENTATIVE RULING

The Court is inclined to GRANT the motion to the extent of \$39,205.49 and DENY the motion to the extent of \$1695.

Party Information

Debtor(s):

Nabeel Slaieh

Represented By
George A Saba

Defendant(s):

D. Edward Hays

Represented By
D Edward Hays
Matthew Grimshaw

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Marshack Hays LLP

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Represented By
D Edward Hays
Matthew Grimshaw

David A. Wood

Represented By
D Edward Hays
Matthew Grimshaw

Larry D. Simons

Represented By
David Wood
D Edward Hays
Matthew Grimshaw

Matthew W. Grimshaw

Represented By
D Edward Hays
Matthew Grimshaw

Plaintiff(s):

Joanne Fraleigh

Represented By
George A Saba

Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays
David Wood
Matthew Grimshaw

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6:13-30133 Nabeel Slaieh

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Adv#: 6:16-01147 Slaieh v. Simons

#11.00 CONT Status Conference RE: [1] Adversary case 6:16-ap-01147. Complaint by Nabeel Slaieh against Larry D Simons (71 (Injunctive relief - reinstatement of stay)

From: 8/31/16, 9/21/16, 10/5/16

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Nabeel Slaieh

Represented By
George A Saba

Defendant(s):

Larry D Simons

Represented By
Matthew Grimshaw

Plaintiff(s):

Nabeel Slaieh

Represented By
Bruce A Boice

Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays
David Wood
Matthew Grimshaw

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6:16-12574 William Dillingham Smyth

Chapter 7

Adv#: 6:16-01212 Pringle v. Smyth

#12.00 Status Conference Re: Complaint by John P. Pringle against Elena Smyth.
Nature of Suit: 13 - Recovery of money/property - 548 fraudulent transfer

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

William Dillingham Smyth

Represented By
Kevin M Cortright

Defendant(s):

Elena Smyth

Represented By
C Scott Rudibaugh

Plaintiff(s):

John P. Pringle

Represented By
Melissa Davis Lowe

Trustee(s):

John P Pringle (TR)

Represented By
Leonard M Shulman
Melissa Davis Lowe

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6:16-11635 Sam Daniel Dason

Chapter 7

Adv#: 6:16-01211 Olivares et al v. Dason

#13.00 Status Conference Re: Amended Complaint by Juddy Olivares, Eric A Panitz against Sam Daniel Dason; 68- Dischargeability - 523(a)(6) Willful and Malicious Injury

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 1/4/17 AT 2:00 P.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sam Daniel Dason

Represented By
Robert G Uriarte

Defendant(s):

Sam Daniel Dason

Pro Se

Joint Debtor(s):

Greta Sam Dason

Represented By
Robert G Uriarte

Plaintiff(s):

Eric A Panitz

Represented By
Lazaro E Fernandez

Juddy Olivares

Represented By
Lazaro E Fernandez

Trustee(s):

Lynda T. Bui (TR)

Pro Se

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6:15-11592 John R. Florentin

Chapter 7

Adv#: 6:15-01155 Schierhold v. Florentin

#14.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01155. Complaint by Glenn D Schierhold against John R. Florentin . (13 (Recovery of money/property - 548 fraudulent transfer)) ,(14 (Recovery of money/property - other)) ,(67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny)) ,(68 (Dischargeability - 523(a)(6), willful and malicious injury))

From: 7/29/15, 8/26/15, 9/2/15, 3/30/16, 4/6/16, 7/6/16, 9/7/16

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Docket 1

***** VACATED *** REASON: ORDER DISMISSING ADVERSARY
FILED 10/13/16**

Tentative Ruling:

9/7/16

This status conference hearing was continued to November 2, 2016, at 2:00 p.m. at the August 31, 2016 hearing on Plaintiff's Motion to Extend the Discovery Deadline. A joint status report is due October 26, 2016.

Appearances Waived.

Party Information

Debtor(s):

John R. Florentin

Represented By
Christopher Hewitt

Defendant(s):

John R. Florentin

Pro Se

Plaintiff(s):

Glenn D Schierhold

Represented By
Timothy A Hill

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CONT... John R. Florentin

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Trustee(s):

Larry D Simons (TR)

Pro Se

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Hearing Room 303

2:00 PM

6:14-13046 Allen Dale Sanderson

Chapter 7

Adv#: 6:14-01116 Verbree v. Sanderson

#15.00 Motion of Adversary Plaintiff for an Order Vacating Order Approving Pretrial Stipulation of September 7, 2016 Based on Mistake and Inadvertance (FRCP Rule 60(b))

EH__

Docket 66

Tentative Ruling:

11/02/2016

PROCEDURAL BACKGROUND

Allen Dale Sanderson ("Debtor") filed a Chapter 7 voluntary petition on March 11, 2014. On April 29, 2014, Margaret Verbree ("Plaintiff") filed a Complaint under § 523(a)(2),(4), and (6). An Answer was filed on July 31, 2014. The matter was assigned to mediator Jeanne Jorgensen on October 27, 2014.. On July 15, 2016, the parties filed a pre-trial stipulation. That stipulation is the subject of this motion. On August 11, 2016, Plaintiff filed a motion for leave to file an amended adversary complaint. On August 25, 2016, Defendant filed its opposition. On August 30, 2016, Plaintiff filed a reply. On September 2, 2016, Plaintiff filed its trial brief. On September 7, 2016, the motion for leave to file an amended adversary complaint was denied. The next day, an order was signed granting the pre-trial stipulation and supplemental exhibit list and witness list. On September 28, 2016, the Plaintiff filed a motion for an order vacating order approving pretrial stipulation of September 7, 2016 based on mistake and inadvertence. Defendant filed a late objection on October 21, 2016. Plaintiff filed a reply on October 27, 2016.

FACTUAL BACKGROUND

On July 8, 2016, Plaintiff sent a pretrial stipulation to Defendant for signature. The following day, Defendant responded with some requested changes and comments. On July 12, 2016, Plaintiff agreed to Defendant's requested changes. As stated by Plaintiff:

Mr. Madoni [Plaintiff's attorney] agreed to Mr. McKernan's proposed change

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to the issue of law to be tried, but did not realize that it had limited claims to Section 523(a)(6) only, not Section 523(a)(2) and (6), despite the fact that this was the clear intent of Mr. Madoni as reflected in both the prior stipulation and Mr. Madoni's letter to Mr. McKernan on July 13, 2016 prior to filing the pretrial stipulation.

At the July 27, 2016, status conference, the Court explicitly asked whether only the § 523(a)(6) claim was going forward and whether the § 523(a)(2) claim was being dropped. Plaintiff's counsel appears to have unambiguously assented to the omission of the § 523(a)(2) claim, despite Plaintiff's current assertion that it "knew at the time that the Adversary Plaintiff was abandoning the 523(a)(4) claim, but did not intend on dropping the Section 523(a)(2) claim."

On September 7, 2016, the Court denied Plaintiff's motion to amend the complaint. The Court explained to counsel that the issue was not with the complaint, which included causes of action under § 523(a)(2), (4) and (6), but that the issue was with the pretrial stipulation. The Court explained that the proper inquiry would be under Fed. R. Civ. P. 60(b).

DISCUSSION

Fed. R. Civ. P. 60(b)(1) states:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

This rule is applicable in bankruptcy proceedings through the operation of Fed. R. Bankr. P. 9024.

Courts disagree about whether, and in what circumstances, attorney error justifies relief under Fed. R. Civ. P. 60(b). Judge Easterbrook has held that attorney *negligence* is never an acceptable basis for relief under the rule. *See U.S. v. 7108 West Grand Ave., Chicago, Ill.*, 15 F.3d 632, 633-35 (7th Cir. 1994) ("Yet why should the label 'gross' make a difference to the underlying principle: that the errors and misconduct of an agent redound to the detriment of the principal rather than of the

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adversary in litigation?"); *see also U.S. v. Golden Elevator, Inc.*, 27 F.3d 301 (7th Cir. 1994) ("Just as an entity may elect not to sue, so it may elect to abandon pending litigation. Ignoring deadlines and orders marks the abandonment of a suit, as surely as does filing a notice of dismissal."). The Ninth Circuit has disagreed, holding that in cases of "gross negligence" relief is warranted under Fed. R. Civ. P. 60(b)(6). *Cnty Dental Servs. V. Tani*, 282 F.3d 1164 (9th Cir. 2002). Ordinary carelessness, however, will not typically support relief though, unless it is excusable. *Medina v. Wells Fargo Bank, N.A.*, 2016 WL 2944295 (C.D. Cal. 2016) (*citing Negron v. Celebrity Cruises, Inc.*, 316 F.3d 60, 62 (1st Cir. 2003)). Thus, there is much space on the spectrum between gross negligence (when an attorney is no longer acting on behalf of a client) and excusable neglect in which relief under 60(b) will be granted.

To determine when neglect is excusable, the Court considers the *Pioneer* factors:

- (1) The danger of prejudice to the opposing party;
- (2) The length of the delay and its potential impact on the proceedings;
- (3) The reason for the delay, including whether it was within the reasonable control of the movant; and
- (4) Whether the movant acted in good faith.

Lemoge v. U.S., 587 F.3d 1188, 1192 (9th Cir. 2009). The *Pioneer* factors, however, are specifically directed to a determination of excusable neglect in the context of a late filing. "The determination of whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Hynes Aviation Indus., Inc. v. Sacramento E.D.M., Inc.*, 2014 WL 6686255 at *3 (E.D. Cal. 2014). The factors are less appropriately determinative in the context of an error included within filed documents.

While application of the Supreme Court's factors is necessary, it is a discretionary decision, and one court stated the following with regard to the vacation of a stipulation:

The question presented here is whether this court should exercise its discretion under Rule 60(b) and convert the stipulation of dismissal with prejudice to one without. Plaintiff insists that its mistake was due to a "miscommunication." However, the facts of this case suggest otherwise. Defendant's initial settlement offer letter *and* the stipulation signed by plaintiffs' counsel clearly indicated that the dismissal was "with prejudice." Defendant represents that

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this is exactly the result it intended when it make the offer. If there was any "miscommunication," it was a result of plaintiffs' counsel's carelessness. Plaintiffs' counsel apparently failed to read not only the stipulation, but also defendant's correspondence. And, although counsel did not draft the stipulation himself, he did draft the proposed order filed therewith, and he explicitly included the term "with prejudice" when titling both documents for the purpose of filing them in the court's e-filing system. This is not a case of a "typo" or even a missed filing deadline, which the court might readily categorize as "mistake or "excusable neglect," but rather a pattern of inattentiveness on the part of plaintiffs' counsel. In *Pincay*, the Ninth Circuit noted that "a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered." Even less compelling is an attorney's failure to read essential documents he himself signs and files.

Int'l Allied Printing Trades Ass'n v. Am. Lithographers, Inc., 233 F.R.D. 554, 555-56 (N.D. Cal. 2006) (footnote, citation and parentheticals omitted). Nevertheless, the *Pincay* court still applied the *Pioneer* factors to their issue. *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004). And one California court has distinguished between a deliberative mistake with unintended consequences and an unintended drafting error. *Parks v. Armour Pharms.*, 1995 WL 13232 at *1 (N.D. Cal. 1995) ("This case is distinguishable from that in *Nemaizer v. Baker*, 793 F.2d 58 (2nd Cir. 1986), wherein the dismissal with prejudice was based upon a stipulation with defense counsel and an apparent misunderstanding by plaintiff of the effect of the stipulation. Here, plaintiffs' counsel and his secretary unilaterally and inadvertently filed a dismissal containing unintended 'with prejudice' language. They did not fail to appreciate the effect of the dismissal with prejudice; they failed to realize what they inadvertently filed.").

The distinction noted in *Parks* is illustrative of the problem here. As *Parks* notes, a party should not be allowed to modify past decisions that were deliberately chosen solely because the party did not comprehend the consequences of the decision. Alternatively, a party should not be forced to maintain a position it inadvertently adopted if there is little risk of significant prejudice to the other party. Here, Plaintiff has framed the situation as properly characterized as the latter. Yet, a review of this Court's proceedings on July 27, 2016, completely undermines that characterization. The Plaintiff was twice asked to confirm the contents of the pretrial stipulation and the intent to dismiss all claims but the 523(a)(6), and, instead of attempting to correct the alleged mistake, assented to the contents. Because it seems that the contents of the pretrial stipulation do not arise from "mistake" or inadvertence" within the meaning of the Rule, relief does not appear warranted under a 60(b) analysis.

In her reply, Plaintiff refers to the more flexible standard applicable to the modification of a pre-trial order. First of all, Plaintiff has not moved to amend the pre-

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trial order, Plaintiff has filed a Fed. R. Civ. P. 60(b) motion seeking vacation of the pre-trial order, and, as such, the standards cited technically does not apply. Fed. R. Civ. P. 16(e) allows modification of a final pre-trial order only upon a showing of "manifest injustice." Even if, *arguendo*, the Court were to view this under Fed. R. Civ. P. 16(e), this is a higher standard than Plaintiff appears to imply. In fact, in the majority of cases cited by Plaintiff, the court determined that leave to modify the pre-trial order should not be granted. The one exception. *Clark v. Pa. R.R. Co.*, 328 F.2d 591 (2nd Cir. 1964) is cited by the Fed. R. Civ. P. Advisory Committee Notes with regard to the following sentence: "Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable." Thus, "manifest injustice" is the proper standard with regard to a request to modify a final pretrial order. The burden of demonstrating "manifest injustice" rests with Plaintiff. *See, e.g., Smith v. Ford Motor Co.*, 626 F.2d 784, 795 (10th Cir. 1980) ("The burden of establishing manifest injustice falls squarely on the moving party."). Plaintiff has failed to demonstrate how "manifest injustice" will occur by not amending the final pretrial order to include a claim that Plaintiff knew might exist, but nevertheless explicitly abandoned in the pretrial stipulation, and then subsequently affirmed that abandonment on the record in open court. *See generally Del Rio Distrib., Inc., v. Adolph Coors Co.*, 589 F.2d 176, 178 (5th Cir. 1979) (denying leave to enlarge pretrial order when Plaintiff knew of the claim prior to the pre-trial conference, yet chose to abandon the claim in the pretrial order).

Plaintiff's argument that the fraud claim is embraced by the language of the pre-trial stipulation is not relevant to the analysis here. If Plaintiff's assertion is legally correct, then Plaintiff would not bring a motion to revise the pre-trial stipulation. The legal effect of the stipulation, however, is to supersede the Complaint and bar "evidence of theories which are not at least implicitly included in the order." *U.S. v. First Nat. Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981).

TENTATIVE RULING

The Court is inclined to DENY the motion.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Allen Dale Sanderson

Represented By
Robert K McKernan

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Defendant(s):

Allen Dale Sanderson

Represented By
Robert K McKernan

Movant(s):

Margaret Verbree

Represented By
Stephen A Madoni

Plaintiff(s):

Margaret Verbree

Represented By
Stephen A Madoni

Trustee(s):

Arturo Cisneros (TR)

Pro Se

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6:13-30133 Nabeel Slaieh

Chapter 7

Adv#: 6:16-01224 Simons (TR) v. Slaieh et al

#16.00 Status Conference RE: [1] Adversary case 6:16-ap-01224. Complaint by Larry D. Simons (TR) against Nabeel Naiem Slaieh, Joanne Fraleigh. (Charge To Estate \$350.00). Complaint for Avoidance and Recovery of Unauthorized Post-Petition Transfer (Attachments: # 1 Part 2 of 2 # 2 Adversary Proceeding Cover Sheet) Nature of Suit: (14 (Recovery of money/property - other)) (Grimshaw, Matthew)

Also #17

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Nabeel Slaieh

Represented By
George A Saba

Defendant(s):

Joanne Fraleigh

Represented By
George A Saba

Nabeel Naiem Slaieh

Represented By
George A Saba

Plaintiff(s):

Larry D. Simons (TR)

Represented By
David Wood
Matthew Grimshaw

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Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays
David Wood
Matthew Grimshaw

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6:13-30133 Nabeel Slaieh

Chapter 7

Adv#: 6:16-01224 Simons (TR) v. Slaieh et al

**#17.00 Motion to Dismiss Adversary Proceeding for Failure to State a Claim
(Withdrawal re Joanne Fraleigh filed 10/17/16)**

Also #16

EH__

Docket 4

Tentative Ruling:

11/02/16

BACKGROUND

On December 18, 2013, Nabeel Naiem Slaieh ("Debtor") filed a petition under Chapter 7. Larry D. Simons is the duly appointed Trustee ("Trustee"). Among the assets listed on Debtor's bankruptcy schedules is real property located at 40834 Baccarat Rd., Temecula, California ("the Property").

On January 7, 2015, the Court entered a stipulated judgment between Trustee and W.E. Jon Albrecht, avoiding and recovering Mr. Albrecht's \$11 million lien against the Property. On January 22, 2015, Trustee filed an application to employ real estate agents to market and sell the Property. On April 6, 2016, Trustee filed a motion to sell the Property. On April 27, 2016, this Court granted the motion and an order thereto was entered on May 26, 2016. Debtor appealed the sale order, and this Court and the district court denied a motion for stay pending appeal.

On May 11, 2016, Debtor executed a grant deed, transferring the Property to his wife ("Wife"). The grant deed was recorded with the County of Riverside. On July 19, 2016, Wife filed a complaint in state court for the following: (1) quiet title; (2) declaratory and injunctive relief; (3) violation of business and professions code § 17200. Wife also filed an *ex parte* application for a TRO and order to show cause; the state court issued a stay of eviction for seven days. Trustee removed the state court complaint to Bankruptcy Court. On July 21, 2016, this Court entered an emergency order dissolving the stay and confirming that state court lacked jurisdiction to issue the stay.

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Nabeel Slaieh

Chapter 7

On August 31, 2016, Trustee filed a complaint to avoid, recover, and preserve an unauthorized post-petition transfer pursuant to 11 U.S.C. § 549-551. On September 28, 2016, Debtor filed a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6) and FRBP 7012(b).

DISCUSSION

In order to avoid dismissal pursuant to Civil Rule 12(b)(6), a complaint must allege sufficient factual matter, which if accepted as true, would "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when a court can draw a reasonable inference that the defendant is liable for misconduct. *Id.* The complaint must state a claim for relief that is plausible in order to survive a motion to dismiss. *Id.*

Debtor asserts that Trustee's complaint is "supported by conclusory allegations of law and unwarranted inferences, which are insufficient to defeat a motion to dismiss for failure to state a claim."

11 U.S.C. § 549 (a) states:

- (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate-
 - (1) That occurs after the commencement of the case; and
 - (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
 - (B) that is not authorized under this title or by the court.

Here, the Trustee has plausibly alleged that: (1) there was a transfer of property of the estate; (2) that occurred after the commencement of the case; and (3) that was not authorized by the court. The Trustee is not required to prove his case at this point in the proceedings, but must merely allege sufficient factual matter, which if accepted as true, would state a claim to relief that is plausible on its face. The Trustee has met his

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burden.

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TENTATIVE RULING

Based on the foregoing, the Court is inclined to DENY the motion.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Nabeel Slaieh

Represented By
George A Saba

Defendant(s):

Joanne Fraleigh

Represented By
George A Saba

Nabeel Naiem Slaieh

Represented By
George A Saba

Movant(s):

Joanne Fraleigh

Represented By
George A Saba

Nabeel Naiem Slaieh

Represented By
George A Saba

Plaintiff(s):

Larry D. Simons (TR)

Represented By
David Wood
Matthew Grimshaw

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Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays
David Wood
Matthew Grimshaw

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6:13-29922 Nancy Ann Howell

Chapter 7

Adv#: 6:14-01070 Law Office of Andrew S. Bisom et al v. Howell

#18.00 Motion for Reconsideration of the Order Granting Plaintiffs' Motion for Continuance Based on Violation of Local Bankruptcy Rules and New Evidence

EH__

Docket 134

Tentative Ruling:

11/02/16

BACKGROUND

On December 12, 2013, Nancy Ann Howell ("Debtor") filed a Chapter 7 voluntary petition. On March 14, 2014, Law Offices of Andrew S. Bisom, Eisenberg Law Firm, APC ("Plaintiff") filed a complaint to determine dischargeability of debt under § 523(a)(2),(6). On April 1, 2014, Debtor received a discharge and on April 9, 2014, Debtor's bankruptcy case was closed.

On July 2, 2014, Debtor filed her answer to Plaintiff's complaint. On October 29, 2014, Plaintiff filed a motion for summary judgment ("the Motion"). On December 1, 2014, Defendant filed her response to the Motion as well as a unilateral pre-trial stipulation and a request for a 10-day retroactive extension of the deadline to file a response. On December 10, 2014, the Motion was denied without prejudice. On October 21, 2015, Plaintiff filed another motion for summary judgment ("the Second Motion"). On the same day, Debtor filed a motion to dismiss the complaint. Debtor filed her opposition to the Second Motion on November 12, 2015, and Plaintiff filed its opposition to the motion to dismiss on November 18, 2015. Further, replies and objections were filed over the coming months. The motion to dismiss was denied on December 18, 2015. The Second Motion was repeatedly continued.

On September 14, 2016, Plaintiff filed a motion to continue the hearing on the Second Motion (scheduled to take place on September 21, 2016), to allow for additional time for Debtor's appeal of a state court judgment. That motion was granted on September 15, 2016. On September 28, 2016, Debtor filed a motion for reconsideration, which included allegations of perjury directed at Plaintiff. Plaintiff filed its opposition on October 7, 2016. Debtor filed amended notice of her motion on

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the same day. Defendant filed a reply on October 25, 2016.

Debtor makes five arguments in the motion at issue: (1) the motion for continuance was not served by overnight mail or personal service; (2) the motion for continuance was not noticed; (3) the notice of the lodgment of the order was not served on defendant; (4) a fabricated proof of service of the notice of lodgment was submitted to the court; and (5) the motion for continuance was made based on false allegations. Plaintiff responds by stating that: (1) the motion was served by e-mail, and that Debtor had previously, on the record, requested service of that nature; (2) that Local Rule 9013-1(c)(2) does not apply to motions for continuance, which is governed by a separate, partially incompatible rule, 9013-1(m)(1); (3) that notice of the lodgment of the order was served on Debtor; and (4) that, while Andrew S. Bisom ("Bisom") did sign the proof service, there is no confusion, after significant litigation, over the identity of the parties to the action.

DISCUSSION

A motion for reconsideration is properly characterized as a motion for relief from judgment or order governed by Fed. R. Bankr. P. 9024. Rule 9024 incorporates Fed. R. Civ. P. 60(b), which provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons

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

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Debtor has not indicated what provision under the rule is applicable in this case, nor has she fashioned any argument that addresses the rule or the accompanying standard. Instead, Debtor alleges a variety of technical and procedural defects in the motion for continuance and the corresponding lodged order. Debtor also fails to explain exactly what the consequences would be of granting her requested relief. If the order granting the continuance were to be granted, then, presumably, it would leave a hearing scheduled for September 21, 2016. "It is axiomatic that this Court cannot order a party to perform an impossible task." *United States v. Silvio*, 333 F. Supp. 264, 266 (W.D. Mo. 1971). Vacating the order granting a continuance would be the equivalent of scheduling a hearing in the past. If Debtor wishes to hold an earlier hearing, she has the ability to file a motion requesting that relief. This Court cannot, however, schedule a hearing for September 21, 2016.

Even if the court could fashion the relief which appears to have been requested, or if the effect of vacating the order would be that Bisom's has failed to support his motion for summary judgment, Debtor has simply failed to present an argument which fits within the requirements of Fed. R. Civ. P. 60. Regarding Rule 60 (b), it has been stated: "Further, 'a party who seeks recourse under Rule 60(b) must persuade the trial court, at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted.'" *In re Rodriguez Camacho*, 361 B.R. 294, 300 (1st Cir. B.A.P. 2007) (Judge Kornreich) (citing *Karak v. Bursaw Oil Corp.*, 28 F.3d 15, 19 (1st Cir. 2002).

Regarding the first of these factors, Debtor has filed a timely motion. Debtor has not, however, satisfied the other three factors. Debtor points to no "exceptional circumstances" favoring "extraordinary relief." Courts routinely grant motions for continuance on short notice. As Debtor notes herself, the lack of compliance with any formality did not preclude Debtor from mounting an opposition; instead the Court's quick response granting the motion precluded a response. The routine practices of this Court do not give rise to "extraordinary circumstances."

Nor does Debtor provide any argument or information that would be have been relevant in an opposition to the original motion. Therefore, Debtor has failed to demonstrate "that if the judgment is set aside, [s]he has the right stuff to mount a potentially meritorious claim or defense."

Finally, while it is unclear what the ramifications of granting Debtor's motion would be, those ramifications would certainly cause unfair prejudice. Scheduling Bisom's motion for summary judgment in the past certainly is prejudicial and

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impossible. Therefore, the motion is denied as moot.

If Debtor wishes to have the summary judgment hearing heard sooner, she should file an appropriate motion and address the proper legal standard.

II. Perjury

Debtor's second claim is that Bisom has committed perjury. Specifically, Debtor argues that Bisom signed the proof of service, which states: "I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding." Debtor points out that Bisom signed the proof of service. Additionally, in that same filing, Bisom submitted a declaration which stated: "I, Andrew S. Bisom, am one of the parties in the above referenced adversary action." It is almost axiomatic that one of these statements was false. The Court does note that Bisom could have signed the proof of service in an individual capacity, and the declaration in a representative capacity.

Nevertheless, a false claim is not the only requirement for perjury:

In order to convict defendant of bankruptcy fraud as set forth in the Indictment, the government must prove (1) the existence of the bankruptcy proceedings; (2) that a statement under penalty of perjury was made therein, or in relation thereto; (3) that the statement was made as to a material fact; (4) that the statement was false; and (5) that the statement was knowingly and fraudulently made.

U.S. v. Lindholm, 24 F.3d 1078, 1082-83 (9th Cir. 1994). Regarding the third factor, materiality, the *Lindholm* court said:

The scope of materiality includes: (1) matters relating to the extent and nature of the bankrupt's assets; (2) inquiries relating to the bankrupt's business transactions or his estate; (3) matters relating to the discovery of assets; (4) the history of a bankrupt's financial transactions; and (5) statements designed to secure adjudication by a particular bankruptcy court.

Id. at 1083. None of these factors are remotely relevant to the signatures on the proof of service, and, as Bisom notes, Debtor and this Court were abundantly aware of the identity of the parties in this proceeding. Therefore, a perjury charge cannot be supported.

Finally, Debtor alleges that Bisom's declaration states that Bisom was waiting for five months for the defendant to file the motion for relief from stay. That is not

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what Bisom's declaration states. Bisom's declaration states that: "Howell [Debtor] did absolutely nothing for five months, thus further delaying the proceedings and showing the falsity of her claims that she wants to quickly end this litigation." The phrase "absolutely nothing" is in regard to the state court litigation, referenced in the prior paragraph of Bisom's declaration. And it is unquestionably true that Debtor did not do anything to resolve the state court litigation in those five months. Therefore, the allegation is without merit.

TENTATIVE RULING

The Court is inclined to DENY the motion to vacate its order of September 15, 2016, as moot and DENY the perjury allegations of Debtor as without merit.

Party Information

Debtor(s):

Nancy Ann Howell Pro Se

Defendant(s):

Nancy Ann Howell Pro Se

Movant(s):

Nancy Ann Howell Pro Se

Plaintiff(s):

Eisenberg Law Firm, APC Represented By
Andrew S Bisom

Law Office of Andrew S. Bisom Represented By
Andrew S Bisom

Trustee(s):

Steven M Speier (TR) Pro Se

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6:12-27339 Joseph Wiggins

Chapter 7

Adv#: 6:16-01087 Cuzzolina v. Wiggins et al

#19.00 CONT Status Conference RE: Complaint by James D Cuzzolina against Joseph Wiggins , Linda Jean Wiggins . false pretenses, false representation, actual fraud)) ,(68 (Dischargeability - 523(a)(6), willful and malicious injury))

From: 6/1/16, 9/28/16

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Joseph Wiggins

Represented By
Robert J Curtis
Todd L Turoci

Defendant(s):

Linda Jean Wiggins

Represented By
Todd L Turoci

Joseph Wiggins

Represented By
Todd L Turoci

Joint Debtor(s):

Linda Jean Wiggins

Represented By
Robert J Curtis
Todd L Turoci

Plaintiff(s):

James D Cuzzolina

Represented By
Arsany Said

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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CONT... Joseph Wiggins

Chapter 7

Trustee(s):

Karl T Anderson (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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6:03-15174 Devore Stop A General Partners

Chapter 7

Adv#: 6:12-01498 Morschauser v. Continental Capital LLC et al

#20.00 CONT Motion For Summary Judgment

From: 11/4/15, 2/3/16, 3/16/16, 3/17/16, 5/11/16, 8/31/16

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***** VACATED *** REASON: CONTINUED TO 11/16/16 AT 2:00 P.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Devore Stop

Represented By
Hutchison B Meltzer

Devore Stop A General Partners

Represented By
Arshak Bartoumian - DISBARRED -
Newton W Kellam

Defendant(s):

American Business Investments

Represented By
Lawrence J Kuhlman
Autumn D Spaeth ESQ

Mohammed Abdizadeh

Pro Se

Jesse Bojorquez

Represented By
Lawrence J Kuhlman
Autumn D Spaeth ESQ

Continental Capital LLC

Represented By
Cara J Hagan

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 303 Calendar**

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CONT... Devore Stop A General Partners

Chapter 7

Stephen Collias

Represented By
Cara J Hagan

Movant(s):

Continental Capital LLC

Represented By
Cara J Hagan

Continental Capital LLC

Represented By
Cara J Hagan

Continental Capital LLC

Represented By
Cara J Hagan

Plaintiff(s):

William G Morschauser

Represented By
Hutchison B Meltzer
Reid A Winthrop

Trustee(s):

Arturo Cisneros (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
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6:03-15174 Devore Stop A General Partners

Chapter 7

Adv#: 6:12-01498 Morschauser v. Continental Capital LLC et al

#21.00 CONT Status Conference RE: [1] Complaint by William G Morschauser against Continental Capital LLC , Stephen Collias , Jesse Bojorquez , American Business Investments , Mohammed Abdizadeh . (91 (Declaratory judgment) , (72 (Injunctive relief - other))

HOLDING DATE

From: 3/11/15, 5/20/15, 7/29/15, 12/16/15, 2/3/16, 3/16/16, 5/11/16, 8/31/16

Also #20

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 11/16/16 AT 2:00 P.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Devore Stop

Represented By
Hutchison B Meltzer

Devore Stop A General Partners

Represented By
Arshak Bartoumian - DISBARRED -
Newton W Kellam

Defendant(s):

American Business Investments

Represented By
Lawrence J Kuhlman
Autumn D Spaeth ESQ

Mohammed Abdizadeh

Pro Se

Jesse Bojorquez

Represented By
Lawrence J Kuhlman

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CONT... Devore Stop A General Partners

Chapter 7

Autumn D Spaeth ESQ

Continental Capital LLC

Represented By
Cara J Hagan

Stephen Collias

Represented By
Cara J Hagan

Plaintiff(s):

William G Morschauser

Represented By
Hutchison B Meltzer
Reid A Winthrop

Trustee(s):

Arturo Cisneros (TR)

Pro Se

**United States Bankruptcy Court
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6:13-27611 Douglas Jay Roger

Chapter 7

Adv#: 6:16-01163 Revere Financial Corporation v. Burns

#22.00 CONT Status Conference RE: [1] Adversary case 6:16-ap-01163. Complaint by Revere Financial Corporation against Don C. Burns. (12 (Recovery of money/property - 547 preference)),(11 (Recovery of money/property - 542 turnover of property)),(14 (Recovery of money/property - other)),(91 (Declaratory judgment))

From: 8/31/16

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas Jay Roger

Represented By
Summer M Shaw

Defendant(s):

Don Cameron Burns

Pro Se

Plaintiff(s):

Revere Financial Corporation

Represented By
Franklin R Fraley Jr

Trustee(s):

Helen R. Frazer (TR)

Represented By
Laurel R Zaeske
Arjun Sivakumar
Carmela Pagay
Franklin R Fraley Jr

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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat
Adv#: 6:15-01303 Cisneros v. AMERICAN EXPRESS

Chapter 7

#23.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01303. Complaint by A. Cisneros against AMERICAN EXPRESS. (Charge To Estate \$350). For Avoidance, Recovery, and Preservation of Preferential and Fraudulent Transfers (with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)),(13 (Recovery of money/property - 548 fraudulent transfer)),(14 (Recovery of money/property - other))

From: 12/30/15, 1/13/16, 3/23/16, 5/25/16, 6/29/16, 8/31/16

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Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

AMERICAN EXPRESS

Represented By
Robert S Lampl
Chad V Haes

Plaintiff(s):

A. Cisneros

Represented By
D Edward Hays
Chad V Haes

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CONT... Douglas J Roger, MD, Inc., A Professional Corporat

Chapter 7

Trustee(s):

Arturo Cisneros (TR)

Represented By
Chad V Haes
D Edward Hays

**United States Bankruptcy Court
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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat Chapter 7

Adv#: 6:15-01307 Cisneros v. OIC MEDICAL CORPORATION, a California corporation

#24.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01307. Complaint by A. Cisneros against OIC MEDICAL CORPORATION, a California corporation, LIBERTY ORTHOPEDIC CORPORATION, a California corporation, UNIVERSAL ORTHOPAEDIC GROUP, a California corporation. (Charge To Estate \$350). for Avoidance, Recovery, and Preservation of Preferential and Fraudulent Transfers (with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)),(13 (Recovery of money/property - 548 fraudulent transfer)),(14 (Recovery of money/property - other))

From: 12/30/15, 2/24/16, 4/13/16, 6/22/16, 8/24/16

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 2/1/17 AT 2:00 PM**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

UNIVERSAL ORTHOPAEDIC

Represented By
Summer M Shaw
George Hanover

LIBERTY ORTHOPEDIC

Represented By
Summer M Shaw
George Hanover

**United States Bankruptcy Court
Central District of California
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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat
Adv#: 6:15-01308 Cisneros v. BWI CONSULTING, LLC et al

Chapter 7

#25.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01308. Complaint by A. Cisneros against BWI CONSULTING, LLC, Black and White, Inc., BLACK AND WHITE BILLING COMPANY, BLACK AND WHITE INK, MEHRAN DEVELOPMENT CORPORATION. (Charge To Estate \$350). for Avoidance, Recovery, and Preservation of Preferential and Fraudulent Transfers (with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)),(14 (Recovery of money/property - other))

From: 1/13/16, 3/23/16, 5/25/16, 7/27/16, 8/31/16

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Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

BLACK AND WHITE INK	Pro Se
MEHRAN DEVELOPMENT	Pro Se
BLACK AND WHITE BILLING	Pro Se
BWI CONSULTING, LLC	Pro Se
Black and White, Inc.	Pro Se

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CONT... Douglas J Roger, MD, Inc., A Professional Corporat

Chapter 7

Plaintiff(s):

A. Cisneros

Represented By
D Edward Hays
Chad V Haes

Trustee(s):

Arturo Cisneros (TR)

Represented By
Chad V Haes
D Edward Hays

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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat Chapter 7
Adv#: 6:15-01309 Cisneros v. DOUGLAS J. ROGER, M.D., INC. DEFINED BENEFIT PLAN

#26.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01309. Complaint by A. Cisneros against DOUGLAS J. ROGER, M.D., INC. DEFINED BENEFIT PLAN. (Charge To Estate \$350). for Avoidance, Recovery, and Preservation of Preferential Transfer (with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)),(14 (Recovery of money/property - other))

From: 12/30/15, 2/24/16, 4/13/16, 6/22/16, 8/24/16

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***** VACATED *** REASON: CONTINUED TO 2/1/17 AT 2:00 PM**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

DOUGLAS J. ROGER, M.D., INC.

Represented By
Summer M Shaw

Plaintiff(s):

A. Cisneros

Represented By
D Edward Hays
Chad V Haes

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Trustee(s):

Arturo Cisneros (TR)

Represented By
Chad V Haes
D Edward Hays

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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat

Chapter 7

Adv#: 6:15-01304 Cisneros v. Kajan Mather & Barish, a professional corporation

#27.00 Motion of Kajan Mather & Barish for Summary Judgment Or, In The Alternative, Summary Adjudication of the Issues

Also #28

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Tentative Ruling:

11/02/16

BACKGROUND

On October 20, 2013, Douglas J. Roger, MD Inc., a Professional Corporation ("Debtor") filed a petition for Chapter 7 relief. On October 20, 2015, Arturo Cisneros ("Trustee") filed a complaint against Kajan Mather & Barish ("Defendant"); Mather Kuwada, a limited liability partnership; Mathew Law Corporation, a California corporation; Law Office of Kenneth M. Barish; Steven R. Mather; and Kenneth M. Barish alleging preferential and fraudulent transfers. On November 18, 2015, Defendant filed an Answer. On February 25, 2016, certain defendants filed a motion for summary judgment. Defendant did not join in that motion. The Others' The priorsummary judgment motion has been continued multiple times and is currently scheduled to be heard on November 9, 2016.

On September 13, 2016, Defendant filed its motion for summary judgment or, in the alternative, summary adjudication of the issues. On October 12, 2016, Trustee filed his opposition to the motion for summary judgment. On October 19, 2016, Defendant filed its reply.

The primary parties involved in this dispute are Defendant, Debtor, and Douglas J. Roger, individually ("Roger"). The Trustee alleges that KMB received transfers in the amount of \$115,424.36 from Debtor and that KMB did not provide value or reasonably equivalent to the Debtors. The Trustee argues that these payments are avoidable as intentional fraudulent transfers (Count 2) and/or constructive fraudulent transfers (Count 3). The Trustee further alleges that \$9,092.27 is

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alternatively avoidable as a preferential transfer (Count 1).

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Defendant argues that Count 2 ("actual transfer") fails to state a claim because Trustee has not sufficiently alleged actual fraud. Defendant argues that summary judgment should be granted on Count 3 because Defendant provided reasonably equivalent value. While Count 1 is not explicitly addressed in the motion, Defendant argues, as a defense to all claims, that it was a subsequent transferee that took for value and in good faith.

Trustee responds by identifying a few badges of fraud and arguing that those badges are sufficient evidence on a motion for summary judgment with regard to Claim 2. Trustee argues that reasonably equivalent value was not received (at least to with respect to those services that decreased the income tax of Roger) because Debtor did not realize any benefit from a decrease in Roger's income tax liability. Finally, Trustee argues that Defendant is not a subsequent transferee because BWI Consulting, LLC ("BWI") had no dominion or control over the funds.

STATEMENT OF FACTS

Debtor became a client of Defendant in January 2010. Defendant was to represent Debtor in tax matters with the IRS. Debtor was billed periodically on an hourly basis. The invoices were directed to Roger, individually. The principle facts at issue in this motion concern the nature of the work done by Defendant for Debtor.

The primary matters that Defendant worked on were income tax appeals and United States Tax Court cases for 2002 through 2005. Debtor is an S corporation, and, as such, the corporation's income tax is paid at the individual level. At issue in this motion is whether, and in what circumstances, Roger was liable for the income taxes, and whether, and in what circumstances, Debtor was liable for the income taxes. Defendant additionally argues that a portion of the services provided were related to Debtor's employment taxes. Trustee concedes that Debtor was liable for the employment taxes. Presently, there does not appear to be any evidence indicating how much of the services were related to income tax and how much were related to employment tax.

Defendant additionally argues that "the corporation still retains a liability if the [income] taxes are not paid by the shareholder, the corporation would have additional liabilities." Trustee objects to this contention and has provided the declaration of Lydia Turanchik, Defendant's attorney who provided services, as support.

DISCUSSION

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I. Summary Judgment Standard

A court may grant summary judgment if the movant shows that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRBP 7056 (incorporating FRCP 56). "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. 242, at 249-50. "A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." 477 U.S. 242 at 248.

Defendant advances three primary arguments in support his motion for summary judgment: (1) the Trustee fails to state a claim for fraudulent transfer; (2) Defendant provided reasonably equivalent value; and (3) Defendant was a good faith transferee.

II. Trustee Fails to State a Claim

11 U.S.C. §548(a)(1)(A) provides:

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years¹ before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted;

11 U.S.C. § 548 (2005); *see also* Cal. Civ. Code § 3439.04 (2016) (equivalent state

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law provision). The relevant provision of the Uniform Voidable Transfers Act, adopted in California as Cal. Civ. Code § 3439.04 (2016), includes "badges of fraud" to guide in making a determination of "actual intent":

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

The badges of fraud analysis is applicable in the context of bankruptcy courts. *See e.g. Ritchie Capital Mgmt., LLC v. Stoebner*, 779 F.3d 857, 862-63 (8th Cir. 2015); *see also In re Llamas*, 2011 WL 7637254 at *6 (Bankr. C.D. Cal. 2011) (Judge Carroll) (*quoting In re Beverly*, 374 B.R. 221, 236 (9th Cir. B.A.P. 2007)) ("The UFTA list of 'badges of fraud' provides neither a counting rule, nor a mathematical formula. No minimum number of factors tips the scales toward actual intent. A trier of

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fact is entitled to find actual intent based on the evidence in the case, even if no 'badges of fraud' are present. Conversely, specific evidence may negate an inference of fraud notwithstanding the presence of a number of 'badges of fraud'. "). "The focus is on the intent of the transferor." *Beverly*, 374 B.R. 221, 235.

The Trustee identifies three badges of fraud that he argues exist in this case: (1) the payments were made while litigation was pending; (2) the payments were made shortly after Debtor incurred debt; and (3) Debtor did not receive reasonably equivalent value for the transfer.

"The presence of one or more [badges of fraud] does not create a presumption of fraud, but is merely evidence from which an inference of fraudulent intent may be drawn." *Wyzard v. Goller*, 23 Cal. App. 1183, 1190 (Cal. Ct. App. 1994). "Fraudulent intent is most commonly inferred 'when an insolvent debtor makes a transfer and gets nothing or very little in return.'" *In re Empire Land, LLC*, 2016 WL 1371278 at *4 (Bankr. C.D. Cal. 2016) (Judge Houle) (*citing Kupetz v. Wolf*, 845 F.2d 842, 946 (9th Cir. 1988)). Again, on a motion for summary judgment, "summary judgment . . . would be appropriate only if the evidence, viewed in a light most favorable to the non-moving party, presents [no] genuine issues of material fact." *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 339 (Bankr. N.D. Cal. 2009) (Judge Montali). Given the detail provided by the Trustee, a rational trier of fact could infer actual intent to defraud from the badges of fraud identified. Specifically, a rational factfinder could infer that Debtor was in poor financial position and had significant liabilities and/or was about to incur significant liabilities, yet Roger diverted funds of Debtor for his own benefit, for which Debtor received nothing or inequivalent value in return, thereby depleting the amount available to creditors.

III. Reasonably Equivalent Value

11 U.S.C. § 548(a)(1)(B) (2005) provides the requirement for a constructively fraudulent transfer:

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(B)(i) received less than a reasonably equivalent value in exchange for such transfer

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or obligation; and

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(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation

The Fourth Circuit has stated the following:

Reasonably equivalent value is not susceptible to simple formulation. . . . The focus is on the consideration received by the debtor, not on the value given by the transferee. *The purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured creditors. Consequently, what constitutes reasonably equivalent value must be determined from the standpoint of the debtor's creditors.*

In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479, 484 (4th Cir. 1992) (citing Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 Bankr. Dev. J. 55, 80 (1991); see also *In re Maddalena*, 176 B.R. 551, 555 (Bankr. C.D. Cal. 1995) (Judge Pappas) (same).

It does not appear to be contested that Defendant provided value to some entity. Instead, Trustee's contention is that reasonably equivalent value was not provided to *Debtor*. Defendant states that: "1) KMB orally contracted with the Debtor; and (2) BWI paid KMB for the services Debtor received from KMB." Defendant further states:

KMB has submitted substantial evidence in its declarations in support of the Motion from which the Court must infer that the Debtor received reasonably equivalent value from KMB's services. KMB's services dealt with millions of dollars of liability of the Debtor, and KMB was successful in reducing this liability of the Debtor substantially.

Defendant seems to rely on two different arguments: (1) that Debtor directly decreased *Debtor's* tax liability; and (2) that Debtor indirectly benefitted from the services pursuant to the indirect benefit rule.

A. Direct Tax Benefit

Debtor is an S corporation, and, as such, its profit or losses passes through to the shareholders, who shoulder the corresponding tax burdens. *See generally* 26 U.S.C. § 1366 (2007); see also *In re 800Ideas.com, Inc.*, 496 B.R. 165, 171-72 (9th Cir. B.A.P. 2013) (Judge Jury). As Trustee notes, it is difficult to see how Debtor could have received a direct benefit from the reduction of the tax liability of Roger; the amount of

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Roger's tax liability does not affect the financial position of Debtor. *See In re Apex Auto. Warehouse, L.P.*, 238 B.R. 758, 773 (Bankr. N.D. Ill. 1999) (Judge Katz). There is no evidence in the record that suggests Debtor was liable for Roger's taxes; while Defendant's reply suggests the IRS "assessed" Debtor for income tax delinquency, the Exhibit referenced was not attached. As the Trustee seems to concede, to the extent Defendant's services were directed at reducing the employment tax of Debtor, for which Debtor was liable, reasonably equivalent value would appear to have been provided. There has been no attempt at distinguishing between services which reduced the income tax that passes through to Roger and the employment tax of Debtor. And Defendant has not provided any legal or factual evidence that Debtor was liable for any income tax that Roger did not satisfy.

Defendant also argues that : "[e]ach time the Debtor made a payment on the open book account with KMB on the Invoices, the Debtor satisfied its own antecedent debt, which by definition constitutes 'value' for fraudulent transfer purposes under the Bankruptcy Code and California law." This argument is not compelling. The proper inquiry is whether the debt itself was incurred in connection with the receipt of reasonably equivalent value. If reasonably equivalent value was not received, then release from that debt cannot constitute reasonably equivalent value. And Defendant's discussion of the law regarding "book accounts" is also irrelevant; it does not affect the determination of whether reasonably equivalent value was received.

B. Indirect Benefit Rule

As Defendant notes:

It is well settled that "reasonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule. If the consideration given to the third person otherwise has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and [the statute] has been satisfied-provided, of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up. If the debtor receives such reasonably equivalent value, "then the transaction has not significantly affected his estate and his creditors have no cause to complain."

In re Flashcom, Inc., 503 B.R. 99, 117 (C.D. Cal. 2013).

Defendant relies on *Northlake Foods* for the proposition that an indirect benefit has been received by Debtor. *In re Northlake Foods, Inc.*, 715 F.3d 1251 (11th Cir. 2013). In *Northlake Foods*, the Eleventh Circuit determined that an S-corp election could constitute reasonably equivalent value to Debtor which would preclude avoidance of the tax reimbursements paid to the shareholders. *See id.* at 1256 ("The

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complaint clearly shows that the Shareholders Agreement provides Northlake with valuable benefits by virtue of its S-corporation election. We hold that these benefits constitute a reasonably equivalent exchange of value for the 2006 Transfer and therefore affirm." Defendant does not address the crucial underlying point of the *Northlake* decision though: that the corporation was contractually obligated to make a payment to the shareholders equal to the tax liability. Therefore, any decrease in tax liability, in that situation, would correspond to a decrease in contractual liability of the corporation. Defendant provides no evidence of a similar agreement in this situation.

IV. Tracing

Defendant also argues that it is the Trustee's burden to trace the funds he seeks to recover. The cases Defendant cites do not stand for that proposition. In *In re Bridge* the court stated:

Although Agent Pickering's investigation was thorough and her testimony credible, the Court must reject the government's legal position that estate funds, once commingled, are "lost." . . . In this case, it is not fatal to the trustee's position that, dollar for dollar, the exact funds cannot be traced.

90 B.R. 839, 846-47 (Bankr. E.D. Mich. 1988) (Judge Rhodes). And, in this court, the ability to demonstrate that a defendant actually received funds is sufficient for tracing purposes. *See generally In re Tag Entm't Corp.*, 2016 WL 1239519 at *16-18 (Bankr. C.D. Cal. 2016) (Judge Kaufman). Here, there is no dispute that Defendant actually received the funds.

V. Initial Transferee

Defendant also argues that it was not the initial transferee of the funds. The parties agree on the standard: "Under the dominion test, a transferee is one who has dominion over the money or other asset, the right to put the money to one's own purposes. *In re Tag Entm't Corp.*, 2016 WL 1239519 at *18 (Bankr. C.D. Cal. 2016) (Judge Kaufman) (*quoting In re Incomnet*, 463 F.3d 1064, 1070 (9th Cir. 2006)). The parties instead dispute whether BWI qualifies as an initial transferee. That dispute is irrelevant in this district with regard to fraudulent transfers. 11 U.S.C. § 550(b)(1) (1994) states that the Trustee cannot recover from a subsequent transferee when the subsequent transferee: "takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer voided." But 11 U.S.C. § 548(c) (2005) states that:

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a transferee or obligee of such transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

In re Maddalena stated that: "the courts define the 'good faith' required by Section 548(c) to mean that viewed objectively, the transferee neither knew nor should have known of the fraudulent nature of the transfer." 176 B.R. 551, 555 (Bankr. C.D. Cal. 1995) (Judge Pappas) (*citing In re Agric. Research & Tech. Group*, 916 F.2d 528, 535 (9th Cir. 1990). This is the same standard as is applied under § 550(b)(2), as shown in section VI., *infra*. Compare 5 Collier on Bankruptcy § 548.09[2] ("Section 548(c) thus requires both value and good faith") with § 548.09[2][c] ("A section § 550(b) transferee can be excepted from liability only if he or she is a good faith transferee, and only to the extent that value was given.")

Therefore, as to the § 548 claims, this distinction makes no difference. § 548 (c) is not a defense to a § 547 claim though, while § 550(b) is a defense to a § 547 claim. Nevertheless, § 550(a)(1) (1994) states: "the initial transferee of such transfer or the entity for whose benefit such transfer was made." (emphasis added); *see also In re Incomnet, Inc.*, 463 F.3d 1064, 1074 (9th Cir. 2006). The record contains a declaration of a former consultant of BWI, Betty Tate-Sylvester, that states the funds were transferred to BWI to cover bills and invoices, that BWI had no legal right to the funds, and that Roger directed the payment of all funds from the account to creditors. Therefore, a rational factfinder could conclude that the funds at issue were transferred to BWI for the benefit of Defendant and that BWI had no dominion over the funds.

VI. Good Faith Transferee

11 U.S.C. § 550(b)(1) (1994) states:

(b) The trustee may not recover under section (a)(2) of this section from-

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided;

§550(a)(2) only applies to subsequent transferees. Therefore, this good faith defense does not apply because, as stated above, there remains a factual question as to whether Debtor was an initial transferee.

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VII. Evidentiary Objection

Defendant appears to object to all of the exhibits included in the Trustee's evidence appendix with the following "shotgun" statement:

Each of these statements are inadmissible hearsay evidence inasmuch as no Declarant has established that these statements fall within an exception as provided in Federal Rules of Evidence Rule 803. In addition, Defendant fails to lay a proper foundation establishing personal knowledge of the events described by these statements. Nothing in the Exhibits demonstrates that Defendant acquired personal knowledge regarding the details and information contained in the documents he is trying to authenticate or the information he is stating. These are conclusory statements without any foundation, basis or justification for these assessments of the information. Defendant is also asserting what he believes another is asserting without personal knowledge of what actually occurred, and there is no testimony as to the accuracy of the documents that he says he has reviewed or not reviewed or what their contents are. The best source for this knowledge is not Defendant, but the document that is referred to. None of the documents submitted or are to be submitted are authenticated or contain any other basis for admission as evidence, or can form the basis for Defendant. . . .

By these statements, the Defendant offers his conclusions as to what the Exhibits did or did not contain. The Exhibits speak for themselves.

It is unclear exactly what relief Defendant requests. First, Defendant appears to mischaracterize the Trustee as the Defendant. Second, Defendant alternatively argues that the evidence is inadmissible and that the evidence speaks for itself. The Court, in its role as fact-finder, reviews and interprets the evidence. Defendant's arguments regarding admissibility are all without merit. All of the evidence submitted by Trustee falls into the following three categories: (1) court files and proceedings; (2) depositions; and (3) declarations signed under penalty of perjury. Regarding (1), as Defendant concedes, judicial notice is appropriate under Fed. R. Evid. 201. *See e.g., Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). Regarding (2), depositions are a standard form of evidence and can be used at hearings and trials in accordance with Fed. R. Civ. P. Rule 32. Finally, regarding (3), declarations signed under penalty of perjury are a common form of evidence in this district. Local Rule 9013-1(i)(3) states: "In lieu of oral testimony, a declaration under penalty of perjury will be received into evidence." Therefore, the Trustee's evidence is admissible.

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TENTATIVE RULING

The Court is inclined to DENY the motion in its entirety.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

LAW OFFICE OF KENNETH M.

Pro Se

Steven R. Mather

Pro Se

Kenneth M. Barish

Pro Se

Kajan Mather & Barish, a

Represented By
Michael S Kogan

MATHER KUWADA, a limited

Represented By
Michael S Kogan

MATHER LAW CORPORATION,

Represented By
Michael S Kogan

Movant(s):

Kajan Mather & Barish, a

Represented By
Michael S Kogan

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Plaintiff(s):

A. Cisneros

Represented By
D Edward Hays
Chad V Haes
Franklin R Fraley Jr
Sue-Ann L Tran
Jasmine W Wetherell

Trustee(s):

Arturo Cisneros (TR)

Represented By
Chad V Haes
D Edward Hays

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6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat

Chapter 7

Adv#: 6:15-01304 Cisneros v. Kajan Mather & Barish, a professional corporation

#28.00 CONT Status Conference RE: [1] Adversary case 6:15-ap-01304. Complaint by A. Cisneros against Kajan Mather & Barish, a professional corporation, MATHER KUWADA, a limited liability partnership, MATHER LAW CORPORATION, a California corporation, LAW OFFICE OF KENNETH M. BARISH, Steven R. Mather, Kenneth M. Barish. (Charge To Estate \$350). for Avoidance, Recovery, and Preservation of Preferential and Fraudulent Transfers with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)),(13 (Recovery of money/property - 548 fraudulent transfer)),(14 (Recovery of money/property - other))

From: 12/30/15, 1/13/16, 3/30/16, 4/6/16, 5/4/16, 5/25/16, 9/28/16

Also #27

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Douglas J Roger, MD, Inc., A

Represented By
Summer M Shaw
Michael S Kogan
George Hanover

Defendant(s):

LAW OFFICE OF KENNETH M.

Pro Se

Steven R. Mather

Pro Se

Kenneth M. Barish

Pro Se

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Kajan Mather & Barish, a
Represented By
Michael S Kogan

MATHER KUWADA, a limited
Represented By
Michael S Kogan

MATHER LAW CORPORATION,
Represented By
Michael S Kogan

Plaintiff(s):

A. Cisneros
Represented By
D Edward Hays
Chad V Haes
Franklin R Fraley Jr
Sue-Ann L Tran
Jasmine W Wetherell

Trustee(s):

Arturo Cisneros (TR)
Represented By
Chad V Haes
D Edward Hays

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6:16-19604 Sam Daniel Dason DDS,A Professional Dental Corpora

Chapter 11

#29.00 Motion Regarding Chapter 11 First Day Motions Emergency First Day Motion for Order Determining Adequate Assurance of Payment for Postpetition Utility Services

Also #30 & #31

EH__

Docket 6

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan

Movant(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan
Michael S Kogan
Michael S Kogan
Michael S Kogan

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6:16-19604 Sam Daniel Dason DDS,A Professional Dental Corpora

Chapter 11

#30.00 Motion Regarding Chapter 11 First Day Motions Emergency Motion for Authority But Not Requiring Debtor to (1) Pay Pre-Petition Accrued Employee Wages, Salaries, Compensation and Contributions to Employee Benefit Plans; (2) Honor Existing Personnel Policies in the Ordinary Course of Business; and (3) Make Payments for Which Payroll Deductions Were Made

Also #29 & #31

EH__

Docket 5

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan

Movant(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan
Michael S Kogan
Michael S Kogan
Michael S Kogan

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6:16-19604 Sam Daniel Dason DDS,A Professional Dental Corpora

Chapter 11

#31.00 Motion Regarding Chapter 11 First Day Motions Emergency Motion for Authority to (A) Use Cash Collateral on an Interim Basis Pending a Final Hearing and (B) Grant Replacement Liens

Also #29 & #30

EH__

Docket 4

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan

Movant(s):

Sam Daniel Dason DDS,A

Represented By
Michael S Kogan
Michael S Kogan
Michael S Kogan
Michael S Kogan